THE

CANADIAN LAW TIMES

Edited by

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VOL. IX.

TORONTO:
CARSWELL & CO., PUBLISHERS.
1889.

PRINTED BY
THOS. MOORE & CO., LAW PRINTERS,
22 & 24 ADELAIDE ST. EAST,
TORONTO.

TABLE OF CASES.

*Those marked * are not reported or noted elsewhere than in this Volume, so far as known.*

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THE

CANADIAN LAW TIMES.

JANUARY, 1889.

THE EFFECT OF INDEMNITY CLAUSES UPON TRUSTEES' LIABILITY FOR WILFUL DEFAULT AND NEGLECT.

R. S. O. cap. 110, sec. 2, provides as follows:—

"Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—'That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited; nor for the insufficiency or deficiency of any stocks, funds or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust

premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument.' "

One would suppose that this section afforded to a trustee a large measure of protection from liability on account of alleged default or neglect, but it is clear from a consideration of the authorities that the real effect of the statutory provision is of a very limited nature. The section itself, or rather the section of the Imperial Act of which this section is a transcript, is spoken of in Lewin on Trusts (*a*), as being nothing more than a statutory recognition of what has always been the doctrine of the Courts of Equity; and in Davidson's Precedents and Forms in Conveyancing (*b*) it is stated that the usual indemnity clause alters neither the definition nor the consequence of default on the part of the trustee, and as on the one hand it is superfluous where there is no default, so where there has been default it is unavailing (*c*).

The chief effect of the clause seems to be to shift the *onus* of proof. If a case comes *prima facie* within the section the *onus* is thrown on the person attacking the trustee to show that he is liable (*d*).

A special indemnity clause may be drawn that will afford immunity to a greater or less degree to the trustee named in the instrument containing it, and practically it is only in case of some departure from the ordinary wording of the indemnity clause that any hesitation can be felt as to the position of the trustee in case litigation arises as to the trust estate.

In many cases the indemnity clause has been entirely disregarded and in many others has been only noticed as being inoperative, still in a number of cases the effect of indemnity clauses has been more or less considered, and it

(*a*) 8th Ed. p. 274.

(*b*) 3rd Ed. Vol. 3, p. 248.

(*c*) See also *Watson's* Compendium of Equity, 2nd Ed. pp. 992 and 1005; *King* v. *Hilton*, 29 Gr. 381; *Dawson* v. *Clarke*, 18 Ves. 247; *Knox* v. *Mackinnon*, 13 App. Cas. 753.

(*d*) *Re Brier*, *Brier* v. *Evison*, 26 Ch. D. 238.

may be useful to notice some of these cases shortly, in order to see in what respects particular provisions are necessary if it is desired to relieve trustees from incurring liability in one or another direction.

Pass v. *Dundas* (*e*) and *Wilkins* v. *Hogg* (*f*) are cases in which trustees have escaped liability by virtue of the special provisions of indemnity clauses.

In the first of these cases the will in question authorized the trustees and executors to carry on the business of the testator, giving them full discretion as to its management, and contained an indemnity clause providing that each trustee should be answerable only for losses arising from his own defaults and not for involuntary acts or for the acts or defaults of his co-trustee, and that any trustee who should pay over to his co-trustee, or who did, or concurred in, any act enabling him to receive any moneys, should not be obliged to see to the due application thereof, nor should such trustee subsequently be rendered responsible by any express notice or intimation of the actual misapplication of the same moneys, but this was not to restrict the power of any trustees to require from his co-trustee an account of the application of moneys or to insist upon his replacing moneys misapplied. The testator in his lifetime had allowed his managing clerk to draw cheques for the purposes of the business. The trustees in carrying on the business after his death, opened a bank account in the name of both trustees, and signed a letter authorizing the bank to honour the signature of one trustee, the son of the testator, alone, without the signature of his co-trustee, the defendant. The son drew out, misapplied and lost some £20,000. It was held that the co-trustee was not liable owing to the wide effect of the indemnity clause.

At the same time it is pointed out that even such an indemnity clause would not protect against gross negligence or personal misconduct. Here it could not be said that there was gross negligence or personal misconduct

(*e*) 43 L. T. N. S. 665; 29 W. R. 332.
(*f*) 3 Giff. 116, affirmed in appeal, 8 Jur. N. S. 25.

because the trustees were merely following a course that had been allowed in the testator's lifetime, and nothing had occurred to give them reason to change it. Moreover there was nothing in the books of the firm to excite any suspicion.

In the second case trustees were held irresponsible for loss occasioned by the misapplication of funds by their co-trustee, received by him with their knowledge and consent, where the will contained a provision that each trustee should be answerable only for losses arising from his own defaults and not for involuntary acts or for the acts or defaults of his co-trustees, and particularly that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of the will, should not be obliged to see to the due application thereof, nor be subsequently rendered responsible by express notice or intimation of the misapplication of the same moneys. In this case it is recognized that without the special indemnity clause the neglect to inquire whether the co-trustee did invest the funds, after their receipt, would clearly render the trustees liable, and that no indemnity clause would protect if the trustees knew as a matter of fact of the contemplated breach of trust. It was considered doubtful whether the clause in question even would have been sufficient to protect if there had not been immediate misapplication by the trustee receiving the moneys.

In the majority of cases, however, the attempt of the trustees to evade responsibility by virtue of indemnity clauses has been made without success. Thus in *McCarter* v. *McCarter* (*g*), the will contained a clause providing that each of the executors should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default. Three executors were appointed, and one who was entitled to the income of the estate for his own benefit was entrusted by the other two with the management of the estate. Sales were made by

g) 7 O. R. 243.

the acting executor, and the proceeds of the sales allowed to remain in the hands of his solicitor for many years. The other two executors were aware of this. The solicitor absconded and the moneys were lost. All three were held liable. The rule is, that where one or more act chiefly in the trust the inactive trustee is accountable equally with the others, if, having means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. In this case the inactive trustees, although aware that the trust funds had been allowed to remain in the solicitor's hands, never made enquiries concerning their disposition, or assured themselves that the trust was being properly administered.

So in *Robdard* v. *Cooke* (*h*), the will contained a clause providing that the trustees should be responsible only for such moneys as they should actually receive, and not for any involuntary loss of any part of the trust funds. Two trustees received certain funds which were duly deposited and credited to the trust account. One trustee was, however, given power to draw upon this account, and drew and misapplied some £600. It was held that the clause in the will did not relieve the co-trustee as the loss was not involuntary but had arisen from his giving the defaulting trustee improper power.

In *Hale* v. *Adams* (*i*), a settlement contained a provision that the trustees should be charged for such moneys only as they should actually respectively receive, and that none of them should be answerable for the other of them, or liable for any misfortune, loss or damage which might happen in the execution of the trusts or in relation thereto, except the same should happen by or through their own wilful default respectively. Certain trust securities were realized, and one of the trustees who had the active management of the estate, obtained control of the proceeds, speculated with them, and loss resulted. The co-trustee was held liable notwithstanding the indemnity clause, as

(*h*) 36 L. T. N. S. 504; 25 W. R. 555.
(*i*) 21 W. R. 400.

he had taken no steps to secure the proper disposition of the funds.

In *Budge* v. *Gummow* (*j*), trustees held funds under a marriage settlement and will. The settlement contained the usual trustee indemnity clauses, and the will in addition contained a clause, that the trustees should not be liable for involuntary losses. It was held that the trustees were liable to make good a loss occasioned by investment on insufficient security, the loss having arisen from the neglect of the trustees in not obtaining proper valuations.

In *Rehden* v. *Wesley* (*k*), the will contained a clause providing that the trustees should be charged and chargeable respectively for such moneys only as they respectively should actually receive, and should not be answerable or accountable for the others or other of them, nor for involuntary losses, nor for any banker with whom or in whose hands any trust money should be deposited for safe custody. At the time of the death of the testatrix there was on deposit to her credit £870 in the Union Bank of London. The defendants drew out this money and paid £678 into the Royal British Bank as an interest bearing deposit. Loss subsequently occurred owing to the failure of this bank. It was held that the trustees were liable. Indemnity clauses must be strictly construed, and the transaction being really an investment and not a deposit, did not come within the protection of the clause.

In *Brumridge* v. *Brumridge* (*l*), the will contained a full indemnity clause providing among other things that the trustees should be charged and chargeable only with their respective receipts and payments, acts and wilful defaults, and that any trustee paying or consenting to the payment of money to a co-trustee with *bona fide* intent to accelerate performance of the trusts, should not be responsible for the conduct or misconduct of the trustee receiving the same, nor answerable for his application or misapplication thereof; and also that the trustees should not be charge-

(*j*) L. R. 7. Ch. 719.
(*k*) 29 Beav. 213.
(*l*) 27 Beav. 5.

able with or for any loss or damage without their respective wilful default. One trustee signed receipts for certain moneys at the request of his co-trustee and after signature by his co-trustee, and the co-trustee received the moneys and misapplied them. The trustee was held liable because he had by this proceeding enabled the co-trustee to obtain and misapply the funds. Such a clause does not exonerate the trustee from the consequences of any acts in consequence of which moneys have been misapplied.

In *Dix* v. *Burford* (*m*), the will contained a bequest of a certain mortgage debt of £400 to executors upon certain trusts, and there was a provision that the executors should not be chargeable except for their respective receipts, payments, acts and wilful defaults, and not otherwise, nor with any sum or sums of money other than such as should come to their or his own hands respectively by virtue of the will, nor with any loss or damage which might happen to the said sum of £400 in consequence of its remaining on security as in the will directed, unless the same should happen by or through his or their respective wilful default. The mortgage referred to was of certain copy-hold lands. The testator had never taken any steps to be admitted, nor had his executors after his death. One executor took the chief charge of the estate. The mortgagors desired to sell the copy-hold premises; the acting executor consented to the sale, received the mortgage moneys, and the purchaser was admitted on his consent. It was shown that if the testator or the executors had been admitted on the roll the purchaser could not have been admitted without the joint consent of all the executors. The executor who had received the mortgage money misapplied it, and the co-executor was held liable notwithstanding the indemnity clause. That is not sufficient to protect the trustee who neglects to take steps necessary to secure the trust funds.

In *Drosier* v. *Brereton* (*n*), the trust deed contained a provision that the trustees should not be answerable for (among other things) the insufficiency or deficiency in the

(*m*) 19 Beav. 409. (*n*) 15 Beav. 221.

title or value of any security or securities, nor for any other misfortune, loss or damage, which might happen in the execution of the trusts or in relation thereto, except the same should happen by or through their own wilful default. The trustees invested £500 on a mortgage without making any particular enquiries as to the security. It was afterwards discovered that there was a prior mortgage on the property, and that the property was out of repair and a loss of about £400 occurred. The trustees were held liable notwithstanding the indemnity clause, and notwithstanding the admitted fact that they were acting in entire good faith and for the best interests, as they thought, of the *cestui que trust*.

In *Fenwick* v. *Greenwell* (*o*), a settlement contained a covenant and agreement that £5000 stock, the property of the intended wife, should be transferred to trustees. The trustees after the marriage took no steps to enforce the transfer, and the stock was sold by the husband and the proceeds misapplied. The trustees were held liable although there was an indemnity clause providing that they should not be liable for any casual or involuntary loss without their wilful default, but for such money only as should actually come to their hands.

Williams v. *Nixon* (*p*), is a case that shows the nice distinctions that may be raised under the same clause as to the liability of the trustees.

A will contained a provision that the trustees and executors should not be answerable for one another or for the defaults of the other, but should be accountable only for the moneys which should actually come to their hands respectively. One executor received certain dividends, as by virtue of his office he had power to do, and misapplied them. The co-executor escaped liability because he had nothing to do with the receipt and did not know of, and had no reason to suspect, the subsequent misapplication.

But when both executors joined in the sale of certain stock and the proceeds were paid to one with the consent

(*o*) 10 Beav. 412. (*p*) 2 Beav. 472.

of the other and misapplied, the co-executor was held liable, because he had taken no measures to see to the proper application of these moneys.

In *Pride* v. *Fooks* (*q*) a will contained a provision that the trustee should be only accountable for losses happening through his wilful neglect and misconduct. The trustee instead of investing a certain portion of the estate in consols as directed in the will, invested it on mortgage. He was made liable for the increased sum that would have been obtained by an investment in consols.

In *Bacon* v. *Clarke* (*r*), a trustee was held liable for loss when he had allowed trust money to remain in the hands of his firm, though there was a provision protecting him, except in case of wilful default or neglect.

In *Moyle* v. *Moyle* (*s*), trustees were held liable for a loss occasioned by the failure of a banker with whom they had allowed trust funds, deposited with him by the testator, to remain for some months, and this, although there was a provision in the instrument that they should not be liable for any loss or damage which might happen without their wilful default. It was their duty to have drawn out and invested the funds without delay.

In *Hanbury* v. *Kirkland* (*t*), two trustees gave to a third a power of attorney to sell certain stock, and he sold the stock and misapplied the proceeds. They were held liable although there was a provision in the settlement that the trustees should be chargeable only with moneys they should respectively actually receive, and that any one or more of them should not be answerable or accountable for the other or others of them or for involuntary losses.

In *Bone* v. *Cook* (*u*), a will provided that the trustees should not be answerable or accountable for any trust money further than each person for what he should respectively actually receive, and not the one for the other or others of them but each for his own acts, receipts and defaults only.

(*q*) 2 Beav. 430.
(*r*) 3 My. & Cr. 294.
(*s*) 2 Russ. & My. 710.
(*t*) 3 Sim. 265.
(*u*) McClel. 168; 13 Pr. 332.

All the trustees were declared liable to account for certain trust moneys received by one and lost in consequence of his bankruptcy, the co-trustees having allowed this money to remain in his possession.

In *Mucklow* v. *Fuller* (*v*), a trustee was held liable for loss occasioned by the failure to get in a debt due by the co-trustee to the testator, notwithstanding a provision in the will that the trustees were not to be liable for any loss unless it should happen through their wilful default.

It sometimes happens that the same instrument gives very wide powers to the trustees and contains more or less wide indemnity clauses in addition. In such case the *prima facie* wide effect of one clause may be limited by the more narrow terms of another; as in *Stretton* v. *Ashmall* (*w*). The trustees in that case were given full power to invest upon such securities as they should approve, but there was an indemnity clause providing that they should not be answerable for loss without wilful default. It was held that the indemnity clause limited the apparently wide terms of the clause relating to investments, and that the liability of the trustees in regard to improper investments was not done away with if wilful default were shown.

In several cases "wilful default" has been defined. Thus in *Elliot* v. *Turner* (*x*), it is said that neglect or default may be wilful though it may have been unintentional and have arisen from forgetfulness. Wilful means —not arising from external circumstances over which there is no control—and therefore the default may be wilful, although merely passive.

And in *Connolly* v. *Connolly* (*y*), it is said that mere negligence or imprudence may be wilful default. It does not imply deliberate or intentional default.

In *Blount* v. *O'Connor* (*z*), it is said that wilful default is improper failure to realize assets, and that mere loss without negligence would not be wilful default.

(*v*) Jac. 198.
(*w*) 3 Drew. 9.
(*x*) 13 Sim. 477.
(*y*) 17 Ir. Ch. Rep. 208.
(*z*) 17 L. R. Ir. 620.

In connection with the question of indemnity it may be noted that the mere fact that a trustee has acted upon the advice of a solicitor is no protection to him if as a matter of fact a breach of trust has occurred (*a*).

A very full discussion of the general subject of the liabilities and duties of trustees, more particularly as regards their relations *inter se*, will be found in the notes to *Brice* v. *Stokes* (*b*).

R. S. CASSELS.

(*a*) Lewin on Trusts, 8th Ed., p. 496; *Bullock* v. *Wheatley*, 1 Coll. 130.
(*b*) 2 W. & T. L. C., 6th Ed. 967.

THE AMALGAMATION OF THE LEGAL PROFESSION IN ENGLAND.

The necessity for the hard and fast line of separation, which exists between the two branches of the Legal profession in England, and the reason for employing two lawyers to do the work which to all intents and purposes might be transacted by one, has for long past exercised, and seems likely to exercise, not only the mind of the general public, but also that of many members of both branches of the profession. That the separation which exists was always as great as it is now, clearly was not the case; for we find by the Rules of Court of Michaelmas, 1654, that attorneys were compelled to become members of an Inn of Court or Chancery; in Trinity term 1677 and Michaelmas term 1684, the Court of Common Pleas ordered the attorneys of that Court to be admitted to some Inn of Court or Chancery; and in Michaelmas term 1704, a rule on the subject was made by the Courts of King's Bench, Common Pleas and Exchequer, by which it was ordered that all attorneys of those Courts not already admitted into one of the Inns of Court or Chancery should procure themselves to be so admitted.

At the present time so absolute is the severance of the profession of a barrister and solicitor, that the mere fact of a candidate for admission to an Inn of Court being a solicitor, or a clerk to a solicitor, is an absolute bar to his admission. Should he desire to proceed to the Bar, it is requisite that he should voluntarily get himself struck off the rolls, and then enter as a student at one of the Inns, in the same way as any ordinary candidate unconnected with the profession, and so inversely a barrister desirous of becoming a solicitor, must first of all be voluntarily disbarred, and then, unless he be of five years' standing, be bound by contract in writing as a clerk to a solicitor for the period of three years.

These obstacles in the way of free passage from one branch of the profession to the other, coupled with the restrictions against the members of either branch practising the business of the other, certainly savours of absurdity, and without doubt is opposed to the interest of the profession; but putting aside the advantage or disadvantage accruing to the members themselves by their separation, it is at once apparent that the advantage that would accrue to the public by their amalgamation is undisputed, for the present system is not only inexpedient, but eminently injurious to the public interest, by introducing into all cases of legal procedure the services of a middleman; for while all the world, if he could get it, might be the client of a solicitor, a barrister's clients are limited to solicitors, the former being prohibited from the general public without the intervention of a solicitor, with the consequence that the Bar practically is dependent upon the latter for business. The main employment of a barrister is that of an advocate; he certainly does chamber work as well, in the way of advising on points of law, and drawing pleadings, and if a conveyancing counsel, he also draws and settles drafts of deeds; but the simplification which of late has taken place in pleadings, and in the forms of deeds has to a great extent deprived the members of the Junior Bar of a large source of employment, and for the future a barrister will have more than ever to direct his attention to advocacy for his support, a privilege which the Bar has always exclusively enjoyed, at least in the superior Courts, and which as long as the legal profession continues on its present basis it will enjoy, a solicitor in those Courts being absolutely denied the right of audience. That the solicitor who obtains the client, hears his complaints, advises as to his remedy, sees witnesses, takes down the evidence, and knows every detail of a case, should on the hearing have to surrender its argument into the hands of another, must act prejudicially to the client, for the barrister in all probability will never see the client until the actual hearing, and accordingly can neither feel the same amount of interest, nor be as thoroughly conversant with the details from

written instruction as the solicitor who has had them from the mouth of his client and his witnesses.

As a rule a solicitor is equally as well acquainted with the general law as the barrister whom he employs, and as far as practical and detail work is concerned is without exception his superior. A solicitor's practice, however, does not as a rule admit of his devoting sufficient time to any particular branch of the law to become a specialist, for he practices in all branches alike, and hence the variety of his employment prevents his being as deeply versed in any one particular portion of the law as a barrister, who makes that particular portion his sole study. A solicitor's five year's course of study is infinitely more severe than the three years undergone by the barrister, and beyond his examinations being of a more searching character, the knowledge that he gleans as an articled clerk, extends not only to a theoretical knowledge of the law but to a practical acquaintance with its application, whilst the strain imposed upon the intellectual capacity of the Bar student is not of the severest, and it might even possibly be thought that a higher and more searching test of his capabilities might be imposed without any great hardship to the student or loss to the public, who may ultimately require the assistance of his forensic abilities. Moreover the Bar student's opportunities of acquiring a practical acquaintance with his profession are the most meagre, for beyond lectures which he may or may not attend, and the knowledge which he may extract from eating his dinners at his inn, he is almost entirely without the opportunity of gaining experience. It is true that during the three years that he is a student he may possibly enter the Chambers of a practising barrister for six or twelve months; but what is the instruction there afforded him? Simply the opportunity of reading the papers entrusted to the barrister by his clients for his opinion, and the opinions, pleadings, and other documents which he may draw in connection with the same; but it must be borne in mind, that to acquire his qualification as a barrister it is not incumbent upon the student to court even this slight opportunity of gaining practical experience, and it is quite

possible for him to pass the examination imposed upon him simply by devoting himself to the study of the legal text books.

In the place of the Bar student's knowledge being allowed to rest on a theoretical basis it would be an advantage to him if two years of his three of study were spent in a solicitor's office, a step which beyond tending to increase his knowledge and accustom him to habits of business, would afford him the opportunity of practically ascertaining for himself the mode in which legal business is conducted; but such a course would be unpalatable to the Benchers and moving spirits of the Inns of Court, who seek to render as wide as possible the gap existing between the two branches of the profession. It may be added that however a barrister may fail to acquire knowledge during his studentship, ample time, if not opportunity, is usually afforded him of acquiring it after his call to the Bar, for before a barrister obtains even a moderate practice, many years often elapse. A solicitor in the earlier stages of his career has certainly less to contend with in the way of weary waiting, and usually gains in far less time a larger share of practice than a barrister does in the same period, and it was no doubt the knowledge of this fact that influenced in some degree the Solicitor General (Sir Edward Clarke) in urging some short time since the amalgamation of the profession.

The great requisite that is now recognized on all hands in connection with Law, is that it should be cheap, so that its aid may be invoked equally by the man of limited means as by him who wears a long purse. Without doubt this end would, to a great extent, be brought about by the fusion of the profession, for with the employment of one lawyer in the place of two, not only would many of the expenses, now solely occasioned by the middleman, disappear, but so also would the extravagent fees so frequently demanded, and paid to our leading counsel on the trial of actions. Another beneficial accompaniment would be the abolition of the antiquated practice of looking upon the barrister's fee in the light of an honorarium

instead of as money earned, and to which he should have a legal right. With his right to sue for and recover his fees would of course come a liability on the part of the barrister for his laches or mistakes. Should a solicitor make the mistakes and omissions which at present it is possible for a barrister to make with impunity, he would bring a hornet's nest about his ears in the shape of an action for damages, if nothing more. But this is only as it should be, for the prevailing non-fee recovering, irresponsible position of the Bar is as absurd as it is impolitic, for if a man's services are valuable to any one, then those services should be rewarded to their utmost value, and the fees so earned should be recoverable in the same manner as any ordinary debt, and accompanying these advantages should be the responsibility on the part of the barrister to his clients for neglect or other laches committed in the exercise of his profession. A solicitor is responsible to his client for negligence, and he can sue for and recover his fees, and in practice neither of these facts is found to work otherwise than beneficially to all parties.

However expedient it may be in the interest of the public that the amalgamation of the two branches of the profession should take place, it is nevertheless a step that must not be taken too hastily, for should it be, then the remedy sought to be effected by giving perfect freedom to every lawyer to practise where and as he pleases, would be disastrous in its results, not only to the public but to a vast majority of the Bar, whom it is desired in some quarters to benefit by the change, for the training afforded to barristers would in many instances, especially among the younger members, be totally inadequate to enable them to perform the varied duties which devolve upon a solicitor, whose business is not solely limited to conducting actions, or matters concerning the conveyance or transfer of property, but extends to a thousand and one transactions which go to make up social and business life, for beyond being a lawyer it is essential that a solicitor should be a man of the world.

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EDITORIAL REVIEW.

Entering Actions for Trial.

The Supreme Court of Judicature has repealed Rule 671 and substituted the following rule therefor:

"Actions not tried or disposed of after being once entered for trial, shall remain for trial subject to the provisions of Rule 670, but shall not be heard at any subsequent sittings unless and until a fresh notice of trial be given for such sittings by one of the parties."

We have not yet seen this rule in the *Gazette* though it is dated 15th December, 1888, and therefore it will not come into force at once. It is not easy to see the benefit to be derived from the rule, as Rule 671 was passed expressly for the purpose of doing away with a grievance which the intended new rule restores. It is within the recollection of practitioners that the Judicature rules did not permit a party entering a record to withdraw it without obtaining the consent of the opposite party or an order of the Court. The result of this was that if a non-jury case was entered at an assize and not reached, the plaintiff had to wait for six months before his action could be tried, although a sittings of the Chancery Division might take place shortly afterwards at which the action might be conveniently tried. In order to remedy this injustice, Rule 671 was expressly passed, by which, if an action were not disposed of, the record could be withdrawn and re-entered at any subsequent sittings. So that, a non-jury case might be taken from the assizes to the Chancery Division sittings or *vice versa*, if not tried at the sittings for which it was originally entered. It was also provided that it might be entered the second time without payment of a second fee.

Advantage was recently taken of this rule in one case, and the party re-entering the record gave a jury notice which his opponent objected to. The whole matter then came before Mr. Justice Rose in *Bunbury* v. *Manufacturers, etc.*, and his Lordship practically read Rule 671 out of force; immediately following his Lordship's decision the proposed rule is passed.

The result of this rule if it ever comes into force will be to restore the old grievance unless an artificial construction be put upon it. If the action is to "remain for trial" we presume that it must remain where it has been entered, and so if it be at the sittings of the Chancery Division it must remain there for six months, though a Court of competent jurisdiction to try it may sit a month afterwards. It would have been easy to strike out the jury notice in *Bunbury* v. *Manufacturers, etc.*, and maintain Rule 671, instead of destroying the rule to get rid of the jury notice.

It is greatly to be hoped that the proposed rule will never be published in the *Gazette*, and so never come into force.

The Indian Title and Crown Lands.

The decision of the Privy Council in *Regina* v. *St. Catharines* was not a surprise to the profession, in so far as it declared that the land occupied by the Indians belongs to the Province. But in the rider attached to the decision, by which the Province is compelled to pay to the goverment of Canada what the government paid to the Indians, the Committee are so illogical that it seems like a compromise of the matter.

The foundation of the Chancellor's original decision, and that upon which the final decision rests also, is that the Indians never had a title to the land. From the earliest times Great Britain treated the land as belonging to the Crown, and dealt with the Indians as subjects for generosity only. As the title was in the Crown from the begining, it became as between the Dominion and the Province, the

property of the Province at Confederation. This reasoning is clear. But the equity of compelling the Province to pay a large sum to the Dominion is not so clear. The gist of the decision is, that the land never belonged either to the Indians or to the Dominion; and the effect of the decision is to make the Province pay for its own land. They could not under the constitution be bound to pay anything for the support or management of the Indians as that is a subject within the jurisdiction of the Dominion. Yet that is what the decision binds them to do, for if the money cannot be treated as a consideration for the land it must be a gratuity to the Indians.

REVIEW OF EXCHANGES.

American Law Register.—March, 1888.

Certification of Bank Cheques, by W. H. Bryant. The acceptance of a cheque is like that of a bill, and may be verbal. The cases are not one as to the effect, some holding that it affirms the genuineness of the instrument, others that it merely recognizes the signature and the state of the account. If the bank certifies by mistake it may relieve itself if notice is given in time, but not otherwise as against *bona fide* holders, unless there is something on the face of the cheque to carry warning to those who take it. By the acceptance the bank becomes the principal and only debtor, the holder discharging the drawer by taking the bank's certificate. It thereafter circulates as the representative of cash in the bank payable on demand to the holder. Where the drawer himself gets the cheque certified he is not discharged.

Ibid.—April, 1888.

Discretionary Charitable Bequests, by Edmund H. Bennett. Where the object is indefinite and depends upon the discretion of the trustee, he may be compelled to exercise his discretion in England. If he dies or renounces without exercising it, the Crown has a prerogative right to administer the bequest unless it falls within the class of cases in which the courts administer *cy près*. As the prerogative power does not exist in the States, the bequests in such cases are void.

Ibid.—May, 1888.

Gas And Water Companies; their Relations with Consumers, by Solon D. Wilson. In early cases it was held that the relation between the company and the consumers originated entirely in contract, and that the supply could not be compelled by a consumer in the absence of contract; but later cases show that it is mandatory upon such companies to supply one and all without distinction. The company may make reasonable rules and regulations which the consumer must obey. The company is not always entitled to cut off the supply in case of a dispute as to payment. Where a judicial investigation is pending, they will be restrained from so doing.

Ibid.—June, 1888.

Law Schools and Legal Education, by Henry Wade Rogers. A defence of the system of teaching by means of Law Schools, though the

writer thinks the course much too short. This article contains some interesting information as to the various ancient and modern Law Schools.

Ibid.—July, 1888.

A Reply on the Subject of Legal Education, by HENRY BUDD. A reply to Professor Rogers' article, in which the writer shows that many eminent men have become so from their training with a practitioner. He says that "nothing can take the place, in legal education, of a learned and conscientious preceptor, accustomed to dealing in practice with legal problems."

The Teaching of Law by the Case System, by SYDNEY G. FISHER. The writer to some extent agrees with Mr. Budd in thinking that a low standard of education is due to the law schools in general, though as a rule there are many excellent schools in operation. He thinks the system of teaching applied law, *i.e.*, the discussion of cases, the best.

Ibid.—August, 1888.

The True Character of Divorce Cases, by RUFUS WAPLES. The learned writer reaches the following conclusions: The divorce suit is not *in rem*, since it is not against any *res*; it is always *in personam*; but as it is to fix status, and may be maintained without a defendant in Court, and results in a universally conclusive decree, it is *quasi in rem*; in *ex parte* divorce proceedings, publication notice is sufficient for the same reason that it is so in an action against property; when only the complainant is in Court, the decree fixing his status as that of a single person, incidentally changes that of the other marital partner, *ex necessitate rei*; the governmental jurisdiction of a state over the status of its own citizens is not such as to defeat the incidental effect of divorces granted against them by *ex parte* proceedings in foreign jurisdictions.

Ibid.—September, 1888.

Citizens, their Rights and Immunities. by D. H. PINGREY. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. Birth is sufficient to give citizenship though the parents are aliens and immediately afterwards leave the country. Citizenship is both national and State. The right of suffrage is not a necessary incident to citizenship. The federal constitution only provides that a citizen shall not be deprived of suffrage. Negroes are entitled to all the rights of other citizens. Indians are treated sometimes as a political body with whom treaties may be made, sometimes as subject to Congress, but they are not citizens unless they surrender themselves to the United States and the latter accept the surrender. Chinese born within the States are citizens, but no alien Chinese can become a citizen. Jury service, interstate rights, interstate commercial agents, and the limitations of the amendments to the constitution are then treated of.

Ibid.—October, 1888.

Ogden v. Saunders Reviewed, by CONRAD RENO. The effect of insolvency proceedings upon creditors in another State is discussed under two heads, "Due process of law," "Obligation of contracts."

Ibid.—November, 1888.

The illegal issue and over-issue of capital stock of corporations, by LEWIS PUTZEL. The learned writer, citing many authorities, discusses the effect of the illegal issue of certificates of stock by agents of a corporation, who fraudulently issue them. When the issue of certificates is an over-issue, though some cases have decided that they are valid, and that the company must purchase a sufficient number of shares in the market to reduce the stock to the lawful number of shares, the almost universal rule is that they are void as share certificates, but *bona fide* holders are entitled to indemnity.

Central Law Journal.—7th October, 1887.

Following Funds Deposited in Banks, by W. W. THORNTON. The general deposit of money in a bank renders the depositor a creditor and the bank a debtor. Where an officer of a Court deposited money entrusted to him in that capacity in his own name with the addition of "clerk," it was held that he could not recover the money as a trustee on failure of the bank. But where the addition is of the word "trustee" the bank takes with notice of the trust attaching to the fund. Cases are cited where funds obtained by fraud have been traced and recovered by the person defrauded.

Ibid.—14th October, 1887.

School Teacher—Rights and Liabilities in Relation to his Pupil, by W. M. ROCKEL. The teacher has power to inflict reasonable corporal punishment, and a jury has to consider the offence, size and apparent condition of the child, the character of the instrument of punishment used, and the extent of the punishment, in determining whether the bounds have been exceeded. The jurisdiction extends to school hours and until the return home of the pupil, but punishment may be administered on return to school for an offence committed out of hours which tends to injure the school or subvert authority. A discretionary power of expulsion exists for reasonable cause. Reasonable rules may be made for the government of pupils.

Ibid.—21st October, 1887.

The Evasion of Exemption Laws in Foreign Jurisdictions, by CHAS. A. ROBBINS. Cases are cited in which the creditor attempts garnishment in a foreign jurisdiction of a corporation doing business in the domestic and foreign jurisdiction to avoid exemption laws in the domestic jurisdiction.

Ibid.—28th October, 1887.

Collateral Attack, by D. R. W. BLACKBURN. The subject treated of is, "Can a judgment be attacked collaterally by the defendant therein, or by any person claiming by, through or under him, where the title to property has been affected by such judgment?" The learned writer's conclusion is that, if a judgment can be attacked collaterally, it can only be impeached by matter appearing upon the face of the record.

Ibid.—4th November, 1887.

Unpaid Corporate Stock—Liability, by S. S. MERRILL. The American cases which differ from the English are cited. The liability is in most cases fixed by statute.

Ibid.—11th November, 1887.

Jurisdiction, by JAMES M. KERR. American cases are cited as to the rights of Courts to try actions where the act in respect of which the action is brought, or the property, was done or lies in another jurisdiction, etc.

Ibid.—18th November, 1887.

The right to Begin and Reply in Special Proceedings, by SEYMOUR D. THOMPSON. Concluded in the following number. The subject is treated of in the following cases:—Issue of sanity, *devisavit vel non*, replevin, interpleader, criminal cases, fraud, proceedings on reports of commissioners or referees, and in special phases of general matters.

Ibid.—2nd December, 1887.

Sister State Corporations, by RUSSELL H. CURTIS. Concluded in the following number. A State may impose terms upon a corporation from another State or prevent it from doing business in the State. Some remarks are made as to interstate commerce which is within the jurisdiction of Congress. It is said that there is nothing to prevent a State from authorizing a corporation to hold meetings of its members beyond the limits of the chartering State, but where the charter is silent they ought to be held within the chartering State.

Ibid.—16th December, 1887.

The territorial limits of corporate powers, by H. CAMPBELL BLACK. The learned writer reaches the following conclusions:—A corporation chartered by one State cannot wholly remove its domicil and affairs into the territorial limits of another. One State cannot legally charter a company for the express purpose of transacting business and enjoying its corporate existence in another State. In the absence of any express authority in the charter, the directors or shareholders cannot lawfully hold meetings or transact other corporate business beyond the limits of the State granting the charter. But the directors acting merely as agents of the company, may make contracts or do other acts in the foreign jurisdiction, as far as compatible with local law. The distinction, however, between corporate acts, properly so called, and

acts which may be done by mere agents is not clearly marked in the cases and will be difficult of ascertainment. If the charter, or the general law of the State, expressly authorizes the meetings to be held, or corporate acts to be done beyond its own limits, it is probable that the validity of such acts would be sustained by the Courts of the State granting the charter. For it would be difficult to obviate the force of the statute at home. But it is also probable that they would be pronounced illegal and void when made the basis of litigation before the tribunals of any other jurisdiction.

Ibid.—23rd December, 1887.

Examining Witnesses de bene esse. ANONYMOUS. English and American cases are cited.

Ibid.—6th January, 1888.

Civil Responsibility for Words Spoken or Written in Legal Proceedings, by SEYMOUR D. THOMPSON. No action lies for matter alleged in a pleading if pertinent to the enquiry, nor for words spoken in forensic debate, but the subsequent publication is not privileged unless it consists of a fair and impartial report of the trial.

Ibid.—13th January, 1888.

A Watercourse—What it is, by WM. M. ROCKEL. Several definitions of watercourse, natural and artificial, are given. It has been decided that water flowing through a ravine or hollow, only in times of rain and melting snow, is not a watercourse. Subterranean waters flowing in a defined and known channel are treated as a watercourse, otherwise as surface water.

Ibid.—20th January, 1888.

Payment of Services and Support between Members of Family, by EUGENE MCQUILLIN. There is no implied promise to pay for services rendered by a relative. Mere consanguinity is not enough; the family relation must exist between the parties, as parent and child, brother and sister, uncle and nephew or uncle and niece living in one family, grand parents and grandchildren similarly situated. So, when the parties are related by marriage; and a stranger received into a family as a member is in the same position. Where there is an express contract set up, there must be direct clear and positive evidence of it.

Ibid.—27th January, 1888.

Real Estate Brokers, by ALBERT N. KRUPP. Some American cases are cited.

Ibid.—3rd February, 1888.

Sunday Laws, by D. H. PINGREY. Before statute in England all ministerial acts pertaining to legal proceedings, and all other business except judicial proceedings were valid. The United States do not enforce any religious doctrines or observances, but select Sunday as a day of rest by civil regulation. Contracts made on Sunday are void if they contravene statute law.

THE

CANADIAN LAW TIMES.

FEBRUARY, 1889.

NOTES ON THE TERRITORIES REAL PROPERTY ACT.

1. Purpose of the Article.

A FEW years ago, when the advocates of the Torrens system were pressing their views on the notice of the government, the profession, and the public, the practical advantages, and some of the more serious defects of the system were pointed out in various articles and contributions in the CANADIAN LAW TIMES. The system has now been in force in the Territories for about two years, and it may be of interest to the profession to investigate some of the practical workings of the Act (*a*).

(*a*) R. S. C. cap. 51.

Unfortunately, though there are a great many dark places in the Act, very few of them have been illumined by the light of judicial interpretation, so that our notes must be regarded rather in the light of suggestions, than as any attempt at an exhaustive examination of the subject. Indeed the conditions under which the practitioner in the North West is obliged to study, make it extremely difficult for him to work out thoroughly a legal problem of any complication, and we offer these notes with a great deal of diffidence, fully alive to the fact that individual opinions, unsupported by authority, are more adapted to suggest difficulties, than to solve them.

We do not then propose to deal with the general merits of the system of real property law and conveyancing introduced by the Act, but rather to accept the Act as we find it, and attempt to elucidate some of its provisions, and point out what we consider some of the defects in the statute and in its practical administration.

Perhaps unfortunately, the Act has no preamble, but its general purpose may fairly be described as being (a) to abolish the distinctive features by which real property was distinguished from other sorts of property, and (b) to simplify titles and facilitate the transfer of land.

2. Application of the Act.

The first question, then, that presents itself is; to what property does the Act apply? Sec. 4 (*b*) says: "All lands in the Territories shall be subject to the provisions thereof." At first glance this would appear to be plain enough, but a question at once arose as to whether the words "subject to" are to be construed as permissive or compulsory; whether an owner of land is bound to bring it under the Act, or whether he could do so or not, as he wished. Those who contended that the words were permissive only, referred to sections 44, 45, 47, and 64, and argued that, whereas, in the case of lands, patented after the

(*b*) R. S. C. cap. 51, sec. 4.

Act came in force, section 44 had the effect of at once bringing them within the provisions of the Act; in the case of lands theretofore patented it is clear from section 45 that it is optional with the owner whether he will bring the land under the Act or not, while section 64 shows that it is only after such registration that the special provisions of the Act in regard to transfers, etc., etc., apply. A case (*c*) submitted to the Court of Queen's Bench in Manitoba under the Manitoba R. P. Act of 1885 (*d*), was cited in support of this position, which, if carelessly read and without a careful comparison of the two statutes, seems to be an authority in point.

On the other hand, it was argued that section 4 is as broad and imperative as it is possible to be; that the general clauses of the Act (sections 5 to 17 inclusive) must plainly apply to all lands, whether already patented or not, and that there is no good reason for refusing to extend the same interpretation to the other sections. However, since the amending Act (*e*) was passed, this position has been turned into an argument on the other side, for section 4 declares that sections 5 to 10 inclusive were intended to extend * * * * "to all land in the Territories and to every estate and interest therein," and on the principle *mentio unius exclusio alterius* it is argued that the other sections do not extend to *all* lands, but only to such lands as are *brought* under the Act, either voluntarily by the owner, or by the transmission of the Crown Grant to the Registrar. To the writers, however, it seems that the Act is *practically* compulsory; for, though it may not be imperative to register the title in the first instance still as soon as the owner comes to deal with his land, to mortgage or convey it, he can only do so after registration of his title under the Act. For, although section 64 says: "*After* the registration of the title * * * no instrument shall be effectual, etc.," by section 59, "no instrument *until registered* under this Act shall be effectual to pass any

(*c*) *Re Irish*, 2 Man. L. R. 361.
(*d*) 48 Vict. cap. 28 (Man).
(*e*) 51 Vict. cap. 20 (D).

estate or interest in any land, or render such land liable, etc., etc.," and since no instrument can be "registered" under the Act, unless there is an existing certificate of title, as will be seen further on, the bringing of the land under the Act is a condition precedent to the operation of any conveyance; and hence section 45 provides for the application by the owner of land, patented when the Act came in force, to have his title registered.

Re Irish (*f*), which is cited to the contrary, is no authority against this position. The section of the Manitoba Act (*g*), which corresponds to sec. 4 of the Dominion statute, reads as follows:—"From and after the commencement of this Act all lands unalienated from the Crown in the Province of Manitoba shall, when alienated, be subject to the provisions of this Act;" and although the learned Chief Justice, in construing sections 36 and 64 of the Manitoba Act, which practically correspond with sections 34 and 64 of the Dominion Act, held that, "*before* the registration of the title, although the land may by the issue of the patent be subject to the provisions of the Act, any instrument may be effectual to pass the interest therein whether it be executed in accordance with the Act or otherwise," yet Mr. Justice Taylor reads the intention of section 28 of the Manitoba Act, "to render compulsory the bringing under the Act all lands, which were at the commencement of the Act unalienated, and afterwards alienated," and Mr. Justice Killam agrees in this view, while both avoid considering the effect of instruments not in accordance with the Act.

Thus, *Re Irish* is rather an authority for the argument that section 4 of the Dominion Act is imperative; while this view is practically settled by section 59, which has no section corresponding to it in the Manitoba statute. We submit therefore, that the Territories Real Property Act is applicable to *all* lands in the Territories, whether patented or unpatented when it came into force, and that its provisions are practically compulsory on all owners.

(*f*) 2 Man. L R. 361.

(*g*) 48 Vict. cap. 28, sec. 28 (Man).

3. Effect of the Act.

The general effect of the provisions of sections 5 to 17 inclusive, may be roughly summed up, as a change in the nature and attributes of land, from "real estate" to "chattels real." It would seem, however, that the distinction between real and personal property has not been entirely obliterated. Thus section 5, of the original Act (*h*), provided that "All lands * * * * shall be held to be chattels real, and shall go to the executor, etc." Under the corresponding section (*i*) of the Manitoba Act, it was held (*j*) by the unanimous judgment of the Court, that lands remain real estate and are not exigible under a writ of execution against goods—a ruling which seems to have been in the mind of the North-west Council, when in the Civil Justice Ordinance (*k*) they retained the provisions with regard to *fi. fa.* lands. In practice, a writ of *fi. fa.* against lands is always issued, when it is intended to levy on lands in the Territories.

Under section 94 (*l*) the sheriff charged with the execution of process against land shall deliver a certified copy "with a memorandum in writing of the lands intended to be charged to the registrar, "which shall operate as a *caveat*, etc."

It does not, however, seem to the writers that the intention of this section is to give to a registered execution simply the effect of a *caveat*, which would lapse in a month unless proceedings were taken to enforce the caveator's title, and an injunction granted restraining the Registrar from dealing with the land (*m*), but the words "operate as a *caveat*" are extended by the concluding sentence of the section (*n*), "and no transfer shall be made by him of such

(*h*) R. S. C. cap. 51; but see amendment, 51 Vict. cap 20, sec. 3.
(*i*) 48 Vict. cap. 28, sec. 21.
(*j*) *Re Irish*, 2 Man. L. R. 361.
(*k*) N. W. T. Ord. No. 2 of 1886, sec. 273.
(*l*) R. S. C. cap. 51; see amended section, 51 Vict. cap. 20, sec. 16.
(*m*) R. S. C. cap. 51, sec. 100, s-s 6,
(*n*) Sec. 16.

land or interest therein, except subject to such writ or other process." But the wording of the section is, we think, unfortunate.

4. Registration, its necessity and effect.

Though we assume that the reader has the Act before him, the provisions with regard to the manner and effect of registration may, for convenience sake, be thus summarized :—

Method.—The registrar is prohibited from registering any instruments except in the manner provided by the Act (*o*), as follows :—He keeps first a register, "and shall enter therein duplicates of all certificates of titles," each constituting "a separate folio" in which particulars of all instruments "required to be registered" affecting the land included under such certificate shall be recorded (*p*). The registrar must also keep a day-book (*q*), "in which every instrument given in for registration shall be entered," with the date and minute of filing.

"Every grant (*r*) (*i. e.* Crown grant) shall be deemed to be registered when marked * * with the folio and volume in which it is embodied in the register; and other instruments as soon as a memorial has been entered in the register upon the folio constituted by the existing grant or certificate of title."

Priority.—The priority of instruments is determined (absolutely) by the time of registration, which is the time of filing as entered in the day-book (*s*).

Effect.—"So soon as registered * * every instrument shall thereupon create, transfer, surrender, or discharge, as the case may be, the estate or interest therein mentioned" (*t*).

(*o*) Sec. 34.
(*p*) 51 Vict. cap. 20, sec. 8.
(*q*) Sec. 39.
(*r*) Sec. 40.
(*s*) Secs. 39, 40.
(*t*) Sec. 41.

The practical effects of these sections can be best appreciated by remembering that by section 69 no instrument *until registered under this Act* shall be effectual to pass any estate or interest in any land, or render such land liable as security for the payment of money. And since by section 40 an instrument shall only be deemed to be registered "as soon as a memorial has been entered in the register upon the folio constituted by the existing grant or certificate of title," it follows that until registration of patent, or, in the case of land that has been dealt with after the registration of patent, until the issue of a certificate of title, no instrument can have any validity, so far as the land is concerned, either as a conveyance or mortgage, because no instrument can be registered in accordance with the Act. We think it only right to state that this conclusion, so far, at least, as lands patented before the Act came in force, and not brought under it, are concerned, is disputed by a number of conveyancers, who hold that an unregistered conveyance in the ordinary form is as valid and effectual as before the Act came into force.

It can easily be imagined that in a new country, like the Territories, these provisions (if our argument be correct) often create great inconvenience, and, in certain cases, even hardship. The laity have not grasped to the smallest extent the radical change in the law of conveyancing, and cannot understand why a man with a Crown patent in his pocket cannot give a good deed to his neighbour, without being obliged to go to the expense of bringing his land under the Act, while the Dominion Land Act (*u*) expressly provides that where a homesteader has been *recommended for patent*, he can convey, assign, or transfer his interest in the land before the actual issue of the patent.

Apart from the operation of section 59 of the Dominion Lands Act, which provides for the registration in the Department of the Interior of assignments of interests in Dominion lands, and which we shall consider at a later stage, of what value is this provision when the Territories

(*u*) R. S. C. cap. 54, sec. 42.

Real Property Act prevents any conveyance or mortgage being operative until after registration, and restricts registration to cases in which there is already a folio in the register constituted by an existing grant or certificate of title?

It is true that, in Manitoba, it has been held (*v*) that the interest of a homesteader, who has been *recommended for patent* under the Dominion Lands Act, can be registered under the Real Property Act of 1885 (*w*); but in section 38 of that Act, which corresponds to section 45 of the Territories Real Property Act, the words "letters patent for which have already issued from the Crown," which form so important a part of section 45 of the latter Act, are not to be found, while the dissenting judgment of Mr. Justice Taylor on this point is a very forcible bit of reasoning against accepting the decision of the Court. In the Territories it seems quite clear that no such owner can apply to have his title registered until letters patent have issued.

By section 125, however, "any mortgage or other encumbrance created by any party rightfully in possession of land prior to the issue of the grant, may be filed in the office of the registrar, who shall on registering such grant" enter and endorse a memorandum of such incumbrance, and "*when so entered and endorsed* the said mortgage shall be as valid as if made subsequent to the issue of the grant;" while by section 39 "every instrument which is given in for registration" is to be filed and entered in the day-book, and the priority of all instruments is determined by the "time of filing."

The advantage of these provisions, however, to purchasers and mortgagees, prior to patent issued, is illusory. The chief danger such purchasers and mortgagees had to fear under the old law, was that proceedings might be taken, on the ground of fraud, non-compliance with homestead provisions, etc., etc., to stay the issue of the patent

(*v*) *Re Irish*, 2 Man. L. R. 361.
(*w*) 48 Vict. cap. 28 (Man.)

and cancel the recommendation (*x*). In such a case, however, they generally felt that at least they, as assignees of the homesteader's estate, would have to be parties to the bill for cancellation, and would have an opportunity of defending. Under the present law, on the other hand, it is at least doubtful whether they are necessary, or even proper, parties to the bill, since until actual *registration*, not mere *filing*, of the instruments under which they claim, no estate or interest in the land can pass to them, nor can the land be security for any money. Again, since months, sometimes years, may elapse, after recommendation, before the actual issue of patent, consider the cheerful position of a mortgagee, whose mortgage has not been "so entered and endorsed," and whose interest is in arrear. It will be observed that we do not here discuss the effect of the deed or mortgage either as a contract between the parties, or in the light of the doctrine of estoppel, or as an agreement for a conveyance.

Again, under the Dominion Lands Act (*y*) the Governor-in-Council grants leases of grazing lands in the Territories. When these leases are assigned, we believe the practice has hitherto been to prepare an assignment, and having obtained the consent of the Governor-in-Council to register it in the Department of the Interior, under section 59 of the Dominion Lands Act. *Quære*, whether the assignment, without registration under the Territories R. P. Act has the effect of conveying the leasehold interest to the purchaser? Is not the proper course for the original lessee to file his lease, which is a Crown Grant, in the Land Titles office, procure a certificate of his title, and then, on execution of the assignment, the assignee would file it, and the old certificate being cancelled, a new one would issue to the assignee (*z*)? We call attention to this point now, but the effect of registration under section 59 of the Dominion Lands Act is more fully discussed later on.

(*x*) See *Re Irish*, *supra*; *Crotty* v. *Vrooman*, 1 Man. L. R. 149; *McDermott v. McDermott*, 3 Chy. Ch. 38; *Wiggins* v. *Meldrum*, 15 Grant 377.

(*y*) R. S. C. cap. 65, sec. 50.

(*z*) See R. S. C. cap. 51, sec. 3, s-s. (*t*).

5. Vendor and purchaser.

The relation of vendor and purchaser as affected by the Act is of special importance is this new country. For example, a western "town" is often the growth of a single year; people must have land upon which to build; a town-site is surveyed, perhaps prior to the Crown Grant, into town lots; the proprietors sell, giving the usual agreement for sale, with a proviso that they shall not be required to give deeds before a fixed date, or before the issue of patent; the purchasers build upon, sell, exchange, and mortgage their lots according to the exigencies of their business, or as opportunities of speculation offer. It is evident that the task of the lawyer who tries to unravel all the complications that can arise under such circumstances is no easy one.

We propose to call attention to the following cases:

(i) *Where patent had not issued at the time the Act came into force.*

(a) *Purchase prior to receipt of patent in Land Titles office, and issue of certificate of ownership.*

In this case the patent, when issued, would be forwarded to the Land Titles office, and a certificate of ownership be issued to the patentee, as provided by section 44 of the Act, as amended by 51 Vict. cap. 20, sec. 9. The purchaser might, until the issue of patent, hand in his agreement for sale to be "marked" and "entered" in the day-book, but we submit it could not be "registered," and does not therefore create any "estate," equitable or otherwise; and, as before pointed out, when speaking of the interests of homesteaders, the purchaser has to run all risks of the patent not being granted, or being cancelled for fraud, etc., after issue and before the certificate of title has been granted to the vendor.

The position we have taken that an "owner," prior to patent issued, cannot register his title and obtain a certificate, even when he has been recommended for patent, or has paid his purchase money, is strongly supported by the dissenting judgment of Mr. Justice Taylor, before referred to in *Re Irish* (*a*). He says, "Nor could the person who

(*a*) 2 Man. L. R. at p. 370.

has obtained a recommendation for patent, or who as an ordinary purchaser has paid his purchase money in full, enforce specific performance against the Crown. That a Court of Equity has no power to decree specific performance against the Crown has been decided in *Simpson* v. *Grant*, 5 Gr. 267, and *Crotty* v. *Vrooman*, 1 Man. L. R. 151. He must then rely solely upon what has been called the infallible justice of the Crown, etc., etc. It is to my mind impossible to imagine that the Legislature ever intended that a person in that position, who may, in a sense, be said to be the owner of an equitable estate or interest in the land, but of one which he cannot enforce, should be able to come in under this Act, and obtain a certificate of title which would under sec. 62, be conclusive evidence, both in law and in equity, as against Her Majesty as well as all other persons."

In this connection, however, section 59 of the Dominion Lands Act must be considered, which provides for the registration in the Department of the Interior of assignments of any rights to Dominion Lands which are assignable under the Act, provided the instrument is in conformity with the Act; "and every assignment so registered shall be valid against any other assignment unregistered or subsequently registered." How is this section to be read with section 59 of the Territories Real Property Act? It will be observed that the Dominion Lands Act does not define what form of assignment or conveyance shall be deemed sufficient, and since before the Real Property Act came into force, the instrument must have complied with all the requirements of the old law of conveyancing, so now the instrument must conform to the requirements of the present law; and since no instrument until registered under the Territories Real Property Act shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or a less period) we submit that registration under the Territories Real Property Act is necessary to transfer an interest or estate to the purchaser; though, by registration of his assignment in the Department of the Interior, he could no

doubt get the benefit of the priority, given by section 59 of the Dominion Lands Act, of the instrument, for whatever value it might have been, apart from the provisions of the Real Property Act.

Let us take an imaginary case. B. is a purchaser of Dominion Lands to whom patent has not issued, and whose rights are purchased by A. The assignment from B. to A is duly registered in the Department of the Interior under sec. 59, D. L. Act; and in due course the patent is issued to A. and forwarded to the registrar. In the meantime, however, an execution against B. has been registered against the lands under section 94 of the Real Property Act. When A., therefore, applies for his certificate of title, the question arises whether he takes subject to the *fi. fa.* under section 94, whether, in fact, B.'s interest passed to A. on *delivery* of the assignment, or whether the execution creditor could not dispute A.'s right to be registered as owner, except subject to the *fi. fa.*, and, if necessary, attack the validity of the patent.

We submit that, on a careful reading of sections 40, 41, and 60 of the Real Property Act, and bearing in mind that by the interpretation clause "instrument" includes a crown grant, no estate or interest can pass to A. by the assignment, nor until the patent to him is registered and certificate of title granted. And it seems clear that under section 94, as amended, the registrar must enter a memorial of the *fi. fa.* upon the certificate. The registrar is to issue a certificate of title to the patentee "with any necessary qualifications" (*b*).

(b) *After receipt of Patent in Land Titles Office.*

This case is simple enough: the agreement of sale can at once be registered; a certificate of title would issue to the purchaser, in respect of the equitable estate, which would at once arise on registration of the instrument, and a memorandum would be endorsed on the certificate of the vendor's lien, or any other incumbrances on the equitable

(*b*) 51 Vic. cap. 20, sec. 9, s-s. 1.

estate; while the certificate of the patentee would be endorsed with a notice of the equitable interest of the purchaser under his agreement.

Of course, even in this case, the purchaser takes the same risk as in Ontario, viz., that before he can register his transfer an execution may be registered ahead of it, or a fraudulent transfer to some one else.

(ii) *Where patent has been issued prior to the time when the Act came into force.*

(a) *Agreement of sale executed before the Act came into force.*

A question of considerable importance arises under this state of affairs, viz., whether the vendor or the purchaser must bear the expense of bringing the land under the Act,—whether, in fact, the vendor's contract will be fulfilled by merely executing a deed or transfer, or whether the duty lies on him to make the deed operative, by bringing the land under the Act.

The vendor may be the original patentee, or may claim title by conveyance from the patentee. When the agreement for sale was made the only conveyance that could have been contemplated was an ordinary deed, which (the vendor's title being complete) would, without registration, have conveyed his estate to the purchaser. This state of the law, however, has been altered, apart from the acts or omissions of either party, and the mere execution of a conveyance or transfer is not effectual to pass the estate, unless the vendor takes out a certificate of title, and until "registration" of the transfer, in accordance with the provisions of the Act.

The argument, on the one hand, is that the vendor is obliged to give a conveyance that actually conveys, and must perform everything that is required (viz., register his title and take out a certificate) in order to make the conveyance operative, as soon as recorded. On the other hand, this additional expense could not have been in contemplation of the parties at the time the contract was made, and,

supposing the purchaser to have made improvements, the vendor, if required to bring the land under the Act, would have to pay an increased percentage towards the assurance fund, in proportion to the increased value of the land (*c*).

To the writers, it seems impossible to lay down any rules of general application; each case as it comes up must be decided according to the special terms of the instrument in question.

Mr. Pollock, in his work on contract (*d*), says, in regard to a class of cases somewhat similar in principle to the subject we are discussing: "But the strong and concurrent tendency of later cases is to avoid laying down absolute rules, and to give effect, as far as possible, to the real intention of the parties—in other words, to treat the subject as one to be governed by rules of construction rather than by rules of law."

If the vendor has made an absolute agreement, not only to make a good title, but also to convey in fee simple, it would seem, on the principle of *Paradine* v. *Jane* (*e*), that he would be bound to do everything requisite to make his conveyance operative, including the registration of his title, and the taking out a certificate of ownership, and probably even registering the transfer to the purchaser. The Real Property Act has not rendered the performance of the vendor's contract to convey at all impossible, it has simply altered the method, and added to the expense. "It is a personal and relative *causa difficultatis*," which, as we have seen, is irrevelant from a legal point of view (*f*).

But where the vendor has stipulated, that he shall only be bound to give a deed in the usual statutory form (*i.e.*, under the old law), or that the purchaser shall do all things

(*c*) It will be observed that the question is not the same as that discussed in *Brady* v. *Walls*, 17 G. R. 699, *Laird* v. *Paten*, 7 O.R. 137, whether registration under the old law is necessary to complete title—as we have assumed that the vendor has a completed title before the Act came into force.

(*d*) 3rd Ed. p. 367.

(*e*) *Aleyn*, 26; see Pollock on Contract, p. 378.

(*f*) Poll. Con. 379.

requisite to complete the conveyance at his own expense, or has otherwise protected himself, the case would be very different, for the principle of *Paradine* v. *Jane* only applies to those cases where "the contract is in substance and effect as well as in terms unconditional."

It must be remembered in this connection that, assuming that the vendor's title deeds have been registered under the old law, or that they are all handed to the purchaser, and that the title is clear, the purchaser can apply to be registered as owner, either in respect of his equitable estate under the agreement for sale, or as legal owner under the transfer. The practice in the latter case, which is very common, is this: that the registrar, upon an application to bring the land under the Act being filed, opens a folio and enters a certificate of title in the name of the vendor; then he enters the transfer to the purchaser and immediately cancels the original certificate and issues a new one to the purchaser.

Under the old law, in the absence of any express agreement, the purchaser pays for the costs of preparing the instrument; but the rule seems to be that the vendor has to bear the costs "of all matters essential to the validity of the deed as a perfect conveyance; *e. g.* the acknowledgment by married women, and the filing of the certificate of acknowledgment, and the enrolling of a disentailing deed, and deed of consent by the protector upon a sale by tenant in tail. Nor will a condition throwing the expense of the conveyance, surrender, etc., on the purchaser, extend to the expense * * in the case of copyholds, of procuring their necessary previous admission on the Court rolls, *although rendered necessary by events subsequent to the contract*" (*g*).

This rule would, we submit, in the great majority of cases throw upon the vendor the onus and expense, not only of registering his own title, under the Act, but also of registering the conveyance to the purchaser; for the rule that the purchaser always paid for the registration of his own

(*g*) Dart on V. & P. Ch. XIII. sec. 10.

conveyance was founded on the fact that the conveyance was valid and effectual without registration (*h*), but now in the Territories registration is essential to the actual validity of the instrument.

(b) *Agreement for sale executed after the Act came in force.*

Assuming that the vendor has not protected himself by a special clause, in this case, it would seem clear that, as registration of his title under the T. R. P. Act is essential to the *validity* of the conveyance to the purchaser—and this must have been in contemplation of the parties—the vendor is bound to take out a certificate of title, and, perhaps, even, as before pointed out, to pay for the registration of the conveyance.

It will be observed that in cases where patent had not issued at the time the Act came into force, this question, in one aspect, is not of as great importance, as the patent is sent from the Department of the Interior direct to the land titles office, and the patentee is entitled to a certificate of title without fee, provided no encumbrances affecting the title have been registered.

C. C. McCAUL.
JOHN C. F. BOWN.

LETHBRIDGE, N. W. T.

(*h*) See *Mittelholzer* v. *Fullarton*, 6 Q. B. 989, 1019.

(*To be concluded.*)

EDITORIAL REVIEW.

Toronto University Law Faculty.

When the announcement was made to which we referred last November that certain of the Judges and leading members of the profession were to be appointed lecturers in the Law Faculty of Toronto University, it was a matter of doubt in the profession whether this announcement was to be taken as a serious one, or whether it was a huge joke perpetrated by the newspapers. It transpires now that it is an actual fact. In addition to the two professors, the following honorary lecturers have been appointed on the following subjects: — Wrongs and their Remedies, Mr. Justice McMahon; Constitutional Law, Mr. Edward Blake, Q.C.; Ethics of Law, Mr. S. H. Blake, Q.C.; Civil Rights, Mr. D'Alton McCarthy, Q.C.; Municipal Institutions, Mr. W. R. Meredith, Q.C.; Criminal Jurisprudence, Mr. Osler, Q.C.; Commercial and Maritime Law, Mr. Lash, Q.C.; Equity Jurisprudence, Mr. Moss, Q.C.; the Comparative Jurisprudence of Ontario and Quebec, Mr. Maclaren.

We understand that it is not yet settled whether Mr. Justice Proudfoot will accept the professorship of Civil Law. Mr. Osler and Mr. Lash have delivered their three lectures each on Criminal Jurisprudence and Commercial and Maritime Law respectively; and Mr. Maclaren has recently delivered three lectures upon his subject.

It is now announced by *The 'Varsity* upon what it calls reliable information that Mr. McCarthy's lectures upon Civil Rights have been indefinitely postponed, owing to that gentleman's inability to find the necessary time. It is also announced that Mr. S. H. Blake's lectures have been postponed until some time during the month of April; and that it is a matter of uncertainty whether Mr. Edward Blake

will lecture upon the dates fixed, or will be obliged to change the dates. We can only reiterate what we said before, that under present auspices the Faculty exists on paper only. The curriculum which has been planned for the course of law is an exceedingly good one, but it is a manifest impossibility that any instruction can be given upon it, under the present system, which will be of the slightest advantage to students who desire to pass the examinations. The present scheme is that each lecturer shall deliver three lectures. Upon the subjects which have been allotted to each lecturer three lectures would do little or nothing to let in the light; and certainly, for students in their first year, the three lectures on each subject would be nothing but a delusion. They cannot afford the slightest aid to the student in mastering the subjects set for him upon the curriculum. This is a consideration altogether apart from the element of uncertainty which attends the whole scheme, and makes it doubtful whether some of the lectures which should be the best will ever be delivered at all.

Until some explanation is offered it must remain a mystery why the Faculty has been so constituted. It is and has been part of the scheme of the Law School at Osgoode Hall, ever since its foundation, that lectures should be delivered by the Benchers and other eminent members of the profession, as well as by the regular lecturers; yet, in the many years during which lectures have been delivered at Osgoode Hall, no one Bencher or other member of the profession, except the paid lecturers, has ever delivered a single lecture, or appeared at a lecture delivered, or in any way manifested the slightest interest in the welfare of the School. As all the Honorary Lecturers, except Mr. Justice MacMahon and Mr. Maclaren, are, as Benchers, ex-officio lecturers at Osgoode Hall, it will always be a mystery, as we have said, unless explained by the Benchers, why, when the Faculty of Law was established at Toronto University, these gentlemen should have accepted the lectureships as they have done, considering that the establishment of this Faculty was, in their opinion as Benchers, a standing menace to the welfare of the Law Society.

Tenancy by Entireties.

The effect of the Married Women's Property Act, by which the property of married women becomes separate estate, was thought in several cases not only to destroy the tenancy by entireties that arose upon a conveyance of land being made to a husband and wife, but to operate so as to increase the wife's share at the expense of a third person where the estate was so conveyed.

In *Griffin* v. *Patterson*, 45 U. C. R. at p. 554, Armour, J., said "I think it might well be contended that the effect of the Married Women's Property Act is to do away with the estate by entireties, and to make the devisees [husband and wife] tenants in common." And in *Re March*, 29 Ch. D. 169, though the Court of Appeal in England reversed the decision of Mr. Justice Chitty, who held that a gift by will to a husband and wife and a third person was divisible into thirds, the reversal was on the ground that the will was not governed by the Married Women's Act.

The question has now been directly passed upon by Mr. Justice Kay in *Re Jupp*, 39 Ch. D. 148, where reasoning will be found which is very convincing in favour of the view that the Act is only intended to alter the rights of the husband and wife *inter se*. There was a testamentary gift to a husband and wife and a third person. His Lordship says at p. 151, "Apart from authority, that would be an extraordinary effect of an Act of Parliament the main purpose and object of which is, to give a married woman certain rights as between her and her husband, because the effect of so holding would be that both husband and wife, instead of getting one-fourth each, would get one-third each of this gift, and Harriett Barkwell, the step-daughter, instead of getting one-half, would only get one-third; thus, the husband would have an increased share, not only as between him and his wife, but against third parties." And again, at p. 154, "The true view seems to me to be that the wife had an unlimited capacity before the Act to acquire property, but that upon its acquisition the marital right of the husband gave him certain interests in it which the Act

has interfered with. This seems to me to be the extent to which her status, if that be the right word, is intended to be altered. But for collateral purposes, that is, for any purpose in respect of property, except altering her right to property as between herself and her husband, I do not find in the Act any intimation of an intention to change her legal position. If that had been the intention I should have expected to find in the Act an express provision to the effect, for example that in all questions relating to property the husband and wife should be considered not only as between themselves, but also as between them and third persons, two separate individuals, and that the old law of unity should be abolished."

So far as this decision goes, then, the rule of construction that husband and wife take but as one person is unaltered, but in the manner of taking as between themselves, the wife will hold her share as separate estate, and will be at liberty to convey separate from her husband.

This is equivalent to abolishing entirely the estate by entireties as stated in the passage which we have quoted from *Griffin* v. *Patterson*.

Successive Independent Trespassers.

The effect of the Statute of Limitations upon the paper title when successive independent trespassers have been in possession has been said to extinguish it; and a distinction has been drawn between cases where the person claiming under the paper title is plaintiff, and those in which he is defendant. In the former case it has been said that if the true owner has been out for the statutory period, it is not necessary that the possession of successive intruders should have been continuous or connected with each other; the owner is barred: *Kipp* v. *Synod*, 33 U. C. R. 220; *Doe Carter* v. *Barnard*, 13 Q. B. 952; *McConaghy* v. *Denmark*, 4 S. C. R. 633. In the latter case the intruder being plaintiff must shew that he has had continuous possession either in himself or by connection with others under whom he claims for the full statutory period before he can recover: *Davis*

v. *Henderson*, 29 U. C. R. 351; *McConaghy* v. *Denmark*, 4 S. C. R. 633; *Dixon* v. *Gayfere*, 17 Beav. 429; *Doe Goody* v. *Carter*, 9 Q. B. 863.

The Editor in his work on Titles, pp. 200 *et seq.*, ventured to express the opinion that the paper title is not extinguished by the successive intrusions of independent trespassers, notwithstanding the cases cited; that the statute ceases running in the interval between the abandonment of the land by one trespasser and its occupation by a succeeding one; that a new cause of action arises as against the second intruder entirely distinct from that which arose against the first; and that in the interval the owner was constructively in possession under his paper title. The same point was touched upon, though not directly decided in *Doe Cuthbertson* v. *McGillis*, 2 C. P. 139, where it is pointed out that there can be no right of action without a defendant, or right of distress without a tenant, and consequently the Act cannot be said to be in process of barring a right of action which did not exist.

The question has now received its *quietus* by a decision of the Privy Council in *Agency Company* v. *Short*, 13 App. Ca. 793, where the very point was presented for decision. Substantially the same view as was expressed in *Doe Cuthbertson* v. *McGillis* was expressed by Lord MacNaghten in giving judgment. His Lordship says: "If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. * * The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

BOOK REVIEWS.

The Lives of the Judges of Upper Canada and Ontario, from 1791 to the present time, by DAVID B. READ, Q.C., Historian of the County of York Law Association. Toronto: Rowsell & Hutchison. 1888.

A series of articles by the author in the Magazine of Western History on the Bench and Bar of Upper Canada and Ontario attracted a good deal of attention in the profession and formed the basis of the present work.

Hitherto a great deal of the family and personal history of the earlier judges of our Province has been matter of tradition only. The generation which connected them with the present is passing away, and we are therefore grateful to Mr. Read for placing in our hands a history, for the truth of which we have a voucher in the person of one whom we all know, and who personally knew many of those of whom he writes. The facts which Mr. Read gives us are many of them already well known to us, but we must take occasion to remark the fluent and easy, and in many parts, graceful, style with which they are related. Of the choice of events the historian must be his own judge, as to which he shall relate and which he shall omit, bearing in mind the relevancy and importance of each class. Mr. Read has been found fault with already for reproducing certain matters which the critics think had better have been omitted. It is, however, the common fault of authors that they do not take counsel of their critics before they write. If the present writer had been consulted he would have recommended the omission of many extracts from the opinions of the Judges taken from the reports. Not all, however. For there were events in the history of Canada which are marked by the decisions of some of the Judges, and without a reference to these the work would be incomplete. But to do more than to illustrate the bent of a judge's

mind, or to remark his influence upon the jurisprudence of the Province by a reference to his decisions is, in our opinion, a mistake, where the task is that of a biographer. The book is, however, a valuable and worthy contribution to our literature.

The practice of the Parliament of Canada upon Bills of Divorce, including an historical sketch of Parliamentary Divorce and summaries of all the Bills of Divorce presented to Parliament from 1867 to 1888, also notes on the Provincial Divorce Courts, etc., by JOHN ALEXANDER GEMMILL, of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co. 1889.

Mr. Gemmill's book contains a history of the jurisdiction of Parliament over Divorce. To many who have often enquired how the Senate got, or professed to exercise, jurisdiction is now given the answer that a Divorce Bill is a Legislative Act originating in the Senate more by custom than as a matter of right. Judged by this standard the task of an author who would outline the laws of Divorce is a difficult one, for Parliament is infallible, in this sense that its Acts are Law and therefore right, and it is guided only by its own discretion. The moral tone, however, which has hitherto governed the members is practically crystallized into precedent, and thanks to the efforts and ability of several of the Senators and the Minister of Justice, not forgetting Mr. Gemmill, who now brings the whole within our reach, we may regard the limits as well settled within which Parliament will act. Mr. Gemmill has also shown us what will be most serviceable to the lawyer, namely, the laws of the various Provinces as to Marriage and Divorce. Owing to the different laws in force in the various Provinces before confederation, and the admission of others since that date, the laws are not now uniform. While the jurisdiction to decree divorce may be considered settled in one Province, it may be, and we venture to think is a matter of debate in others, and now that it is promin-

ently brought before us, the advisability of rendering the laws uniform by attracting all the jurisdiction to Parliament may well be considered. In addition to a treatise upon the law of Divorce, Mr. Gemmill has printed the Rules of Parliament governing procedure, and other serviceable information.

Manual of Evidence in Civil Cases. By R. E. KINGSFORD, M.A., LL.B., Lecturer on Commercial Law, Contracts and Evidence to the Law Society of Upper Canada, assisted by J. E. HANSFORD, of Osgoode Hall, Barrister-at-Law. Toronto: William Briggs. 1889.

The foundation of this book was the lectures delivered by Mr. Kingsford, at Osgoode Hall. They are here enlarged and methodically arranged so as to be ready of access. The plan adopted is simple and comprehensive. Under the particular class of action the author states concisely what the plaintiff must prove in order to make out his case, citing authority where necessary in order to sustain his text. Where occasion requires it, he also gives the good defences, and what must be proved to sustain them. Such books as Roscoe's Nisi Prius, and the large books on Actions and Defences are out of reach of students and some of the profession, and therefore Mr. Kingsford's manual, which carries out a similar design on a smaller scale, ought to find an easy place. The difficulty which besets young men about to commence practice is that, though they may well understand the rights and remedies of a plantiff, they do not, from want of practice and opportunity, know how to go about giving the necessary proof. Hence the value of the work, and we hope to see it largely taken advantage of.

HAMILTON LAW ASSOCIATION.

The trustees beg to present their Ninth Annual Report, being for the year 1888.

The number of members at the date of the last report was 70, two vacancies have occurred and one new member has been added, namely, Ralph R. Bruce, and the present membership is 69. The annual fees to the amount of $302.50 have been paid. The number of volumes in the Library is about 1963, exclusive of Sessional Reports and papers, of which 160 were added during the year. The following periodicals are received, namely, The Law Times, The Solicitors' Journal, The Albany Law Journal, The Canada Law Journal, The Canadian Law Times. The Treasurer's Report is submitted herewith, giving detailed statement of the receipts and expenditures, and of the liabilities and assets of the Association, and the same is also in the form required by the Law Society. The Trustees were successful in obtaining from the Law Society a loan of $1,000, which is re-payable in ten yearly instalments of $100, each without interest; this sum has been expended in reports, and the addition will no doubt prove a very useful one. The Irish Law Reports and the Weekly Reporter together with the Railway and Canal Cases and Privy Council Reports will now be on the shelves of the Library, and further purchases will be made very shortly. Out of the proceeds of this loan the indebtedness of the Association referred to in the last Annual Report and amounting to $547.76 has been paid so that the indebtedness is now represented by the $1,000 owing to the Law Society.

The Trustees desire to call attention to the fact that the Barristers' Room is continually used during the Sittings of Court by litigants and witnesses; a witness room is already

provided, and the Trustees think that some action should be taken to preserve the Barristers' Room for the use of the members of the profession only.

The Consolidated Rules of Practice have been published and are now in force. The consolidation and revision of all the existing rules has been a work of very considerable labour, and one which seems to meet with the general approbation of the profession. No doubt some improvement can be made in the existing Rules, but the desirability of having a general consolidation was pointed out by this Association last year.

The re-organization of the Law School has received a considerable amount of attention during the current year, and a final report is shortly expected. The Trustees feel that it would be very detrimental to the interests of the Law Society to abandon their rights of examination. The Law School in its present shape can be rendered much more efficient, and the Trustees hope that the steps which have been taken in that direction may have the desired effect.

The opinions of the various County Associations throughout the Province have been noticeably felt in connection with the deliberations on the consolidation of the rules and the re-organization of the Law School, and the Trustees consider that it is a matter of congratulation to the profession that questions of importance to the Bar now receive such general consideration.

Hamilton, 7th January, 1889.

E. E. KITTSON, Secretary. EDWARD MARTIN, President.

REVIEW OF EXCHANGES.

Central Law Journal.—10th February, 1888.

Condonation as a Defence to an action for Divorce on the grounds of Drunkenness, by R. S. ERVIN. American cases are cited.

Ibid.—17th February, 1888.

Execution, Authentication and Construction of Wills.—ANONYMOUS. English and American cases are cited.

Ibid.—24th February, 1888.

Powers of Municipal Corporations—Some Leading Cases, by JOSEPH A. JOYCE. American cases are cited to show that Municipal Corporations possess only those powers which are expressly granted to them, and can exercise them only in the manner perscribed for their exercise, and that those who deal with them must find out the limits and nature of their power at their peril. The learned writer concludes as follows:—"Although the mode prescribed by the charter must be followed, yet it has been decided that where the authority given in the charter is not intended as a limitation of its powers, a municipal corporation might ratify acts done by its agents in a mode different from that stated."

Ibid.—2nd March, 1888.

Res Gestæ, by D. R. N. BLACKBURN. While the rule is not qualified as to the admissibility of explanatory acts or words, the American Courts differ as to the length of time that may be permitted to intervene between the act complained of and the words or acts that may be admitted to qualify or explain it. Illustrative cases are cited.

Ibid.—9th March, 1888.

Issuance of Summons as commencement of Action, by ALBERT D. MARKS. American cases are cited. The Ontario rules state when a writ is deemed to have been issued.

Ibid.—16th March, 1888.

The right of the Husband to work for the Wife without compensation, by CHAS. A. ROBBINS. The decisions of various states are cited showing that *prima facie*, a business carried on in the wife's name by the husband, is the husband's business, and the onus lies on her to establish that it is hers.

Ibid.—30th March, 1888.

Memorandum to refresh recollection of Witness, by SEYMOUR D. THOMPSON. The trial judge must be satisfied that the witness wrote down the memorandum when he had a recollection of the events, if he wrote it himself. If he has a recollection of the events it makes no difference who made the memorandum. The notes may be in characters which the witness alone can understand. A copy may be used if the witness can speak from recollection. Though there is authority against it, it is said to be the true rule that a witness cannot refresh his memory by reading notes of evidence given by him in a former proceeding touching the same matter. When a witness refreshes his memory by a document, the opposite party has a right to inspection thereof.

Ibid.—6th April, 1888.

Presentment and Acceptance of Cheques. ANONYMOUS. American cases are cited.

Ibid.—13th April, 1888.

Mining on Public Lands, by S. S. MERRILL. American Statute Law and cases are cited.

Ibid.—20th April, 1888.

Implied Revocation of Wills, by W. F. ELLIOTT. The effects of marriage, marriage and birth of a child, birth of a child alone, the execution of a new and inconsistent will, or codicil, and alteration of estate, are considered.

Ibid.—27th April, 1888.

Lis Pendens. ANONYMOUS. The definition of *lis pendens* is given, and cases cited upon the principle on which it is founded, what the notice of must contain, when and where to be filed, who must file it, and its effect; also who are incumbrancers, and effect of omission to file notice. American cases are cited.

Ibid.—4th May, 1888.

View by Jury, by J. C. THOMSON. The common law origin and early English Statutes are given, and American cases are cited.

Ibid.—11th May, 1888.

Foreign Voluntary Assignments Contravening Domestic Laws—Are They Valid Against Citizens of the State Where the Assignment was Made, by WILLIAM WEBSTER. "It is almost universally admitted," says the learned writer, "that such foreign assignments as contravene domestic law are voidable, at least against domestic creditors." American cases are cited and consitutional points discussed.

THE

CANADIAN LAW TIMES.

MARCH, 1889.

NOTES ON THE TERRITORIES REAL PROPERTY ACT.

(*Concluded.*)

6. *Mortgages.*

THE most positively objectionable features of the Act, however, are the provisions with regard to mortgages—sections 76 to 88—read in connection with sections 34 and 64.

Section 34 prohibits the registrar from registering any instrument * * * * "unless such instrument is in accordance with the provisions hereof; but any instrument substantially in conformity with the forms in the schedule to this Act, or an instrument of like nature shall be sufficient: Provided that the registrar shall have power to reject any instrument appearing to be unfit for registration."

Section 64 provides that instruments must be executed and registered in accordance with the Act to be effectual against any *bona fide* transferee; and section 76, that "Wherever any land or estate or interest in land * * * * is intended to be charged or made security in favour of any mortgagee, the mortgagor shall execute a memorandum of mortgage in the form J., or to the like effect," etc., while by section 77 "mortgage and encumbrance under this Act shall have effect as security, *but shall*

not operate as a transfer of the land thereby charged." The word "transfer" is defined as "the passing of an estate or interest in land under this Act" (*a*).

The practical effect of these clauses is that a cast-iron statutory form of contract, most objectionable, too, from the conveyancer's standpoint, is provided for all cases in which it is proposed to make land security for money lent. So objectionable are these provisions with regard to mortgages, that several loan companies, that were, under the old law, doing a large business in the Territories, have withdrawn altogether.

The term "mortgage" indeed, by which the Act designates the security provided for, is an entire misnomer. Mortgage implies an estate in the mortgagee, subject to divestment on the condition of the deed by which it is created being fulfilled—in short, a conditional estate. Under the Real Property Act, "mortgage," in the form prescribed by the Act, may fairly be described as a simple contract to pay money, binding upon the borrower, his executors, administrators and assigns, which can be registered against lands so as to acquire priority, capable of being enforced in certain cases of default by a statutory power of sale, and under certain conditions by a statutory process of foreclosure under strict conditions.

Let us particularize our objections:

1. The instrument should be under seal. Though it was evidently the intention of the framers of the Act to abolish the use of the seal in conveyancing, we find nowhere a provision giving to a simple written instrument the full effect of an instrument under seal. Consequently it has become the practice among conveyancers in the Territories to draw all instruments under seal, more particularly instruments containing "*covenants.*" The meaning and object of the word "covenant" must still, it is submitted, be construed by the principles of the old law, and a "covenant" can only be created by deed (*b*).

(*a*) See Interpretation clause, R. S. C. cap. 51, sec. 3, s-s. (*c*).

(*b*) Smith's Compendium, § 1796; see also Leith's Blackstone, p. 211; R. S. O. cap. 108, sec. 17.

2. The covenant should use the word "heirs." It may be said that this is unnecessary since lands in the Territories go to the executor, etc.; but it is quite possible that a mortgagee might require to enforce his remedy on the covenant in some other part of the British Dominions, where the "heirs" would not be bound unless named. It is submitted that the word "heirs" still has its full legal meaning, apart from this Act, and that it can be added by the draftsman in the statutory form.

3. The power of sale is objectionable.

(a) The principal objection to the power is founded on the words of section 79, which provide that on registration of a transfer to the purchaser "the estate or interest of the mortgagor or encumbrancer therein described as conveyed shall pass to and vest in the purchaser, freed and discharged from all liability on account of such mortgage or incumbrance, or of any incumbrance registered subsequent thereto; and the purchaser shall be entitled to receive a certificate for the same." Now it is quite possible that the mortgagor should, when the power of sale is exercised, have no estate or interest in the land; and since the mortgagee himself has no estate or interest, his "transfer" to the purchaser would not appear to be a very valuable document. It may be argued that the intention of this section is that the *original* estate of the mortgagor can be transferred; if this is correct, all we can say is, that the Act is very unhappily drafted, while the force of our objection is emphasized by a comparison with the Victorian Transfer of Land Statute (*c*), where the interest conveyed by the transfer of the mortgagee is described as "the estate and interest of the mortgagor or grantor in the land therein described *at the time of the registration of the mortgage or charge, or which he was then entitled to or able to transfer, etc., etc.*"

In order to partially get over this difficulty, some conveyancers insert in their mortgages the covenant for further assurance from the old "Short Form of Mort-

(*c*) See A'Beckett's Transfer of Land Statute, p. 139.

gage," and insert a further clause making all covenants, etc., binding upon the mortgagor, his heirs, executors, administrators, assigns, and *transferees*. This practically amounts to a covenant to convey to the mortgagee, if he so require it, in case of default, and though, perhaps, somewhat against the spirit of the Act, as regards mortgages, it does not appear to be against the letter; but it is at best a poor expedient to have to resort to, and it is to be hoped that the all important power of sale clause will be amended, so as to clear up this difficulty, at an early date.

4. The covenant for payment should contain a clause providing that mortgagee will pay taxes, etc.

5. There should be a proviso making the principal payable on default in payment of interest.

This is especially necessary because the power of sale, although exercisable on default in interest, is so framed as to be a suitable remedy only in case of default in payment of principal (*d*). The moneys arising on the exercise of the power of sale are to be applied, 1st, in payment of expenses; 2nd, in payment of the moneys *which are then due and owing*, etc., etc.; 3rd, in payment of *subsequent* incumbrances, etc. This clause can of course be added by the draftsman among the "special covenants." The necessity for it is further apparent, when we consider the next objection.

6. There should be a proviso giving the mortgagee a right of entry on default, and a covenant for quiet possession.

We admit that in making this suggestion we are, perhaps, departing from the rule we laid down for ourselves, not to discuss the policy of the Act, but to accept it as we find it. Such a clause would clearly be against the spirit of the provisions in regard to mortgages, and might be ruled inadmissible if inserted among the "special covenants" in the mortgage as not being "in substantial conformity, etc., etc.," and as creating an "estate" or "interest" in the land; but we find that the Victorian Statute gives the

(*d*) R. S. C. cap. 51, sec. 77.

mortgagee full powers of entering into possession and receiving rents and profits, as well as a right of distress (*e*). There does not seem to be any good reason for depriving the mortgagee of these valuable privileges, and when Parliament undertakes to legislate as to the particular form of security a mortgagee shall accept, it is surely not unreasonable to expect that everything that will tend to make the statutory security a safe one, without sacrificing the principle of the legislation, will be inserted among the mortgagee's rights.

7. There should be a full power of distress.

Our remarks under the last heading apply with equal force to the power to distrain. In the light of the decision in *Trust & Loan* v. *Lawrason* (*f*), the distress clause, from the ordinary Short Form of Mortgage, could be appropriately added among the "special covenants;" since it neither creates nor implies any "estate" or "interest" in the land, but has been construed to be a mere license. But we think a statutory provision, giving to mortgagees the right to distrain, as landlords, for interest in arrear, would make the security a more valuable one.

8. Finally, there should be some provision, similar to the Short Forms Act, providing short forms for all special covenants likely to be required. The statutory covenants *implied* in lease or mortgage, are set out in Form I. of the Schedule to the Act, but we have attempted to shew that there are several other covenants, of essential importance, that might just as well be inserted in "Short Form," while others, such as the covenant to insure, will readily suggest themselves. At present, a not uncommon practice is to insert these special covenants in "Short Form," and then to add a special clause, providing that they shall have the extended meaning given to them by the ordinance respecting Short Forms, etc. But this is a rather clumsy device, and the statute itself might very well provide short forms of "special covenants."

(*e*) See secs. 83 and 89 of the Act.

(*f*) 10 S. C. R. 679.

We do not discuss the question as to whether the ordinance respecting Short Forms has been repealed, as we understand the ordinance is now expressly repealed by the Revised Ordinances of the N. W. T. which came into force on the 1st March, 1889.

We do not wish to offer any general conclusions in regard to the Act, beyond observing that the practitioner, who is called upon to advise on any question of real property law in the Territories, has to proceed very slowly and cautiously, for, instead of having general principles, and judicial decisions to guide him, he has now to interpret a difficult and complicated statute, principally by the unaided light of his inner consciousness. Under these circumstances, it can readily be understood, that we do not set up any claim to have arrived at the correct solution of all the problems we have been discussing; the most we can hope is that we may have indicated some of the dangers that beset the conveyancer, whose subject-matter happens to be land in the North-West Territories.

C. C. McCAUL.

Lethbridge, N. W. T. JOHN C. F. BOWN.

NOTE.—The following form of mortgage is one that has been adopted by the writers in their respective practices, at Lethbridge and Calgary, and has been accepted for registration in the South Alberta Land Registration District:

MEMORANDUM OF MORTGAGE.

I. A. B., of the of in the hereinafter called the Mortgagor, being registered as owner of an estate (*in fee simple, or as case may be*), subject, however, to such encumbrances, liens and interests as are by memorandum underwritten or endorsed hereon, of all and singular th certain tract or parcel of land situate, lying and being in

in consideration of the sum of $ lent to me by C. D. of, etc., hereinafter called the mortgagee the receipt of which sum do hereby acknowledge, covenant with the said mortgagee, C. D., as follows:

FIRSTLY,—That I will pay to the said mortgagee, C. D., the above sum of $ at on the day of

SECONDLY,—That I will pay interest on the said sum at the rate of per annum half yearly, on the day of and the day of in every year

THIRDLY,—(*a.*) And in case the said principal sum shall not be paid when due, that I will continue to pay interest at the same rate and in the same manner until the whole of the said prinicipal sum shall be fully paid and satisfied. And will pay all rates, taxes, charges and assessments, now or hereafter to be rated, taxed, charged or assessed against the said lands.

(*b.*) That the said mortgagor will execute such further assurances of the said lands as may be requisite.

(*c*) That the said mortgagor will insure the buildings on said lands to the extent of not less than $

(*d.*) Provided that the mortgagee may distrain for arrears of interest.

(*e.*) Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.

(*f*) And it is hereby expressly agreed and understood that all the covenants, provisoes, matters and things herein contained shall be binding upon, and be for the benefit of the said parties and their respective heirs, executors, administrators, assigns and transferees. And further, that whenever or wherever any of the words, expressions and clauses set out in the First column to the Second schedule to Ordinance No. 1 of 1881 of the ordinances of the North-West Territories, entitled "An Ordinance respecting Short Forms of Indentures," are herein written or printed, such words, expressions and clauses shall have the extended meaning given to them by the second column of the said schedule, as if this instrument were drawn in pursuance of and fully complied with the provisions of the said Ordinance, notwithstanding any express or implied repeal of the same.

And for the better securing to the said morgagee, C. D., the repayment in manner aforesaid of the principal sum and interest, I HEREBY MORTGAGE to the said mortgagee, C. D., my estate and interest in the said lands.

IN WITNESS WHEREOF I have hereunto signed my name and affixed my seal this day of A.D. 188

Signed, sealed and delivered by the said A. B. as mortgagor, this day of A.D. 188 in presence of

EDITORIAL REVIEW.

The Jesuits Estates Act.

The Act which has caused so much discussion in the public press, has some interest for lawyers, as it is possible to raise an important constitutional point with respect to it.

Without noting the inconsistencies of the position taken by the contracting parties,—the Church of Rome and the Government of Quebec,—we might remark first, that the vulgar impression that the Province of Quebec has peculiar rights depending upon treaty with France is entirely erroneous. Canada was ceded to Great Britain "in the most ample manner and form, without restriction." The King of Great Britain agreed at the same time to "grant the liberty of the Catholic religion to the inhabitants of Canada" and to give orders "that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, as far as the laws of Great Britain permit." This was followed by a proclamation and an Act of Parliament (14 Geo. III. cap 83) which, "for the more perfect security and ease of the minds of the inhabitants of the said province" declared "that His Majesty's subjects, professing the religion of the Church of Rome of and in the said province of Quebec, may have, hold and enjoy, the free exercise of the religion of the Church of Rome, subject to the King's Supremacy, declared and established by an Act, made in the first year of the reign of Queen Elizabeth and that the clergy of the said church may hold, receive, and enjoy, their accustomed dues and rights, with respect to such persons only as shall profess the said religion." By the passing of this Act, which provided for the Government of the Province, the Crown discharged its only obligations under the treaty. How far this Act, or the treaty, could create any greater rights than

protestant subject of His Majesty enjoyed, it is difficult to see. There are no rights arising out of the treaty except liberty to profess the religion of the Church of Rome, and that only so far as the laws of Great Britain permit, the same liberty of worship which is enjoyed in every Province of the Dominion, by every body of Christians, and no more.

We have referred to this, because it must be acknowledged in approaching the question, that Great Britain is under no continuing obligation to a foreign power in dealing with her subjects in Quebec, nor could she be, without a partial surrender of sovereign power. Any accretions to the rights and privileges granted by the Act just cited, depend entirely and exclusively upon the fact of self-governing powers having been given to the Province. There was a very important constitutional limitation in the Act cited, by which no ordinance touching religion should have any force or effect until it should have received His Majesty's sanction. But the succeeding changes in the provincial constitutions gave greater liberty of action in domestic affairs; and the power to legislate so as to confer new and important rights upon favoured individuals or bodies is now derived entirely from the right to make laws subject only to disallowance by the Governor-in-Council.

The policy of disallowing a provincial Act must be determined by responsible ministers of the Dominion. They are constitutionally answerably to Parliament and the people, and as has frequently been shown, the right to disallow Acts was not granted in order that unconstitutional or invalid legislation might be got rid of, but in order that the more important policy of the Dominion should not be interfered with by the provinces. The whole course of English History shows a struggle with the ecclestiastical houses to prevent property from falling into their hands. The policy both in England and her colonies has been the same—to prevent the property of the nation from falling into mortmain. But it is a question, not of legality, but of policy, and with the policy of the governments of the day we have nothing to do. If a particular Province choose to depart from this policy and permit the absorption of

property by ecclesiastical orders, it is undoubtedly acting within its constitutional rights. The Governor in Council would also be acting within his constitutional rights in opposing such a policy by disallowing all Acts tending thereto; but it is a question of policy, as we have said, and not of law. The Act then must be looked at with regard only to its contents.

It recites the negotiations which took place between the Government of Quebec and the Church of Rome, and then proceeds to ratify them. The Lieutenant-Governor is authorized to pay the sum of $400,000 "in the manner and under the conditions mentioned in the documents" recited. He is also authorized to transfer to the Society of Jesus the rights of the Province in Laprairie Common, in commemoration of the settlement. He is then authorized to pay $60,000 to the Protestant committee of Public Instruction. He is finally authorized to dispose of the whole of the property known as the Jesuits' Estates. The terms of the negotiations are shortly these:—There being no legal obligation to compensate the Jesuits, a moral obligation is deemed sufficient, and a claim for restitution in kind having long ago been abandoned by the Jesuits, it was determined to make a pecuniary compensation. The money was to be expended exclusively within the Province, and complete and perpetual concession was to be made of all the property to the Government. Then, it was agreed that the negotiations should be ratified by the Government and the Pope, and that the proceeds of the sale should remain in the possession of the Government as a special deposit until the Pope should have ratified the settlement and made known his wishes respecting the distribution of the money.

In order fully to appreciate the final settlement which is embodied in the correspondence, it is necessary to read the whole correspondence. It is noticeable, that it is only after "His Holiness was pleased to grant permission to sell the property * * upon the express condition that the sum received be deposited and left at the free disposal of the Holy See," and after a modification of the terms as sug-

gested by the Premier was made in the following terms:—"The Pope allows the Government to retain the proceeds of the sale of the Jesuit estates as a special deposit to be disposed of hereafter with the sanction of the Holy See," that negotiations are entered upon, and finally concluded by correspondence as already mentioned. The Act then professes to ratify the arrangements, and authorizes the payment of $400,000 to the order of the Pope.

While a long correspondence is notoriously remarkable for elasticity in its terms and the meaning to be assigned to it, and therefore difficult of construction, there are two salient points in this one, the first that the Pope grants permission to sell the estates which by the Act are declared to belong to the Crown; the second that he allows the Government to retain the proceeds of the sale as a special deposit subject to his disposal. Inasmuch as the estates belonged to the Crown, as recited in the Act, and the Church of Rome had no title thereto, the sanction of the Pope is unnecessary and unmeaning unless it is construed as a permission to the Legislature to deal with lands which are the property of Her Majesty, as the Legislature has confessedly recognized and acted upon this permision. It amounts to an unwarranted deference and a subordination of Her Majesty's power to that of a foreign authority. Again, while the Pope after giving his sanction to sell the estates professedly allowed the Government to retain the "proceeds of the sale" as a special deposit subject to be disposed of by him hereafter, it is notoriously the fact that the subsequent negotiations and the Act itself do not provide for sale and retention of the proceeds but provide that $400,000 shall be given in lieu of the estates out of "any public money" at the disposal of the Government. Nothing is said about the proceeds of sale, and though they might fall far short of $400,000 the public money to that extent is so disposed of, while if they should in future exceed that sum there is nothing to prevent the Pope from making, but on the contrary everything to encourage him to make, a demand therefor, as the stipulation ratified by the Act is that the proceeds of the sale are to remain at his

disposal; and if a moral claim is at the present time sufficient to base a demand upon, the negotiations ratified by Act of the Legislature are of greater moment in making such a claim. Whatever therefore may be the effect or result of the recitals, the actual fact is that the Government has presented $400,000 of public money to the Pope to be disposed of as he pleases.

The constitutional question that arises is not the voting away of public money, be the pretext never so shallow, but the subordination of the Sovereign to a foreign authority, and the placing of Her Majesty's public funds at the disposal of the same foreign authority. It is of course an unquestionable and fundamental proposition of law that the Legislature cannot deny the sovereignty of Her Majesty or acknowledge the sovereignty of any other person, especially as under the constitution it derives its sole authority from an Act passed by the Imperial Parliament. But there is authority for saying that such a proceeding would be unconstitutional. In *International Bridge Company v. Canada Southern R. Co.* 28 Gr. 114, the effect of concurrent legislation of the Parliament of Canada and the Legislature of New York respecting the International Bridge Company was considered, and Proudfoot, V.C., said "If Canada has chosen to pass an Act in terms similar to the New York Act, it derives its validity from the Canadian Legislature, not from the Legislature that originally created it. No express clause was required to exclude the laws of one from operating in the territory of the other; the exclusion arose from the countries forming part of different nationalities with different sovereign powers. Each country has assented to the corporation created by it uniting with the corporation created by the other, and bringing into the union the rights and liabilities conferred or imposed upon it, and certainly Canada has not introduced the provisions of any Act of Congress passed subsequent to the union applying to the united Company. Were the Canadian Parliament to endeavour to do so—to say that Canadian subjects, and Canadian corporations, are to be subject to legislation that might be passed by Congress, it would I ap-

prehend be unconstitutional, it would be authorizing a foreign power to legislate for its subjects, an abdication of sovereignty inconsistent with its relation to the Empire of which it forms a part." So, when a Canadian Legislature seeks and accepts foreign permission to deal with Crown Lands, and holds the public funds subject to the disposition of the foreign authority its action may well be characterized in like terms.

COUNTY OF YORK LAW ASSOCIATION.

ANNUAL REPORT, 1888.

The Trustees in presenting their third annual Report to the Association again take pleasure in reporting that the affairs of the Association are in a prosperous condition. There has been a large addition to the membership during the year, sixty-six new members having subscribed for stock.

Since the last annual meeting the Report of the Joint Committee of the Law Associations has been embodied in the new Rules of Practice, and since their promulgation a sufficient time has elapsed to make it plain to the profession that these rules have simplified practice and are a well attempted effort to bring about more effectually the fusion aimed at by the Judicature Act.

The strong recommendation of the Joint Committee which provided for the fixing definitely of the mode of trial before trial has not been adopted in the rules. It is understood that the Judges in dealing with this recommendation in so far as it relates to trial by Jury, apart from the question of *ultra vires*, have deemed it inexpedient to interfere with the expressed wish of the Legislature embodied in the 76th and following sections of the Judicature Act. The Trustees suggest that a representation be made to the Attorney General upon this subject and that legislation be asked to carry the recommendation of the Joint Committee into effect.

The important question of the establishment of a permanent circuit list which will bring about a more complete fusion of the Divisions of the High Court will receive the further consideration of the Joint Committee of the Judges and the Law Associations. This Joint Committee have agreed to the suggestion that two Judges shall sit in each week, before whom motions may be brought according to

the following scheme, without regard to the divisions in which the papers relating to such motions may be styled:

	Monday	Tue'day	Wedn'sday	Thursday
Division A	Chambers	Court Motions	Appeals from Reports	Court Motions
Division B	Court Motions	Cha'ber Appeals	Court Motions	Chambers

This scheme is now before the Supreme Court of Judicature for consideration.

This Committee have also suggested that the minor differences of practice in the offices of the various divisions at Osgoode Hall should be brought to the attention of the Attorney-General, and that he should be requested to designate some officer to whom such differences in practice should be referred for arrangement so as to ensure conformity.

The question of the increase of Judicial salaries has been lately pressed upon the authorities. That an increase should be made is freely admitted, and the trustees hope that during the next sittings of Parliament a measure will be passed for this purpose.

The trustees have endeavoured during the past year to expend the available funds in the purchase of books most needed by members. The daily attendance in the Library is now however so large, and the demands for books are so varied, that the Trustees cannot expect that the collection of books will anything like answer requirements for years to come.

During the year nothing whatsoever has been done to remedy the scandalous condition of the present court house, nor has any effort been made by the City to comply with the statutory requirement imposed by the Act passed during the session of 1887. It was the duty of the Corporation forthwith after the passing of that Act to proceed with the erection of a new court house so as to complete the

same before the 26th of June 1888. No attempt has been made to comply with that duty. The attention of the Mayor and Council has been called to this matter and the following resolution passed by the Trustees has been transmitted to them:

"Whereas it was the duty of the Corporation of the City of Toronto to commence forthwith after the passing of the Act 50 Victoria Chapter 72 and proceed with the erection of a new Court House in the City of Toronto, And whereas the work has not been proceeded with,

Resolved that the attention of the Mayor of the City of Toronto be directed to the provisions of the Act, and that he be urged to forward the erection and completion of the Court House, and that in default of such work being forthwith commenced and actively prosecuted such prceedings by way of indictment and otherwise be taken as may be advised to compel the performance of the duties imposed by the Act."

It is understood that a measure is to be introduced during the present sittings of the Legislature for the division of the City Registry Office. The following Resolution passed by the Trustees has been transmitted to the Attorney General:

"Whereas under the system of registration which is at present in force in the City of Toronto the lands within the said City are divided into park lots containing one hundred acres each and town lots of smaller area, upon which respective park lots or town lots all instruments affecting the lands therein contained are registered until the owners of said lands choose to register plans relating to their holdings,

"And whereas in many instances no plans have been registered upon the said park lots or town lots, or upon considerable portions thereof, by reason whereof it is necessary that each person who is called upon to search his title to the smallest portion of the said lands shall peruse all instruments registered upon the said park lots or town lots, for the purpose of ascertaining whether they or any of them affect the title to the particular lands in question,

which instruments in many cases amount to several thousands in number and to peruse which necessarily consumes a great amount of time and involves the incurring of great risk and expense;

"And whereas it is expedient that the Registry Laws and the Registry offices should be framed and regulated so as to afford the greatest possible facilities to persons searching titles to land;

"Be it therefore resolved that, in the opinion of this Board, before any sub-division of the Toronto Registry Office be made, the grievances aforesaid should be removed by legislation providing for the sub-division of all the lands in the City of Toronto into small blocks or sections;

"And providing for the preparation of Abstract indices in books of a convenient size relating to the said sub-divisions, each of which Abstract indices shall extend from the Crown Patent onwards, and shall contain those registrations only that affect the sub-division to which the said abstract index relates;

"And provided that whenever a plan of any lands has been or may be registered in the said Registry office, an Abstract index shall be prepared in Abstract books of convenient size relating to the lands comprised within the said plan which Abstract index shall extend from the Crown Patent onwards and shall contain those registrations only that affect the lands comprised within the plan to which the said Abstract index relates;

"And providing that the said Abstract indices shall with reference to each instrument therein mentioned indicate as concisely as may be the lands which are by the said instrument affected;

"And providing for the duplication or further multiplition of the said Abstract indices as convenience shall require;

"And be it further resolved that in the opinion of this Board the above mentioned reforms can be better secured by the continuance of the existing system of registration under the Registry Act presided over by a single Registrar than by a sub-divided system and a multiplication of offices."

The Trustees under the powers conferred upon them by the Declaration of Incorporation and in obedience to a request made by the Libraries Aid Committee of the Law Society at a meeting of the Board held on the 3rd of November last altered by-law number twenty-six of the Association by striking out the words "first Monday in February" in the second line thereof and inserting in lieu thereof the words "last Monday in January" and this alteration is submitted for approval at the next general meeting of the members pursuant to the provisions of the Declaration of Incorporation.

The Trustees record with great satisfaction the high opinion they continue to entertain of the services of the Librarian.

One member of the Association, Mr. James Maclennan, Q.C., the Vice-President elected at the last annual meeting was appointed a Justice of the Court of Appeal during the year.

The Trustees record with deep regret the death of one member during the year, Mr. W. A. Foster, Q.C.

The Historian of the Association has during the year published his lives of the Judges, a most valuable contribution to the history of the Dominion.

At the date of the last annual report the association numbered 256 members. There are now 314 members. The particulars required by the by-laws accompany this report being: 1. The names of the members admitted during the year. 2. The names of the members at the date of this report. 3. A list of the books contained in the library. 4. A list of books added to the library during the year. 5. A list of periodicals received during the year. 6. A detailed statement of the assets and liabilities of the association at the date of this report and of the receipts and disbursements during the year.

The treasurer's accounts have been duly audited and the report of the auditors will be submitted to you for your approval.

January 27th, 1889.

BOOK REVIEWS.

A Manual of the Practice of the Supreme Court of Judicature in the Queen's Bench and Chancery Divisions. Intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor; First Prizeman, Mich. Term, 1872; Author of "Principles of the Common Law," "Epitomes of Leading Cases," "Manual of the Principles of Equity," etc. Fifth Edition. London: Stevens & Haynes, 1888.

This Edition of this well known work is brought out to include the changes made by rules passed and decisions given since the last Edition. Owing to our provincial rules not having followed the English rules the work is not of use to the profession in this province, but no doubt will find an easy sale in England.

REVIEW OF EXCHANGES.

Albany Law Journal.—2nd June, 1888.

Can the Judiciary Determine Whether a Statute Exists? by Guy C. H. Corliss. Concluded in the following number. At common law the enrolled Act is conclusive as to its own existence; but it may show on its face that it is void. In our system of law the printed copies printed by the Queen's printer are evidence. In the United States the laws vary as to the obligation to keep journals of the proceedings in the legislatures. Where it is obligatory, the Courts take judicial notice of the journals and their contents, but they do not affect the Act unless they are silent respecting some requirement specifically directed to be entered therein. The Courts will not go beyond the journals, nor receive parol evidence on the question. If the journals are lost, the enrolled Act is conclusive and controls the printed statute.

Ibid.—23rd June, 1888.

The 17th Section of the Statute of Frauds and Perjuries, by Martin W. Cooke. The supposed origin of the statute is touched upon, the criticisms of Sir James Stephen and Mr. Pollock in the Law Quarterly are criticised, and the statute defended.

Ibid.—25th July, 1888.

Right of Innocent Purchaser of Land to Apparent but not Real Fixtures, by Guy C. H. Corliss. Concluded in following number. The discussion ranges over those cases in which sales of chattels have been made to the owners of land on the agreement that the property should not pass till payment. The right of the purchaser of the land depends upon whether the agreement obtains against him. There are American authorities both ways. Registration of a chattel mortgage has in some cases been held notice to the purchaser, who is thus under an obligation to search for chattel mortgages as well as for executions and arrears of taxes. If there is no chattel mortgage it is said in some cases that the owner of the land cannot convey what he does not own. So it was held in this Province in *Weir* v. *Niagara Grape Co.*, 11 Ont. R. 700. But in view of the registry laws, that is no objection, for title may be acquired by priority of registration to land which has previously been conveyed, and so was not the property of the grantor. In other cases it is held that as against a purchaser of the land the chattels must be actually, not ideally, severed, otherwise he acquires title to them.

Ibid.—8th September, 1888.

Equitable Lien of Mortgagee on Insurance Policies and Insurance Money, by GUY C. H. CORLISS. On the maxim that equity regards that as done which should have been done, there are many cases which hold that the mortgagee has a lien on insurance money where the mortgage contains a covenant that the mortgagor will insure the buildings upon the mortgaged property for the benefit of the mortgagee, although the policy is not payable to the mortgagee.

Ibid.—10th November, 1888.

Trusts for Charity. Recent American cases are cited in which charitable trusts are construed.

Ibid.—1st December, 1888.

Drinks and Drinking, by R. VASHON ROGERS. A number of American cases are cited.

Ibid.—22nd December, 1888.

Defective General Assignments, by W. F. ELLIOTT. A consideration of state laws concerning assignments.

Ibid.—29th December, 1888.

Indemnitor, How far Bound by Judgment, by GUY C. H. CORLISS. When a person is bound to indemnify another against loss or liability, a judgment obtained against the party indemnified is *prima facie* evidence against the indemnitor, in some cases (as it is held) though there was no notice to the latter, in others only where he has had seasonable notice, so that he might prepare himself for defence.

Central Law Journal.—18th May, 1888.

Effect of Admissions by Partners, by STEWART RAPALJE. The subject is discussed under the following heads:- What admissions are sufficient or insufficient to prove or disprove partnership; rule as to "holding out," and what constitutes "holding out"; effect of not preventing use of firm name; when admissions bind the firm; when they are admissible as proof; declaration in favour of firm or partners making them; admissions subsequent to dissolution; revival by admissions of debt barred by statutes of limitation; acceptance of service of process by one partner; confession of judgment by one partner.

Ibid.—25th May, 1888.

Character in Criminal Cases, by D. R. N. BLACKBURN. After citing American cases, the learned writer concludes: "It seems therefore that evidence of the character of the defendant is admissible in almost every case, while evidence of the character of the deceased, or of the prosecuting witness is admitted only in particular cases."

Ibid.—1st June, 1888.

Order Appointing Receiver in Mortgage Foreclosure. The American practice is detailed and cases cited.

Ibid.—8th June, 1888.

Liability of Retiring Partners Without Notice of Dissolution, by SEYMOUR D. THOMPSON. After stating the general doctrine, the learned writer shows that the rule applies only in favour of persons who have had previous dealings with the firm; but a retiring partner may become liable to strangers by a "holding out." The rule does not apply as against dormant partners, nor does it apply to a firm trading under a corporate name. Actual notice should be given to previous customers, and notice of publication to the public generally.

Ibid.—15th June, 1888.

Contracts in Restraint of Trade, by E. E. DONNELLY. A valid contract in partial restraint of trade must contain, in addition to the elements of an ordinary contract, a reasonable restriction or limitation as to space. If the limitation be general as to space, a limitation as to time will not cure the illegality; if partial as to space the absence of a time limit will not taint it with illegality. The construction is for the court which will not look at the sufficiency of the consideration. The remedy on breach is either at law or in equity.

Ibid.—22nd June, 1888.

Sister State Corporations, by D. R. N. BLACKBURN. The common law rule that a corporation could not be sued outside of the jurisdiction which created is cited. The various Americau statutes imposing conditions upon foreign corporations coming within the state, are referred to and cases thereon cited.

Ibid.—6th July, 1888.

Questions of Fact for the Judge, by SEYMOUR D. THOMPSON. When the admission of evidence depends upon a preliminary question of fact, the Judge should determine it. But the Judge is not bound to decide the question if his decision would be equivalent to deciding the main issue. As for instance, where the legitimacy of a person was in question, his declarations were objected to on the ground that it was not established that he was a member of the family until the legitimacy was proved. But the Judge, Lord Penzance, held that a *prima facie* case of legitimacy having been made the declarations should be admitted, as their exclusion would practically determine the main issue, the illegitimacy. Other illustrations are given. Admissibility of documentary evidence, of depositions of witness unable to attend, questions of privilege, dying declaration, threats or promises excluding confessions, usage of trade or business, are treated of in like manner.

Ibid.—13th July, 1888.

Dying Declarations. The general principle is stated, but the the reason is said not to be certainly fixed. It has been held that they are admissible on account of the solemn occasion on which they are spoken, and also because of the necessity of the case in order that the murderer should not have the benefit of his own destruction of the witness. They are admissible only if the deceased believed that death was impending. Preliminary proof of the circumstances under which they were made is necessary in order to admit them; and it is sufficient if the witness gives affirmative answers or significations of assent by gesture to leading questions. Opinions of the deceased are not admissible; facts only can be proved by the declarations.

Ibid.—20th July, 1888.

Tender of Amount Due on Mortgagee. The tender must be made to the mortgagee who must be sought out for the purpose, and must fulfil the ordinary requirements of a tender of a sum of money for debt. The effect upon the relative rights of the parties and the lien on the land is treated of.

Ibid.—27th July, 1888.

Argument to Jury in Criminal Cases, by ALBERT B. GUILBERT. As a rule argument by illustration or a reference to matters of history or public notoriety do not invalidate a verdict unless it can be shown that they have done some serious wrong. The conduct of the trial depends largely upon the discretion of the presiding Judge, who may allow great latitude. Abusive language or language calculated to excite prejudice, have been held in some American cases ground for a new trial.

Ibid.—3rd August, 1888.

Powers of Foreign Involuntary Assignments, by WILLIAM WEBSTER. A foreign involuntary assignment does not pass the title to domestic realty which cannot be affected by an extra-territorial law. Personalty, being governed by the law of the domicil will pass by such an assignment, provided that domestic creditors' rights are not interfered with. Cases illustrative of the application of assets to the claims of domestic and foreign creditors respectively are cited.

Ibid.—10th August, 1888.

Transactions Resembling Sales. Definitions of sales are given. The negotiations preliminary to the sale are not a sale, but amount at most to an executory agreement which culminates in a bargain and sale. A gift, delivery in accord and satisfaction, etc., do not amount to a sale. Compensation for services in kind is not a sale of the commodity. Payment of a note by a third person is not a purchase of it. A sale of liquor by a club to its members is not a sale within the meaning of a statute forbidding the sale of liquor without a license.

Ibid.—17th August, 1888.

Bona fide Holder of Negotiable Paper—Notice from the Instrument, by Wm. M. Rockel.. A person taking negotiable paper before maturity for value without notice of any equities, takes a good title. But notice may be given by the appearance of the instrument. One who takes a bill dishonoured on its face, cannot claim the privilege of *bona fide* holder. In such a case the question of notice is for the Court. Instances of this are given. If diligence in inquiry is used it will protect the holder, but he is responsible for negligence.

Ibid—24th August, 1888.

Foreign Marriages. A number of English and American cases are cited.

THE

CANADIAN LAW TIMES.

APRIL, 1889.

TRUST INVESTMENTS.

THE subject of trust investments is one that obviously is too large to be fully dealt with in the compass of a magazine article. All that is hoped is that a few of the main points in this connection may be brought out by reference to some of the leading authorities.

The subject may for present purposes be conveniently treated in three divisions.

(i) *The nature of the securities upon which trust investments may be made.*

(ii) *The precautions to be observed in making trust investments.*

(iii) *The duty of trustees with regard to the calling in of trust investments.*

(i) *The nature of the securities upon which trust investments may be made.*—A very full discussion of this subject will be found in the works cited in the note (*a*). A reference to the cases collected in these works will show that a decision of the question now under consideration depends chiefly upon a process of eliminating from a list of possible securities that very large number that the Court has from time to time declared to be unsuit-

(*a*) Lewin's Law of Trusts, 8th ed., chap. 14, sec. 4; Watson's Compendium of Equity, 2nd ed., p. 996 *et seq.*; Perry's Law of Trusts, 2nd ed., section 453 *et seq.*; *Brice* v. *Stokes*, 2 W. & T. L C. 6th ed. 967, at p. 995; Chitty's Equity Index, 4th ed., p. 7014.

able for trust investments. Of positive decisions there are not many. By Statute (*b*), however, the perplexed trustee is afforded some firmer foothold, and finds that he may (unless there be some declaration to the contrary in the instrument creating the trust) invest trust moneys in any stock, debentures, or securities of the Government of the Dominion of Canada, or of this Province; or in securities which are a first (*c*) charge on land (*d*) held in fee simple; or in the debentures of certain classes of corporations specified in the Act.

The chief rule to be deduced from the cases is that, without the clearest and most express authority in the instrument creating the trust, the trustee cannot safely make investments upon securities of a personal or possibly speculative character. Even power to invest upon "any securities" is not sufficient to justify the trustee in accepting personal securities (*e*); and wide discretionary powers as to investment do not authorize an investment upon speculative securities (*f*). Where there is authority to invest upon personal securities it is most strictly construed. Thus in *Langston* v. *Ollivant* (*g*), executors had power to place out funds upon such real or personal security as should be thought good and sufficient. The executors lent to a man in trade, the husband of the *cestui que trust*, £500 of the trust funds upon his bond, at the same time lending him £600 of their own money. At this time the man was in good credit, but he afterwards failed and a loss occurred. The trustees were held liable for the loss upon the ground that the transaction was not really an investment but

(*b*) R. S. O. cap. 110, secs. 29 and 30.

(*c*) *Carter* v. *Hatch*, 31 C. P. 293, is a case in which an investment on second mortgage was held improper.

(*d*) In this Province: *Burritt* v. *Burritt*, 27 Gr. 144; and see Lewin's Law of Trusts, 8th ed. p. 329.

(*e*) *Lewis* v. *Nobbs*, 8 Ch. D. 591.

(*f*) *Burritt* v. *Burritt*, 27 Gr. 144; *Smith* v. *Smith*, 23 Gr. 114; *New London & Brazilian Bank* v. *Brocklebank*, 21 Ch. D. 302; *Stretton* v. *Ashmall*, 3 Drew. 9; *Re Brown*, 29 Ch. D. 889. In the last case there was power to invest in such mode or modes as trustees should in their uncontrolled discretion think fit; yet a *bona fide* investment in the bonds of a foreign government was directed to be realised as soon as possible.

(*g*) G. Coop. 33.

merely an accommodation loan. Instances of a similar nature might be multiplied, but the cases can be readily referred to in the books above mentioned.

Power to "invest in real estate" may authorize the purchase of real estate (*h*).

Strict compliance with the provisions of an investment clause is in all cases necessary. Thus in *Webb* v. *Jonas* (*i*), trustees were held liable where the trust deed authorized them to invest "in their or his names or name" on "real securities," and they invested in a contributory mortgage of freeholds, the Court being of opinion that it was of the very essence of the investment clause that the security should be in the names of the trustees alone. An analagous decision is that of *Consterdine* v. *Consterdine* (*j*). In that case three trustees were appointed with an absolute discretion to sell and invest. It was held that they were not justified in investing in shares of a company in which only one trustee could be registered as owner, and where, therefore, there might be danger of loss through want of joint control.

What may be a perfectly justifiable investment at one time may at another under different circumstances be an entirely unjustifiable one. In *Re Maberly* (*k*), trustees were given certain funds upon trust to invest them in freehold land in Ireland. It was held that owing to the unsettled condition of that country it would be a breach of trust, notwithstanding this direction, to invest funds there. So in *Boss* v. *Godsall* (*l*), trustees under a marriage settlement were empowered and *required* at the request of the wife to advance part of the funds to the husband on the security of his bond. The husband became insolvent, and the wife then required the trustees to make a loan to him. It was held that there was such a change in circumstances that the clause was inapplicable

(*h*) *Re Barwick*, 5 O. R. 710, and cases there cited.
(*i*) 39 Ch. D. 660.
(*j*) 31 Beav. 330.
(*k*) 33 Ch. D. 455.
(*l*) 1 Y. & C. C. C. 617.

and that the trustees were justified in refusing to make the loan. Upon the converse question, whether a trustee is justified in making investments upon securities that are proper, *e. g.*, in consequence of statutory authorization, at the time the investment is made but were not proper at the time the trust was created, there has, in England, been some conflict of authority. Our statute however probably removes any difficulty of this kind (*m*).

Where an improper investment is made the trustee is liable for all subsequent consequences, however unexpected, or however remotely connected with the original breach of trust. In *Kellaway* v. *Johnson* (*n*), there was an unauthorized sale and investment, and the trustees were held liable for a subsequent loss, the root and cause of the loss being the original unauthorized sale. In *Fyler* v. *Fyler* (*o*), trustees obtaining an unauthorized but ample security, were held liable for a future loss traceable to that first error. In *Cocker* v. *Quayle* (*p*), trustees had power to lend on bond with the consent in writing of a certain person. They lent with oral consent and without taking a bond. The borrower subsequently became bankrupt and a loss occurred. It was held that as the original loan was made in an unauthorized way they were liable for all future loss, though in the result the position would have been exactly the same. Had they complied, in making the loan, with the terms of the trust deed, a bond debt and a simple contract debt would have been in the same position in the bankruptcy proceedings. And it is laid down in *Clough* v. *Bond* (*q*), that where a line of duty is not strictly pursued and loss is eventually sustained, the trustees are liable, however unexpected the result, however unlikely to arise, and how-

(*m*) Lewin's Law of Trusts, 8th ed., pp. 307, 315; *Re Tuckett's Trusts*, 57 L. J. Ch. 760; 58 L. T. N. S. 719; 36 W. R. 542; *Re Wedderburn's Trusts*, 9 Ch. D. 112; *Waite* v. *Littlewood*, 41 L. J. Ch. 636; *Re Ward's Settlement*, 2 J. & H. 191; *Re Simson's Trusts*, 1 J. & H. 89; *Dodson* v. *Sammell*, 6 Jur. N. S. 137; 1 Dr. & Sm. 575; *Re Miles's Will*, 5 Jur. N. S. 1236; *Page* v. *Bennett*, 2 Giff. 117; R. S. O. c. 110, ss. 29 and 30.

(*n*) 5 Beav. 319.

(*o*) 3 Beav. 550.

(*p*) 1 Russ. & My. 535.

(*q*) 3 My. & Cr. 490.

ever free from improper motive their conduct may have been. So in *Grayburn* v. *Clarkson* (*r*), it is said that where there is a breach of trust the trustee is liable for all consequences, though they do not develope themselves till long afterwards. And in *Caffrey* v. *Darby* (*s*), it was held that trustees are responsible for all loss if they are once guilty of breach of trust, no matter what the immediate cause of the loss may be. They would not be relieved even if the actual and immediate cause of the loss were accidental. Even if the loss is caused by the negligence of his legal adviser the trustee is not excused (*t*).

It is no answer to the claim upon trustees to make good a loss incurred in respect of one fund to say that owing to their care and foresight a great improvement has taken place in another fund, nor can they be allowed to set off such improvement against the loss (*u*). Nor is the fact that the quantum of interest of an attacking *cestui que trust* is very small, any ground for allowing the trustee to escape liability (*v*.)

Sometimes a trustee who has made an improper investment seeks to escape liability by showing acquiescence on the part of the *cestui que trust*. This defence is however a difficult one to support successfully. The general question as to what is sufficient to constitute acquiescence is discussed in various places (*w*). The *cestui que trust* is entitled to place reliance on the trustee, and is not bound to make enquiries unless something is done to excite his suspicion (*x*). Where acquiescence is set up as a bar it must be shown that the *cestui que trust* was *sui juris* and acquainted with the facts (*y*); and the intention to

(*r*) L. R. 3 Ch. 605.

(*s*) 6 Ves. 488.

(*t*) *Hopgood* v. *Parkin*, L. R. 11 Eq. 74.

(*u*) *Wiles* v. *Gresham*, 2 Drew. 258.

(*v*) *Walcott* v. *Lyons*, 54 L. T. N S. 786.

(*w*) *Brice* v. *Stokes*, 2 W. & T. L. C. 6th ed. 967, p. 1042; Watson's Compendium, 2nd ed., p. 1007; Lewin on Trusts, 8th ed., p. 496.

(*x*) *Re Vernon, Evens & Co.*, 33 Ch. D. 402.

(*y*) *Sawyer* v. *Sawyer*, 28 Ch. D. 595; *Stretton* v. *Ashmall*, 3 Drew. 9; *Harrison* v. *Harrison*, 14 Gr. 586.

waive rights by the *cestui que trust* must be clear (*z*). The *cestui que trust* is not estopped from objecting to the account of the trust fund on the ground of acquiescence merely because he does not dispute its correctness while his interests are reversionary, especially where he is not in full possession of all the facts (*a*).

(ii) *The precautions to be observed in making trust investments.*—The leading case of late years upon this question is *Speight* v. *Gaunt* (*b*). In that case trust funds had been lost, owing to the dishonesty of the broker who had been employed by the trustee to purchase stock, and had misappropriated the funds entrusted to him for payment to the sellers. The trustee was held not liable on the ground that he had acted in the way that an ordinary prudent man of business would act in making investments through a broker, and had trusted the broker in the usual and regular course of business. It is, however, pointed out that the trustee would have been liable if he had employed a broker whose character should have led him to suppose that the wrong would have been perpetrated, and that the mere fact that the broker had been employed by the testator in his lifetime would not be sufficient in itself to absolve the trustee from exercising discretion as to the propriety of employing the particular person in question. If, however, there is nothing calculated to excite suspicion in the mind of an ordinary prudent man of business, the trustee would not be liable for the unexpected loss. The mere fact of being a trustee would not absolve the trustee from taking precautions, but at the same time the Court should lean in favour of the honest trustee where there is doubt as to the propriety of the course taken.

The case of *Speight* v. *Gaunt* was followed by *Re Godfrey*, *Godfrey* v. *Faulkner* (*c*). It was there pointed out that the mere fact of incurring risk is not sufficient to charge the

(*z*) *Re Cross*, *Harston* v. *Tenison*, 20 Ch. D. 109; see also *Garrett* v. *Noble*, 6 Sim. 504.

(*a*) *Inglis* v. *Beaty*, 2 A. R. 453; see also *Smith* v. *Smith*, 23 Gr. 114; *Paddon* v. *Richardson*, 7 D. M. & G. 563.

(*b*) 22 Ch. D. 727; 9 App. Cas. 1.

(*c*) 23 Ch. D. 483.

trustee because ordinarily prudent men sometimes incur risk, but that the trustee must show that he acted as a prudent man would do in dealing with his own property. The trustees in this case were relieved from loss arising from the subsequent depreciation of a farm upon which they had advanced something over two-thirds of the amount at which the farm was valued, but after a careful and proper valuation had been made, and the subsequent depreciation had arisen from unforeseen causes.

But the general doctrine of *Speight* v. *Gaunt* was considerably limited by the case of *Fry* v. *Tapson* (*d*). It was there laid down that the rule, that trustees acting according to the ordinary course of business and employing agents as prudent men of business would do on their own behalf are not liable for the default of such agent, is subject to the limitation that the agent must not be employed out of the ordinary scope of his business. In this case the trustees were held liable for the loss on an investment in Liverpool property where they had acted upon the valuation of a London surveyor who had no local knowledge or experience. And in *Smethurst* v. *Hastings* (*e*), it is stated that, though the Court may of late years have been less severe upon trustees than formerly, still the one homely, inflexible rule remains that the trustee is bound to act as a prudent man would act in dealing with his own property; and the trustees, having made advances upon houses that had been lately built and were unoccupied, and the value of which was therefore to a certain extent speculative, were made liable for the loss. The case was, however, compromised upon an appeal being taken.

The whole doctrine of trustees' liability (especially the application thereto of the case of *Speight* v. *Gaunt*) has, however, again come under full discussion in the late case of *Re Whitely*, *Whitely* v. *Learoyd* (*f*), affirmed in the House of Lords *sub nomine* *Learoyd* v. *Whitely* (*g*).

(*d*) 28 Ch. D. 268.
(*e*) 30 Ch. D. 490.
(*f*) 32 Ch. D. 196; 33 Ch. D. 347.
(*g*) 12 App. Cas. 727.

In the Court of Appeal it is laid down that although it is correct to say that the trustee is only bound to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own business, yet it must be borne in mind that the business of the trustee and the business an ordinarily prudent man is supposed to be conducting is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person who is entitled to the present income. It is further laid down that although the trustee is not bound to have special knowledge yet he may and ought to consult those who have such special knowledge before incurring risks. The trustees in this case were made liable for loss upon an investment on the security of a brickyard.

And in the House of Lords it is said that the trustee cannot accept the opinion of a skilled person and be absolved from risk. He must choose a skilled person, get all facts and opinions from him, and then exercise his own judgment on such facts and opinions. If the facts on their face show the imprudence of the investment, the opinion is no protection.

Shortly speaking, it may be said that it is the duty of trustees in making investments to obtain all possible information, and also, where the nature of the proposed security admits of it, careful valuations by competent valuers; competent not only in general, but competent also having regard to the special duty that they are required to perform, and fully instructed as to the nature of the investment for the purpose of which the valuation is required; and then in addition to exercise their own judgment in the matter in the light of the information that they have obtained (*h*).

There is not, as commonly supposed, any hard and fast

(*h*) See in addition to the cases already cited *Re Brogden, Billing* v. *Brogden*, 38 Ch. D. 546; *Re Partington, Partington* v. *Allen*, 57 L. T. N. S. 654; *Bullock* v. *Bullock*, 56 L J. Ch. 221; *Re Olive, Olive* v. *Westerman*, 34 Ch. D. 70; *Walcott* v. *Lyons*, 54 L. T. N. S. 786; *Re Pearson, Oxley* v. *Scarth*, 51 L. T. N. S. 692; *Budge* v. *Gummow*, L. R. 7 Ch. 719; *Mickleburgh* v. *Parker*, 17 Gr. 503; *Sovereign* v. *Sovereign*, 15 Gr. 559.

rule as to the percentage of value up to which trustees are justified in making advances. Each case depends upon its own circumstances, and in each case the prudence of the transaction is to be considered, but if the ordinary rule is departed from, and loss results, the trustee has greater difficulty in escaping liability (*i*).

(iii) *The duty of trustees with regard to the calling in of trust investments.*—It may be noted in the first place that there seems to be no difference in principle, as a general rule, between an active breach of duty and a passive breach by reason of failure to do something that is incumbent upon the trustee (*j*). Though there may be a difference in specific cases, more particularly as to the liability for compound interest (*k*).

The general rule is clear that executors or trustees must not allow funds to remain out on personal security longer than is absolutely necessary. This rule applies even where the security has been taken by the testator himself and there is no direction in the will to call the funds in, and no pressing necessity for so doing in order to pay debts or legacies. Moreover, it is the duty of the executors or trustees to make enquiries as to the circumstances of the debtor, and the mere fact that interest is paid regularly on the debt does not relieve them from the necessity of making these enquiries (*l*). If, however, the executors act in good faith and exercise a reasonable discretion they may escape liability. Thus in *Buxton* v. *Buxton* (*m*), the executors were directed to call in with all convenient speed such part of the personalty as should not consist of money. The testator at the time of his death was the owner of certain

(*i*) Lewin's Law of Trusts, 8th Ed., page 325; *Re Partington*, *Partington* v. *Allen*, 57 L. T. N. S. 654; *Re Olive*, *Olive* v. *Westerman*, 34 Ch. D. 70; *Re Godfrey*, *Godfrey* v. *Faulkner*, 23 Ch. D. 483; *Hoey* v. *Green*, W. N. 1884, p. 236; *Macleod* v. *Annesley*, 16 Beav. 600.

(*j*) *Devaynes* v. *Robinson*, 24 Beav. 86, at p. 95; *Gragburn* v. *Clarkson*, L. R. 3 Ch. 605.

(*k*) *Tebbs* v. *Carpenter*, 1 Madd. 290.

(*l*) *Powell* v. *Evans*, 5 Ves. 839; *Bocan* v. *Clarke*, 3 My. & Cr. 294; *Moyle* v. *Moyle*, 2 Russ. & My. 710; *Cann* v. *Cann*, 51 L. T. N. S. 770; 33 W. R. 40.

(*m*) 1 My. & Cr. 80.

Mexican bonds. Some delay occurred, and then one executor wished to sell, but the market price was at that time falling, and the other executor thought that it would be advisable to delay. Subsequently a sale was effected, at a loss considerably less than would have occurred if the sale had taken place when at first desired by the co-executor, but greater than would have been incurred had a sale been effected within a few months after the testator's death. It was held that the executors were not liable for the loss, as they were entitled to hold the bonds for a reasonable time without endeavouring to sell, and a better price could not have been obtained after a reasonable delay took place.

Mere delay in calling in a debt or investment is not in itself negligence (*n*). But if there is delay, and loss occurs, the *onus* is upon the executors and trustees to show that they are not responsible for the loss (*o*). And delay is fatal if the investment retained is of such a nature as to expose the estate to liability. As, for instance, where shares upon which there was an unlimited liability were not converted within a reasonable time after the testator's death (*p*); even if what is done is considered best and is done in perfect good faith (*q*). In the latter case a discretion was given to the trustees as to the time of conversion, but it was held that it should have been exercised within a reasonable time and unless retention of shares of this nature was actually ordered by the will it would be the duty of the trustees to sell them as soon as possible.

Where absolute discretion is given to the executors they are not bound by the ordinary rule, and although where the discretion is to be actively exercised it must be exercised honestly and intelligently, yet where there is a discretion to remain supine culpable negligence or dishonesty must be shown to render the trustee liable (*r*). This latter state-

(*n*) *Re Johnston, Johnston* v. *Hogg*, 25 Gr. 261; *Re Owens, Jones* v. *Owens*, 47 L. T. N. S. 61.

(*o*) *McCargar* v. *McKinnon*, 15 Gr. 361; 17 Gr. 525.

(*p*) *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605.

(*q*) *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232.

(*r*) *Re Norrington*, 13 Ch. D. 654.

ment, however, seems to be too strong in view of the late case of *Re Johnson, Johnson* v. *Hodge* (*s*), where it seems to be recognized that even if uncontrolled discretion is given to the executors in realizing the assets of the estate, still reasonable discretion must be exercised by them in order to escape liability (*t*). Somewhat more latitude is allowed where the property is of an uncertain or speculative value (*u*). But even in a case of this nature the trustees would not be relieved if there were any circumstances in connection with the investment or the debt that should have excited their suspicion. Thus in *Fraser* v. *Murdoch* (*v*), trustees retained certain shares in the City of Glasgow Bank that were owned by the testatrix, power being given to realize or to continue to hold any shares should they consider it advisable or expedient to do so without personal responsibility for loss, if any should be sustained. It was held that apart from the special provision their duty would have been to dispose of the stock at once, but that under the special circumstances, as there was no reason for believing that there was any more risk than usual in connection with the stock, and as they acted in good faith and in the honest exercise of discretion, they might escape liability.

In *Paddon* v. *Richardson* (*w*), trustees were empowered to lend trust money upon personal security until they should deem it advantageous to invest it in the funds. It was held that the omission to call in the money did not, in the absence of misconduct, create liability for its loss, upon the ground that the trustees had no knowledge that it was not advantageous to allow the fund to remain out on personal security, nor was it shown that they should have had this knowledge.

In *Sutton* v. *Wilders* (*x*), a trustee was made liable for a

(*s*) W. N. 1886, p. 72.
(*t*) And see *McMillan* v. *McMillan*, 21 Gr. 369.
(*u*) *Marsden* v. *Kent*, 5 Ch. D. 598.
(*v*) 6 App. Cas. 855.
(*w*) 7 D. M. & G. 563.
(*x*) L. R. 12 Eq. 373.

loss incurred through the fraud of his solicitor, where the trustee had reason to suspect the sufficiency of the security but took no steps to enquire into the matter.

It is quite clear that the mere fact that the security in question was one taken by the testator himself is no reason for the executor delaying to take proper steps to secure the funds. There seems to be no distinction between an original investment by the trustee and one made by the testator and merely continued by the trustee. The trustee is not relieved from the duty of watching and calling in the fund if there is any danger of loss (*y*).

In *Styles* v. *Guy* (*z*), trustees were directed to get in such book debts as were not approved by them, and they were held liable for not taking measures to collect a debt due by one of themselves to the testator. The mere fact that confidence has been reposed by the testator does not justify similar dealing by the executors, and where they know or have the means of knowing that part of the estate is not in a proper state of investment it is their duty to interfere and take measures to secure it unless under the will it necessarily remains as it is. And a similar decision was come to in *Bullock* v. *Wheatley* (*a*). The mere fact that enforcing payment will have a disastrous effect upon the debtor is not sufficient excuse (*b*). In the last case, under a marriage settlement, the settlor gave a bond to the trustees upon trust that when the trustees should think fit and expedient so to do they were to levy the amount and hold it for the uses of the settlement. The trustees took no steps to enforce the bond, and the settlor became insolvent. It was shown that if they had enforced the bond the settlor would have lost certain situations that he from time to time held, and would have been ruined in his credit. It was held, however, that this was not sufficient to justify the trustees and they were made liable for the loss.

(*y*) Perry on Trusts, 2nd Ed. s. 465; *Harrison* v. *Thexton*, 4 Jur. N. S. 550; *Burritt* v. *Burritt*, 27 Gr. 143.

(*z*) 1 Mac. & G. 422; 4 Y. & C. Exch. 571.

(*a*) 1 Coll. 130.

(*b*) *Luther* v. *Bianconi*, 10 Ir. Ch. Rep. 194.

Re Gabourie, Casey v. *Gabourie* (*c*), is a late case in which the liability of the executor who allows a debt to remain outstanding is considerably discussed. There the executor was held liable because he failed to call in a debt that was due to the testator, believing that the debtors were solvent, and that it was for the benefit of the estate, owing to the high rate of interest that was being received, to allow the debt to remain outstanding.

Where it is sought to make the trustee or executor liable for a loss by reason of his failure to call in a debt or investment he is at liberty to show that the same loss would have occurred if steps had been taken promptly by him, and he may escape liability either wholly or in part upon this account (*d*). Or he may show that he has made unavailing attempts to realize the security, or that any attempts would have been fruitless (*e*).

In this connection it may be useful to consider the position of an executor or trustee who carries on the business of the testator. The general question of the rights and liabilities of executors and trustees in this regard is shortly discussed in the authorities cited in the note (*f*). The general rule is that laid down by Lord Langdale in *Kirkman* v. *Booth* (*g*), viz., that to justify an executor in carrying on the business of the testator, there must be in the will most distinct and positive authority and direction to do so. In *Tyse* v. *Foster* (*h*), the doctrine is recognized that leaving money in a testator's business without a clear direction to do so, would be a breach of trust. In that case, however,

(*c*) 13 O. R. 635.

(*d*) *Gainsborough* v. *Watcombe*, etc. *Co.*, 54 L. J. Ch. 991; *Styles* v. *Guy*, 1 Mac & G. 422.

(*e*) *Taylor* v. *Magrath*, 10 O. R. 669; *Taylor* v. *Tabrum*, 6 Sim. 281; *Fry* v. *Fry*, 27 Beav. 144; *Edinburgh Life Assurance Company* v. *Allen*, 23 Gr. 230; *Re Brogden, Billing* v. *Brogden*, 38 Ch. D. 546.

(*f*) Watson's Compendium of Equity, 2nd Ed., p. 274; *Brice* v. *Stokes*, 2 W. & T. L. C., 6th Ed. 967. at p. 979; Williams on Executors, 8th Ed. p. 1798; Schouler on Executors, secs. 325 and 326; Perry on Trusts, 2nd ed. sec 454.

(*g*) 11 Beav. 273.

(*h*) L. R. 8 Ch. 309; L. R. 7 H. L. 318.

no harm resulted, but on the contrary the estate was largely benefited. In *Flockton* v. *Bunting* (*i*), the same doctrine is recognized, that a trustee using trust assets in business is liable for any loss.

Even where there is what might fairly be considered an authority to the executors to carry on the testator's business, it may be construed to be merely an authority to allow such part of the testator's assets as are in the business to remain there, and not to justify the executors in intermeddling with the business themselves. A case of this kind occurred in *Travis* v. *Milne* (*j*). What amounts to sufficient authority to justify the executors in carrying on business is discussed in the case of *Hall* v. *Fennell* (*k*).

It may be noted that the use of the word "employ" might perhaps give the executors larger powers than the use of the word "invest" (*l*).

So strong is the objection to allowing the legal representatives to carry on the business of the testator or intestate, that it has been held that the Court has no power to direct an administratrix to carry on business where infants are concerned in the estate (*m*).

The rule laid down *Kirkman* v. *Booth*, *supra*, is somewhat limited by the decision in the late case of *Re Chancellor*, *Chancellor* v. *Brown* (*n*). In that case full discretion was given to the executors to postpone the sale and conversion of the estate, and no mention was made of the testatator's business which constituted the main portion of this estate. It was held that there was an implied power to carry on business for a reasonable period in order to effect a proper sale as a going concern.

Where a testator directs merely that his trade is to be carried on, the executors are not justified in employing in the trade more of the testator's property than was employed

(*i*) Reported in the notes to *Vyse* v. *Foster*, L. R. 8 Ch. 309 at p. 323.
(*j*) 9 Hare 141.
(*k*) 9 Ir. Rep. Eq. 406, 615.
(*l*) *Dickenson* v. *Player*, C. P. Coop. 178.
(*m*) *Land* v. *Land*, 43 L. J. Ch. 311.
(*n*) 26 Ch. D. 42.

in it at his decease (*o*). And where a specific portion of the estate, or the capital already embarked, is directed to be kept in the business that portion only is liable for the trade debts (*p*); though the executor is personally liable to the creditors for the full amount of their claims (*q*), and may resort only to the specific assets directed to be employed in the business for indemnity. In such a case the creditors also may resort to the specific assets unless the executor is in default to the estate (*r*). But if there is a general direction to carry on business and no particular assets are specifically directed to be therein employed, the creditors have no right to resort to the assets at all but must rely merely on the liability of the person carrying on the trade (*s*).

Though the executor cannot carry on trade as a rule without special authority, except for the purpose of winding it up, he may carry it on in order to complete an unfinished contract of the testator, or in order to render productive something that without further outlay would be comparatively, or wholly, unproductive (*t*).

This, however, seems to be upon the principle that in certain cases where there is danger of loss further advances may be clearly necessary in order that there may be any chance of avoiding that loss. There is no rule that such advances should not be allowed merely because loss does in fact result, but it must be shown that before making the advance the probability of success was carefully investigated. Every available means of information must be used and nothing can be done except that which a reasonable man would do in similar circumstances with reference to his own property, and after having obtained all the evidence possible relative to the chances of success or failure.

(*o*) *Smith* v. *Smith*, 13 Gr. 81; *McNeillie* v. *Acton*, 4 D. M. & G. 744.

(*p*) *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Madd. 138; *Cutbush* v. *Cutbush*, 1 Beav. 184.

(*q*) *Owen* v. *Delamere*, L. R. 15 Eq. 134; *Labouchere* v. *Tupper*, 11 Moo. P. C. 198.

(*r*) *Re Johnson, Shearman* v. *Robinson*, 15 Ch. D. 548.

(*s*) *Strickland* v. *Symons*, 26 Ch. D. 245.

(*t*) *Collinson* v. *Lister*, 20 Beav. 356; and see *Re Henderson's Trusts*, 28 Gr. 45; *Smith* v. *Smith*, 23 Gr. 114.

A somewhat similar case was that of *Garrett* v. *Noble* (*u*) where the executors were held not liable for a loss that occurred in carrying on the business without authority. It was shown, however, that they acted in good faith, and that it was necessary to carry on the business in order to preserve its value and that they made efforts continually, though without success, to dispose of it.

Even where power to carry on business is given, care must be taken to see that the business is carried on by the proper persons.

In Schouler on Executors, at sec. 326, it is pointed out that though executors may pursue powers fairly conferred upon them, and place or leave assets in trade, still this is often permitted, not to executors as such, but as those especially honoured or burdened by the testator's personal confidence.

This question was considered in the case of *Ex parte Butcher* (*v*), and there it was held that the power to carry on business must be strictly construed, and if given to the executors as such, cannot be exercised by two when three have taken out probate. The same question arose in *Devitt* v. *Kearney* (*w*), where it was held that the power was given to the executors *virtute officii*, and that where two had been named under the will, of whom one had renounced and the other had alone taken out probate, he was entitled to carry on the trade. *Ex parte Butcher* was distinguished on the ground that in it the three executors had accepted probate. It should be noticed that in *Devitt* v. *Kearney*, however, there was an imperative direction to carry on the trade. No discretion was given, and therefore the question of personal confidence could not arise.

Personal confidence is often an essential ingredient for consideration, as for instance in the case of *Lyon* v. *Radenhurst* (*x*), where "the trustees, or the survivor of them, their or his heirs, executors, or administrators," were given

(*u*) 6 Sim. 504.
(*v*) 13 Ch. D. 645.
(*w*) 11 L. R. Ir. 225; 13 L. R. Ir. 45.
(*x*) 5 Gr. 544.

power to appoint some person, whom they might think fit and competent, to carry on the testator's business. No appointment was made by the persons designated by the testator, and the surviving trustee having died intestate, his administrator declined to act as a trustee under the will. A new trustee was appointed by the Court, and it was held that he had no right to exercise this power of appointment. It is recognized that such a power is one involving the greatest personal confidence.

It seems to be a rule that if there are no special directions as to the mode in which the business should be carried on the business should be carried on in the same manner as in the testator's lifetime (*y*).

Even when there is clear authority to carry on the business, this is not sufficient to justify the trustee in retaining funds in the business after a change in the nature of the business or the constitution of the firm. In Perry on Trusts, 2nd ed., sec. 454, the general rule is laid down that without special authority it is a gross breach of trust to employ assets in trade, and that even if a clear direction is given to continue the trade the trustees are confined to the fund already embarked, and must not continue the trade against their own judgment, nor allow the assets to remain in the trade if a change in the constitution of the business takes place.

The principle that the retention of the funds in the business after a change in partnership is unjustifiable, receives support from the case of *Edwards* v. *Edmunds* (*z*). There the testator held a number of shares in an unlimited company, and the executors were directed to convert these shares at their sole discretion, and at such time or times as they should think fit, and invest the proceeds in any public company. The unlimited company was in very high standing and making large profits. A new issue of shares was made, and these shares were allotted to the existing shareholders *pro rata* and were considered so advantageous an investment that every shareholder, including the execu-

(*y*) *Gow* v. *Forster*, 26 Ch. D. 672.
(*z*) 34 L. T. N. S. 522.

tors, took up the number allotted. Subsequently a loss occurred. It was held that although the executors under the special wording of the will committed no breach of trust in retaining the shares already owned by the testator yet it was a breach of trust to accept the new ones, and they were made liable.

Upon the direct question of the right to allow the funds to remain in the business after a change in the firm, there are two authorities which unfortunately somewhat conflict with each other. In *Cummins* v. *Cummins* (*a*), trustees were authorized to continue trust funds upon the personal security of a trading firm, and they were held guilty of a breach of trust because upon a change in the firm taking place they still permitted the trust funds to remain upon the personal security of the new firm. The new firm was a continuation of the old firm, but some of the former members had retired.

In *Ex parte Butterfield* (*b*), a testator directed that it should be lawful for his wife to retain in her hands and employ in carrying on his business any part of his assets not exceeding £6,000, so long as she should think fit, and he appointed his wife and his son executors. The widow took the son into partnership and they became bankrupt. It was held that the use of this money in this partnership was not authorized by the will, and was a breach of trust, on the ground that the new partnership really discontinued the testator's trade. This decision was reversed by Lord Chancellor Cottenham on appeal, apparently, however, mainly on the ground that to hold that this was a breach of trust would interfere with the rights of bona fide creditors of the partnership.

R. S. CASSELS.

(*a*) 3 Jo. & La. 64 ; 8 Ir. Eq. R. 723.
(*b*) 1 De G. 319, 570.

THE CASE OF MR. DAVIES' DONKEY.

10 Meeson & Welsby, 546.

"With the deepest respect for Mr. Davies' donkey, whose memory is embalmed in the delightful pages of 10 M. & W." *Per* Hagarty, C. J., *Follet* v. *Toronto Street Railway Co.*, 15 App. R. 347.

LORD ABINGER, C. B. loq.

DAVIES possessed an ass: no doubt
Trained to the horticultural load;
One day he turned his donkey out,
Its fore-feet fettered, on the road.
Here one remark seems necessary—
'Twas very wrong of DAVIES—very!

CHORUS OF BARONS.

Oh fair judicial harmony!
In this great truth we all agree.

LORD ABINGER, C. B.

While thus the ingenuous creature fed,
MANN'S man came driving, all too fast.
O'er the mild brute the roadsters sped,
And DAVIES' donkey breathed its last.
We dwell not on the owner's sense
Of loss—it's not in evidence.

CHORUS OF BARONS.

DAVIES, thy grief, thy bosom's rents,
Thy groans—are not in evidence!

LORD ABINGER, C. B.

Who caused this crisis asinine?
MANN'S man—and MANN must foot the bill:
Had his man passed the road's decline
With ordinary caution, still,
Still might the rich unstinted strain
Of DAVIES' donkey shake the plain.

CHORUS OF BARONS.

Wisdom hath given sentence! though
The donkey was not rightly there,
Was MANN'S rude man excused? Oh, no!
He ought to drive with proper care.
Wherefore we do adjudge and say,
For DAVIES' donkey MANN must pay!

ALL, STERNLY.

For DAVIES donkey MANN must pay!
(*He pays.*)

M.

EDITORIAL REVIEW.

Grand Juries.

We have read Senator Gowan's speech in the Senate upon the question of abolishing grand juries and substituting some other means of preliminary investigation. The plan suggested is to appoint a prosecutor whose duties shall be similar to those of our county attorneys, but more extensive and responsible. The learned Senator has had an experience equalled by few, and is eminently well qualified to speak upon such a subject; but until he can assure us of some better method of investigation we must retain that which we have. It is true that grand juries make mistakes, sometimes very ridiculous. But they are not peculiar in that. Very many more instances could be adduced of mistakes made by Judges, and in some cases apparently inexcusable mistakes, than can be instanced of grand juries. Yet we have not lost confidence in the Bench. Mistakes are also made by county attorneys. The writer is able to instance one which showed such complete ignorance combined with want of common sense that the mistakes of grand juries sink into insignificance beside it. A mortgagee having been in possession for fourteen years without acknowledgment, and having therefore a good title in fee, was forcibly ejected by one who claimed under the mortgagor. The latter was committed for trial at the sessions for forcible entry and detainer. When the bill came before the grand jury they asked the county attorney for information, and were told by him that the private prosecutor had entirely misconceived his rights. In his opinion after a mortgagee had been in possession for ten years without acknowledgment the law presumed that his mortgage was satisfied, and required him to give up possession; and on his advice the grand jury ignored the

bill. The writer had this from the county attorney himself (now deceased) and can therefore vouch for its being his mistake and not that of the grand jury.

The danger of influences being brought to bear upon members of the grand jury through relationship or favour we think is not well founded. Such danger may occasionally arise. But the existence of a number of persons engaged in the investigation is the best safeguard against the effect of such influence. What of a case where a relative of the public prosecutor should try to exercise undue influence?

There is the additional advantage to the public not to be lost sight of, that the grand jury system brings numbers of the best men of the community into actual touch with the responsible duties of administering justice; it opens the public institutions to their inspection; and awakens their thoughts to matters which should be subject of thought but which otherwise would never be thought of for lack of opportunity. The original reason for their existence may be gone but an equally good one may remain.

BOOK REVIEWS.

General Digest of the Decisions of the Principal Courts in the United States. Refers to all reports, official and unofficial, published during the year ending September, 1888. Annual. Being Vol. iii. of the series. Rochester, N.Y.: Lawyers' Co-operative Publishing Company. 1888.

This is perhaps the most valuable of the series of books published by this Company. The present volume is of large proportions, and the price is small compared with other like publications; the title page explains the scope of the work.

Lawyers' Reports annotated. Book I. All current cases of general value and importance decided in the United States, State, and Territorial Courts, with full annotations. By ROBERT DESTY, Editor. EDMUND A. SMITH, Reporter. BURDETT A. RICH, Editor-in-Chief of the United States and General Digests, and the several Reporters and Judges of each Court, Assistants in selection. Rochester, N.Y.: Lawyers' Co-operative Publishing Company. 1888.

Mr. Desty's name is well known as an Editor and Author, and the value of his notes will be well appreciated. This volume is a large and closely printed one, and contains a vast number of cases.

The American State Reports, containing the cases of general value and authority subsequent to those contained in the "American Decisions" and the "American Reports," decided in the Courts of last resort of the several States. Selected, reported, and annotated by A. C. FREEMAN, and the Associate Editors of "American Decisions." Vol. iv. San Francisco: Bancroft-Whitney Company. 1889.

In this volume the Editors have introduced a new feature which consists in the noting of other decisions from the current State Reports upon the point involved in the case selected.

Privileged Communications as a branch of Legal Evidence. By JOHN FRELINGHUYSEN HAGEMAN, Counsellor-at-Law, Princeton, New Jersey. Somerville, N.J.: Honeyman & Co., publishers of *The New Jersey Law Journal.* 1889.

This is a very handy and compact volume upon a subject not elsewhere so well treated in one place. The work strictly is a work on evidence, and embraces not only the law of privileged communications in actions of defamation, but all communications between professional adviser and client, physician and patient, etc. We have much pleasure in recommending the work.

REVIEW OF EXCHANGES.

Central Law Journal—31st August, 1888.

The Right of one Railway Company to Condemn the Property of another Railway Company under a General Statutory Authority, by RUSSELL H. CURTIS. Concluded in the following number. "The general rule to be gathered from all the authorities, considered together, is, that a legislative grant of power to condemn property, expressed in general terms, confers on the grantee power to take all kinds of property except property already devoted to public use and necessary for the exercise of such use." A number of American cases are cited.

Ibid.—14th September, 1888.

The Doctrine of the Lex Fori, by JAMES M. KERR. The subject is treated under the following heads:—Remedies upon contracts; arrest on foreign contract; form of judgment and execution; defence on matter *ex post facto*, including counter-claim or set-off, discharge, statutes of limitations. American cases are cited.

Ibid.—21st September, 1888.

Statutory Liability of Wife for Necessaries for Family, by D. R. N. BLACKBURN. American statutes and cases are cited.

Ibid.—28th September, 1888.

Cross Examination, by SEYMOUR D. THOMPSON. The English and American practices are both referred to in detail and cases on each cited.

Ibid.—5th October, 1888.

The Accused as a Witness. The right of the State towards the accused is discussed. It cannot attack his character unless he first puts it in issue, nor prejudice the jury against him by evidence of any misconduct other than the offence charged, nor show a tendency in him to commit the offence charged.

Ibid.—12th October, 1888.

Railroad Law, some Novel Decisions, by JOHN D. LAWSON. A number of American cases are cited on the powers and regulations of railroads, carriers of passengers and goods; agents and employers, etc.

Ibid.—19th October, 1888.

Reasonable Time, by SEYMOUR D. THOMPSON. In the early decisions the Courts decided in many cases what was a reasonable time where they would now leave it to the jury. The reason given was that

what is contrary to reason cannot be consonant to law which is founded on reason; and, therefore, the reasonableness is to be decided by the Judge. In questions arising in the course of judicial proceedings sometimes the matter was decided by the Court, sometimes by the jury. Very many cases are cited.

Ibid.—26th October, 1888.

Pleadings and Proof of Foreign Laws and Judgments. Foreign laws must be pleaded and proven, and the proof is governed by the *lex fori*. The mode of proving them is then dealt with.

Ibid.—2nd November, 1888.

Interstate Garnishment, by D. H. PINGREY. The learned writer sums up as follows:—Foreign Corporations must assume the same burden as domestic; their agents may be served, and they are liable to garnishment for the wages of a non-resident employee; when both debtor and creditor are residents of the same state the courts of the state will enjoin the debtor from going into other states to evade the laws domicil in collecting the debt.

Ibid.—9th November, 1888.

Telegraph poles and wires, by ADELBERT HAMILTON. The right to erect poles and string wires must in the United States be derived from the legislatures, and cannot be granted by municipalities unless under express power given to them to authorize their erection. Poles and wires are not a nuisance in fact.

Ibid.—16th November, 1888.

The scope of the intent in action for false representations, by W. H. BAILEY. The learned writer divides the cases into three classes, viz. Where the false representations are made; 1. With reference to the subject of the action; 2. Touching some fact not the subject of contract between the party making the representation and him to whom it is made, but asked for by the latter as a guide to his conduct with a third party; 3. Under such circumstances as to cause unknown persons to act on them. After reviewing a number of cases he concludes that the proof of intent is not required in cases falling under the first class, but is generally required in the other kinds of actions.

Ibid —23rd November, 1888.

Perpetuating Testimony—Notice and Publication. Such testimony must be taken after notice to parties interested. The practice as to serving notice, its length, what it should contain, etc., are treated of. "Publication" will not be allowed if the witness is living and capable of attending the trial.

Ibid.—7th December. 1888.

Mortgagee in Possession of Chattel Property before Condition Broken and without Express Agreement, by M. C. PHILLIPS, American cases are cited.

Ibid.—14th December, 1888.

The Civil Liability of Physicians for Malpractice, by A. J. VINJE. The physician must be ordinarily and reasonably skilful, and it is said that the locality in which he practises together with the school to which he belongs may be taken into consideration in determining what amount of skill might have been expected of him. He must follow the established mode of treatment or take the risk, and should exercise his best judgment; but he is not liable for errors in judgment. The patient may contribute to the injury and thus forfeit his right; and upon him lies the *onus* of establishing the malpractice.

Ibid.—21st December, 1888.

Foreign Judgments. English and American cases are cited.

Ibid.—4th January, 1889.

Declarations on Insurance Policies, by ADELBERT HAMILTON. A collection of American cases upon pleading policies.

Ibid.—11th January, 1889.

Statute of Limitations in Mortgage Foreclosure. A collection of American cases with a reference to the English statute.

Ibid.—18th January, 1889.

Intoxicating Liquors—Some Cases of Pleading, Evidence and Association, by JOSEPH A. JOYCE. American cases are cited.

Ibid.—25th January, 1889.

Burial Lots, by SOLON D. WILSON. American cases are cited.

Ibid.—1st February, 1889.

Removal of Causes for Prejudice or Local Influence, by SAMUEL MAXWELL. Cites cases on the United States Act respecting removal of causes.

Ibid.—8th February, 1889.

Actions for Injuries by Vicious Animals, by B. E. BLACK. After stating the well known common law rule, the learned writer says that the liability attaches either to the owner or keeper. The gist of the action for injury is the keeping of the animal after knowledge obtained of its vice. The knowledge of a servant is imputable to the master, though not actually communicated. The agent's knowledge must be with reference to the agency.

Ibid.—15th February, 1889.

Rights of the Cherokee Nation, by FRANK P. BLAIR. A recital of the title of the Cherokee nation by treaty and grant which is divested by Act of Congress.

Ibid.—22nd February, 1889.

The Procedure in Habeas Corpus Cases, by LEWIS HOCHHEIMER. American and English cases on practice are cited.

Law Journal.—10th March, 1888.

The Distinction Between Seizure and Charging Clauses in Bills of Sale. A criticism of some cases on the effect of adding to the bill of sale moneys paid for insurance.

Ibid.—12th May, 1888.

Actions for Breach of Promise of Marriage Against Executors. The case of *Findlay* v. *Chesney*, 57 L. J. Q. B. 247 is discussed. The learned writer sums up as follows: "The result of this case is, therefore, that no action of breach of promise of marriage for damages of the ordinary kind can be brought against an executor; and none for special damage, unless actual loss to the estate flows from the breach. The seduction of the plaintiff is excluded from this category, and the loss of trousseau for this particular case, but not generally."

Libel and Servants' Characters. In *Wennhak* v. *Morgan*, 57 L. J. Q. B. 241 the plaintiff sued for libel for endorsing a written character from a former master with a reason for dismissing him from the defendant's service, which document was handed to the defendant's wife to give to the plaintiff. The plaintiff was non-suited, but a new trial was granted to settle the question of publication. The question of injuring the plaintiff's property by defacing it was also a point to be tried.

Ibid.—19th May, 1888.

Literary and dramatic copyright. Mrs. Burnett having brought an action to restrain the dramatisation of her tale, "Little Lord Fauntleroy," Mr. Justice Stirling ordered the defendant to state on oath what copies of the work existed, to extract from the copies in his possession or power and deliver to the plaintiff all passages copied, taken, or colourably imitated from the book, and to produce to the plaintiff for examination the copies after the pirated passages had been extracted. "If the decision be right," says the learned writer, "practically a dramatic copyright is secured to the author of a tale if it is adapted and put on the stage as Mr. Seebohm adapted this piece." The decision is criticised.

Ibid.—30th June, 1888.

Settlements, and Married Women's Property Act. In bankruptcy it was held in *Re Armstrong*, by the court of appeal, that a power of appointment was not "property" within the meaning of the Married Women's Property Act, and did not pass to the trustee.

THE
CANADIAN LAW TIMES.

MAY, 1889.

THE MINISTER OF JUSTICE ON THE JESUITS ESTATES ACT.

WE expressed the opinion in a former number that the Jesuits Estates Act was not within constitutional limits; and though it is not necessary to reiterate what has been already said, it is due to the Minister of Justice to examine his arguments in favour of leaving the Act to its operation, and give them their due weight, as well as to ourselves to ascertain how far they form an answer to what has been urged. Inasmuch as the Minister, as *ex officio* leader of the Bar of Canada, has pronounced the Act unobjectionable, on all grounds except that of some want of taste, and except perhaps of policy (though he refuses to interfere with the policy of the Province), we might expect to find convincing arguments in favour of its constitutionality, but if they are not convincing we may reasonably infer that it is incapable of support. In dealing with the Minister's arguments which appear *in extenso* in his speech in the House, their true legal and logical value alone will be tested as far as we can do so. With respect to the policy which guided the Government, we shall only say that it is a lamentable thing that any policy should require that the supremacy of a constitutional Sovereign and Legislature should not be asserted at all hazards. As the Minister went a little beyond the mere construction and examination of the Act, owing to the wide range of the debate, we shall follow him and test those propositions which he laid down in advising the House.

His first proposition is that the Treaty of Paris, by which the King agreed to "give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church as far as the laws of Great Britain permit," did not introduce the laws of England as to the Supremacy of the Crown and as to public worship. Technically speaking, the laws of Great Britain did not thereby come into force in as full a measure as they would have been brought into operation by a proclamation; but it must be admitted as an essential and fundamental proposition that all laws and constitutional usages concerning the sovereignty of the conqueror, as distinguished from the body of municipal law, must have been in actual force from the moment of the capitulation. To assert the contrary would be to deny the power of the conqueror to impose laws without the leave of the subdued nation, which is absurd. The power to impose laws exists from the moment of the capitulation, and with this power co-exists of necessity all the attributes of the constitutional sovereignty of the victorious nation. There is implied in this the proposition that common enemies of the King or of the constitution, and those who are refused asylum in the realm, are in his newly acquired dominion only by sufferance, and cannot say that they are there by right of their ancient laws which made lawful what would be unlawful and impossible in their new Sovereign's dominions. Therefore all that was repugnant to the British constitution became unlawful immediately upon the capitulation. So, all laws which were in existence at that moment relating to the genius and spirit of the British constitution, as well as all laws pertaining immediately to the King's prerogatives, and those laws passed for the protection of the Crown from dishonour immediately came into force. This must have been well understood and admitted by the French. For the Roman Catholic religion, which was lawful in all respects under the French dominion was against British law, and it was necessary to obtain leave to profess it between the capitulation and the Treaty; it was necessary also to ask

protection for the Jesuits who could not lawfully remain. As to the latter the French had to be satisfied with a reservation for the pleasure of the King to be known.

The inhabitants, by the capitulation (or perhaps more correctly, by the treaty) and their choice of domicil in Canada, became subjects of the king and immediately liable to all such laws as we have suggested, and therefore they could not lawfully have professed the Romish religion but for the terms of the treaty; and inasmuch as the religion was before the Treaty totally interdicted, the right to profess it under the treaty must not be extended beyond what the words and spirit will allow. These allow the profession according to the *rites* of the Church of Rome, and in so far as the profession and ceremonies are concerned all laws repugnant thereto are necessarily suspended or repealed, but in so far as any pretensions in excess of the the liberty to worship are concerned, it was the evident intention to exclude them as far as the laws of Great Britain could do so.

In order to ascertain what was the understanding of the French authorities as to this, it may be worth while to look at the articles of capitulation to see what was asked for and what was granted. By the 27th article it was asked that "the free exercise of the catholic apostolic and Roman religion shall subsist entire *in such manner that all the states, and the people of the towns and country places and distant posts shall continue to assemble in the churches and frequent the sacraments* as heretofore without being molested in any manner directly or indirectly." This was granted; and it is worthy of notice that it did not include the obligation by law to pay tithes, which was asked for by the same article and refused till the King's pleasure should be known. It was also asked that the chapter, priests, curates and missionaries should continue to exercise their functions, that the grand vicars should have liberty to dwell in the country and visit with ordinary ceremonies, that the communions of nuns should be preserved in their constitutions and privileges and should continue to observe their rules—which requests were granted. It was asked, as well, that

if Canada should remain by the treaty to the British crown the king of France should "name the Bishop, who shall always be of the Roman communion and under whose authority the people shall exercise the Roman religion—"refused"; that the communities of Jesuits and Recollects and the house of the priests of St. Sulpice, at Montreal, should be preserved in their constitutions and privileges and continue to observe their rules; and that they should preserve their right to nominate to certain curacies and missions as theretofore; and that the actual vicars-general and the bishop, when the Episcopal See should be filled, should have leave to send to the Indians new missionaries, when they should judge it necessary—all of which were refused. It was also asked that the bishop should establish new parishes and provide for rebuilding his cathedral and palace, dwell in the country, visit his diocese and exercise his jurisdiction as under the French dominion, save that he should take the oath of allegiance. The answer to this was that it was comprised in other articles. We refer to these articles to show that the term "free exercise of the Romish religion" did not, in the mind of the French general, comprehend all the liberties which the inhabitants might desire, nor did the British general intend to grant all that might have been demanded as accessory to the profession of that faith.

Further than that, by the 52nd article it was asked that the French and Canadians should "continue to be governed according to the custom of Paris, and the laws and usages established for this country, and they shall not be subject to any other imposts than those which were established under the French dominion." Answer—"they become the subjects of the King." Nothing then can be clearer than that the high contracting parties understood, (1st) that the Romish religion could not be professed with safety in British dominions; (2nd) that only so much of its profession and practice as was allowed should be lawful; (3rd) that its profession and exercise did not include what was expressly stipulated for as to the communities; (4th) that the inhabitants who elected to remain fell under British

sovereignty immediately and could not expect to retain any of their laws if their new Sovereign chose to impose British laws upon them. It is notorious that many of the statutes directed against Rome were especially designed to protect the Sovereign from dishonour and to assert his pre-eminence, and to these they became subject immediately, though not to the general body of municipal law.

Again by the 34th article the communites and priests were to preserve their property, but by the 35th, if the canons, priests, etc., and Jesuits chose to go to France, passage was to be given to them in British ships, and leave to sell their estates and take the produce with them. The inhabitants could not have been ministered to in case the priests had left the country; and it is perfectly just for Mr. Attorney to say, if no priests, then no sacraments for the living or dying. But the argument is not pressed as to the state of the people, but as to what the parties meant. The French secured safe conduct for their priests if they desired to leave the country; if they desired to stay they were to exercise their functions as far as the laws of Great Britain would permit them.

One word more as to the Treaty. The Attorney-General argued that to have intended to insist upon the full signification of the phrase "as far as the laws of Great Britain permit" would have been to hold out a false promise with one hand while accepting with the other half a continent; because the laws of Great Britain did not permit the exercise of the Romish religion at all. We have shown that this is not the necessary construction. But if it were, it would have been no less false of His Most Christian Majesty to have agreed, that his late subjects should have freedom of worship only so far as the laws of Great Britain should permit, and then to assert that the limitation was never intended by him to be submitted to.

At this point it may well be maintained that a society illegal according to the laws of England could not claim any rights, because if their existence was obnoxious to British laws they could not become subjects of the King. The Jesuits, not having been born within the realm, were

liable to expulsion, under the law as interpreted by Attorney-General Northey. He says, with regard to Maryland, a British plantation, in 1705, "As to the question whether Her Majesty may not direct Jesuits or Romish priests to be turned out of Maryland, I am of opinion, if the Jesuits or priests be aliens, not made denizens or naturalized, Her Majesty may by law compel them to depart Maryland" (*a*). But the terms of the capitulation and the subsequent treatment of the Jesuits softened the remedy by expulsion into leave to sell their possessions and depart, or remain and gradually die out. They chose to remain and die out, and having occupied their late estates for a time by sufferance, when the last Jesuit died the property by natural process of law reverted to the Crown. Mr. Attorney does not deny this, but says that the question is complicated by the fact that in the meantime the Pope had suppressed the Jesuits, and that "by the terms of that suppression and by the terms of the civil law, which, it is contended, still prevailed in the Province of Quebec, the properties, instead of reverting to the Crown, passed to the Ordinaries of the dioceses in which they were situated." It is strange that the Attorney-General of Canada should deny the application of British laws to the Jesuits in Canada, should deny the power of the King to suppress them, but should find no difficulty in stating the proposition that His Holiness suppressed them. This involves the proposition the Pope had the power to keep the Jesuits in community at his will in the British realm although British laws rendered them unable to reside within the realm. It is also strange that the Attorney-General should invoke the canon law of the Church of Rome to determine the course of devolution of property. The canon law of the Church of England does not bind the laity unless adopted and confirmed by Parliament (*b*), and it would be strange if the canon law of the Church of Rome could take effect *proprio vigore*. No such complication can for a moment be admitted. The Jesuits' estates would

(*a*) Chalmers' Col. Opinions, p. 43.

(*b*) *Middleton* v. *Crofts*, 2 Atk. 650; *Bishop of St. David's* v. *Lucy*, 3 Carth. 485.

immediately upon capitulation have become the property of the Crown, and the Jesuits liable to expulsion, but for the terms of the capitulation. Lord Mansfield has said (*c*), "It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection, *and grants them their property*, he has power to fix such terms as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases." Although Mr. Attorney denied the power of the Sovereign to suppress the priests, and to impose laws without the authority of Parliament, he invoked his Majesty's power to confirm the property of the communities by the terms of capitulation. Probably the King could not have allowed the Jesuits to remain and hold property in the face of the Acts of Parliament directed against them. But we will assume that their title was confirmed by the terms of the capitulation, or, as Lord Mansfield puts it, granted them by the King. It follows, as a necessary consequence, that when the last Jesuit died in Canada, by the terms upon which they were suffered to remain in possession of their estate the land reverted to the Crown from which title was originally derived, not to the Ordinaries who never had any title, nor could have any, unless it be shown that the canon law of the Church of Rome was supreme.

Further light is thrown upon this question by the Act of 1774, by the eighth section of which it is enacted "that his Majesty's Canadian subjects within the Province of Quebec, *the religious orders and communities only excepted*, may also hold and enjoy their property and possessions, etc." If, therefore, the King's confirmation of the titles was valid, the Parliament subsequently refused to acknowledge it in so far as the communities were concerned.

We should not have referred to this at such length, as the Jesuits Estates Act admits the title to the estates to

(c) *Hall* v. *Campbell*, Cowp. 209.

have been in the Crown, but for the Attorney-General's reference to it at great length, and his omission to notice some important elements which are germane to the discussion.

It was also contended that the Treaty did not make applicable any of the laws of England, but subjected the inhabitants only to such as might afterwards be made. If that is so, then the Act of 1774 unquestionably made applicable the Act of Supremacy in express terms, with a change only as to the oath, as well as the laws of Great Britain generally. It is said that it was not intended to bring in the Act of Supremacy because it would have prohibited the exercise of the Romish religion altogether. That is not so. The Romish religion may be professed and exercised subject to the Act, the oath of allegiance being substituted for the oath required by that Act. It was directed against the dishonour of the Crown by the pretension of the Pope to exercise jurisdiction within the realm, and is peculiarly applicable to the Jesuits Estates Act, which dishonours the Sovereign, the Constitution and the Legislature by its subserviency to His Holiness the Pope. The oath of allegiance being substituted for the oath required by the Act of Elizabeth shows (by a common rule of construction) that in all other respects the provisions of that Act were intended to be applicable. It is also noticeable that, although power was given by the Act to a council to make ordinances, it was enacted that no ordinance touching religion should be of any force or effect until the same should have received the King's approbation. This shows that the intention, from the signing of the articles of capitulation to the passing of this Act, was to permit the worship according to the rites of the Romish Church, but to limit and hold in check those who professed it, and particularly the hierarchy.

The next proposition was that the King could not by proclamation revoke the charter of the Jesuits granted by the King of France, nor introduce laws; but that it was necessary to invoke the power of Parliament for this purpose. The Attorney-General denied absolutely the power

to revoke the charter of the Jesuits, but doubted the power to introduce laws. The latter would probably include the former, unless the Jesuits' charter was possessed of peculiar properties which placed it above law. In *Hall* v. *Campbell* (*d*) Lord Mansfield delivered the unanimous judgment of the Queen's Bench upon the point after the case had been argued four times. The following extracts are pertinent:—"It has been contended at the bar, that the letters patent are void on two points; the first is that although they had been made before the proclamation of 7th October, 1763, yet the King could not exercise such a legislative power over a conquered country. * * A great deal has been said and many authorities cited relative to propositions in which both sides seem to be perfectly agreed; and which indeed are too clear to be controverted. * * I will state the propositions at large. * * The sixth and last proposition is, that if the King (and when I say the King, I always mean the King, without the concurrence of parliament), has a power to alter the old and to introduce new laws in a conquered country, this legislature being subordinate, that is subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. * * These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of the government of a conquered dominion. * * It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall; it never was questioned in parliament. Coke's report of the arguments and resolutions of the judges in *Calvin's* case, lays it down as clear. If a king (says the book) comes to a kingdom by conquest,

(*d*) *Supra.*

he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws by himself without the consent of parliament. * * A maxim of constitutional law as declared by all the judges in *Calvin's* case, and which two such men in modern times as Sir Philip Yorke and Sir Clement Wearge took for granted, will require some authorities to shake."

This case is of peculiar value because not only is it probably the only case on the subject, but it is upon the very treaty of Paris under which Canada with other possessions was ceded to Great Britian. If not deemed conclusive by the Minister, there is yet another authority at hand. The proclamation was recited in the Act of 1774, and was therein said to have been found inapplicable to the state and circumstances of the inhabitants, and the act then revoked the proclamation and enacted that resort should be had to the laws of Canada (*i. e.* the laws in force at the conquest) in all matters relating to property and civil rights. Whatever opinion Mr. Attorney may hold as to the validity of the proclamation, the Parliament of Great Britain recognized it as valid and exerted its strength to revoke it and substitute a new code of laws.

The arguments which we have so far criticised were not directed to the Act itself, but were a general attempt to establish that there was a doubt as to whether British laws ever were introduced into Quebec; and out of this doubt might of course arise a question whether the canon law of Rome, and so the authority of the Pope, was not after all perhaps a factor in the government of the Province under the Treaty.

With respect to the interpretation of the Jesuits Estates Act, the Minister of Justice endeavoured to soften its meaning by arguing that the contention for the estates had been rife between the hierarchy who claimed them on the one hand and the Jesuits who claimed them upon the other, and that both parties were finally content to submit their claims to their common superior the Pope, who as an arbitrator should settle the claims, and as a consequence the successful party would claim the compensation from the govern-

ment. It is difficult to meet this contention in any other manner than by saying that the most ingenious person alive could not glean this from a perusal of the Act itself, for it is not susceptible of that interpretation. Nothing is said that in the slightest degree lends countenance to such a theory. It implies that there was a compensation of some kind waiting to be granted to the successful party, whereas the Act shows that such was not the case, but that the question of compensation was the question to be settled by the Act. The question is further complicated, to use Mr. Attorney's phrase, by the statement made by him in an early part of his speech, that the last Jesuit in Canada had died in 1800, so that the contest between the hierarchy and the Jesuits, if not purely imaginary, was not at any rate of a very sanguinary or serious character. It is also subject to the objection that no decree or award was made before the Act was passed, for in fact none was intended. And it is obnoxious to that principle of canon law by which Mr. Attorney, also in an early part of his speech, stated that on the suppression of the Jesuits by the Pope their property reverted to the Ordinaries. The contest in fact was, as the Minister truly points out in another place, and as the Act recites, between the Church of Rome and the Government of the Province of Quebec. Whenever the latter attempted to sell the estates the former prevented it, and in the end the Government, instead of asserting the authority of the law, begged of the Pope that he would permit the estates to be sold, and the Pope "allowed" the sale on the condition that the proceeds should be held to his order. Mr. Attorney says that "allow" is in this Act equivalent to "consent," but we cannot appreciate the distinction. The "advice and consent" of the legislature is stated in the preamble, and according to the Minister the "consent" of the Pope as well. This gives His Holiness' authority as important a rank as that of the legislature itself.

It was also stated by the Minister that when His Holiness "reserved to himself" the right of settling the question, it only meant that he had withdrawn the letters of attorney

from the Archbishop of Quebec, who had been commissioned to settle it, and thus required direct negotiations to be made with himself. That does not improve the position, for it assumes his superior title. It is also obnoxious to the preceding argument by the Minister, that the Pope was an arbitrator between two contending parties, and therefore was not a party claiming as against the government. It is also subject to the objection that His Holiness did not take this position himself, but immediately appointed the Procurator of the Jesuits to negotiate. In fact the theory may be said to be without foundation.

Great stress was laid upon the fact that the government of Quebec had got a complete release of all claims from the Church of Rome in every way, so that the question had received its final settlement. The Minister in another part of his speech laboured to show that the legislature of Quebec was not exercising a delegated power, but that when acting within its own scope it had as great a measure of authority as the Imperial Parliament itself. That is true, as laid down by the Privy Council, but it weakens the force of the argument that any gain was derived from the Pope's ratification and release of his claims. It is a notorious instance of the want of independence and courage that the question should have been so treated. Hallam says (*e*), "The principal European nations determined with different degrees of energy, to make a stand against the despotism of Rome. In this resistance England was not only the first engaged but the most consistent, her free parliament preventing, as far as the times permitted, that wavering policy to which a Court is liable. * * Our ancestors disdaining to accept by compromise with the Pope any modification or even confirmation of their statute law."

The Minister's appeal to the House as to whether the Roman Catholic subjects of Her Majesty are to be governed to-day by means of statutes which were the product of the bigotry of several hundred years ago, is not an argument

(*e*) Middle Ages, Chap. vii, Pt. ii.

upon the validity or invalidity or the policy or wisdom of legislation which acknowledges either the right or the expediency of Papal interference in civil affairs. No one has in the present discussion suggested that the penal statutes should be enforced against Roman Catholics, and therefore there is no issue upon that point. On the contrary the law is that they enjoy a full measure of freedom of worship in Ontario with exceptional privileges. It has been held in this province that a bequest of money to pay for masses for the repose of a testator's soul is not a superstitious use, but is valid on the ground that all our christian bodies enjoy equal toleration (*f*). But will Mr. Attorney go so far as to say that such portions of those statutes as are directed against the pretension to exercise Papal jurdisdiction in the British realm are obsolete? The statutory right to collect tithes and the obligation to take the oath of allegiance with penalties for breach thereof stand side by side in the Act of 1774. Is one obsolete and the other not? The statutory right to the free exercise of the Romish religion, and the limitation imposed by the Act of Supremacy stand together in the same clause. Is one obsolete and the other not? It is a convenient argument to say that the British laws against Papal aggression have worn out just at the time when the ambition of the Church of Rome urges it to control the legislature—but it is not a convincing one. It is not possible for such laws to be obsolete as long as Great Britain is an independent Power.

After a careful perusal of the arguments of the Attorney-General, we cannot see that they remove the many objections that have been raised to this Act.

(*f*) *Elmsley* v. *Madden*, 18 Gr. 386.

NEW RULES OF THE MARITIME COURT OF ONTARIO.

The Act which established this Court (*a*) became law on 28th April, 1877. By section 8 of the Act, the Judge was empowered, with the approval of the Governor-in-Council, from time to time, to make, alter and rescind general rules for establishing and regulating the "practice, pleading, writs, procedure, costs and fees to practitioners and officers in suits instituted under the Act." And it was further provided that such rules should have force and effect as if therein enacted.

By section 9, it was provided that the practice, pleading, writs and procedure in force at the time of its abolition in the instance side of the High Court of Admiralty in England should be followed, where no special provision was made by the Act and rules made thereunder (*b*).

Shortly before the passing of this Act, namely, on the 2nd of November, 1875, the High Court of Admiralty—in England—had been united and consolidated with the Superior Courts of Common Law, the Court of Chancery, the Court of Probate and the Divorce Court, in one Supreme Court of Judicature, on one branch of which, under the name of the High Court of Justice, the original jurisdiction of the above mentioned Courts was conferred. The High Court of Justice was further sub-divided into five divisions,

(*a*) 40 Vict. cap. 21.

(*b*) The "Instance court" is the name usually given to the high court of admiralty as distinguished from the "Prize court." The latter is not a permanent court, but was called into existence by warrant form the Lords Commissioners of the Admiralty to the Judges of the High Court of Admiralty issued in pursuance of a special commission to them from the Crown at the commencement of each war. (See preface to Pritchard's Digest). The term "instance" appears to have reference to causes promoted at the instance of a private person—*ad instantiam partis*—as distinguished from causes instituted on behalf of the Sovereign "in her office of admiralty," or it may have reference to the jurisdiction of the Court as a Court of first instance, as distinguished from the appellate jurisdiction which it formerly exercised.

to one of which called the Probate, Divorce and Admiralty Division, all causes and matters which would previously have been within the exclusive cognizance of the Court of of Admiralty, were assigned. Rules of court were also promulgated for regulating the practice of the Court, with such special rules as appeared necessary for the peculiar procedure in admiralty.

At the time of the establishment of the Maritime Court, the Court of Chancery, and the Superior Courts of Common law, were still in existence in Ontario, and it was not until the year 1881 that the Ontario Judicature Act was passed, which following the English precedents above referred to, fused these courts into one Supreme Court of Judicature, divided into a High Court of Justice and a Court of Appeal.

Rules were promulgated regulating the practice, etc., of this Court, mainly adopting the English rules, but largely incorporating the rules of the Court of Chancery of Ontario, and these, with subsequent additions and amendments, have been revised and consolidated. If these changes had been made in Ontario at the time of the passing of the Maritime Court Act, there is little doubt that the rules of practice and procedure of the Maritime Court would have been framed in much the same way as if it had been an Admiralty Division of the High Court of Justice, but such not being the case, resort was had to the practice previously in vogue in the High Court of Admiralty in England, and the practice at that time prevailing in the Court of Chancery in Ontario, and the rules of the Maritime Court were compounded of these two elements.

On the 23rd of August 1883, an Imperial Order-in-Council was passed establishing new "rules and tables of fees" for the Vice-Admiralty Courts in Her Majesty's possessions abroad, which came into force on 1st January, 1884. These rules are based on the rules of the High Court of Justice regulating admiralty practice and procedure, but contain some noteworthy variations. They are printed in the appendix to Mr. Cook's edition of Lower Canada Admiralty Court Cases, p. 384.

The new rules of the Maritime Court of Ontario, which have recently been promulgated, and came into force on the first of May, are based upon the Vice-Admiralty rules above referred to, but are supplemented by rules largely adopting the practice and procedure now in vogue in the High Court of Justice for Ontario, and the consolidated rules. Some of the existing rules of the Maritime Court which seemed of special value are retained.

All actions in the Maritime Court, under the new rules must be commenced by a writ of summons. In collision actions, preliminary Acts are to be filed by each party within one week from appearance. No pleadings are to be used, unless specially ordered. The High Court practice respecting pleadings is in other respects adopted, and also that respecting examination of parties before trial; and the Ontario Statutes respecting witnesses and evidence are incorporated in their entirety. Provision is made for the appointment of an official reporter to report the evidence and proceedings at trials in shorthand. Heretofore a foreign commission could not be issued, but this is now remedied. The tariff of costs has been carefully revised and improved, and provision has been made for a "lower scale" in cases involving small amounts. A full schedule of forms is appended.

It will be apparent that these rules, which have been carefully prepared under the personal direction of the Judge, will greatly improve the practice and procedure of the Court, and extend its usefulness.

Last year by the Act 51 Vict. cap. 39, jurisdiction was conferred on the Court over claims in respect of any mortgage on any ship registered in Ontario, whether the ship or proceeds thereof be under arrest of the Court or not. A Bill was before the House of Commons in the recent session containing a large number of proposed additions to the Court's jurisdiction, framed with the view of rendering it worthy of its title—The *Maritime* Court of Ontario.

St. Catharines, April 2nd, 1889.

R. Gregory Cox.

EDITORIAL REVIEW.

The Green Bag.

A new legal publication has appeared under this title. It characterises itself as "a useless but entertaining magazine for lawyers." It requires a good deal of ability to become absolutely useless, and if the editorial staff fails in its attempt, it may fall back upon the satisfactory argument that if it is not entirely useless it cannot be condemned for having proved somewhat useful. It is hinted in this title that it is useless to entertain lawyers. We should like to hear from *The Green Bag* upon this.

Apropos of this title the *Law Journal* gives a short history of bags, their colours and uses. As our custom in Ontario has varied a little from the English custom it may not be out of place to allude to it. The black bag is generally carried by a solicitor, but as there are but few solicitors who are not barristers as well, the black bag is rarely seen, except with busy students who have within the past few years adopted it. The barrister carries a blue bag; and though he may carry a red bag if a Queen's Counsel presents him with one, such an event has never occurred, to the writer's knowledge, in this province; it would probably require a good deal of courage on the part of a barrister to accept a red bag under such circumstances. The Queen's Counsel carries a red bag, and the judges alone display the green bag. Finally, black leather bags have largely come into fashion, and are carried indiscriminately by all branches of the professions.

Judicial Salaries.

The effort to obtain a rise in judicial salaries was thought to have been successful this session; but the exigencies of political life have again postponed it. If report is to be

credited, some adjustments were made for Quebec, but none where they were really needed. It was said that the feeling against larger expenditure made the measure unpopular. That report should be made to the Department of Marine, if there are any marines in it. At the same session the movement to expend a few millions on railways was not found to be decidedly unpopular on the same ground.

Entering Actions for Trial.

We referred, at page 17, to the new Rule 671, which had been passed as a result of the decision in *Bunbury* v. *Manufacturers, etc.*, but which at that time was not gazetted. A good many of the profession, we are told, relying upon the statement that the rule had not been gazetted, attempted to enter cases under the old rule, without ascertaining whether in the meantime the *Gazette* did not contain the rule. A reference to the *Gazette* of the 26th January, at page 107, will disclose the rule regularly gazetted.

The Law School.

It is understood that rules for the government of the proposed Law School have been drafted by a special committee and that they will be discussed in Convocation during the approaching term.

Recent Appointments.

Mr. Johnston, the late Deputy-General for Ontario, having been appointed Inspector of Registry Offices, Mr. John R. Cartwright becomes Deputy-Attorney General.

Mr. Neil McLean, chief clerk in the office of the Master in Ordinary, has been appointed an Official Referee, and will take such matters as may be referred to him.

REVIEW OF EXCHANGES.

American Law Review.—September-October, 1888.

Malicious Prosecution, by SEYMOUR D. THOMPSON. A very full article citing English and American cases.

Judgments by default against non-residents considered constitutionally, by CONRAD RENO. The article is continued from 21 Am. L. R. 715, and deals with judgments *quasi in rem*.

Ibid.—November-December, 1888.

The Nemd; or the Remnant of the Jury of Swedon, by GUSTAF EDW. FAHLCRANTZ. A description of the Swedish jury system and its decline.

The American Jury System, by HENRY C. CALDWELL.

Contracts in Restraint of Trade, by JAMES M. KERR. English and American cases are cited.

Louisiana; The Story of its Jurisprudence, by JOHN HENRY WIGMORE.

Maritime Collisions; Inscrutable Fault, by SOLON D. WILSON. The Admiralty rule is said to differ from the common law rule. The English cases are said not to settle the rule, but in the United States the general trend of the decisions is towards holding that the damage should be divided.

Law Journal.—14th July, 1888.

Liability of Hosts to the Stranger within their Gates. In *Tolhausen* v. *Davies*, 57 L. J. Q. B. 393, the plaintiff was visiting at a house, and hearing a noise as of a horse galloping, ran out to see what was the matter and was injured within her host's premises by her host's horse which had been started home by a servant without any one to lead him. A verdict was given for the plaintiff. The case is criticised.

Ibid.—21st July, 1888.

Between Cab and Train. In *G. W. R. Co.* v. *Bunch*, 57 L. J. Q. B. 36, the plaintiffs handed a hand bag to a railway porter, who said he would take care of it. Between this time and the arrival of the train the bag was lost, and it was held by the House of Lords, Lord Bramwell dissenting, that the company was liable.

Is Negligence Causing Nervous Shock Actionable? In *Victorian R. Com.* v. *Coultas*, 57 L. J. P. C. 69, the plaintiff received a severe fright from being nearly run over by the defendants' train through their negligence. The Privy Council held, reversing the Victorian Supreme Court, that there could be no recovery. The decision is said not to be satisfactory.

Ibid.—28th July, 1888.

The Purchase of Houses for Breaking Up. In *Lavery* v. *Pursell*, 57 L. J. Ch. 570, a house was bought for the purpose of breaking it up for the material. There being an insufficient writing, though a portion of the price was paid, the question arose whether it was a sale of goods, and it was held that it was an interest in land.

Ibid.—11th August, 1888.

Thorogood v. Bryan in the Lords. *Mills* v. *Armstrong*, or *The Bernina*, 57 L. J. Q. B. 65, raised the same question as *Thorogood* v. *Bryan*, and the latter was overruled. The case is discussed.

Ibid.—8th September, 1888.

Unauthentic Seals and Estoppel. A corporation having left their seal with their solicitor the latter affixed it to documents transferring to himself certain shares, and having sold them absconded with the proceeds. He was tried and convicted. Thereupon the corporation sued the Bank of England at which place the stock was transferred. It was held that there was not such negligence or carelessness as to estop the plaintiffs from recovering.

The Value of a Husband under Lord Campbell's Act. In *Stimpson* v. *Wood*, 57 L. J. Q. B. 484, it appeared that a widow sued under Lord Campbell's Act for compensation for the death of her husband. She had been living with another man, and the husband had been living with another woman. The learned writer says :—"The true solution of the question would seem to be in the fact that Lord Campbell's Act does not create a cause of action. It adds heads of damage to existing causes of action, and to decide that the bare fact of matrimony gives the wife a right to succeed under Lord Campbell's Act would be to read that Act as if it brought into existence a new cause of action. The test is not whether the person killed was legally bound to support the plaintiff, but whether he did in fact support him, and would have continued to do so."

THE
CANADIAN LAW TIMES.

JUNE, 1889.

EQUITABLE EXECUTION.

THE inability of the Courts of Law to reach by legal process various valuable interests possessed by judgment debtors and to render the same exigible in execution, and the necessity for applying a remedy to prevent a failure of justice, induced the Courts of Equity to adopt the method of granting equitable execution by the appointment of a Receiver.

It may be stated as a general rule that the Court, for the purpose of granting equitable execution, will appoint a Receiver of any estate, right, title or interest, whether legal or equitable in or to any property, real or personal, over which the judgment debtor has a power of disposal, provided that the same cannot be reached, or cannot be conveniently reached, by common law process.

Equitable execution by the appointment of a Receiver is the longest arm of the Court and is one which should ever be lengthened and extended rather than contracted.

The necessity for an understanding of the principles and practice governing the appointment of Receivers has in this Province been increased by the changes made in the rules as to garnishment upon the recent consolidation of the Rules of Practice. Consolidated Rule 935 provides as follows:—"The Court or a Judge may, upon the *ex parte* application of the judgment creditor, or the person en-

titled to enforce the judgment, either before or after the oral examination mentioned in the preceding rules, and upon affidavit by himself or his solicitor, or some other person or persons aware of the facts respectively, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within Ontario, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, *and all claims and demands of the judgment debtor against the garnishee, arising out of trust or contract, where such claims and demands could be made available under equitable execution*, shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge or an officer of the Court, as the Court or a Judge shall appoint, to show cause why he should not pay the judgment creditor, or the person entitled to enforce the judgment, the debt, *claim or demand* due from the garnishee to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt." The italics substantially indicate the changes which were made in the said Rule upon the Consolidation.

When should equitable execution be granted? — The appointment of a Receiver by way of equitable execution is now recognized as one of the regular and ordinary methods of execution, and a judgment creditor in a proper case is as much entitled to equitable execution as he is to a writ of *fieri facias* (*a*).

"Before the passing of the Judicature Act the mode of obtaining equitable execution was by issuing a writ of *elegit*, and, without obtaining a return, to file a bill in equity alleging that the plaintiff had issued his writ of *elegit*, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a Receiver. According to the practice the application for the Receiver was made by interlocutory

(*a*) See *Kincaid* v. *Kincaid*, 12 P. R. 462.

application before the hearing, and in a proper case it was granted. Now, I am not aware that it was ever decided that it should be refused because the defendant was owner in fee simple. *It ought to be granted in every proper case*" (*b*).

"Prior to the Judicature Act, the Courts of Equity, before granting equitable execution, required to be satisfied of two things; first, that the plaintiff in the action had tried all he could to get satisfaction at law; and then that the debtor was possessed of that particular equitable interest which could not be attached at law" (*c*).

The Court has jurisdiction to appoint a Receiver by way of equitable execution to receive any fund over which the judgment debtor has the control or which he has the right to receive (*d*).

It appears to be a perfectly sufficient reason for the appointment of a Receiver to receive such a fund that there is no method or no convenient method by which the fund can be made available under a common law execution.

Chitty, J., in disposing of an application for a Receiver, says:—"As there is no way of getting this fund except by the appointment of a Receiver which operates as equitable execution, I shall therefore appoint a Receiver as asked" (*e*).

Where a judgment creditor was unable to render his debtor's lands available in common law execution by reason of the legal estate being outstanding and of the existence of prior incumbrances, it was held that in an action in which the debtor and the subsequent incumbrancers only were defendants, he was entitled to have a Receiver appointed to receive the rents and profits (but without prejudice to the right of any prior incumbrancer to either keep or take possession) and to an order that unless the plaintiff

(*b*) *Per* Jessel, M.R., in *Anglo-Italian Bank* v. *Davies*, 9 Chy. D. at p. 283.

(*c*) *Per* Jessel, M.R., in *Salt* v. *Cooper*, 16 Chy. D. at p. 552.

(*d*) *Per* Hawkins, J., in *The Queen* v. *Judge of County Court of Lincolnshire*, 20 Q. B. D. at p. 171.

(*e*) *Westhead* v. *Riley*, 25 Chy. D. at p. 414-5.

should be redeemed within six months the interest of the defendants in the said lands should be sold and the purchase money paid into Court (*f*).

A Receiver has been appointed to receive an absolute reversionary interest in a fund which would fall in after a prior life interest (*g*), and to receive costs which had been ordered to be paid to the judgment-debtor (a solicitor) out of a fund standing in court (*h*); so also one has been appointed to enforce the payment of money into Court by receiving the debtor's share or interest in equity in a joint undertaking or syndicate (*i*), and to receive the separate property of a married woman to which she was entitled without any restraint on anticipation (*j*), and to receive the rents and profits and the proceeds of sale of an equity of redemption in lands (*k*). This is a proper remedy when it is desired to reach a fund vested in trustees, the income of which is payable to the debtor (*l*). So also it is a proper method of reaching the rents and profits and the proceeds of sale of lands subject to an equitable incumbrance, the legal estate in which lands is in the debtor (*m*).

Where the execution debtor was the mortgagee of lands in this Province, the Court at the instance of the execution creditor appointed the sheriff of the county in which the lands lay to be Receiver of all moneys payable under the mortgage until the judgment should be satisfied, without security and without salary other than the usual sheriff's fees, and restrained the mortgagee from dealing with the mortgage or receiving any moneys thereunder and restrained the mortgagor from paying any of the mortgage moneys to any other person other than the receiver (*n*).

(*f*) *Wells* v. *Kilpin*, 18 Eq. 298.

(*g*) *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*h*) *Westhead* v. *Riley*, 25 Chy. D. 413.

(*i*) *Re Coney*, 29 Chy. D. 993.

(*j*) *Re Peace & Waller*, 24 Chy. D. 405; *Bryant* v. *Bull*, 10 Chy. D. 153.

(*k*) *Anglo-Italian Bank* v. *Davies*, 9 Chy. D. 275, and see *Salt* v. *Cooper*, 16 Chy. D. 544, and *Kirk* v. *Burgess*, 15 O. R. 608.

(*l*) *Webb* v. *Stenton*, 11 Q. B. D. 518, and see *Stuart* v. *Grough*, 15 App. R. 299.

(*m*) *Re Pope*, 17 Q. B. D. 743.

(*n*) *Parent* v. *Lortie*, 7 Can. L. T. 195.

"*Just or convenient.*"—"A mandamus or an injunction may be granted or a Receiver appointed by an interlocutory order of the Court, in all cases *in which it shall appear to the Court to be just or convenient* that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just" (*o*). "These words are very wide and give to all the divisions a *larger power than the Court of Chancery possessed before*" (*p*). The Court's power to appoint a Receiver extends to every case in which it is just or convenient (*q*). Lord Justice Cotton says:—"In my opinion it is just and convenient to enforce the plaintiff's judgment by giving him equitable execution where he cannot by reason of the legal impediment of the outstanding mortgage, get legal execution at the hands of the sheriff" (*r*).

A Receiver by way of equitable execution can be appointed only in a case where there is some order or judgment to be executed, and therefore a Receiver of the assets of a joint stock company will not be appointed on an interim application in an action brought against the company by a simple contract creditor on behalf of himself and all other creditors although it be shown that the company is insolvent and has improperly made away or is about to make away with its assets (*s*). The Court will not appoint a Receiver unless from all the surrounding circumstances it appears that some good would probably result from such an appointment (*t*).

Ferguson, J., is reported to have said that upon a motion for a Receiver he could not construe a will for the purpose of determining whether the judgment debtor took an interest under the will which was exigible in execution (*u*),

(*o*) R. S. O. cap. 44, sec. 53, sub-sec. 8.
(*p*) *Per* Brett, L.J., in *Smith* v. *Cowell*, 6 Q. B. D. at p. 78.
(*q*) *Re Coney*, 29 Chy. D. 995, and see *Kirk* v. *Burgess*, 15 O. R. 608.
(*r*) In *Smith* v. *Cowell*, 6 Q. B. D. at p. 78.
(*s*) *McCall* v. *Canada Farmers' Mutual Ins. Co.*, 18 Can. L. J. 117.
(*t*) *Smith* v. *Port Dover, etc., Railway Co.*, 8 O. R. 256; 12 App. R. 288.
(*u*) *Graham* v. *Devlin*, 9 Can. L. T. 138.

but there is probably some error in the report, for there must be numerous instances in which the Court would consider the quantity and the quality of the estate which the judgment debtor takes under a will or other instrument creating a trust, for the purpose of ascertaining whether such interest can be made available in execution.

"The order for a Receiver may be made the subject of considerable trouble and oppression to third persons and ought to be granted only in cases where the amount of the judgment debt warrants the expense . . . and also only where there is fair reason to suppose that there is something for the Receiver to receive" (*v*).

New action not necessary.—The words "interlocutory order" in sec. 53, s.-s. 8 of the Judicature Act (R. S. O. cap. 44), are not confined in their meaning to an order made between writ and final judgment but mean an order other than final judgment in an action, whether such order be made before judgment or after; therefore the Court has power to grant equitable execution against a defendant by appointing a Receiver in the action in which the judgment is obtained, although the writ of summons may not have been endorsed with a claim for a Receiver, and it is unnecessary for the judgment creditor to bring a new action for the purpose of obtaining equitable execution (*w*).

When a client applies for the taxation of a solicitor's bill of costs submitting at the same time to pay what shall be found due, and an order for payment is in that proceeding subsequently made against the client, a Receiver by way of equitable execution may, on the application of the solicitor be appointed as against the client in that proceeding and without the necessity for an independent action (*x*).

Order may be made ex parte.—An application for an order under sec. 53, s.-s. 8 of the Judicature Act may be made to the Court or a Judge by any party to an action

(*v*) *Per* Field, J., in *I.* v. *K.*, W. N. (1884), p. 63.
(*w*) *Smith* v. *Cowell*, 6 Q. B. D. 75; *Salt* v. *Cooper*, 16 Chy. D. 544.
(*x*) *Re Peace & Waller*, 24 Chy. D. 405.

and it may be made either *ex parte* or on notice (*y*). "*Ex parte* applications for a receiver ought not to be granted, even after judgment, except in case of emergency, and it is desirable that this rule should always be borne in mind and not be lightly departed from" (*z*).

When a case of urgency was shown the plaintiff was appointed interim Receiver, without security, for 14 days or until a Receiver could be appointed, the applicant through his counsel not to deal with the property except under the direction of the Court, and to abide by any order which the Court might think fit to make as to damages (*a*).

Trustee need not be a party.—When a Receiver is appointed by way of equitable execution as against a *cestui que trust* who is a judgment debtor, it is not necessary that the trustee should be a party to the application (*b*).

Who should be appointed.—It is improper to appoint one of the plaintiff's solicitors as receiver. "To allow such appointments would to a great extent destroy the value of the appointment of a receiver, which greatly depends on the watchfulness of the solicitors of the plaintiff over his course of conduct and his accounts" (*c*).

"It is a settled rule that one of the parties to the cause shall not be appointed receiver without the consent of the other party unless a very special case is made. I will illustrate my meaning as to a special case by referring to *Sargant* v. *Read* (*d*) where, under special circumstances, I appointed the plaintiff receiver against the will of the defendant. But it requires a very strong and special case to induce the Court to do so" (*e*). Where the Receiver is appointed upon an *ex parte* application the applicant is

(*y*) Consolidated Rule 1134.

(*z*) *Per* Lindley, L.J., in *Lucas* v. *Harris*, 18 Q. B. D. at p. 134.

(*a*) *Taylor* v. *Eckersley*, 2 Chy. D. 302; and see *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*b*) *Re Peace & Waller*, 24 Chy. D. 405.

(*c*) *Per* Jessel, M.R., in *Allen* v. *Lloyd*, 12 Chy. D. at p. 452.

(*d*) 1 Chy. D. 600.

(*e*) *Per* Jessel, M.R., in *Allen* v. *Lloyd*, 12 Chy. D. at p. 451.

generally the person who is appointed (*f*); and even when the application for a Receiver is made upon notice, the applicant is usually the person who is appointed if no objection be made thereto (*g*).

Security.—Where the plaintiff is appointed Receiver for the purpose of receiving sufficient only to pay his own judgment claim he is usually appointed without security and without salary (*h*), but where a Receiver is appointed to receive for creditors generally it is necessary that he should furnish security (*i*).

Where a person is by name appointed Receiver upon his giving security he is not a Receiver until the security is given (*j*), but, upon his giving the requisite security, his appointment relates back to the date of the original order (*k*).

Form of order.—Subject to what we shall afterwards suggest as to the operation and effect of the Creditors Relief Act an *ex parte* order for the appointment of an interim Receiver of rents may be in the following form :—

"Upon motion of Mr. of counsel for the plaintiff upon hearing read, etc., and upon hearing what was alleged by counsel aforesaid and the plaintiff by his counsel aforesaid undertaking to be answerable for all sums to be received by the Receiver hereinafter named.

This Court doth order that be and he is hereby appointed until the day of inclusive or until further order to receive the rents, profits and moneys receivable in respect of the following property, that is to say [or as the case may be] but this appointment is to be without prejudice to the rights of any prior incumbrancers upon the said premises, who may think proper to take possession of

(*f*) See *Taylor* v. *Eckersley*, 2 Chy. D. 302; and *Fuggle* v. *Bland*, 11 Q. B. D. 711.

(*g*) See *Kincaid* v. *Kincaid*, 12 P. R. 462.

(*h*) See *Taylor* v. *Eckersley*, 2 Chy. D. 302; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Hyde* v. *Warden*, 1 Ex. D. 309; and *Kincaid* v. *Kincaid*, 12 P. R. 462.

(*i*) See *Kirk* v. *Burgess*, 15 O. R. 608.

(*j*) *Edwards* v. *Edwards*, 2 Chy. D. 291.

(*k*) *Ex p. Evans*, 13 Chy. D. 252.

or receive the same by virtue of their respective securities, or, if any prior incumbrancer is in possession, then, without prejudice to such possession.

And this Court doth further order that the tenants of the said estate do (without prejudice as aforesaid) attorn and pay their rents in arrear and growing rents to the said so long as he shall continue to be such Receiver, and that all questions as to passing his accounts and all further questions be reserved until further order " (*l*).

The following may be uses as clauses to insert in a subsequent order after the permanent Receiver has been appointed, or in the order appointing such receiver: " And this Court doth further order that such Receiver do, on the day of next, and at such time or times thereafter as shall be appointed by the Registrar of this Court pass his accounts before the said Registrar and pay the balance or balances appearing due on the said accounts or such part thereof as shall be certified as proper to be so paid, such sums to be applied in or towards payment of what shall for the time being be due in respect of the judgment signed herein on the day of for the sum of $ debt, and $ for costs, making together the sum of $.

And this Court doth further order that the costs of this order, and of the prior order herein, and of the receivership to be taxed shall be primarily payable out of sums received by the Receiver, but if there shall be no funds out of which the same may be paid by the Receiver, then, upon the certificate of the said Registrar to that effect (to be given after passing the final accounts of such Receiver) the same shall be paid by the judgment debtor to the judgment creditor, and execution may issue for the same.

And this Court doth further order that any of the parties are to be at liberty to apply to a Judge in Chambers as there may be occasion."

(*l*) See form of order in *Wells* v. *Kilpin*, 18 Eq. at p. 300, and in *Hewett* v. *Murray*, 52 L. T. N. S. 380. For form of an order appointing a receiver and manager of a business, see *Truman* v. *Redgrave*, 18 Chy. D. 550.

Order without prejudice to prior incumbrancers.—Where a mortgagees' proceedings to obtain possession of the mortgaged premises were stopped by the possession of a Receiver of the rents and profits, who had been appointed in an administration action, whereupon the mortgagees at once applied to the Court for leave to proceed, which application was resisted and considerable delay was caused thereby, it was held that the Receiver must be deemed to have received the rents for the benefit of the mortgagees from the time when their proceedings were so stopped (*m*).

The order appointing a Receiver should always be expressly made subject to the rights of prior incumbrancers, but even though it be not so expressed upon the face of the order, yet the Court in construing the order will read such a term into it. In a case where the order did not contain the usual clause, Chancellor Boyd says: "Though the order appointing the Receiver was silent on the subject, yet I think it is a most reasonable practice to hold that such appointments are always made, and to be treated as made without prejudice to prior incumbrances" (*n*).

Inquiry as to estate exigible in execution.—Equitable execution may be granted against a married woman by directing an inquiry of what the separate estate of the married woman (to which she was entitled without any restraint on anticipation) consisted at the date of the judgment, and whether any and what disposition thereof, or dealing therewith, by the married woman has been made since that date, and of what that separate estate now consists, and whether any and what parts thereof still remain capable of being reached by the judgment and execution of the Court; and by ordering that, subject to the rights of the trustees of such estate, a proper person be appointed to collect, get in and receive such separate estate as shall be certified to be capable of being reached as aforesaid, and the dividends and income thereof until the amount of the plaintiff's claim and costs shall be sooner paid" (*o*).

(*m*) *Wallace* v. *Wallace*, 11 O. R. at p. 580-1.
(*n*) *Wallace* v. *Wallace*, 11 O. R. at p. 580-1.
(*o*) *Re Peace & Waller*, 24 Chy. D. 405.

Numerous cases have arisen as to the validity and effect of what are called "spendthrift trusts," which are trusts created by settlors with a view to prevent the objects of their bounty from alienating the subject of the settlement, either voluntarily by assignment or involuntarily by bankruptcy or legal process.

These cases are collected and commented upon in Professor Gray's work on "Restraints on Alienation," sections 145 to 268. After collecting and commenting on the English cases Professor Gray states their effect as follows: "The principle upon which these cases go is very simple. Whatever rights, legal or equitable, in property a man has, those rights are alienable. Whatever a man can demand from his trustees, that his creditors can demand from him. All the cases are in accordance with principle, except, possibly, the two decisions of Shadwell, V. C., in *Twopeny* v. *Peyton*, 10 Sim. 487, and *Godden* v. *Crowhurst*, *Ib.* 342; and in the former of these the *cestui que trust* was known by the testator to be bankrupt and insane; while in the latter the bankrupt's interest was perhaps not separable from that of his family (*p*). It is true that many of these cases were difficult to decide, and the correctness of some of the decisions may be doubtful, but the difficulty and doubt do not lie in the application of the principle that the rights of the *cestui que trust* are alienable, but in determining what his rights are. When property is held by trustees to be applied in their discretion for the support and maintenance of John Stiles, or of John Stiles and others, it is often hard to determine what the exact rights of John Stiles are, yet this the Courts cannot avoid. If the trustees refuse to supply John's needs or wishes, or do not supply them as liberally as he thinks they should, and he complains to the Courts, the Courts must determine whether the trustees have violated any of his rights. It is often a difficult question but its difficulty does not excuse the Court from passing upon it. And this is the only difficulty that arises in cases of alienation by a *cestui que*

(*p*) Gray's "Restraints on Alienation," sec. 166.

trust, or of his bankruptcy. It may be hard to determine to what he is entitled, but there is no difficulty in saying, whatever it may be, it goes to his assignee. Whatever amount of the trust fund, principal or income, a *cestui que trust* is entitled to, so that he or his executor have a right to it against any others of the *cestuis que trustent*, that amount is alienable by him; and any discretion which the trustee may have as against the *cestui que trust*, in the manner or time of applying the fund is at an end. Such discretion was imposed solely for the benefit of the *cestui que trust*, not at all for his assignee" (*q*).

There have been various cases in which the Court has, by a reference to a master or otherwise, undertaken for the benefit of creditors to separate and set apart the interest of a *cestui que trust* debtor in a fund settled upon trustees for the support and maintenance of such debtor, his wife and children.

In *Page* v. *Way* (*r*), property had been settled upon trustees to receive the rents and profits "and pay and apply the same, when received, unto and for the maintenance and support of A. his wife and children, (if any), or otherwise, if they should so think proper, permit the same rents, etc., to be received by" A. for life, but without power to anticipate, and on his death over. A. having no children became bankrupt, and it was held that the assignee in bankruptcy took the whole income, subject to a proper allowance for the wife, to be settled by the Master (*s*).

The general rule is that a settlor cannot give to the object of his bounty either a legal or an equitable interest in property so as to exclude all claims of the creditors of the beneficiary (*t*). An exception to this rule exists in the

(*q*) *Ib.*, sec. 167.

(*r*) 3 Beav. 20.

(*s*) See also *Rippon* v. *Norton*, 2 Beav. 63; *Lord* v. *Bunn*, 2 Y & C. C. C. 98; *Kearsley* v. *Woodcock*, 3 Hare 185; *Wallace* v. *Anderson*, 16 Beav. 533.

(*t*) As showing that property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift, see *Rochford* v. *Hackman*, 9 Hare 475, 480, and *Younghusband* v. *Gisborne*, 1 Coll. 400, and see the English and American cases collected in *Smith* v. *Powers*, 14 Atl. Rep. 497.

case of married women upon whom property can be settled without their having the power of alienation or anticipation *during coverture* (*u*).

One cannot help feeling astonishment mingled with regret upon reading the judgment of the Court of Appeal in *Fisken* v. *Brooke* (*v*), and one may perhaps venture to hope that in the event of a similar case again arising before that Court or before the Supreme Court of Canada, it may be deemed that in view of the great extension of the practice of granting receivers by way of equitable execution since the passing of the Judicature Act, the arm of the Court is now long enough to reach any property whatsoever which a debtor can claim as of right, and to thereby prevent the possibility of a debtor living in luxury upon money to which he is entitled as of right, and out of which no creditor of his can recover payment.

Where a fund is settled in trust with an absolute *discretion* to the trustees from time to time and at such time or times as they shall think proper *to pay or apply the whole or any part of the income* thereof to or for the benefit of a named person, in such manner in all respects as they shall think proper a judgment creditor of that person cannot procure the appointment of a Receiver of the fund or the income by way of equitable execution, for in such a case the debtor is not entitled as of right to the benefit of any portion of the fund, but he is entirely subject to the discretion of the trustees who may refuse to allow him to derive any benefit whatever from the fund (*w*).

A. H. MARSH.

(*To be concluded.*)

(u) For a history of the origin of the power of restraint on anticipation, see *Jones* v. *Harris*, 9 Ves. 493. For the application of this doctrine to the subject-matter of this article, see Gray's "Restraints on Alienation," secs. 269 to 277 *a*; and see *Becket* v. *Tasker*, 19 Q. B. D. 7. A restraint against alienation will not bind a woman so long as she is single or a widow, but will bind her whenever she is married, although if the testator or settlor wishes, he may limit the restraint to any particular coverture. See Gray's "Restraints on Alienation," sec. 274.

(v) 4 App. R. 8.

(w) *The Queen* v. *The Judge of the County Court of Lincolnshire*, 20 Q. B. D. 167.

THE LOCAL COURTS.

The system of Local Courts in operation in Ontario has answered well the purposes for which these Courts were originally brought into existence, but since the time when that system was introduced, about half a century ago, the circumstances of the country have greatly altered, and it is therefore by no means remarkable that some changes in the machinery for the administration of justice should now be thought desirable. In the old times, when the counties were large, and means of communication and travel difficult, a resident Judge in every county was a necessity. By this means the public had their disputes adjusted at small expense and inconvenience; the administration of justice was brought as near their doors as possible, and the time of the judge was taken up within the limits of his county. But now the facilities of travel are vastly better, not only by reason of better roads, but railways serve in every direction, from which it will be seen that the services of the local judiciary could be utilized over far larger districts without injury or disadvantage to the interests of the public.

In connection with the present system there are certain objectionable features, and a remedy for some of these, no doubt, was sought in 1876 by passing an Act with the object of grouping the counties. That proposal, however, has never been carried into general effect, one difficulty in the way being a question as to the powers of Judges in counties other than those for which they were appointed.

To meet the difficulty mentioned, and to bring about desirable changes in the system under discussion, the writer would suggest that the business of the County Courts

might be transferred to the High Court of Justice, to be disposed of by the Judges who already hold commissions as Local Judges of the High Court of Justice. The counties could then be grouped, or the Province divided into districts, and so arranged that in each district there would be not less than three Judges. The Judges should be required to hold sittings in rotation in every county town within the district to which they are attached, and to arrange the work of the Division Courts and matters of extraordinary jurisdiction, so that the duties should be equally shared and performed by each alternately in every part of the district; and the Judges of each district should sit together in each county town, to dispose of Term business, thereby giving greater weight to their decisions, and reducing the work of the Court of Appeal.

It would follow as one of the results of the scheme suggested, that as vacancies occur, there might be a reduction in the number of Judges, making it possible to pay better salaries without an increase in cost to the country. The writer ventures to say that there are many County Court Judges who would gladly undertake more work than they have now if paid in proportion, and those whose duties are sufficiently onerous would not object to assistance from their less heavily burdened brethren.

No doubt there would be difficulties to overcome in bringing about the changes here proposed, but it is believed that all objections can be answered, and the details thoroughly and satisfactorily adjusted.

ANONYMOUS.

EDITORIAL REVIEW.

The Local Courts.

We print this month a short contribution from a gentleman who has given the subject of the Local Courts some consideration and is well qualified to speak upon it. It is hoped that those who are most interested will find it convenient to express their views. In the County of York both the County Court work and the Division Court work is increasing so steadily, that there must be an increase in the number of Judges if the business is to be satisfactorily disposed of, in addition to the numerous duties that are heaped upon the County Judges.

Before discussing the details of a proposed measure a principle of action, if action be needed, must be found and agreed upon, but when in search of a principle of action we must first ascertain what is the prevailing evil, if any.

The loss of business to the County Courts on account of the increased jurisdiction of the Division Courts cannot be called an evil, nor is it quite apparent that it is a proper subject of complaint; for it is merely the object aimed at by the very recent change in the law which increased the Division Court jurisdiction. That is a question which, we presume, was well agitated and discussed at the time when the amendment was passed by the Legislature. It could not have been expected that a new class of business would immediately spring up in the County Courts to supplement the volume which would necessarily decrease on account of the increase of the lower jurisdiction. The very aim and object of the increased lower jurisdiction was to acquire for the Division Courts a large amount of business

which was formerly transacted in the County Courts. And if that was a good policy several years ago it should be adhered to now. Legislation is designed for the future, not for a particular year.

The possibility of an increase in the County Courts jurisdiction in order to preserve the balance was discussed at the same time, and was not viewed with favour. Any such measure would result only in lightening to some extent the business of the High Courts, and weighting the lower courts with it.

That business has increased in some of the County and Division Courts is certain, while it is also certain that it has decreased in others. But this is due, as our contributor shows, to the changes in the features of the counties themselves, to the increase in general business in some and its decrease in others. The problem then is to equalize the business amongst the Local Courts, not by a change in their jurisdiction, but by a re-distribution of business among them.

There is, therefore, no necessity for fusing the County Courts, so to speak, into the High Courts, or transferring their business to the High Court to be transacted by the same Judges under another name. Such a measure would be attended by a good many difficulties, not the least of which would be the great probability, the certainty we might say, of strenuous opposition from the Dominion Government. An attempt to alter the jurisdiction in Quebec so as to throw the appointment of Justices into Provincial hands, was recently frustrated by disallowance. And an attempt to create a new class of Judges of the High Court, under cover of a change in jurisdiction, would undoubtedly meet the same fate. The Dominion Government always keep well in view the fact that they pay the Judges, and anything tending to strengthen the right to ask for an increase of pay is viewed with great disfavour at Ottawa. If the County Court Judges, who now exercise a portion of the jurisdiction of the High Court in matters of procedure, were to become High Court Judges in fact by

the disappearance of the County Courts, it would embarrass the Government greatly to refuse them salaries commensurate with their advanced position. And the Government cannot be expected to sanction any scheme in this Province which might result in its own embarrassment. This is not Quebec.

The proposition to group the counties, or to divide the Province into districts, is one that deserves consideration, though there will be met with many difficulties in detail. We cannot say that that is the remedy required if there be one, nor do we deny it to be a remedy. But we can foresee that the Districts might have to be changed to suit local requirements. It must of necessity occur that changes in the social and business features of the Province will take place. A very slight circumstance may tend to turn a quiet part of the Province into a busy one. That that is the case is evident from what has been said as to the cause of the present unequal distribution of business. And a shifting set of Judicial Districts is not a desirable thing.

At any rate the matter is worth discussing, and will bear a great deal of it.

The Statutes.

It is now many weeks since the Legislature of Ontario was prorogued, and yet the Statutes, except the *Gazette* edition, are not yet published. We have before called attention to this, and again refer to it because it is a real grievance, and one that is easily removed and should be removed in the public interest.

From enquiries which the writer has made the course of action pursued by the printer appears to be as follows: The type is first set up in the size of page in which the Statutes ultimately appear. At the close of the session it is made up for the *Gazette* in order to secure a speedy issue. The *Gazette* being printed and distributed the type is again shifted into the original size, and at the leisure of the printer the volume is worked off. At this stage, the *Gazette*

being in the hands of all who care to pay fifty cents for it, the printer may well excuse himself from undue haste, and the consequence is that the Statutes are stale before they can be got in the official form.

There is no valid reason why they should not appear within a week of the day on which the final assent is given. As the bills are finally passed the type could be corrected and the various statutes arranged in chapters ready for putting on the forms, and, with a little extra exertion at the close of the session, the whole work could be put on the press and worked off in the course of a few hours. The compiling of the index is a matter of several hours only.

It is to be hoped that the Attorney-General, who is always ready to accommodate the profession in any reasonable way, will find time to have this matter remedied.

REVIEW OF EXCHANGES.

Law Journal.—3rd November, 1888.

May Railway Companies Expel Passengers ? In *Butler* v. *Manchester, etc., R. Co.*, 57 L. J. Q. B. 564, it was held that a railway company had no power to expel a passenger who had paid for his ticket but lost it.

Ibid.—29th December, 1888.

Footpaths and Railways. In *Cole* v. *Miles*, 57 L. J. M. C. 132, it is held that a railway company cannot prosecute for trespass where a public footpath (not comprehended in the term "road") crosses the line, but they are bound to make a bridge therefor.

Ibid.—5th January, 1889.

One's Duty Towards One's Client's Adversary. A discussion of *Cann* v. *Willson*, 57 L. J. Ch. 1034, in which a mortgagee's solicitors sued a valuer for over valuation.

Ibid.—19th January, 1889.

Solicitor-Trustees Attesting Wills. The case of *Re Pooley*, 58 L. J. Ch. 1, in which it was held that a solicitor-trustee who was authorized by the will appointing him to charge for professional services, was disqualified by his being a witness to the will, is discussed, and, though the decision is no doubt sound, the policy of the law which deprives the legatee of his benefit is criticised.

Possession and Counter-Possession in Law. The case of *Agency Co.* v. *Short*, 58 L. J. P. C. 4, is discussed, in which the Privy Council held that successive independent trespassers do not bar the title of the true owner. The case is approved.

Innuendoes Implied in Trade Lists. In *Williams* v. *Smith*, 58 L. J. Q. B. 21, the plaintiff sued for a libel by publication of the fact that a judgment for a certain sum had been entered and registered against him. The fact was true, but he had paid the judgment. The case is discussed, and it is said that the question remains, as a matter of law, whether there is any evidence to go to a jury that anything was written which was untrue.

THE

CANADIAN LAW TIMES.

JULY, 1889.

EQUITABLE EXECUTION.

(*Concluded.*)

IN the last number were noted some of the cases in which the Court will appoint a Receiver by way of Equitable Execution, and we now pursue the same subject.

Money, etc., in Personal Possession of Debtor.—Much doubt has been felt as to the right of a judgment creditor by any legal process to get possession of moneys which are in the possession of a judgment debtor, and are carried upon his person. It has been felt to be a reproach upon the law that there should be any doubt about the right of a creditor to make such money available in execution. The only method by which a Common Law Court, before the Judicature Act, could have afforded any relief in such a case, was by subjecting the debtor to examination as a judgment debtor, with regard to which examination Wilson, C.J., says:—"I think the true meaning of a satisfactory answer, according to the Statute, means more than that the answer is, or shall be, full, appropriate and pertinent, it means that the answers shall show a satisfactory disposition of the property." (*Crooks* v. *Stroud*, 10 P. R. 132-3.) If this interpretation of the Statute meets with general acceptance it would seem that the rights of a creditor in a case such as the one stated may be enforced by attachment in the event of the debtor refusing to hand over the money, but no reported case has ever yet gone that far (*a*).

(*a*) See *Merrill* v. *McFarren*, 1 C. L. T. 133, and Leading Article, *Ibid.*, p. 217.—Ed.

It would seem that the same end may be attained by the appointment of a Receiver by way of equitable execution.

The Court has jurisdiction to appoint a Receiver by way of equitable execution, to receive any fund over which the judgment debtor has the control, or which he has the right to receive (*aa*).

The order appointing a Receiver may direct the defendant to deliver over to the Receiver all moneys and securities for money which are in the possession, custody, or control of the defendant, and may restrain the defendant from disposing thereof, dealing therewith, or parting with the possession thereof, otherwise than in compliance with the terms of the order (*b*).

Although, for the purpose of recovering land, the old writ of asssistance has been superseded by the writ of possession, the writ of assistance may still be issued for the purpose of recovering possession of and preserving chattels which have been ordered to be delivered to a Receiver (*c*).

Speaking of a Receiver, Burton, J.A., says:—"He is merely an officer or representative of the Court, and when once in possession, any interference with that possession is punishable as a contempt; and *when a party to the suit is in possession and wrongfully refuses to give up possession, a like remedy is open*" (*d*).

The power of appointment of a Receiver by way of equitable execution is the longest arm of the Court for the purpose of plucking pecuniary fruit from a judgment, and as such is a power which should be jealously guarded by the Court. The Judicature Act confers the power upon the Court wherever it is just or convenient. The Court will rarely set any limits to its jurisdiction to grant injunctions, but will from time to time, as new com-

(*aa*) *Per* Hawkins, J., in *The Queen* v. *Judge of County Court of Lincolnshire*, 20 Q. B. Div. at p. 171.

(*b*) See form of order in *Wyman* v. *Knight*, 39 Chy. D. at p. 167.

(*c*) *Wyman* v. *Knight*, 39 Chy. D. 165.

(*d*) *Dickey* v. *McCaul*, 14 App. R. at p. 171; and see *per* Osler, J.A., in same case at p. 183.

binations of fact arise, extend that remedy to meet the exigencies of the case; so also should the Court refuse to restrict its power to appoint receivers, and should always extend that remedy as a method of enforcing its own judgments whenever it is just or convenient.

Pensions, Official Incomes, Gratuities, etc.—The right of creditors to have a Receiver appointed to receive pensions, official incomes, and gratuities payable to a judgment debtor, has recently been much discussed in *Ex p. Webber* (*e*), *Lucas* v. *Harris* (*f*) and *Crowe* v. *Price* (*g*).

To what extent must a Creditor pursue his Common Law Remedy?—Before the passing of the Judicature Act it was necessary that a judgment creditor, who sought to reach his debtor's equitable interest in freehold estate by means of a bill in equity, should first attempt to enforce his judgment by common law process (*h*), but since the passing of the Judicature Act this is no longer necessary (*i*).

Dealing with this subject Wills, J., says:—"It is true that in the cases cited and in those referred to in the judgments in those cases, the reason why equitable execution was resorted to was that there was a legal impediment in the way of legal execution which rendered legal execution impossible, whilst in the present case it only renders it

(*e*) 18 Q. B. D. 111.

(*f*) 18 Q. B. D. 127.

(*g*) 22 Q. B. D. 429. See also the following cases:—Emoluments of the office of a Master Forester of a Royal Forest exigible, *Blanchard* v. *Cawthorne*, 4 Sim. 566; *Quære* as to the annual allowance paid to the Assistant Parliamentary Counsel to the Lords of the Treasury, *Cooper* v. *Reilly*, 1 Russ. & Myl. 560; military prize money exigible, *Alexander* v. *Duke of Wellington*, 2 Russ. & Myl. 35, and *Stevens* v. *Bagwell*, 15 Ves. 139, 152; Emoluments of a fellow of a college exigible, *Feistel* v. *King's College* (*Cambridge*), 10 Beav. 491; Revenues of lands to which a Canon was entitled for future duties to be performed exigible, *Grenfell* v. *Windsor*, 2 Beav. 544; *Quære*, as to the profits of the office of Clerk of the Peace, that being an office which may be executed by deputy, *Palmer* v. *Vaughan*, 3 Swanst. 173; Salaries of public officers, whose duties cannot be performed by deputy, such as judges, not exigible, *per* Lord Kenyon in *Flarty* v. *Odlum*, 3 Term Rep. 682-3; *Semble*, that the emoluments of a public officer such as a Registrar, whose income is derived from fees paid by the public, and against whom persons resorting to his office have a right of action for malfeasance are not exigible, *Hill* v. *Paul*, 8 Clark & Fin. at p. 306-7. See the subject discussed in 2 Story's Eq., sections 1040 *d*, 1040 *e*, and 1040 *f*.

(*h*) *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407.

(*i*) *Ex parte Evans*, 13 Chy. D. 252.

highly inconvenient. We cannot think that this circumstance can make the execution of less effect in the one case than in the other; and we are glad to be able to adopt a view which is free from the anomaly of making the order of the Court, by which the payment of a debt is enforced, of less avail because it is derived from the equitable jurisdiction of the Court than it would have been had it been derived from the jurisdiction at Common Law" (*j*).

Cotton, L.J., deals with the same subject as follows:— "The Court of Equity always acted on the principle that it would never grant a Receiver where the party applying for the Receiver had a legal right to the possession. An equitable mortgagee could get a Receiver, but a legal mortgagee never did get a Receiver until the passing of the Judicature Act. . . . . Since the passing of that Act it has been a usual practice for the Chancery Division to grant a Receiver at the instance of a legal mortgagee just as it formerly did at the instance of an equitable mortgagee. Because, although a legal mortgagee has power to take possession, and can do so without the assistance of a Court of Equity, yet there are obvious conveniences in granting a Receiver, so as to prevent a mortgagee from being in the very unpleasant position of a mortgagee in possession; and that has been constantly done. What the Court of Chancery did up to the time of the Judicature Act was that, when there was difficulty in the way of a judgment creditor getting possession by process of law, and, after he had tried to get possession by legal process, if he failed, then the Court interposed by granting a Receiver, which was then considered and was in fact the proper course to adopt. But in my opinion as this section enables the Court of Equity to depart from its former practice and to grant a Receiver, not only where there is no power to take possession at law, but where there is power to interfere, if it is just or convenient that an order for a Receiver shall be made, then, in my opinion, if it was just or convenient, the Court in this case had power to grant a Receiver,

(j) *Re Pope*, 17 Q. B. D. at p. 746.

though undoubtedly the judgment creditor could by elegit have got possession. But if he had got possession he would have done so subject to being interfered with by the prior mortgage [mortgagee ?] and that would have thrown great difficulty in the way of his working out his possession by elegit, and the interest he could get by elegit" (*k*).

Boyd, C., deals with the same matter as follows:—"It was contended that the order should not be made in this case because the plaintiff was not without remedy, as he could sell the equity of redemption under his execution; but that contention is answered by the judgment of Cotton, L. J., in *Re Pope*, 17 Q. B. D. 749, which shows that though other and ordinary remedies by way of execution are open, yet the Court has power to award equitable execution in any and every case where it is just or convenient so to do. *The question is one not of jurisdiction but of discretion*, and if the Court sees that any good end will be served by appointing a Receiver it will so order" (*l*).

"Where there is no impediment shown in the particular case to the realization of the judgment by the ordinary mode of execution at law, it is not shown to be just or convenient to appoint a Receiver and to substitute for the ordinary practice of execution by *Fi. Fa.* another practice, viz., the appointment of a Receiver, which, to be effectual, must be followed by a further order for sale of the goods. Then with regard to the debts due to the judgment debtor's estate; in the absence of any special difficulty in the particular case, the judgment creditors could have recourse to the known practice by way of attachment of debts. It is not necessary to decide whether the terms of the section might not be applicable in cases where any special difficulty existed, as for instance if it were impossible to find out what the debts due to the judgment debtor were by reason of concealment on the part of the judgment debtor, or some such matter" (*m*).

(*k*) *Re Pope*, 17 Q. B. D. at p. 749-50. See also *Coney* v. *Bennett*, 29 Chy. D. 993.

(*l*) *Kirk* v. *Burgess*, 15 O. R. at p. 610.

(*m*) *Per* Lord Esher, in *Manchester, etc., Banking Co.* v. *Parkinson*, 22 Q. B. D. at p. 175-6. See also *Trust & Loan Co.* v. *Gorsline*, 12 P. R. 654.

Receiver must obtain leave to bring action, etc.—The proper course for a Receiver is to obtain the sanction of the Court before bringing an action, or making a distress, or taking any other important step in the exercise of his functions. The necessity for a Receiver obtaining the sanction of the Court before commencing actions is by reason of a rule of practice acted upon by the Court for the protection of the estate, and where costs have been incurred by him without such sanction, he will not usually be allowed the said costs out of the estate; but where such action on his part has been beneficial to the estate he may be allowed such costs, and in no case can the unsuccessful debtor, who has resisted the Receiver's claim, object to pay the Receiver's costs on the ground that the Receiver had not before action obtained authority from the Court to bring the action (*n*).

The proper course for a Receiver who desires directions from the Court as to the conduct of proceedings, is to apply to the person who has the conduct of the cause to make a motion for such directions, and it is not proper for the Receiver to make such application unless the person having the conduct of the cause refuses to do so (*o*).

It was at one time the practice that under no circumstances could a Receiver originate any proceedings, but the rule now is that when a Receiver finds himself in circumstances of difficulty he ought in the first instance to apply to the person having the conduct of proceedings to relieve him therefrom, and upon that person neglecting to apply, the Receiver is then justified in making the necessary application to the Court himself (*p*).

Receiver cannot bring action in his own name.—"The receiver is the proper person to collect and get in the outstanding debts. Payment to him is a proper discharge of the debt, and where there is no dispute he alone should act in the premises: *Wood* v. *Hutchins*, 2 Beav. 294; *Wickens* v. *Townsend*, 1 R. & M. 361. But if litigation is needed to recover the alleged debt, it must be prosecuted in the name

(*n*) *Re Neill, Dickey* v. *Neill*, 9 P. R. 176.

(*o*) *Third National Bank* v. *Queen City Refining Co.*, 20 Can. L. J. 151.

(*p*) *Parker* v. *Dunn*, 8 Beav. 497. See also *Ireland* v. *Eade*, 7 Beav. 55.

of the person having title to recover at law. The Receiver is no more than an officer of the Court, who becomes custodian of the assets when received, and has no right to sue in his own name for a debt. How can that right be conferred upon him, by an order such as the present, authorizing him to sue in his own name? The usual practice is, in proper cases, to direct the action to be brought in the name of the creditors: *Dacie* v. *John*, McClel. 575. If there is no person in whose name the action can be brought, it may be that there would be jurisdiction to direct the action to be in the name of the Receiver, as was suggested by Jessel, M. R., in *Hills* v. *Reeves*, 31 W. R. 209, and as appears to be also indicated by the Irish M. R. in *Acheson* v. *Hodges*, 3 Ir. Eq. R. 522. But apart from special circumstances, I find no authority for giving permission to the Receiver to sue in his own name in respect of a right of action which is vested in another" (*q*).

"The order appointing a Receiver does not transfer the ownership in the property, over which he is appointed Receiver, to him. In the case of leasehold property it is not as owner of the reversion that a Receiver exercises the right of distress; the order appointing him Receiver directs the tenants to attorn to him, and upon attornment it is held that the relationship of landlord and tenant is created by estoppel between him and the tenants, in virtue of which he distrains" (*r*).

If tenants have attorned to the Receiver, he may be authorized by the Court to distrain for rent in his own name, but if they have not attorned he can only be authorized to distrain in the name of the person who has the legal estate in the reversion (*s*).

Rights of Third Persons as against Receiver.—As a general rule a person who is not a party to an action is not entitled to apply by motion for payment of money to him by a

(*q*) *Per* Boyd, C., in *McGuin* v. *Fretts*, 13 O. R. at p. 702-3. See also *Dickey* v. *McCaul*, 14 App. R. 166; and *Stuart* v. *Grough*, 14 O. R. 255.

(*r*) *Per* Gwynne, J., in *Campbell* v. *Lepan*, 19 C. P. at. p. 34.

(*s*) See *Stuart* v. *Grough*, 14 O. R. at p. 258.

Receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the Receiver's hands (*t*).

Speaking of the effect of a receiving order, Fry, J., says: "Such an order gives no right to every person to whom the Receiver may owe money for expenses, still less to every person to whom the [execution debtor] may owe money for expenses, to come and ask for payment of his claim *brevi manu* out of the funds in Court, the produce of the profits received by the Receiver. It is evident that if such a construction could be given to the order, it would be somewhat extraordinary that liberty should be given to the parties to the action to apply as to any payments to be made by the Receiver, because then every person but the parties to the action would be entitled to apply without having liberty to apply given to him. * * * * The parties have liberty to apply in order that the Receiver, if he is not doing his duty, may be called to account by any of them, but third persons have no right to be judges of the directions given to the Receiver" (*u*).

A person who is prejudiced by the conduct of a Receiver appointed in an action by way of equitable execution, ought not, without leave of the Court to commence a fresh action to restrain the proceedings of the Receiver, even though the act complained of was beyond the scope of the Receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the Receiver was appointed (*v*).

Does a Creditor by getting a Receiver thereby acquire Priority.—In England, where the appointment of a Receiver by way of equitable execution usually gives priority to the creditor who procures such appointment to be made, it is a common thing to appoint several successive Receivers for the purpose of receiving the income from the same fund for the benefit of the several creditors who procure

(*t*) *Brocklebank* v. *East London Ry. Co.*, 12 Chy. D. 839.

(*u*) *Brocklebank* v. *East London Ry. Co.*, 12 Chy. D. at p. 843.

(*v*) *Searle* v. *Choat*, 25 Chy. D. 723.

the appointment to be made, and in such case the Receivers take rank in the order of their appointment, and each one is appointed without prejudice to the rights of those previously appointed. But in a case where, by reason of the provisions of the Railway Act, no such priority could be acquired, and the appointment of a Receiver was for the benefit of all creditors who would be entitled to apply for the appointment of a Receiver, the Court of Appeal held that no more than one Receiver should be appointed because no benefit would accrue from any subsequent appointment to the creditor who procured the appointment to be made (*w*).

It would therefore seem by reason of the provisions of the Creditors Relief Act, and the extension thereof effected by the decision in *Dawson* v. *Moffatt* (*x*), that after a Receiver has been appointed in this Province by way of equitable execution, no other Receiver will be appointed during the continuance of the appointment of the first Receiver. The English Court of Appeal in the case of the *Mersey Ry. Co.* (*y*), found considerable difficulty in determining when a Receiver appointed under the provisions of the English Railway Act should be discharged, and the Court was of the opinion that he should not be discharged until all of the judgment creditors, who could obtain a receivership order under the provisions of the Act, had been paid off, including therein all persons who became such judgment creditors during the continuance of the receivership. Under such a rule there would appear to be great difficulty in effecting a proper distribution of the funds realized under the receivership, and whatever difficulty may be found to exist in England, either as to the continuance of the receivership or the distribution of the assets, will probably be found to exist in this Province in an aggravated form by reason of the peculiar provisions of our Creditors Relief Act.

(*w*) *Re Mersey Ry. Co.*, 37 Chy. D. 610.

(*x*) 11 O. R. 484.

(*y*) 37 Chy. D. 610.

It is difficult, nay, impossible to indicate at present with any reasonable degree of accuracy, the limits of the rights and obligations between a Receiver and the creditor at whose instance he is appointed, on the one hand, and the execution creditors and general creditors of the common debtor, on the other hand, until the question has been further dealt with, either by the legislative Solons who grind out our yearly grist of statutes, or by the Courts in their judicial exercise of legislative functions, but the prospects appear to be favourable to the lazy creditor, who, taking no trouble and assuming no responsibility, complacently plays the part of lion, while the *role* of jackal is filled by the active creditor, who is made to divide the fruit of his vigilance with the more favoured pet of the Legislature and the Judges. Inverted equity appears to be in vogue in the Chancery Division and *Dormientibus non vigilantibus judices subveniunt* must be deemed to have there replaced the formerly time honoured maxim (*z*).

The reason for the rule adopted by the Chancery Division is given by the Chancellor in *Dawson* v. *Moffat* as follows: "A practice has obtained for many years in the Court of Chancery in this Province of granting stop orders in favour of execution creditors against funds in Court. . . . . This practice is justified by such cases as *Courtoy* v. *Vincent*, 15 Beav. 486, and may indeed be rested upon the inherent jurisdiction of the Court to award equitable execution in respect of assets not otherwise available for the satisfaction of creditors. . . . In the case of judgment or execution creditors, priority of payment out of the fund arrested was determined by the order of time in which the stop orders were obtained. In popular parlance it was 'first come first served.' In England that practice was adopted in analogy to the like order of priority in cases of a trust fund, in respect of which incumbrancers gave notice

(*z*) See *Sylvester M'f. Co.* v. *McEachon*, 9 Occ. N. 138, and note thereto, from which it appears that the Judges of the Chancery Division are prepared to carry the principle of *Dawson* v. *Moffatt* one step further than it was carried in that case, while two at least of the Judges of the Queen's Bench Division, not having any paternal affection for *Dawson* v. *Moffatt*, prefer to let the revolution in question be wrought by the Legislature if wrought at all.

to the trustees of their charge: *Re Holmes*, 29 Chy. D. 786. The reward of first payment was accorded to the most diligent, if there was nothing else to regulate the priorities: *Thomas* v. *Cross*, 2 Dr. & Sm. 423. But it would be more satisfactory to account for that priority in this Province on the ground that such was the order of payment of executions at law, and equity aiding the law conformed to the legal order of administering the funds. . . . But as this principle of priority of and amongst execution creditors has been abolished by the Creditors' Relief Act of 1880, it is no longer reasonable or seemly to preserve the analogous system of priorities in awarding equitable execution as the outcome of stop orders. Without seeking to employ in practice all the machinery of that Act, it is enough to recognise the leading principle of equality in dealing with funds in Court covered by a succession of these orders" (*a*).

Not only are all execution creditors entitled to rank *pari passu* upon the funds of their debtor in Court, but upon the analogy of the Creditors Relief Act, so also are the simple contract creditors of the common debtor (*b*).

The principle of equality in distribution of assets is also made applicable to moneys recovered by a creditor under garnishing process (*c*).

The learned Chancellor states in *Dawson* v. *Moffatt* that in England the priority of stop orders upon a fund in Court was regulated by analogy to the order of priority in cases of a trust fund, in respect of which incumbrancers gave notice to the trustees of their charge, and he then goes on to say that it would be more satisfactory to account for that priority in this Province on the ground that such was the order of payment of executions at law, and equity aid-

(*a*) *Per* Boyd, C., in *Dawson* v. *Moffatt*, 11 O. R. at p. 485-6, the judgment in which case was affirmed by the Divisional Court. See also *Reid* v. *Gowans*, 13 App. R. at pp. 506 and 518, and 49 V. c. 16, s. 37, which is now consolidated in R. S. O. c. 65, s. 24. The Court of Appeal was divided as to the application of this or a somewhat similar principle in *Reid* v. *Gowans*, *supra*; but the industrious Legislature came to the rescue with 51 V. c. 11, s. 1.

(*b*) *Dawson* v. *Moffatt*, 11 O. R. at pp. 488 and 490.

(*c*) R. S. O. c. 65, s. 37.

ing the law conformed to the legal order of administering the fund. It does not appear, however, why the practice as to stop orders should have had one origin in England and another origin in this Province, especially in view of the fact that the reason for the English origin is equally as applicable to this Province as to England, and the alleged reason for the origin of the practice or doctrine in this Province would have equally accounted for its origin in England, if it had been sufficient to account for its origin anywhere.

The whole groundwork of the judgment of the Chancellor in *Dawson* v. *Moffatt* is based upon this alleged domestic origin of the rule as to the priority of stop orders in this Province. The learned Chancellor says:—"In the case of judgment or execution creditors priority of payment out of the fund arrested was determined by the order of time in which the stop orders were obtained. In popular parlance it was 'first come first served.' . . . . He who first took that step was accorded the precedence, as in the case of the creditor who first placed his writ to levy in the hands of the sheriff." Mr. Justice Ferguson however, on the other hand in the same case, says:—"After a perusal of a very large number of the English cases in addition to those that were mentioned in the argument, as well as the cases in our own Courts, I have arrived at the conclusion that when an execution creditor, basing his application upon the fact that he is an execution creditor, applies for and obtains a stop order, what he is granted is in the nature of aid in the execution of the writ, and that he does not by obtaining the order gain any new priority over other execution creditors." The result arrived at by this learned judge is a logical result and the only doubt that arises is as to the correctness of his premises.

If for argument's sake it be admitted that this case was correctly decided in so far as concerns the distribution of moneys in Court upon which stop orders have been obtained, yet it does not follow that before the Creditors Relief Act and *Dawson* v. *Moffatt* had caused their light to shine upon us, a puisne execution creditor was not able in this Pro-

vince to get a Receiver by way of equitable execution and to thereby acquire priority over a prior common law execution creditor. It therefore cannot be said that the priority of a creditor having equitable execution depended upon the priority of his common law execution, and that when the latter priority is taken away the former priority must vanish along with it.

In strictness, therefore, the decision in *Dawson* v. *Moffatt* does not cover the question as to a creditor's right to priority upon the appointment of a Receiver by way of equitable execution; but there appears to be a sort of notion abroad that by compelling the venturesome and diligent creditor in all cases to share the fruits of his energy with the timid and slothful creditors, effect will be given to the spirit of the Creditors Relief Act. This idea appears to have been present in the mind of Mr. Justice Proudfoot when delivering his judgment in *Dawson* v. *Moffatt*, in which, speaking of the application of the Creditors Relief Act by analogy, he says:—"I do not see that it can make any difference in the right of the execution creditor that the fund is in Court and cannot be directly seized by the sheriff. In both cases the funds belong to the debtor and may be made liable to satisfy the creditor. If there be any rule of the Court that would conflict with this right to equality established by the statute the rule must give away, whether it is founded on analogy to the former rule at law or on priority regulated by notice to trustees."

The question then arises, has a Statute got a spirit which the Courts can recognise to the extent of enabling them to enlarge and extend the operation of the Statute and make it include cases not contemplated by the Legislature, for the purpose of giving effect to some presumed spirit or general tendency of the Statute in question? We can understand and admire the manner in which the spirit of the common law has been followed and acted upon so as to mould and develop that law and make it applicable to the ever varying circumstances of successive centuries; but a Statute is a written code devoid of life and having no power of growth, it means just what it says, and if it does not

say just what it was intended to mean, then the Legislature should speak again. It is true that the spirit or intent of a Statute may be looked to for the purpose of construing that Statute, but the question with which we are dealing is not one involving any question of judicial construction, but is a seeking after the limitations which are to be put upon judicial legislation.

Lord Brougham touches upon the question as follows:—"We may look at the spirit as well as the letter of the enactment. But here, in order to uphold the decision, we are called upon to go a great deal further and to look at the presumed intention of the Legislature. Because the Legislature has confined itself to one specific mode of accomplishing its purpose, of carrying into effect the intention with which it made the enactment, we are therefore to add enactments which the Legislature never made, provisions beyond what the Legislature has made for the purpose of completing that which it left incomplete, for the purpose of supplying what it left defective. I am not at all prepared to adopt any such general principle of construction" (*d*).

The Supreme Court of the United States deals as follows with the rights acquired by a judgment creditor who issues common law execution and then obtains equitable execution:—"The ground of the jurisdiction, therefore, is, not that of a lien or charge arising by virtue of the judgment itself, but of an equity to enforce satisfaction of the judgment by means of an equitable execution. And this it effects by a sale of the debtor's interest, subject to prior incumbrances, or according to the circumstances, of the whole estate, for distribution of the proceeds of sale among all the incumbrancers, according to the order in which they may be entitled to participate. It is to be noted therefore that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien

(*d*) *Philpott* v. *St. George's Hospital*, 6 H. L. C. at p. 363.

arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, dates from the filing of the bill. 'The creditor,' says Chancellor Walworth, in *Edmeston* v. *Lyde* (1 Paige Ch. 637-40), 'whose legal diligence has pursued the property into this Court is entitled to a preference as the reward of his vigilance'; and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the spoils thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit.' As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date" (*e*).

It is to be hoped that when a case of sufficient importance arises, the parties interested will carry it if necessary to the Supreme Court of Canada, and thus settle what are the rights of a creditor who has obtained equitable execution, when a question of priority arises as between himself and other creditors. Of course the venturesome litigant would have to assume the risk of being bowled out by the timely passage of one of those favourite Statutes of our Legislature declaring that in this Province "the law is and always has been" etc., etc.

A. H. MARSH.

(*e*) *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S. 715 *et seq.*

EDITORIAL REVIEW.

Payment of Customer's Note by Bank.

A correspondent sends us some notes of an important case decided in the Supreme Court of Tennessee, *Grissom* v. *Commercial National Bank*, 3 Lawy. Rep. An. 273. The point decided is that a bank has no authority to pay a third party a note made by a depositor payable at its place of business, merely because he has funds there sufficient for that purpose, in the absence of any course of dealing or previous instructions so to apply the deposits. In the third edition of *Daniel* on Negotiable Instruments, the view was taken that when a note is made payable at a particular bank, the bank was bound to pay it without consulting its customer, though in previous editions the contrary view was expressed. In *Chalmers*, 2nd ed., 234, it is said that the acceptance of a bill payable at the acceptor's bank is an authority to the bank to pay it, but *quære* whether the banker is bound to do so in the absence of special arrangements, citing *Rymer* v. *Laurie*, 18 L. J. Q. B. 218; *Robarts* v. *Tucker*, 16 Q. B. 579.

The following extracts are made from the American case by our correspondent:—"If we ingraft upon the law of this State, what is said to be the English rule, authorizing the bank to treat the paper made payable at its place of business as tantamount to a cheque, we should do so, not in part, as the American cases relied on do, but as a whole, and carry with it an obligation and duty upon the bank to pay, so that, upon failure to do so, it must be liable to an action for damages for injury to the credit of its customer. * * Without referring further to the cases cited in the text books, they may be classed as resting either on custom well established, or course of dealing between the parties thereto, or to paper owned and

held by the bank at maturity where the principle of set-off has been applied. * * Of course there is nothing to prevent any depositor from making such agreement with his bank as to the protection of his paper." After stating Mr. Daniel's proposition that the bank must pay if it has funds the judgment proceeds, "Now are we willing to go this far? Must we establish as the law of this State the several propositions above announced, each of kin, and logically dependent one upon the other? Surely not, unless compelled by the overwhelming weight of authority. * * * Is the liability of indorsers and sureties to depend upon the pleasure of the bank whether or not it will appropriate the deposits of the maker to the payment of his notes under the first and third propositions. * * If the bank should pay cheques drawn on the day of the maturity of a note of the maker in favour of itself or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter; and is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers, as to whether or not they have been thereby discharged—they perhaps, having given notice to the bank that unless deposits sufficient are held they will claim their discharge. * * * If the bank should, under such notice, deem it safer to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of the cheque unpaid? Is the maker of a note, where there has been a total failure of consideration, giving him a good defence to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward, and paid the note of the maker advancing the money therefor under the fifth proposition, authorizing the bank to treat the note made payable months before at its house equivalent to a cheque or request to pay? On the other hand, if the bank should fail to pay a note so made payable where there were sufficient deposits, whereby the note is protested, is the bank to become a defendant to a suit for damages for

injury to the credit and business of the maker, upon the authority of the sixth proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposit.

Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely."

The Law School.

The Law School at Osgoode Hall may now be treated as an established fact, and we may expect the school to be in full operation next autumn.

At a meeting of convocation held to appoint a principal (upon whom will devolve the duty of administering and governing the school, as well as lecturing) Mr. Justice Strong of the Supreme Court of Canada was elected. Shortly afterwards the learned Judge declined the proffered appointment.

At a subsequent meeting of convocation Mr. W. A. Reeve, Q.C., who has been for some years Lecturer on Criminal Law and Torts, was appointed Principal. It is understood that he will proceed with two of the Benchers to some of the American cities to endeavour to obtain information as to the working of Law Schools in those places. As the schools are all closed at this season, it is not anticipated that a large measure of success will attend the trip—in that respect at least.

The question of other Lecturers and the general scheme of the school is still an open one, and will not be settled until September when another meeting of convocation will take place. One brick at a time.

The Circuits.

The Committee of Judges and Barristers which some time ago agreed upon a scheme for reforming the circuits seems to have gone asleep. In the meantime the circuit lists have come out again with the same objectionable

features as heretofore. The fixing of the 9th September for sittings has the effect of cutting off from trial all actions in which the pleadings are not closed before vacation, as the rules prohibit the filing of pleadings in vacation, except by consent or upon order. If a jury case it must stand till the following spring, as the Judges of the Chancery Division do not try jury cases. We hope that the Committee will awake to their work and complete it.

Delivering Judgments.

While we have no doubt that the Judges possess a very earnest desire to accommodate the profession as far as they can consistently do so, we desire to point out what is rather a serious matter in the way of delivering judgments. Judgments are usually delivered on the last day before vacation. They are of no immediate practical use when they come so late. Judgment cannot be entered, costs cannot be taxed, money cannot be taken out of Court. In fact nothing can be done except by a dishonest debtor who has two months in which to arrange matters so as to defeat or hinder his creditors if so minded. If judgments were delivered a week, or even three days, before vacation it would be a vast convenience.

BOOK REVIEWS.

Digest of reported cases touching the Criminal Law of Canada; with references to the statutes and an Index. By THOMAS P. FORAN, M.A., B.C.L., (compiler of Foran's Code of Civil Procedure). Toronto: Carswell & Co., 1889.

Mr. Foran's Digest classifies under one head all the Canadian cases upon Offences. Other heads are Trial, Amendment of Indictment, and a great number of various subjects. All the cases on extradition form a head by themselves. In addition to this arrangement there is an index, reference to which will in a moment guide one to the proper heading for any class of cases desired. The arrangement in this respect is all that can be desired, and arrangement is the whole basis of a Digest. The value of the work lies in its forming a very ready reference book on criminal cases, and in giving all the Canadian cases reported.

The amendments and additions to the Public Statutes of Ontario, subsequent to the Revised Statutes, 1887, arranged in a form suitable for consolidation or reference, with an Index. By F. J. JOSEPH, of Osgoode Hall, Barrister-at-Law. Toronto: Rowsell & Hutchison, 1889.

The amendments to and alterations of our Statutes are so numerous that some arrangement of them is almost essential. Mr. Joseph has done the work for the many who need it by this publication. In the left hand column stand the chapters and sections of the Acts affected. Opposite are the amendments or alterations with the text of the alteration or amendment in full. The work has been printed on one side of the leaf only, so that, if desired, the amendment may be cut out and pasted into the Statutes.

In addition, we have here an index of all the public Statutes passed since the revision, which will be exceedingly useful. It is to be hoped that this will be continued from year to year.

Handy Book of the Dominion and Ontario Franchises, containing the Franchise Act (R. S. C. c. 5) and the Amending Act of 1889 (52 Vict. c. 6), and The Ontario Manhood Suffrage Acts, (51 Vict. c. 4, O., and 52 Vict. c. 5, O.) with Notes and References to the cases and annotations under the former Act. By THOMAS HODGINS, Q.C., Editor of Hodgins' Election Cases, Canadian Franchise Acts, and Manual on Voters' Lists. Toronto: Carswell & Co., 1889.

Mr. Hodgins' books on the Franchise are well known to the profession. This little book will be found useful in arranging the voters' lists. It includes, besides notes on the Acts, a table of qualifications for the Dominion, a glance at which shows who are qualified to vote.

The Municipal Manual, containing the Municipal, Assessment, Liquor License, and other Acts relating to municipal corporations, together with the amending Acts of 1888 and 1889, with notes of cases bearing thereon. By the Honourable ROBERT ALEXANDER HARRISON, D.C.L., late Chief Justice of Ontario. Fifth edition. By F. J. JOSEPH, Esq., of Osgoode Hall, Barrister-at-Law. Toronto: Rowsell & Hutchison, 1889.

Since the revision of the statutes all have been waiting for the issue of this work, which has been somewhat delayed. It now includes the amendments of 1888 and 1889, the former, as far as we can learn, introduced into the principal Act, the latter by itself, as most of the work must have been in press when the latter Act was passed. For ready reference and as a guide to more deliberate

work, this book is invaluable. The notes of our own case with cross references are indispensable. It is a feature o the Municipal Act that cognate subjects are scattered ove various Acts and various parts of the same Act, and one i never quite sure that he has all the law bearing on it. Th policy of striking out some of the paraphrases by the lat Chief Justice Harrison will probably not commend itse to all, but all know how diffuse the learned Judge was, an we might safely assert without investigation that some thing at least might safely have been dispensed with. As they ar dropped to make room for other notes, which as notes o decided cases are indispensable, this course may have bee necessary. It is, however, in our opinion a decided im provement to drop such references to American cases as it i possible to drop, and to refer to or quote Mr. Justice Dillon' work on the point, that learned gentleman having per mitted such quotations. Dillon's work is accessible to al the profession, but to own the American reports is out o the question. An excellent calendar and an exhaustiv index, the work of Mr. A. M. Dymond, are features of thi work.

Magistrates' Manual; or Handy Book, compiled from th Revised Criminal Law, Revised Statutes of Canada, an Revised Statutes of Ontario, 1887, with the several amend ments thereto. By J. T. Jones, Deputy Clerk of the Peace County of York. Toronto: Carswell & Co., 1889.

After giving the substance of the Criminal Procedur Act, the Act respecting summary convictions, and th legislation concerning appeals, the author gives an alpha betical arrangement of offences, with concise references t the statutes, and some paraphrases. The book also in cludes forms, and by reference in display type shows whe one magistrate can act and when two are necessary, etc.

REVIEW OF EXCHANGES.

Criminal Law Magazine.—November, 1887.

Abuses of the Right of Argument, by SEYMOUR D. THOMPSON. The trial judge has a wide discretion in controlling the argument of counsel, but counsel should duly object to abuses of the right by his opponent or he may waive his right to repair the injury done. The practice in reserving the right to move is detailed, and that of the Court in reviewing the case on such grounds. While counsel are allowed great latitude in drawing inferences from the evidence they must not misstate facts or comment on excluded testimony. It is said that in libel counsel may argue and cite law to the jury as they are judges of the law as well as fact in libel, but in other cases they must not.

Ibid.—January, 1888.

Can Capital Punishment be Longer Justified? by C. H. EATON, D. D. The writer in a well written article examines the following assumed propositions:—1. Capital punishment is commanded by God. 2. It is necessary to the protection of society. 3. It deters others from crime. His arguments are not convincing, and his statistics we have seen doubted, but he sums up as follows:—"Capital punishment is not commanded by God as a perpetual institution. It was abrogated by Christ. It is not necessary to the protection of society, as practical experiments, continued through many years at widely separated points and under a great variety of circumstances, have conclusively shown. Imprisonment for life and the change in conditions and power of pardons would give actual protection. It does not deter from crime, because thoroughly verified statistics show that under its administration crime increases, and decreases when it is abolished. It is inexpedient, because it is not absolutely necessary, because of the uncertainty of its infliction, because it disregards the society of human life and excites the very passions it would allay, and because of the many innocent who suffer through the fallibility of human judgment."

Special Verdicts in Criminal Cases. Though special verdicts in criminal cases are not often found, it is said the jury may find one in any case. It must state the facts and not the evidence of the facts, and must state essential facts positively, though it need not refer to matters not proven or matters not necessary to be negatived.

Ibid.—March, 1888.

Cautionary Instructions in Criminal Cases, by SEYMOUR D THOMPSON. A very exhaustive article on charging juries.

Ibid.—May, 1888.

Railway Crimes and Misdemeanors, by ADELBERT HAMILTO The subject is based largely upon statute law, and is treated under th following heads:—Police power of Railway Companies; Organizatio stock, voting and dividends; Construction and equipment; Depot stations, and freight houses; Employees, duties and qualifications, pen enactments respecting; Operation, crimes and misdemeanors connecte with. Speaking of the punishment of directors, the learned write points out the injustice of visiting the superiors with punishment whe they have employed the best servants and provided the best appliance When an operator by negligence dispatches a train and causes loss o life, he and not the directors should be held responsible. The liability however, must depend on the wording of particular statutes.

Ibid.—July, 1888.

Disorderly Houses, by SOLON S. WILSON. A disorderly house i one in which acts punishable by a fine are habitually carried on, an the nuisance must be proved to be ordinary and usual in the house. I need not be noisy to be disorderly. The reputation must be proved b facts not fame. A lessor of a house for disorderly purposes may b indicted if he knowingly permits it to be used as such.

Law Journal.—16th March, 1889.

Club or Public-house ? The case of *Newell* v. *Hemingway*, 58 L J. M. C. 46, is discussed and disapproved, in which it was held that club registered as a limited company with no entrance fee or annua subscription except a shilling payable on joining, could lawfully se liquor to its members without a license.

Ibid.—30th March, 1889.

Is Clay a Mineral ? A discussion of the judgment in a case o *Lord Provost, etc., of Glasgow*, v. *Faric*, 58 L. J. P. C. 33, in which th question arose whether a waterworks company could claim a seam o clay, or whether it was reserved to the owner as a mineral.

THE

CANADIAN LAW TIMES.

AUGUST, 1889.

ONTARIO LEGISLATION, 1889.

THE work of our Legislature is to a large extent unknown to us until the official publication of the statutes, which usually reaches us at a considerable period after the assent is given to the Bills. But little publicity is given to the contents of the Bills brought before the House, as those matters which are of most interest to the profession are of least interest to the public, while those matters which most interest the general public have but little interest for the student of our laws. Hence the debates which are reported in the newspapers, as a rule, do not give the details of the alteration of our statutes which are from year to year passed. It is true that the *Ontario Gazette* is published at an early period after the close of the session; but no particular advantage is offered to any one except the publisher by this course. When we say no advantage is offered, we must be understood as meaning, that as long as it is the policy of the responsible department to withhold the official publication, it is an advantage; but the policy of withholding the statutes and publishing the *Gazette* is a disadvantage. Again the *Gazette* does not contain all the statutes, and it may be necessary for the practitioner occasionally to make a search on his own account for statutes which will not be published between the assent of the Lieutenant-Governor and the appearance of the official publication. We have before referred to this

matter, and at a recent meeting of the Trustees of the County of York Law Association a resolution was passed to request the Attorney-General to remedy this.

The first Act of the last session which claims our attention is chapter 7, which relates to the conveyances of lands granted under the Free Grants and Homesteads Act. By the latter Act, cap. 25 of the Revised Statutes, the wife of a locatee is given certain controlling interests in the land. By sec. 17, no alienation (otherwise than by devise) and no mortgage or pledge of the land, or of any right or interest therein by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife of the locatee, shall be valid or of any effect unless the same be by deed in which the locatee's wife is one of the grantors with her husband, and executes the deed. By sec. 19, the land, upon the death of the locatee devolves upon the widow during her widowhood, unless she elects to take her dower in the land. The Act under review now provides for the conveyance of such lands without the wife's concurrence in certain cases, and includes the Rainy River Free Grants and Homestead Act (R. S. O. cap. 26) which makes applicable to that district the terms of the general Act with some exceptions. By sec. 1, where the wife of the locatee is a lunatic or of unsound mind, and confined as such in an asylum, or has been living apart from her husband for two years under such circumstances as by law disentitle her to alimony, he may at any time apply to a Judge of the High Court, who, if he approves, may by order in a summary way, upon such evidence as seems meet and either *ex parte* or upon notice dispense with the concurrence of the wife for the purpose of conveying or mortgaging the land. By the second section, where the wife of a locatee has not been heard of for seven years under such circumstances as raise a legal presumption of death, the locatee may similarly apply to a Judge of the High Court who may *ex parte* in a summary way, upon such evidence as seems meet, dispense with the concurrence of the wife for the purpose of conveying or mortgaging the lands. By the third section the order may

contain conditions or directions for the benefit of the children of the locatee if the Judge sees fit, and subject thereto the order shall operate to bar the right, title and interest of the wife in and to the land, as if she being alive (*sic*) and of sound mind had been one of the grantors with her husband and had duly executed the deed.

The Act is similar in some respects to that which permits a Judge to order the conveyance of land by a wife apart from her husband when the latter has an interest therein. As a matter of detail it is worth noticing that in the latter Act the wife is permitted to convey the estate of her husband, while in the Act under review it is the order of the Judge which bars the right of the wife. It is also worthy of notice that nothing is said in the Act as to the effect of such an order as a release of dower. It has been decided that in order to bar dower the wife must be a party to the instrument by executing it at least, and that it must contain a bar of dower. It has also been determined that where the wife joins as a granting party and executes the deed it will bar her dower. Under the Free Grants legislation however she has two interests—a controlling interest over her husband's conveyance with a right of succession on his death, and the right to dower in lieu thereof if she so elect. It is quite possible therefore that in case of a mortgaged estate she might elect after her husband's death to become dowress instead of succeeding to the mortgaged land. In such a case it might be a matter for determination whether the order had barred her dower or only validated her husband's conveyance of his estate. So, where the husband, in the wife's absence or while she is lunatic, conveys under an order which does not specifically refer to dower, the wife might after the husband's death set up a claim to dower. While such a complication might be avoided by a conveyance containing a bar of dower in which the wife actually joins to bar dower as well as to grant, it cannot be dealt with where an order for a conveyance is made as no authority is given in the Act for a bar of dower. Although not expressly provided for it is presumed that the order may follow the forms provided in the Act respect-

ing conveyances by married women and may be registered. *Quære*, can a general order be made for future conveyances, or only for the purpose of carrying out a specific sale?

Finally, what is to be deduced from the third section which allows provision to be made for the children in the order? A conveyance of the whole estate would not be complete if anything were reserved out of the land for the children of the locatee. Such a case is not likely to arise, for one can hardly imagine a purchaser taking a conveyance of land subject to rights of his vendor's children therein. Again, was it intended by this clause to interfere with the wife's right of succession during widowhood which is given her by the original Act? That such an order might be made in case of a mortgage of land is not only possible but highly probable. The Judge might, as the price of allowing a mortgage, stipulate for a provision for the children in case of the death of the locatee. But in such a case, again, it must be asked, is the widow's right of succession to be interfered with merely because being absent or lunatic she cannot join in the conveyance? And it would be as difficult to give the children an interest in the purchase money as in the land.

Chapter 10 is entitled "an Act respecting the administration of justice in certain cases," and contains various enactments of different kinds. The first section contains the title, and the second is intended to enforce in Ontario the Act commonly known as the Thellusson Act, respecting accumulations of investments under wills. The Act was passed in England in the 39 and 40 Geo. III, and as this was after the Canadian Act 32 Geo. III cap. 1, which introduced the English law at that date, Mr. Leith concludes that it was not in force in Ontario (*a*). And so it was recently held in *Harrison* v. *Spencer* (*b*). Then comes this statute whose chief peculiarity is not that it makes applicable the Thellusson Act, but that it declares it "to

(*a*) Leith & Sm., p. 403.
(*b*) 15 Ont. R. 692.

have been in force, and to be in force in Ontario." The section is declared not to affect any action or other proceeding which has been heretofore brought or is now pending. The intention was probably not to affect *Harrison* v. *Spencer* (because it was a right decision) or other pending actions, but the result really is to declare that *Harrison* v. *Spencer* is a wrong decision, and that all other pending actions and proceedings brought in similar cases shall be decided in contradiction to the very terms of the present enactment. If the Thelluson Act always has been in force, why not have it enforced? If not, why make this declaration retrospective? When decisions of the Court have stood unquestioned for a long time, and it has been found that they were wrong, remedial legislation may most prudently take the course of a confirmation of such decisions and a declaration that the law always has been so. But where the Courts have been deciding correctly, it is a unique exercise of legislative power to in effect declare that they were wrong, to alter the law, but insist that their decisions shall stand. The phrasing in which the section is couched is also objectionable. A statute passed by the Imperial Parliament after self-governing powers are given to a colony does not affect the colony unless it is expressly named, or is applicable by necessary intendment. Under this classification, the Thellusson Act was evidently not intended to fall. There is no express mention of Canada in the Act, and it deals not with a matter of universal application to the Empire, but with one of property and civil rights upon which we already had been given power to legislate for ourselves. To have declared that the provisions of this Act should henceforth be applicable to matters in Ontario of the kind affected by it would have been intelligible and sufficient; but to enact that it has always been in force and now is in force in Ontario is to deny what the Imperial Parliament asserted, namely, that it was locally applicable to the United Kingdom only—a process which would be effective enough if only efficacious when adopted by a subordinate legislature.

Section 5 of the Act under review makes an amendment in clause 95 of The Judicature Act, which refers to the Courts of Assize, etc. The amendment substitutes the word "sittings" for the old phrase. It is also designed to avoid the appearance of giving authority in criminal procedure which the section as it previously stood might be said to do.

Section 7 enables a debtor to pay the sheriff voluntarily part of the amount of an execution without having it applied to other claims provided that there is no other execution in the sheriff's hands. Why he should not so pay the whole of a claim has not been revealed; and the practice of paying the solicitor for the creditor personally, allowing him to withdraw the writ, will still continue where it is desired to pay only that claim.

This chapter concludes with a clause authorizing the Judges to make rules of court with respect to District Courts of the Judicial Districts.

Chapter 11 which by its title professes to make certain amendments in the law relating to procedure, in our estimation goes very much further in the first section and confers jurisdiction where it did not dwell before. The first section gives power to the Judges of the County Courts in their capacity of Local Judges of the High Court, to grant interlocutory injunctions in certain cases. The section of the Judicature Act (157), which gives them jurisdiction in High Court Cases, expressly treats the matter as one of jurisdiction and not of procedure. The objection to an extension of jurisdiction that was urged to the Quebec Magistrates' Courts Act cannot be urged to this Act, because the Local Judges have been expressly commissioned as Local Judges of the High Court. The objection, if any there be, is to the decentralization of business. It is true that Toronto practitioners are open to the charge of selfishness in protesting against the decentralization of business, but we have the assurance of competent authorities that Ontario has a stronger Bench and Bar with its system of concentration than Quebec has with its decentralized system. It is not disputed, but, on the contrary, asserted by many

of the County Court Judges that it would tend greatly to strengthen the County Court Bench if Courts of Review composed of several Judges, were formed for the purpose of hearing motions for new trials and against verdicts and judgments. It is also beyond dispute that the views and practice of the Local Judges differ materially from each other. This was exemplified in a striking manner after the passing of the Judicature Act in the way in which motions for judgments were dealt with in Division Court matters. Although not acting as High Court Judges in such cases the individual opinions and leanings were none the less brought out, and so well supported were they on each side that there seemed to be no hope of reconciliation until a statute put an end to the controversy.

Under the clause now in review the Local Judges are given jurisdiction to grant interlocutory injunctions under section 53, sub-section 8, of the Judicature Act in cases of emergency. The section of the Judicature Act just quoted gives authority to the court amongst other cases to grant interlocutory injunctions to prevent trespass or waste "whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if not in possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable." Now that the Local Judges have thus got some jurisdiction in matters of title to land, we may point to this statute as a distinct departure from that policy which has always excepted from the jurisdiction of the County Court all actions in which the title to land is brought in question. Having established that a Local Judge may entertain such matters for the purpose of injunction—probably an instance of the highest exercise of jurisdiction by a Court—it will be easy to argue that as a County Court Judge he is quite as competent to act in his own Court respecting matters of title. If the policy of the County Court Act is not to be departed from the step is one which it will be difficult to retrace.

The jurisdiction, too, is given only in cases of emergency on proof, to the satisfaction of the Judge that the delay required for an application to the High Court is likely to involve a failure of justice. It may be said that every case in which an interlocutory injunction is granted is a case of emergency, but if not, there is sure to be a great variety of opinion as to what are cases of emergency. The Judge granting the injunction is sole judge of this. For, on application to the High Court to continue the injunction, a Judge would not refuse to do so in a case proper for an injunction even though he might consider that it was not such a case of emergency as to have justified the Local Judge in taking jurisdiction. In addition to the emergency, the Judge must also be satisfied that the delay necessary to apply to the High Court would be likely to involve a failure of justice. This is a much stronger expression than the former, and seems to limit applications to a very narrow range. If the Legislature had said that the Local Judge might act where the delay involved in applying to the High Court would be injurious, very many cases could be made out for the exercise of the jurisdiction. But it is necessary under this phrasing to show that the delay would involve a failure of justice—presumably a total, as it does not say partial, failure of justice, and presumably a failure of the remedy by injunction. The order in any case is only to be in force for a period not exceeding eight days as the Local Judge may direct. The period until the next motion day is the period usually allowed by the High Court which is a period rarely exceeding four or five days. Under this clause the Local Judge has power to postpone the return until the eighth day, an exercise of jurisdiction unknown (we think we may safely say) in the practice of the High Court.

Chapter 13 makes important alterations in the procedure of making submissions to arbitration orders of Court. It was suggested at the time of revising the rules of practice that awards should be filed, and that thereupon all motions respecting them might be made as if they were reports or as if the submissions had been made orders of

Court. It was not thought advisable at that time to make this change but the present legislation tends in that direction. The Act (except sections 4, 6, and 7) applies only to cases in which an appeal does not lie under the provisions of the Revised Statute respecting arbitrations, but includes arbitrations under the Municipal Act. And sections 4, 6, and 7, apply to all arbitrations to which the Revised Statute applies. Sections 4, 6, and 7, apply to appeals and the remainder to making the submissions, orders of Court. This is consequently, a very obscure way of saying that the clauses respecting appeals shall apply to appealable cases only.

The second section enacts that any party to an agreement or submission to arbitration, unless it contains words purporting that the parties did not intend this Act to apply, may file the award or certificate made, together with such agreement or submission, in the office of the clerk or registrar of any of the divisions of the High Court, and such filing shall have the same effect as the making of the submission or order of Court. This is enacted by sections 2 and 3. What then is the significance of section 5, which declares that every submission which may under section 13 of the Revised Statute be made an order of Court, shall for the purpose of any application to enforce or set aside the award, be deemed a rule or order of the Court, and that it shall not be necessary to make any order for that purpose? Section 13 referred to merely states that a submission may be made an order of Court unless the contrary is agreed to. The combined result of the two enactments is that, when a submission is made which does not contain words purporting that it shall not be made an order of Court, then, for the purpose of moving to enforce or set aside an award made thereunder, it shall be deemed to be a rule or order of Court without any formal order being drawn for that purpose. With such a simple enactment as this the procedure by filing which is provided for by sections 2 and 3 is cumbersome. We now have three modes of procedure. First, the submission may be made an order of Court, for the Revised Statute is not repealed.

Second, it may be made an order of Court by filing it. Third, and this in reality supersedes the others, it is to be deemed an order of Court without being made so, and without filing.

By section 4 a motion against an award under this Act, shall not be made after the expiration of fourteen days from the filing of the award and submission and notice of the filing unless under special circumstances a Judge shall allow an appeal. And in cases to which section 4 does not apply, by section 6, an application shall not be made to set aside an award after the expiration of three months from the making and publication thereof.

Section 7 provides that a Judge of the High Court may appoint arbitrators where provision has not been made by the submission.

The next statute, we were about to say "fills a long-felt want." But let us hope that slanders of the kind aimed at will be few. The Act, chapter 14, is entitled "An Act to amend the Law of Slander." It is designed to give the right to a woman to recover damages for imputations upon her chastity, without proving special damage. Whether it really was the design of the legislature to limit the right to recover to nominal damages or whether it mistakenly made the use of the word "nominal" may yet form a subject of debate when the case arises. Whatever the intention the Act marks a distinct step forward in a civilized direction.

The action for slander for imputing unchastity to a woman falls within that class of cases in which words are actionable only by reason of special damage. And it may almost be alleged that special damage cannot be proved in such a case, so stringent are the rules of law. Thus, to lose the society of friends is not special damage (*c*), though that is the natural direct and sometimes the only consequence of an imputation of the kind. And Lord Wensleydale in the same case denied that loss of the *consortium* of her husband would constitute special damage to a married woman.

(*c*) *Lynch* v. *Knight*, 9 H. L. C. 577.

The origin of the law, or rather the reason for it is explained by Odgers as follows:—"(1) In the days when our common law was formed, every one was much more accustomed than they are at present to use gross language, and epithets such as 'whore' were freely used as general terms of abuse without seriously imputing any specific act of unchastity. (2) The spiritual courts had jurisdiction over such charges and though they could not award damages to the plaintiff, they could punish the defendant for the benefit of his soul, but all actions in the Ecclesiastical Courts for defamatory words were abolished by the 18 & 19 Vict. c. 41, and no attempt was made to substitute any remedy in the ordinary Courts of law."

This state of the law has not existed without criticism, and we cannot forbear quoting Lord Campbell's lamentation on the "unsatisfactory state of our law according to which the imputation by words however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her."

That being the state of the law, the first section of the Act declares that in an action for words imputing or meaning that the woman has committed or been guilty of either adultery, fornication, or concubinage, it shall not be necessary to allege or prove special damage, but the plaintiff may recover nominal damages, without averment or proof of special damage. With great respect for the draughtsman, we would have preferred the use of the term "unchaste conduct" to the expressions used in the Act. An imputation of conduct unworthy of a chaste woman, and yet not amounting to adultery, fornication or concubinage, may be just as injurious as an imputation within the Act. The most deadly slander is often that which leaves the gravamen of the charge to the inference which an unclean mind will draw from mere acts or words of suspicion. Such slanders originate from the meanest human sources. They leave the defamer open to the actual demonstrable charge of stating suspicions only and

leaving unspoken the actual slander, and yet having by most effectual means circulated the poison.

It is true that unchaste conduct is a wide term, but the defences to a woman's chastity should be laid wide and strong. As the Act stands, we apprehend that any unchastity short of the actual commission of adultery or fornication, may still be imputed to a woman without danger of the action. It may be, however, that the jury being judges of the meaning of the words, may be allowed to place meanings upon ambiguous phrasing which were actually intended by the defamer though not open to such upon a strict verbal construction.

The use of the word "nominal" may have a peculiar result upon the action given by the statute. It is not clear that the intention was to allow nominal damages only to be recovered. The word is apparently used in contradistinction to the word "special." Thus, "the plaintiff may recover *nominal* damages without averment or proof of *special* damage." If one were asked to rehabilitate the section, he would be apt (having regard to the previous condition of the law) to phrase it so as give a plaintiff the right to a verdict without proof of special damage, leaving the amount to the jury. The action did not lie formerly without proof of special damage. Now it will lie without such proof. It is not essential to this change that the damages to be given should be nominal only. And we know of no reason why they should be so limited. It seems to be impossible to get over the actual meaning of the phrase, however convincing may be the reasoning that the intention was to give vindictive damages. The result may be that every defendant may, as a matter of prudence, allow judgment by default as the cheapest way out of a difficulty. The damages being fixed beforehand at a nominal sum, it is for his interest to have the costs as small as possible, and that may be accomplished by allowing judgment for the nominal sum to be signed by default. If this be the natural result of this legislation, it amounts to little more than permission to a woman to formally enter

a protest on the files of the Court against a vilainous slander.

By the second sub-section of the first section the plaintiff is required to allege in her statement of claim that the action is brought under this Act, otherwise she shall not be entitled to recover a verdict under the Act. There is nothing, as far as we can see, to prevent the joinder of a claim for special damage with one for damage under the Act, so that a verdict may be sustained either with or without evidence of special damage.

The third sub-section is a very striking one and if the remainder of the Act is a just piece of legislation this clause is somewhat unjust. It provides that in any action under the Act the defendant may apply for an order for security for costs, and may show (i) the nature of the action, (ii) that the plaintiff has not enough property to satisfy the costs of the defendant if he succeeds, (iii) that the defendant has a good defence as the merits, (iv) *or* that the grounds of the action are trivial or frivolous. We presume that the *or* in the fourth item permits the Judge to act either upon the fact of a good defence or the trivial grounds of action, and that the want of property must be a factor in every case. The Judge is authorized upon this material (and it may be added to by an examination of the plaintiff under sub-section 4) to make an order for security for costs in the usual manner staying proceedings until it is complied with.

The question at once arises upon this section whether a married woman not possessed of separate estate is not wholly debarred from the benefit of this legislation unless she can give security for costs. Even where she has property she may have to give the security unless it is of such a character as to be available for creditors. In any light in which we may regard this clause it is a piece of class legislation. Rich women may bring actions but poor women may not. Probably the person most exposed to insults of the kind aimed at in this Act is that woman who is without property and without friends—and such are

absolutely without redress. It is true that the defendant must swear that he has a good defence on the merits or must show that the grounds of the action are trivial. But unfortunately the affidavit of merits is altogether too common a one to place much reliance upon. None but the extremely conscientious will refuse to make an affidavit of merits if their so icitors hold out the slightest hope to them. The affidavit of defence upon merits means absolutely nothing unless the defence is disclosed. The defendant is not the judge of whether his defence is a good one. Cases may arise in which the defendaut may have been misrepresented by a third person as to what he actually said. His words may have been entirely innocent. But such cases arise in every species of action for defamation. Why make a class ?

Again what constitutes a frivolous or trivial ground of action ? If the Act had been wide enough to include all imputations of unchastity, there might have arisen cases in which it would have been well to interpose a check on the ground that the offence arose from the extreme sensibility of the plaintiff and not in reality from the meaning of the words themselves. But here again would be an objection to having their meaning and effect partially determined at an early stage of the case; and perhaps with the result that on account of the poverty of the plaintiff their actual effect and meaning would never be passed upon by a jury. But where the imputation to be within the Act must be that the plaintiff has been guilty of adultery, fornication or concubinage, it is difficult to imagine a case of triviality where the words have been spoken. It might happen even under the Act, however, that words whose natural meaning did not impute such an offence might from their general surroundings (to be divulged only at the trial) clearly bear the meaning attributed to them. It would be distinctly unjust to check the plaintiff in such an action; and how easy it is to go wrong on partial information.

Again, if the plaintiff joins a claim for special damage is the action "any such action" within the meaning of this

clause? Has the Judge got jurisdiction to stay the claim for damages under the Act, and allow the action to proceed as to the claim for special damage? And if such a course were adopted and no special damage were proved, but in the opinion of the judge the plaintiff had a good cause of action on the statute, would the order for security prevent her from having a verdict? It is evident that the plaintiff is seriously hampered by this clause, though she may make a strong counter move by a joining a claim for special damage.

By the second section the Act is not to apply to or affect any action brought because of words spoken before the Act.

Chapter 15, an Act respecting appeals on prosecutions to enforce penalties under Ontario statutes, is an important piece of legislation. Where the question of the validity of the Act creating the offence is brought in question, it provides for an appeal to the Court of Appeal from a motion to quash a conviction, for an appeal from a conviction by a magistrate, and for a mode of raising the question of the validity by demurrer. This enactment applies of course only to statutes passed by the Province, for the Provincial Legislature could not interfere with criminal procedure.

The third section gives an appeal to the Court of Appeal, whether the conviction is quashed, or the prisoner discharged, or the application is refused, provided that the Attorney-General for Ontario or the Attorney-General for Canada certifies his opinion that the decision involves a question on the construction of the British North America Act and that the same is of sufficient importance to justify the case being appealed.

By the fifth section any party dissatisfied with the decision of a justice, on a summary trial, "as being erroneous as regards the constitutional validity of the statute in point of law," may apply to have a case stated for the judgment of the Court of Appeal.

In the first case the enactment is retroactive (as we presume some question is to be raised on a conviction which

is unsatisfactory) and no security for costs of the appeal is required to be given. In the second case it is prospective only and security must be given by the defendant before he can appeal, but if the appeal is brought by or under the direction of the Attorney-General of Canada or the Attorney-General of Ontario no security need be given, which seems rather oppressive, as the sole question to be determined is the validity of a Provincial Act. The Justice in the latter case also may refuse to give a certificate for the Court of Appeal for the use of the defendant if he is of opinion that the application is merely frivolous, and thereupon the defendant is to apply to the Court of Appeal or a Judge in Chambers upon which application the justice may be ordered to state a case if the Court thinks fit. No doubt the average Justice will consider most appeals frivolous.

It is certainly a valuable right to bring the validity of penal statutes before the Court of Appeal for a decision, but considering that the decision to be obtained is purely a matter of jurisdiction, purely a matter that concerns the government of the Province, it is rather hard to give facilities to the Attorney-General to procure a favourable decision, if he can, when the primary decision is against him, and to hamper the defendant when the decision is against him. It may be taken for granted that when the High Court Judges are so averse to holding a Provincial statute invalid, every Justice will almost as a matter of course convict if the validity of the Act only is in question. The decision of a Justice either in favour of or against the validity of a statute would not be treated with the slightest consideration as a determination of the point, and nothing is gained by a conviction, or a succession of them, but the casting upon some unfortunate defendant of the whole burden of settling a question of public law. It has been the opinion of many eminent members of the profession that questions of the kind should be settled at the expense of the public and not at the expense of a private individual.

By section 4 it is enacted that every objection to a prosecution for an offence under a statute of the Province, on

the ground of the invalidity of the statute, shall be taken on demurrer before pleading and not otherwise, and no motion in arrest of judgment shall be allowed for any question which could have been taken by demurrer. We do not think that the intention of this clause can be carried out. The legislature cannot gain jurisdiction by legislating against the trial of its jurisdiction. If an Act of the legislature were invalid it might be completely disregarded, and everything done under it would be void. By closing the defendant's mouth the statute does not become valid; and we feel inclined to say that a Court would be bound to recognize a litigant's right to object by some form of proceeding at any time. The policy of preventing, or hampering the testing of an Act of the legislature, especially a penal enactment, is not a wise one. Apart from the oppression, it may induce the legislature to go a little further in trying its strength than it would go if the greatest freedom were allowed to test its powers. We must regard, with all the weight due to it, the inconvenience of having Provincial legislation continually subjected to question. But at the same time we must regard the inconvenience of being subjected to enactments which may be in fact oppressive as being illegal, and which become all the more oppressive if the means of getting rid of them are narrowed. But apart from the policy of such a course we believe that such an enactment is itself invalid. To append to an Act a condition that its validity should not be questioned, would be indicative of oppression certainly, but would also be futile. To pass a general Act forbidding the questioning of any Act of the legislature would also be futile on the same principle; and it is only a matter of degree when the right of disputing an Act is limited either as to time or method of procedure. If the Act is invalid it is void, and nothing can give it force. It is interesting at this point to turn to the Quebec Resolutions of 1887 (*d*) and to compare the opinions of those who signed them with the policy of this Act. By the second resolution it was resolved that there should be facilities for obtaining

(*d*) 7 C. L. T. 285.

a judicial determination respecting the validity of statutes, and that too before, as well as after, their passing. The Act in question certainly increases the facilities but in such a way as to make it an onerous thing to the defendant. By the third resolution it was resolved that " the constitutionality of Federal or Provincial statutes should not be open to question by private litigants except within a limited time (say two years) from the passing thereof," and afterwards only at the instance of a government. Now we presume that the reason for this resolution was that at present the validity may be questioned at any time by a private litigant, and therefore, a constitutional amendment would be necessary to limit the time. If this opinion be correct, and we quite agree with it, the fourth section of the Act under review, must be unconstitutional in limiting the private litigant not to two years, but to the time allowed him for pleading.

The Registry Act next undergoes some amendments, and the city of Toronto is or is to be divided into two divisions for registration purposes.

The inspector is given the power to direct the subdivision of lots for the purposes of abstracts, so that in making a search those instruments only which apply to the particular part under examination will have to be read. Provision is made also for preparing an abstract index when a new plan is registered, of the part sub-divided; with a wholesome power to direct the person registering the plan to pay the cost thereof. Plans must hereafter have the signature attested and proved by affidavit as in the case of other instruments. A clause of this Act declares that after an instrument has been entered in the abstract and alphabetical books and copied, no entry shall afterwards be made except by correction in red ink with a memorandum signed by the registrar or his deputy with the date of making it. This fixes the liability of the registrar for any error, if any has occurred and been acted upon before the amendment.

Provision is also made for multiplying copies of abstract index books, so that a number of searchers may be accom-

modated at once; and for entering in the abstract index such a description of the land affected by an instrument as will identify it.

It has been decided that the duty of entering an instrument in the abstract index is not one that the registrar owes to the public, and that the public are not entitled to examine the index. By the present Act, sec. 5, s-s. 4, the registrar is now obliged to enter the instrument in the index upon production of the same to him, thus securing priority by the time of delivery to him. By section 57 of the Registry Act, the certificate of the registrar is evidence of the registration and due execution of the deed. It has been ruled that this applied only to the duplicate kept by the registrar in his office. This ruling has been doubted, and to remove the doubt the clause has been amended so as to read as follows:—"In case an instrument in two or more original parts is registered, the registrar shall endorse upon each of such original parts a certificate of registration * * and any original so certified shall be received as *prima facie* evidence of," etc.

EDITORIAL REVIEW.

The Quebec Magistrates Courts Act.

The disallowance of this statute in the Province of Quebec has brought prominently into view the peculiar provisions of the British North America Act respecting disallowance. By section 56 of the Act, when a bill of the Dominion Parliament has been assented to by the Governor-General, a copy is to be transmitted to one of the Secretaries of State, and the Queen-in-Council may within two years after the receipt disallow the Act; and such disallowance "being signified by the Governor-General by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification."

By section 90 the provisions of the Act respecting the disallowance of Acts are made to extend and apply to the legislatures of the several provinces as if those provisions were re-enacted and made applicable in terms to the provinces, with the substitution of the Lieutenant-Governor of the province for the Governor-General, the Governor-General for the Queen and a Secretary of State, one year for two years, and the Province for Canada. The result is that an Act transmitted to the Governor-General may be disallowed at any time within one year after its receipt by him; and such disallowance being signified by the Lieutenant-Governor either by message or proclamation, shall annul the Act from and after the date of such signification.

It is evident that, the power of disallowance being absolute, the Governor-General has a right to disallow any Act, whether valid or invalid, of the Legislatures of the Provinces. The peculiarity that we desire to notice is that, assuming the Quebec Magistrates Courts Act to have been a valid Act, a great amount of business transacted under it

in the way of obtaining judgments, and of bringing actions which have not yet proceeded to judgment, is valid, the annulling or disallowing of the Act not having the effect of rendering it void from its passage, but only from the date of the signification of the disallowance. In the case of judgments which have been entered, if the validity of the Act in the first place were undisputed, they would doubtless be valid; in the case of actions which have not yet proceeded to judgment, it would be quite proper, if the Act is valid, that liberty should be given to proceed to judgment and execution, or that some provision should be made for the translation of those actions from this Court to one of the existing Courts of the Province; and one could not object to advice being given to the Lieutenant-Governor of the Province to withhold his proclamation or signification of the disallowance until such provision had been made.

If, on the other hand, the Act itself were invalid as invading by indirect means, though not expressly, the jurisdiction of the Dominion Parliament, and usurping the functions or prerogatives of the Governor-General as to the appointing of Judges, the disallowance, though an effective mode of getting rid of the Act, would have no effect upon the Act itself, which would be void *ab initio*. Under such circumstances the unsatisfactory condition of affairs would exist that all business done in the Court while it existed would be absolutely null and void. This being the case, we presume the only mode of testing the validity of the Act would be to proceed to set aside a judgment in another Court, or to actively resist the execution of such a judgment.

It is rather extraordinary that the disallowance of this Act should have been postponed until nearly the end of the year permitted for disallowance, when, as a matter of fact, its provisions were well known to the Dominion Government, and had in effect come before them in a different form the year before when a previous Act was disallowed. See 8 C. L. T. p. 246.

The Law School.

We understand that a scheme of lectures is in course of preparation for the Law School, and will shortly be published. The compulsory attendance will, be believe, be limited to those who may be classed as "first year students," *i. e.*, the lectures for the first year of the school only will be delivered. Next year there will be two sets of lectures; and the third year, three; by that time the school will be in full operation.

We would strongly recommend as many as can make it convenient to attend the lectures, whether compelled to do so or not. There is no doubt of the great, almost inestimable advantage to be derived from lectures, and they should not be neglected simply because attendance is not compulsory. It will also be interesting for students to know that the passing of the examinations will be very much facilitated by attendance at lectures.

BOOK REVIEWS.

The American State Reports. Containing the cases of general value and authority, subsequent to those contained in the "American Decisions," and the "American Reports," decided in the Courts of last resort of the several states. Selected, reported, and annotated. By A. C. FREEMAN, and the Associate Editors of the "American Decisions." Vol. VI. San Francisco: Bancroft-Whitney Co. 1889.

The sixth volume of this series now comes to hand, and displays the same care both in selection and reporting that the learned editors show in former volumes.

Lawyers' Reports Annotated. Book II. All current cases of general value and importance decided in the United States, State and Territorial Courts, with full annotations, by ROBERT DESTY, Editor; EDMUND H. SMITH, Reporter, etc. etc. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co. 1889.

The second volume, called Book II, of this series to which we have before referred, and which appears to hold its own with the numerous publications of like kind in the States.

The Elements of Roman Law Summarized. A concise digest of the matter contained in the Institutes of Gaius and Justinian, with copious references arranged in parallel columns, also chronological and analytical tables, lists of

Laws, etc., etc., Primarily designed for the use of student preparing for examination at Oxford, Cambridge and th Inns of Court. By SEYMOUR F. HARRIS, B.C.L., M.A Second Edition, revised. London: Stevens & Hayne 1889.

The compiler of this manual does not profess to pu before us a treatise or even an elementary work on Roma law, but simply an index or guide to the Institutes o Gaius and Justinian. It is a little more than a guide, too for it consists of concise statements or propositions, and i some cases definitions, which might be the condense meaning extracted by careful reading, and put into th form of notes with reference to the principal works. I thus brings the whole subject within a small compass.

THE
CANADIAN LAW TIMES.

SEPTEMBER, 1889.

FEDERAL GOVERNMENT IN CANADA (a).

IN the addresses to the Queen embodying the resolutions of the Quebec conference of 1864, the legislatures of the provinces respectively set forth that "in the federation of the British North American Provinces the system of government best adapted under existing circumstances to protect the diversified interests of the several provinces, and secure harmony and permanency in the working of the Union, would be a general government charged with matters of common interest to the whole country, and local governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections."

In the third paragraph the resolutions declare that "in framing a constitution for the general government, the conference, with a view to the perpetuation of our connection with the mother country, and the promotion of the best interests of the people of these provinces, desire to follow the model of the British Constitution so far as our circumstances permit." In the fourth paragraph it is set forth: "The executive authority or government shall be vested in the

(a) This article is composed of abstracts of lectures delivered in June last before Trinity University, Toronto, and I now avail myself of the permission accorded me to publish a necessarily brief abstract of their material points in the pages of the CANADIAN LAW TIMES before they can appear in full in the publications of Johns Hopkins University. J. G. B.

sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British constitution by a sovereign personally, or by the representative of the sovereign duly authorized."

In these three paragraphs we see tersely expressed the leading principles on which our system of government rests; a federation with a central government exercising general powers over all the members of the Union, and a number of local governments having the control and management of certain matters naturally and conveniently falling within their defined jurisdiction, while each government is administered in accordance with the British system of parliamentary institutions. These are the fundamental principles which were enacted into law by the British North America Act of 1867.

The law and the conventions or understandings of the constitution.—Before I proceed to refer to the general features of the federal system, I may here appropriately observe that the practical operation of the government of Canada affords a forcible illustration of a government carried on, not only in accordance with the legal provisions of a fundamental law, but also in conformity with what has been well described by eminent writers as conventions or understandings, which do not come within the technical meaning of laws since they cannot be enforced by the Courts. It was Professor Freeman (*b*) who first pointed out this interesting and important distinction, but Professor Dicey has elaborated it in a recent work, in which he very clearly shows that "Constitutional Law," as we understand it in England and in this country, consists of two elements: "The one element, which I have called the 'law of the constitution,' is a body of undoubted law; the other element, which I have called the 'conventions of the constitution,' consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the constitution are not in

(*b*) Freeman's Growth of the English Constitution, pp. 114, 115.

strictness law at all" (*c*). In Canada this distinction is particularly noteworthy. We have first of all the British North America Act (*d*), which lays down the legal rules for the division of powers between the respective federal and provincial authorities, and for the government of the federation generally. But it is a feature of this government that, apart from the written law, there are practices which can only be found in the usages and conventions that have originated in the general operation of the British Constitution—that mass of charters, statutes, practices, and conventions, which must be sought for in a great number of authorities. For example, if we wish in Canada to see whether a special power is given to the Dominion or to the Provincial Government, we must look to the written constitution—to the 91st and 92nd sections; but if we would understand the nature of the constitutional relations between the Governor-General and his advisers, we must study the conventions and usages of parliamentary or responsible government as it is understood in England and Canada. The Courts accordingly will decide whether the parliament or the legislatures have a power conferred upon them by the Constitutional Law whenever a case is brought before them by due legal process; but should they be asked to adjudicate on the legality of a refusal by a government to retire from office on an adverse vote of the people's house, they could at once say that it was a matter which was not within their leading functions, but a political question to be settled in conformity with political conventions with which they had nothing whatever to do.

In short, we have not only a written constitution to be interpreted whenever necessary by the Courts, but a vast storehouse of English precedents and authoritative maxims to guide us—in other words, an unwritten law which has as much force practically in the operation of our political system as any legal enactment to be found on the statute book.

(*c*) Dicey's Law of the Constitution, p. 25.
(*d*) 30-31 Vict. c. 3 (Imp.).

Position of Canada as a Colonial Dependency of Great Britain.—The Queen is the head of the executive authority and government of Canada (*e*), and her supremacy can alone be acknowledged in all executive and legislative acts of this dependency. As she is unable to be present in person in Canada, she is represented by a Governor-General appointed by Her Majesty in Council. This high functionary has dual responsibilities, for he is at once the governor in chief of a great dependency who acts under the advice of a ministry responsible to its parliament—as I shall show later on—and at the same time the guardian of imperial interests. Canada being a colonial dependency and not a sovereign state, cannot directly negotiate treaties with a foreign power, but must act through the intermediary of the imperial authorities, with whom the Governor-General, as an imperial officer, must communicate on the part of our government not only its minutes of Council, but his own opinions as well, on the question under consideration.

The general power possessed by the Imperial Government of disallowing any measure, within two years from its receipt, is considered as a sufficient check, as a rule, upon colonial legislation. The cases where a bill is reserved (*f*) and allowed are now exceedingly limited. Only when the obligations of the Empire to a foreign power are affected, or an Imperial statute is infringed in matters on which the Canadian Parliament has not full jurisdiction, is the supreme power of England likely to be exercised.

The Imperial Parliament has practically given the largest possible rights to the Dominion Government to legislate on all matters of a Dominion character and importance which can be exercised by a colonial dependency; and the position Canada consequently occupies is that of a semi-independent power. Within the limits of its constitutional jurisdiction, and subject to the exercise of disallowance under certain conditions, the Dominion Parliament is in no sense a mere delegate or agent of the Imperial Parliament, but enjoys

(*e*) B. N. A. Act, s. 9.

(*f*) The latest case was the Bill in 1886 respecting the Fishery dispute between Canada and the United States.

an authority as plenary and ample as that great sovereign body in the plenitude of its power possesses (*g*). This assertion of the legislative authority of the Dominion Legislature is quite reconcilable with the supremacy of the Imperial Parliament in all matters in which it should intervene in the interests of the Empire. For that parliament did not part with any of its rights as the supreme authority of the Empire, when it gave the Dominion Government "exclusive authority" to legislate on certain classes of subjects enumerated in the Act of Union. This point has been clearly explained by the late Mr. Justice Gray of the Supreme Court, British Columbia, and one of the members of the Quebec Conference of 1864. In deciding against the constitutionality of the Chinese Tax Bill, passed by the legislature of his province, he laid down that "the British North America Act, 1867, was framed, not as altering or defining the changed or relative positions of the provinces towards the Imperial Government, but solely as between themselves." Proceeding, he said that the Imperial Parliament "as the paramount or sovereign authority could not be restrained from future legislation. The British North America Act was intended to make legal an agreement which the provinces desired to enter into as between themselves, but which, not being Sovereign States, they had no power to make. It was not intended as a declaration that the Imperial Government renounced any part of its authority."

A question of great legal importance was raised in the last session of the Dominion Parliament. An Imperial Statute (*h*), passed in 1865, expressly declares that any colonial law "in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate," shall, to the extent of such repugnancy, be "absolutely void and inoperative." And in construing an Act of Parliament, "it shall be said to extend to any colony, when it is made applicable to such colony by the express words or necessary intendment" of the

(*g*) See *Regina* v. *Burah*, 3 App. Cas. 889; *Hodge* v. *Reginam*, 9 Ib. 117.
(*h*) 28 & 29 V. c. 63 (Imp.).

same. Since the passage of this Act Canada has received a larger measure of self government in the provisions of the B. N. A. Act, which confers certain powers on the Dominion and the Provincial authorities. No one can doubt that it is competent, as Mr. Justice Gray has intimated, for Parliament to pass any law it pleases with respect to any subject within the powers conferred on the Dominion or Provinces; and any Canadian enactment repugnant to that Imperial Statute would be declared null and void by the Courts, should the question come before them. But the point has been raised whether it is in the power of the Canadian Parliament or Legislatures to pass an Act repealing an Imperial Statute passed previous to the Act of 1867, and dealing with a subject within the powers expressly granted to the Canadian authorities. It must be here mentioned that the Imperial Government refused its assent to the Canadian Copyright Act of 1872, because it was repugnant, in the opinion of the law officers of the Crown, to the provisions of an Imperial Statute of 1841 extending to the Colony (*i*).

On the other hand, in the debate on the constitutionality of the Quebec Jesuits Bill it was contended by the Minister of Justice that a provincial legislature, "legislating upon subjects placed under its jurisdiction by the B. N. A. Act, has the power to repeal an Imperial Statute passed prior to the B. N. A. Act affecting those subjects" (*j*). In support of this position he referred to three decisions of the judicial committee of the Privy Council. One of these, *Harris* v. *Davies*, held that the legislature of New South Wales had power to repeal a statute of James I. with respect to costs in case of a verdict for slander (*k*). The second case was that of *Powell* v. *Apollo Candle Co.*, in which the principles laid down in *Regina* v. *Burah*, and in *Hodge* v. *Reginam*, were affirmed (*l*). The third and most

(*i*) 5 & 6 V. c. 45 (Imp.); Can. Sess. Pap 1873, No. 28.

(*j*) See Can. Hansard, March 27, 1889.

(*k*) *Harris* v. *Davies*, 10 App. Cas. 279.

(*l*) *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282; *Regina* v. *Burah*, 3 *Ib.*, 889; *Hodge* v. *Reginam*, 9 *Ib.* 117.

important case as respects Canada was *Regina* v. *Riel*, in which it was practically decided that the Canadian Parliament had power to pass legislation changing or repealing (if necessary) certain statutes passed for the regulation of the trial of offences in Rupert's Land before it became a part of the Canadian domain (*m*). This contention is thus directly raised for the first time, but it is not supported by the several authorities who have referred to the relations between the parent state and her dependencies (*n*).

The question is too important to be treated summarily in this brief review, especially as it will come up formally in connection with the Copyright Act of 1889, in which the same conflict as in 1875 arises. The new Act necessarily contains a clause permitting it only to come into force by a proclamation of the Governor-General (*o*). No doubt the fundamental principle that rests at the basis of our constitutional system is to give Canada as much power over all matters affecting her interests as is compatible with Imperial obligations. In the debate of last session it was urged that the Parliament and the Legislatures have frequently repealed Imperial enactments in the course of general legislation. In the case in question, however, the assertion of Canadian legal independence is more emphatically and definitely made than on any previous occasion (*p*).

The Queen's Privy Council of England has the right to allow appeals to the judicial committee—one of the survivals of the authority of an ancient institution of England —from the Courts of Canada. This right is only exercised on principles clearly laid down by this high tribunal, but

(*m*) *Riel* v. *Reginam*, 10 App. Cas. 675.

(*n*) See Hearn's Government of England, App. II.; Todd's Government in the Colonies, pp. 188-192; Dicey's Law of the Constitution, pp. 95 *et seq.*

(*o*) Can. Hans., April 20, 1889.

(*p*) The Dominion Act of 1888 (51 V. c. 43), providing that "notwithstanding any royal prerogative," no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal in the United Kingdom, may be cited as a remarkable assertion of Canadian judicial independence, objected to by the Imperial authorities in strong terms; but the Act has not been disallowed.

it is emphatically a right to be claimed by the Canadian people as forming part of the Empire under the sovereignty of England. It is a right sparingly exercised, for the people of Canada have great confidence in their own Courts, where justice is administered with legal acumen and strict impartiality; but there are decided advantages in having the privilege of resorting in some cases, especially those affecting the constitution, to a tribunal which is generally composed of men of great learning.

In the foregoing paragraphs I have briefly referred to the relations that should naturally exist between the supreme head of the Empire and its colonial dependencies. I may here add, what will be obvious to every one, that the power over peace and war, and the general control of such subjects as fall within the province of international law, are vested in the home Government, and cannot be interfered with in the least degree by the Government of the Dominion.

The respective powers of the Dominion and the Provinces.—We come now to consider the nature of the federal system, the respective powers of the Dominion and the Provincial Governments, and the relations that they bear to one another under the constitution. The statesmen that assembled at Quebec believed it was a defect in the American constitution to have made the national government alone one of enumerated powers and to have left to the States all powers not expressly taken from them (*q*). For these reasons mainly the powers of both the Dominion and the Provincial Governments are stated, as far as practicable, in express terms with the view of preventing a conflict between them; the powers that are not within the defined jurisdiction of the Provincial Governments are reserved in general terms to the central authority. In other words, "the residuum of power is given to the central instead of to the States authorities." In the B. N. A. Act we find set forth in express words in the ninety-first, ninety-second, ninety-third, and ninety-fourth sections,

(*q*) See remarks of Sir John Macdonald, Confederation Debates, p. 33.

1. The powers vested in the Dominion Government alone.

2. The powers vested in the provinces alone.

3. The powers exercised by the Dominion Government and the provinces concurrently.

4. Powers given to the Dominion Government in general terms.

The conclusion we come to after studying the operation of the Constitutional Act, until the present time, is that while its framers endeavoured to set forth more definitely the respective powers of the central and local authorities than is the case with the constitution of the United States, it is not likely to be any more successful in preventing controversies constantly arising on points of legislative jurisdiction. The effort was made in the case of the Canadian constitution to define more fully the limits of the authority of the Dominion and its political parts; but while great care was evidently taken to prevent the dangerous assertion of provincial rights, it is clear that it has the imperfections of all statutes, when it is attempted to meet all emergencies. Happily, however, by means of the courts in Canada, and the tribunal of last resort in England, and the calm deliberation which the parliament is now learning to give to all questions of dubious jurisdiction, the principles on which the federal system should be worked are, year by year, better understood, and the dangers of continuous conflict lessened. It is inevitable, if we are to judge from the working of a federal system in the United States, that there should be, at times, a tendency either to push to extremes the doctrine of the subordination of the provinces to the central power, or, on the other hand, to claim powers on behalf of the provincial organizations, hardly compatible with their position as members of a confederation based on the principle of giving complete jurisdiction to the central government over all matters of national and general import. It is obvious that in certain legislation the Dominion Parliament must trench upon some of the powers exclusively given to the local organisations, but it cannot be argued, with a due

regard to the true framework of the Constitutional Act and the principles that should govern a federal system like ours, that the powers of the provinces should be absorbed by the Dominion or central authority in cases of such apparent conflict. Referring to this point, the Privy Council calls attention to the fact that the general subject of "marriage and divorce" is given to the jurisdiction of the Dominion Parliament, and the "solemnization of marriage" to the legislature of a province. It is evident that the solemnization of marriage would come within the general description of the subject first mentioned; yet no one can doubt, notwithstanding the general language of the ninety-first section, that the subject is still within the exclusive authority of the legislatures of the provinces. "So," continues the Privy Council, "the raising of money by any mode or system of taxation is enumerated among the classes of subjects in section ninety-one; but though the description is sufficiently large and general to include direct taxation within this province in order to aid the raising of a revenue for provincial purposes assigned to the provincial legislatures by the ninety-second section, it obviously could not have been intended that in this instance also the general power should over-ride the particular one" (*r*).

It is now laid down by the highest judicial authorities that the Dominion Parliament has the right to interfere with 'property and civil rights' in so far as such interference may be absolutely necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. Laws designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which brings them within the general authority of Parliament, to make laws for the good order and government of Canada, and have direct relation to criminal law, which is

(*r*) *Citizens Ins. Co.* v. *Parsons*, 45 L. T. N. S. 721; 1 Cart. 272, 273.

one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada. Few if any laws could be made by the Parliament for the peace, order, and good government of Canada which might not, in some incidental way, affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it (*s*).

As on the one hand the Federal Parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally provincial, by enacting them for the whole Dominion; so, on the other hand, a provincial legislature cannot extend its jurisdiction over matters constitutionally federal, by a territorial limitation of its laws, and legislate on matters left to the federal power, by enacting them for the province only, as for instance, incoporate a bank for the province (*t*).

When the B. N. A. Act enacted that there should be a legislature for a province, and that it should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in the ninety-second section, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by the section, as the Imperial Parliament, in the plenitude of its power, possesses and could bestow (*u*).

In short, each legislative body should act within the legitimate sphere of its clearly defined powers, and the Dominion Parliament should no more extend the limits of

(*s*) *Russell* v. *Reginam*, 7 App. Cas. 829.

(*t*) *Citizens Ins. Co.* v. *Parsons*, 4 S. C. R. 310.

(*u*) *Hodge* v. *Reginam*, 9 App. Cas. 117; 3 Cart. 162. The same power exists in the States. "When a particular power," says Judge Cooley, is found to belong to the States, they are entitled to the same complete independence in its exercise as the National Government in wielding its own authority."

its jurisdiction, by the generality of the application of its law, than a Local Legislature should extend its jurisdiction by localising the application of its statute (*v*).

The Federal Government should as far as possible work in harmony with the provincial institutions, and by leaving them full scope within the limits of the constitution at once give strength and elasticity to the central government and confidence to the various local organizations without which it could not exist.

The power of disallowing Provincial Acts.—In one most important respect the Dominion Government exercises a direct control over the legislation of each province. While the Imperial Government can disallow any Act of the Canadian Parliament at variance with the interests of the Empire, the Governor in Council may, within one year from its receipt, disallow any Act of a Provincial Legislature. This power of disallowance is not limited in terms by the fundamental law but may be exercised even with respect to an Act clearly within the constitutional jurisdiction of the provincial legislatures (*w*).

From the instances so far of the exercise of this political power, the student will see that it is one to be exercised with great discretion and judgment, as otherwise it may involve consequences fatal to the harmony and integrity of the confederation. This power can be properly exercised when the Act under consideration is beyond the constitutional competency of the legislature, or when it is repugnant to Dominion legislation in cases where there is concurrent jurisdiction, or when it is hostile to the rights enjoyed by a minority under the constitution, or when clearly hostile or dangerous to the peace and unity of the Dominion generally. The principal danger arises from the exercise of the power on the grounds of public policy, in the case of a question clearly within the constitutional powers of a legislature. The principle that should prevail

(*v*) Legal News, (the late Mr. Justice Ramsay) in *Hodge* v. *Reginam*, Jan. 26, 1884.

(*w*) B. N. A. Act, sec's 56, 90.

in the opinion of the advocates of provincial rights is to leave to their operation all acts that fall within the powers of the Provincial Legislature, which within its legal sphere has as absolute a right of legislation as the Dominion Parliament itself.

Opinion is divided as to the wisdom of a provision which gives so sovereign a power to a political body, and it may be doubted if in this respect our constitution is an improvement upon that of the United States. The authors of the American constitution wisely decided, as experience seems to show, to leave the judicial branch of the constitution to determine the constitutionality of all Acts of Congress or of the Legislature. Political considerations cannot enter into this judicial determination. As long as a statute is within the constitutional jurisdiction of a body that passed it, the federal judiciary cannot do otherwise than so declare, even if it be objectionable at the time on grounds of public policy. The future will soon prove whether this extraordinary supervision, given to the Dominion over the provinces, is calculated to strengthen the confederation, or has in it the elements of political discord and disunion.

The inexpediency of disallowing any measure believed to be within the constitutional jurisdiction of a province was strongly asserted in the debate in the Canadian House of Commons in 1889, on the Quebec Statute, 51-52 Victoria, c. 18, "An Act respecting the settlement of the Jesuits' Estates." In the course of the learned debate that took place on the merits of this very vexatious issue, a very clear exposition was given by several speakers, from their respective points of view, of the principles by which the relations between the Dominion and the Provincial Governments should be governed. But there is another conclusion which I think may be fairly deduced from a debate of this character. An executive power which can be thus questioned in the political arena seems obviously fraught with perilous consequences. If all questions of the constitutionality of a provincial Act could be decided only in the Courts, Parliament would be saved the discussion of matters which once mixed up with political and other issues, must necessarily

be replete with danger in a country like this. In Canada there is so much respect for the law that the people rarely question the wisdom of a judicial decision on any subject of importance. Can as much be said for the judgment of a political body, however carefully considered and honestly rendered it may be?

Importance of the Supreme Court of Canada as a Court of constitutional reference.—It is on the Courts of Canada, aided by the ripe judgment and learning of the judicial committee of the Privy Council, we must, after all, mainly depend for the satisfactory operation of our constitutional Act. The experience of the United States has shown the inestimable value of the decisions given by the Judges of the Supreme and the Federal Courts on questions that have arisen, from time to time, in connection with their constitution. The judiciary in all the provinces of Canada can and do constantly decide on the constitutionality of Acts passed by the various legislative authorities of the Dominion. They do so in their capacity as Judges and exponents of the law, and not because they have any special commission or are invested with any political duties or powers by the Constitution. The Supreme Court of Canada established in conformity with the B. N. A. Act (section 101), however, may hear and consider any matter which the Governor-General in Council may deem advisable in the public interest—a useful provision if discreetly used in cases of constitutional difficulty. A reference to the summary of the powers of the Court will show that it is intended to be as far as practicable a court for the disposal of controversies that arise in the working of the constitution of Canada. So far its decisions on the whole have won respect and have been rarely over-ruled by the judicial committee of the Privy Council.

The Governor-General: his functions and responsibilities.—The Governor-General assembles, prorogues, and dissolves parliament, assents to or reserves bills in the name of Her Majesty; but in the discharge of these and all other executive functions which are within the limits of his commission, and in conformity with the constitution, he acts

entirely by and with the advice of his council, who must always have the support of the house of commons. Even in matters of imperial interest affecting Canada, he consults with the council and submits their views to the colonial secretary of state in England. On Canadian questions clearly within the constitutional jurisdiction of the Dominion he cannot act apart from his advisers, but is bound by their advice. Should he differ from them on some vital question of principle or policy he must either recede from his own position or be prepared to accept the great responsibility of dismissing them; but such an alternative is an extreme exercise of authority and not in consonance with the sound constitutional practice of modern times, should his advisers have a majority in the popular branch of the legislature. Should he, however, feel compelled to resort to this extreme exercise of the royal prerogative, he must be prepared to find another body of advisers, ready to assume the full responsibility of his action and justify it before the house and country. For every act of the Crown, in Canada as in England, there must be some one immediately responsible, apart from the Crown itself. But a governor, like any other subject, cannot be "freed from the personal responsibility of his acts, nor be allowed to excuse a violation of the law on the plea of having followed the advice of evil advisers" (*x*). Cases may arise when the Governor-General will hesitate to come to a speedy conclusion on a matter involving important consequences, and then it is quite legitimate for him to seek advice from his official chief, the secretary of state for the colonies, even if it be a matter not immediately involving imperial interests (*y*).

It will therefore be evident that power is practically vested in the ministry, and that the Governor-General, unless he has to deal with imperial questions, can constitutionally perform no executive function except under the responsibility of that ministry. The royal prerogative of mercy, and the power of allowing or disallowing provincial acts are not

(*x*) Hearn's Government of England, p. 133.

(*y*) See case of Lieutenant-Governor Letellier de St. Just, 1878-79.

exercised on his own judgment and responsibility, but under the same constitutional restraints and limitations which apply to all other acts of executive authority. Even with respect to the all important prerogative of dissolution, which essentially rests in the Crown, he acts on the advice of his advisers; and it is obvious from many examples in the recent history of Canada, he does not hesitate to follow that advice under all circumstances.

The Privy Council or Ministry.—The British North America Act provides that the Council, which aids and advises the Governor-General, shall be styled the "Queen's Privy Council for Canada." Here we have one of the many illustrations that the constitutional system of the Dominion offers of the efforts of its authors to perpetuate as far as possible in this country the names and attributes of the time-honoured institutions of England. The ministry is practically a committee of the two houses. Its head is generally known as the Premier, or Prime Minister, who, as the leader of a political party, and from his commanding influence and ability, is in a position to lead the House of Commons and control the government of the country. The moment he is entrusted with this high responsibility it is for him to choose such members of his party as are likely to bring strength to the Government as a political body, and capacity to the administration of public affairs. The Governor-General on his recommendation appoints these men to the ministry. As a rule on all matters of public policy the communications between the Cabinet and Governor take place through the Premier, its official head. If he dies or resigns, the Cabinet is *ex officio* dissolved, and the ministers can only hold office until a new premier is called to the public councils by the representative of the Crown. In case a government is defeated in parliament, the premier must either resign or else convince the Governor-General that he is entitled to a dissolution on the ground that the vote of censure does not represent the sentiment of the country. If the circumstances are such as to justify a dissolution of parliament the premier must lose no time in obtaining an expression of public opinion;

and should it be apparently in his favour he must call parliament together with as little delay as possible; or if, on the other hand, the public sentiment should be unequivocally against him he should resign; for this course has been followed in recent times both in England and Canada. Strictly speaking, parliament alone should decide the fate of the ministry; but the course in question is obviously becoming one of the conventional rules of the constitution, likely to be followed whenever there is a decided majority against an administration at the polls.

From what precedes it will therefore be seen that while there is a nominal constitutional separation between executive and legislative authorities, still it may be said that, in Canada as in England, parliament governs through an executive dependent on it. The Queen is at once the head of the executive authority and the first branch of the legislative department. The responsible part of the executive authority has a place in the legislative department. It is a committee of the legislature, nominally appointed by the Queen's representative, but really owing its position as a government to the majority of the legislative authority. This executive dependence on the legislature is an invaluable, in fact the fundamental, principle of parliamentary government. This council thereby becomes responsible at once to crown and parliament for all questions of public policy and of public administration. In a country like ours legislation is the originating force, and the representatives of the people are the proper ultimate authority in all matters of government. The importance then of having the executive authority represented in parliament and immediately amenable to it is obvious. Parliament is in a position to control the administration of the executive authority by having in its midst men who can explain and defend every act that may be questioned, who can lead the house in all important matters of legislation, and who can be censured or forced from office when they do wrong or show themselves incapable of conducting public affairs. By means of this check on the executive, efficiency of government, and

guarantees for the public welfare are secured beyond question. The people are able through their representatives to bring their views and opinions to bear on the executive immediately. The value of this British system of parliamentary government can be best understood by comparing it with the American system which so completely separates the executive from the legislature.

JNO. GEO. BOURINOT.

(To be concluded.)

EDITORIAL REVIEW.

The Quebec Magistrates Courts Act.

In commenting on the disallowance of this Act in our last number we referred to the delay in disallowing it, assuming that the Act had been passed in the summer of 1888. At the time of writing the *Gazette* was not accessible, but since the publication of the last number the attention of the writer has been directed to the dates which appear in the *Gazette*. The Act was passed by the Legislature of Quebec on 21st March, 1889, was received in Ottawa, 2nd April, and was disallowed on 1st July, so that there was a delay of three months only, during which, however, great activity seems to have prevailed in the Courts.

Osgoode Hall Library.

The alterations made in the Library are a decided improvement. The room is a beautiful one, but if it was originally designed for a Library the requisite characteristics were entirely lost sight of. The windows were obscured by galleries and there was a decided lack of shelf room. The present arrangement, by which the galleries on the south side disappear, remedies the want of light, but leaves the room out of symmetry until the northern galleries are removed.

It only remains for the profession to carry out the rules respecting the observance of silence in the room. It is commonly used as a lounging room, whereas it should be the quietest and most orderly room in the building—saving the Court rooms.

BOOK REVIEW.

Maritime Court, Ontario: General Rules (1889) and Statutes, with Forms, Table of Fees, etc. By ALFRED HOWELL, of Osgoode Hall, Barrister-at-law, (author of "Surrogate Courts Practice," and "Naturalization and Nationality in Canada,") and ALEXANDER DOWNEY, Official Reporter, Maritime Court, Toronto. Toronto: Rowsell & Hutchison. 1889.

The recent rules to which reference was made by Mr. Cox, on page 118, are contained in this compilation, together with Act respecting the Maritime Court, an Act to extend the jurisdiction of the Court and extracts from the Vice-Admiralty Courts Act. There are also included the Inland Seamen's Act and the Act respecting navigation of Canadian waters, table of fees and forms. A list of decided cases which have been reported in the Supreme Court Reports, this journal and the *Canada Law Journal* is appended together with a full general index. The practitioner has here in handy form all the legislation which he is likely to require on inland maritime cases, together with the rules of practice and forms in general use.

REVIEW OF EXCHANGES.

Albany Law Journal.—2nd March, 1889.

Necessity of Recording Transfers of Stock, by GUY C. H. CORLISS. Concluded in the following number. Cases are cited on the construction of statutes requiring a record of the transfer of stock in order to validate it.

Ibid.—20th April, 1889.

The Rights of Debtors, by W. G. MAXWELL. A theory is propounded that, apart from all fraud or breach of faith, property acquired by a debtor after he has become insolvent and answered the demands of creditors as far as possible should be exempt from all claims which arose before the insolvency, without going through the useless form of a discharge.

Ibid.—11th May, 1889.

Liability of Surety on Offical Bond when Officer has levied on Property of Stranger to the Process, by GUY C. H. CORLISS. Cites cases to show that when a sheriff seizes the property of a stranger under a writ he is acting officially and not as a private individual, and his sureties are liable on the bond.

Ibid.—6th July, 1889.

How Corporate Existence Attacked by quo warranto, by GUY C. H. CORLISS. The learned writer cites American cases upon whether the pseudo corporation is a proper party to a proceeding to declare that it is not a corporation.

American Law Review.—January-February, 1889.

Cases Without Treatises, by JAMES SCHOULER. A sharp criticism of the method of instruction by reference to cases only, and, rather more than a defence—a strong advocacy—of the method of instruction by text books.

The Liberty of Testamentary Bequests, by AMASA A. REDFIELD. An argument in favour of the right to dispose by will within certain limitations but with perfect freedom as to beneficiaries; the right of enjoying property and so of disposing of it being a civil, not a natural, right.

More Justice and Less Technicality, by SEYMOUR D. THOMPSON. A very able and critical essay on some of the anomalies of law. The caustic remarks on the jury system are justified by the authorities cited. The evil seems to be in the selection of juries and in the absurd line of decisions which preclude the Judge from giving them any assistance in the performance of their functions.

Receivers in Mortgage Foreclosure, by JAMES M. KERR. The article deals to a very large extent with the practice in making appointments.

Civil Damage Liquor Laws, by G. W. FIELD. Statutes giving the action are strictly construed. All who contribute to the intoxication which is the cause of the injury are jointly and severally liable; the proprietor is liable for the act of his servant in selling unless *bona fide* instructions against selling were given. Actual damage must result from the intoxication. In case of death it is proper to ascertain the present value of a husband's earnings based upon tables of mortality and the habits, health, etc., and station in life, in estimating the damages. Where the plaintiff contributes to the injury which was the result of the intoxication there can be no recovery.

Central Law Journal.—1st March, 1889.

Constitutionality of Registry Laws, by HENRY Z. JOHNSON. An article on the constitutional validity of Acts requiring voters to be registered.

Ibid.—8th March, 1889.

Right of the Teacher to Inflict Corporal Punishment Upon the Pupil, by EUGENE MCQUILLIN. The teacher has a right to inflict corporal punishment, just as a parent has, though not co-extensive with the parent's right. It may be inflicted for misconduct of all kinds within the schoolroom or without the school for misconduct in presence of pupils and teacher where the effect reaches within the schoolroom. But it cannot be inflicted to compel pursuit of any particular line of study, unless education is by law compulsory. Punishment must be moderate, and the teacher is responsible for immoderate punishment.

Ibid.—22nd March, 1889.

Powers and Liabilities of Assignees, by WM. M. ROCKEL. The assignee must be qualified by health, age and education. So, where a debtor assigned to relatives who were incapaciated by illness, absence, and want of ability, the assignment was held bad, though an assignment to relatives is not for that reason alone bad. In the American cases he has been held to have all the powers of questioning the debtor's acts as well as representing him as against others. He should in general observe all the duties which a trustee is bound to observe.

Ibid.—5th April, 1889.

Agreements to Support in Consideration for a Conveyance of Land, by W. W. THORNTON. Such agreements are usually construed not as mortgages (unless in the form of mortgages) but as conveyances upon condition subsequent, entitling the grantor to the usual remedies upon condition broken when there has been default. It has been held that redemption may be had after breach of the condition. A substantial performance of the condition is sufficient. When nothing is said as to the place of residence of the beneficiary, he is not bound to reside on the land, but may reside elsewhere incurring no unreasonable expense. But when he is required to live on the land he must do so unless the conduct of the grantee is such that a person of reasonable endurance could not be expected to tolerate it.

Ibid—19th April, 1889.

Telephone Law, by JAMES MCCALL. It has been held in England that a conversation through a telephone is a telegram. Telephone companies are common carriers of news. They are in general obliged to offer facilities for exchange. As to evidence of transactions taking place through the telephone, it has been held in the States that evidence may be given of conversation the voice being identified.

Ibid.—26th April, 1889.

Law of the Domicile, by JAMES M. KERR. The ability of a party to contract depends upon the law of his domicile when the question is one of personal ability. The law as affecting assignees and receivers is touched upon. A contract made by the Master of a vessel in a foreign country, is governed by the law of the owner's domicile. Personal property follows the owner.

Ibid.—3rd May, 1889.

The Recent Law of Gift. A gift must not only be made voluntarily and without consideration, but there must exist as well the actual consummation of the gift as the intention to make it. Some recent cases on *donationes mortis causa* are cited.

Ibid.—10th May, 1889.

Foreign Assignments, by G. W. FIELD. American cases are cited.

Ibid.—17th May, 1889.

Transactions Between Husband and Wife, by DAVID PLESSNER. The common law incapacity of the wife is stated. A *donatio mortis causa* however might be made to the wife. Contracts between husband and wife were recognized in equity if there was separate estate. The evidence of a gift must be of the clearest; so of the relations of debtor and creditor. They may occupy the relation of principal and surety to each other, or go into partnership. It has been held in the States that the husband may be held the tenant of his wife where he lives on her land, though living with her.

Ibid.—24th May, 1889.

The Assignability of Personal Contracts, by FLOYD R. MECHE
Where there is a relation established by the contract based upon t
personal confidence of one of the parties he cannot assign it.

Ibid.—31st May, 1889.

Stipulations for Attorney's Fees in Promissory Notes,
D. R. N. BLACKBURN. There have been three objections; 1st, that su
stipulation is usurious; 2nd, that it renders the note non-negotiabl
3rd, that it is contrary to public policy without consideration, and voi
The learned writer criticises these propositions.

Ibid.—7th June, 1889.

Foreign Divorces, by JOHN J. ESCH. The subject is considered und
the following heads: 1. A consideration of the requisites for giving t
Court jurisdiction in both domestic and foreign divorces. 2. The for
and nature of the action including notice by publication. 3. The effe
of a foreign judgment of divorce upon the *status* of parties, plaintiff a
defendant. 4. The validity of the judgment in other states.

Criminal Law Magazine.—September, 1888.

The Theory of Culpability, by J. T. RINGGOLD. Concluded in t
following number. The test of culpability from the mental conditi
is discussed in an exhaustive paper.

THE

CANADIAN LAW TIMES.

OCTOBER, 1889.

FEDERAL GOVERNMENT IN CANADA.

(Concluded.)

The Senate.—The Upper House of the Canadian Parliament bears a name which goes back to the days of ancient Rome, and also invites comparison with the distinguished body which forms so important a part of the American Congress; but neither in its constitution nor in its influence does it resemble those great assemblies (*a*).

The Senate of Canada is nominated by the Crown for life, and has limited powers even of legislation since it cannot initiate or even amend money or revenue bills; the Senate of the United States is elected by the state legislatures for a limited term, has a veto on treaties and important appointments to office, can amend appropriation bills so as to increase money grants to any amount, and can sit as a court of impeachment. In one respect, however, the Senate of Canada can be compared to the American house; it is a representative of the federal, as distinguished from the popular principle of representation. The three great divisions of Canada, the Maritime Provinces, Ontario, and Quebec, have been each given an equal representation of twenty-four members with a view of affording a special

(*a*) See article in *Quarterly Review* by Sir Henry Maine (No. 313), "Essay on the Constitution of the United States."

protection to their respective interests— a protection certainly so far not called into action even in the most ordinary matters. Since 1867, the entrance of other Provinces, and the division of the territories into districts has brought the number of senators up to seventy-eight in all, but at no time can the maximum number exceed eighty-four, even should it be necessary to resort to the constitutional provision allowing the addition of three or six new members—a position intended to meet a grave emergency such as a dead lock in a political crisis. But no doubt as long as our parliamentary system is modelled on the English lines, an upper house must more or less sink into inferiority when placed alongside of a popular house, which controls the treasury and decides the fate of administrations. It is in the Commons necessarily that the majority of the ministers sit and the bulk of legislation is initiated. In 1888, the two houses passed one hundred and eleven bills, and of these only three public bills and five private bills originated in the upper house; and the same condition of things has existed since 1867, though now and then, as in 1889, there is a spasmodic effort to introduce a few more government bills in the Senate. In the session of 1888, twenty-six Commons bills were amended out of the one hundred and three sent up to the upper house, and the majority of these amendments were verbal and unimportant. Under these circumstances it may well be urged that by arrangement between the two houses, as in the English parliament, a larger number of private bills should be presented in the Senate, where there is a considerable number of gentlemen whose experience and knowledge entitle them to consider banking and financial questions, and the various subjects involved in legislation. For reasons already given, government measures must as a rule be introduced in the Commons, but still even in this respect there might be an extension of the legislative functions of the upper chamber, and the effort made in 1889 by the goverment in this direction ought certainly to be continued until it becomes a practice and not a mere matter of temporary convenience.

. *The House of Commons.*—It is in the commons house that political power rests. As I have already shown it has both legislative and executive functions, since through a committee of its own it governs the country. Like its great English prototype it represents the people, and gives full expression to the opinions of all classes and interests, to a greater degree indeed than in England itself, since it is elected on a franchise much more liberal and comprehensive. At the present time the Canadian House of Commons contains two hundred and fifteen members or about one member for every twenty thousand persons. The representation is re-arranged after every decennial census by Act of Parliament in accordance with the terms of the constitutional law.

No property qualification is now demanded from a member of the Commons nor is he limited to a residence in the district for which he is elected, as is the case in the United States by law or usage; but should he not be able to obtain a seat in the locality or even in the Province where he lives he can be returned for any constituency in the Dominion. This is the British principle which tends to elevate the representation in the Commons; for while as a rule, members are generally elected for their own district, yet occasions may arise when the country would for some time lose the services of its most distinguished statesmen should the American rule prevail.

The House of Commons may be regarded as fairly representative of all classes and interests. The bar predominates, as is generally the case in the legislatures of this continent (*b*); but the medical profession, journalism, mercantile and agricultural pursuits contribute their quota. It is an interesting fact that a large proportion of members have been educated in the universities and colleges of the provinces, and this is especially true of the representatives from French Canada, where there are a number of seminaries or colleges, which very much resemble the collegiate

(*b*) The Parliamentary Companion notes sixty-two lawyers in the present House of Commons.

institutes of Ontario, or the high schools of the Unite States, where a superior education, only inferior to that the universities, is given to the youth of the country. An other matter worthy of mention is the fact that a goo proportion of the House has served an apprenticeship i the municipal institutions of Ontario.

The Provinces as Political Organizations.—The Province are so many political entities, enjoying extensive powers local government, and forming parts of a Dominion whos government possesses certain national attributes essentia to the security, successful working, and permanence of th federal union. It has been urged by an eminent judge (that the British North America Act carried out Confe eration "by first consolidating the four original provinc into one body politic, the Dominion, and then redistributin this Dominion into four provinces." In other words th provinces were newly created by the Act of Union. But n no reasoning from the structure of the Act can this co tention, which makes the provinces the mere creations the statute, and practically leaves them only such powe as are specially stated in the Act, be justified (*d*). If were so, there must have been for an instant a legislati union, and a wiping out of all old powers and functions the provincial organizations, and then a redivision into fo provinces with only such powers as are directly provide in the Act.

The weight of authority now appears to rest with tho who have always contended that in entering into the feder compact the provinces never intended to renounce the distinct and separate existence as provinces, when the became part of the confederation. This separate existen was expressly reserved for all that concerns their intern government; and in forming themselves into a federal ass ciation under political and legislative aspects, they form a central government for inter-provincial objects only. F

(*c*) Mr. Justice Strong, *St. Catharines Milling Company* v. *Regina* 13 S. C. R. 605.

(*d*) See, however, *per* Hagarty, C.J., *Regina* v. *Hodge*, 46 U. C. R. at 149.—Ed. C. L. T.

from the federal authority having created the provincial powers, it is from these provincial powers that there has arisen the federal government to which the provinces ceded a portion of their rights, property and revenues (*e*).

The constitutions of the four provinces, which composed the Dominion in 1867, are the same in principle and in details, except in the case of Ontario where there is only a legislative assembly. The same may be said of the other provinces that have been brought into the union since 1867. All the provisions of the British North America Act that applied to the original provinces were as far as possible made applicable to the provinces of British Columbia, Manitoba and Prince Edward Island, just as if they had formed part of the union in 1867. All of the provinces have the authority under the law to amend their constitutions, except as regards the office of Lieutenant-Governor. As in Ontario, there is only one House in Manitoba and in British Columbia.

In all the provinces, at the present time, there is a very complete system of local self-government administered under the authority of the British North America Act and by means of the following machinery:

A lieutenant-governor appointed by the governor general in council.

An executive or advising council, responsible to the legislature.

A legislature, of an elective house in all cases, with the addition of an upper chamber appointed by the crown in three provinces, and elected by the people, in one.

A provincial judiciary, composed of several courts, the Judges of which are appointed and paid by the Dominion government.

A civil service with officers appointed by the provincial government, holding office as a rule during pleasure and not removed for political reasons.

(*e*) See argument of Hon. E. Blake, Q.C., in the case of the *St. Catharines Milling Co.*, 1888.

A municipal system of mayors, wardens, reeves, and councillors, to provide for the purely local requirements of the cities, towns, townships, parishes and counties of every province.

The Lieutenant-Governor.—The Lieutenant-Governor is appointed—practically for five years—by the Governor-General in council, by whom he can be dismissed for "cause assigned" which, under the constitution must be communicated to parliament. He is therefore an officer of the Dominion as well as the head of the executive council of the Province and possesses, within his constitutional sphere, all the authority of a Lieutenant-Governor before 1867. He acts in accordance with the rules and conventions that govern the relations between the Governor-General and his privy council. He appoints his executive council and is guided by their advice as long as they retain the confidence of the legislature. He has "an unquestionable constitutional right to dismiss his ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right as of any other of his functions, he should of course maintain that impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and for any action he may take he is (under the fifty-ninth section of the British North America Act) directly responsible to the Governor-General." Doubts have been raised from time to time, though rarely now, compared with the earlier years of the working of our system, whether the Lieutenant-Governor of a Province represents the crown as before the union of 1867, but it is generally admitted that in the discharge of all the executive and administrative functions that devolve constitutionally upon him and require the interposition of the Crown in the Province the Lieutenant-Governor has all the necessary authority.

The Executive Council.—The executive council which is the name now given to the administration of each province, a name borrowed from the old provincial systems of government, comprises from nine members in Prince Edward Island, to five in British Columbia, holding as a rule, various

provincial offices as heads of departments. Their titles vary in some cases, but generally there is in every executive council an attorney-general, a provincial secretary, and a commissioner of mines and lands. All the members of the executive council, who hold departmental and salaried offices, must vacate their seats and be re-elected as in the case of the Dominion ministry. In Prince Edward Island there are six members without portfolios. The principle of ministerial responsibility to the Lieutenant-Governor and to the legislature is observed in the fullest sense.

The Legislatures.—The legislatures of all the provinces have a duration of four years,—except in Quebec, where the term is five years—unless sooner dissolved by the Lieutenant-Governor. They are governed by the constitutional principles that obtain at Ottawa. The Lieutenant-Governor opens and prorogues the legislature with the usual formality of a speech. A speaker is elected by the majority in each assembly or is appointed by the Crown in the Upper Chamber. The rules and usages that govern their proceedings are derived from those of England and do not differ in any material respect from the procedure in the Dominion parliament. The legislatures of Ontario and Quebec, like the Dominion parliament must sit once every twelve months; but apart from the law to the effect that supply has to be voted every twelve months the Act demands an annual session. None of the provinces have yet adopted biennial sessions in imitation of the very general practice of the State legislatures. Not only does the British practice of voting annual estimates stand in the way of this change which could only be effected by constitutional amendments, but it would be hardly acceptable to an opposition in a legislature, since it would greatly strengthen an administration and lessen their responsibilities to the assembly. In the United States there is no cabinet with seats in the assembly dependent on the vote of the majority, and biennial sessions have their advantages, but it would be in this country a radical change hardly consistent with the principles of responsible government.

The subjects that come under the purview of the legislature, from session to session, are multifarious, so extensive is the scope of their legislative powers. The very section giving it jurisdiction over property and civil rights necessarily entails legislative responsibilities which touch immediately every man, woman and child in the province.

The Veto of the Lieutenant-Governor over Provincial Legislation.—It is not necessary to dwell at greater length on the power of disallowance than I have already done, but there is one question of some interest which requires a few words of comment since it is not quite intelligible on sound constitutional principles. The British North America Act gives the Lieutenant-Governor, as well as the Governor-General, the power to "reserve," as well as "veto," a bill when it comes before him. The power of reserving bills is exercised by the Governor-General in very exceptional cases affecting Imperial interests; but there is no instance in our parliamentary history since the concession of responsible government, of the exercise of the veto, a royal prerogative in fact not exercised even in England since the days of Queen Anne. Lieutenant-Governors not unfrequently reserve bills, in all the provinces, for the consideration of the Governor-General in council, and this is constitutionally justifiable; but the same functionaries in the maritime sections have occasionally vetoed bills of their respective legislatures. Their legal right is unquestionable, but it is a right clearly quite inconsistent with the general principles of British constitutional government which should govern us in all cases.

In the United States where the power of veto is given to the President, and to all the governors of the states, with only four exceptions, the cabinet or executive officers have no responsibility whatever in matters of legislation, and the power generally operates as a useful check on the legislatures, which otherwise would be left practically without any control on their proceedings. In the Canadian provinces, however, the case is very different, for the ministry in each is responsible to the House and to the Lieutenant-Governor for legislation. If any bill should

pass the Houses despite their opposition as an administration, it is clear that they have, more or less, according to the nature of the measure, forfeited the confidence of the people's representatives, and it would be a virtual evasion of their ministerial responsibility, for them at the last moment to advise the Lieutenant-Governor to intervene in their behalf and exercise his prerogative. He might well question their right to advise him at all, since they had shown they had not the support of the legislature of which they were a committee. In Ontario and Quebec no ministry has ever occupied so anomalous a position, and the only explanation that can be offered for the existence of the veto in the other provinces is that by carelessness or ignorance governments have permitted legislation, which the Lieutenant-Governor has found to be beyond the competency of the legislature, or otherwise very objectionable, and that he has been forced to call the attention of his cabinet to the fact.

An executive council has, under these circumstances, (for I am speaking from authoritative information on this interesting point), felt itself bound to accept the situation and advise the disallowance of the bill. Under the peculiar circumstances that probably existed the veto may at times have proved advantageous to the public interests; but looking at the nature of our government, it would be probably wiser to be content with the check which the Constitutional Act already imposes on improper legislation in a provincial legislature—that is, the general power of veto by the Dominion Government.

General Remarks on the Judiciary.—The judiciary, like its English prototype, evokes respect in every Province of Canada, for the legal attainments and high character of its members. Entirely independent of popular caprice, and removable only for cause on the address of the two houses of parliament, it occupies a very advantageous position compared with the same body in many of the United States. While the administration of justice, including the constitution, maintenance and organization of the Provincial Courts, both of civil and criminal jurisdiction, is one

of the matters within the purview of the legislatures; the government of the Dominion alone appoints and provides the salaries of the Judges of the Superior, District and County Courts, except those of the Probate Court in Nova Scotia and New Brunswick. It has also been decided that the Dominion Parliament is at liberty to create new Courts, when public necessity may require it, for the better administration of the laws of Canada, or to assign to the jurisdiction of existing Courts any further matters appropriate to their sphere of duty. For when legislating within its proper bounds, that Parliament is clearly competent to require existing Courts in the respective provinces, and the Judges of the same, who are appointed and paid by the Dominion, and removable only by address from the same Parliament, to enforce its legislation (*f*).

The position of the judiciary of Canada may be compared with that of the federal judiciary of the United States, since the latter has a permanency and a reputation not enjoyed by the Courts of all the States. The President appoints, with the approval of the Senate, not only the Judges of the Supreme Court at Washington, but the Judges of the Circuit and District Courts. In the majority of the States, however, the Judges are elected by the people, and in only four cases is there a life tenure. The Supreme and Circuit Courts of the United States occupy a vantage ground from their permanency, and the nature of their functions, which embrace a wide sphere of study and interest. In Canada the salaries are even less than in the United States; and there are also inequalities between the large and small provinces which ought to be removed as soon as salaries generally are readjusted and increased, so as to be more in consonance with the great responsibilities of these high positions. The county and district Judges especially receive far too small a sum for the onerous and responsible work which they have to perform. Although the salaries are small compared with what a leading lawyer can make at the bar, yet the freedom of

(*f*) *Valin* v. *Langlois*, 3 S. C. R. 70; 5 App. Cas. 115.

the office from popular caprice, its tenure practically for life, its high position in the public estimation, all tend to bring to its ranks men of learning and character. Since those deplorable times in Canadian history when there was a departure from the wise principle of having the executive and legislative department in separate hands, the Bench has evoked respect and confidence; and there have been no cases of the removal of a judge on the address of the two houses.

The Legal Powers of Municipalities.—The municipal institutions of Canada are the creation of the respective legislatures of Canada and may be amended or even abolished under the powers granted to that body by the ninety-second section of the fundamental law. The various statutes in force establish councils, representative in their nature in accordance with the principle which lies at the basis of our general system of local government. All the municipalities have large borrowing powers, and the right to issue debentures to meet debts and liabilities incurred for necessary improvements or to assist railways of local advantage. The councils, however, cannot directly grant this aid, but must pass by-laws setting forth the conditions of the grant, and means of meeting the prospective liabilities, and submit them to the vote of the rate-payers, of whom a majority must approve the proposition. The reference to the people at the polls of such by-laws is one of the few examples which our system of government offers of a resemblance to the *referendum* of laws passed by the Swiss federal legislature to the people for acceptance or rejection at the polls. It is a practice peculiar to municipal bodies, though the same principle is illustrated in the case of the Canada Temperance Act.

On the right of the provincial legislatures to delegate powers specially given them by the constitution to any body or authority also created by themselves, we have a decision by the Privy Council in the case of the Liquor License Act of Ontario (the most important yet given by that tribunal on the constitutional jurisdiction of the provinces), which authorized certain license commissioners to pass resolutions

regulating and determining within a municipality the sale of liquors. The maxim *delegatus non potest delegare* was distinctly relied upon by the opponents of the measure, but the Judicial Committee emphatically laid down that such an objection is founded on an entire misconception of the true character and position of the provincial legislatures. Within the limits of its constitutional powers "the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under the circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect." Such an authority is, in their opinion, "ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail." A legislature in committing important regulations to agents or delegates it is decisively stated, does not by any means efface itself; for "it retains its powers intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands," and how far it "shall seek the aid of subordinate agencies and how long it shall continue them, are matters for each legislature, and not for Courts of law to decide."

General Remarks on the Municipal System.—The municipal system on the whole is creditable to the people of Canada. It has its weaknesses owing in some measure to the disinclination of leading citizens, especially in the cities and large towns, to give up much of their time to municipal duties, although every person is so deeply interested in their efficient and honest performance. Jobbery and corruption are, however, not conspicuous characteristics of municipal organizations in the provinces; and we have happily no examples in our history at all inviting comparison with the utter baseness of the Tweed ring in New York. In the rural municipalities of Ontario there is a greater readiness than in the large cities to serve in the municipal councils, and as I have already shown those bodies have given not a

few able and practical men to parliament. On an effective system of local self-government rests in a very considerable degree the satisfactory working of our whole provincial organization. It brings men into active connection with the practical side of the life of a community and educates them for a larger though not more useful sphere of public life.

Political organization of the Territories.—The Government of the Dominion now holds complete jurisdiction over the Territories. The provisional district of Keewatin was formed some years ago out of the eastern portion until the settlement of the boundary dispute between Ontario and the Dominion, but since that difficulty was adjusted it has only a nominal existence, though it still remains under the government of the Lieutenant-Governor of the Province of Manitoba. In 1882 a large portion of the North-West was divided into the four districts of Assiniboia, Saskatchewan, Alberta, and Athabasca, for postal and other purposes. Beyond these districts lies an unorganized and relatively unknown region, watered by the Peace, Slave, and Mackenzie Rivers.

Until the winter of 1888, the Territories were governed by a Lieutenant-Governor and Council, partly nominated by the Governor-General in council and partly elected by the people. In the session of 1888, the Parliament of Canada passed an Act granting the Territories a legislative assembly of twenty-two members, but they do not yet enjoy responsible government like the Provinces. The Lieutenant-Governor, who is appointed by the Governor in council for four years, has, however, the right of choosing from the assembly, four members to act as an advisory council in matters of finance. Three of the Judges of the Territories sit in the assembly as legal experts, to give their opinion on legal and constitutional questions as they arise, but while they may take part in the debates they cannot vote. The assembly has a duration of three years and is called together at such times as the Lieutenant-Governor appoints. It elects its own speaker and is governed by rules and usages similar to those that prevail

in the assemblies of the provinces. The civil and crimin laws of England are in force in the Territories, so far they can be made applicable; and the Lieutenant-Governo and assembly have such powers to make ordinances for th government of the North-west as the Governor-General council may confer upon them; but their powers cann at any time exceed those conferred by the constitution Act upon the provincial legislatures. There is a Supren Court composed of five Judges, appointed by the Ottaw government and removable upon the address of the Sena and House of Commons.

The Court has within the Territories, and for the admi istration of the law, all such powers as are incident to superior court of civil and criminal jurisdiction. Th Territories are represented in the Senate by two senato and in the House of Commons by four members, who vo and have all the other privileges of the representatives the provinces. In this respect the territories of Canad enjoy advantages over the United States territori which are not represented in the Senate, but have on delegates in the house of representatives without the rig of voting. Year by year, as the population increases, th people must have their political franchises enlarged. Th time has come for introducing the ballot, and the inhab tants are an exceedingly intelligent class, drawn for th most part, so far, from Ontario and the other Englis provinces, and are in every way deserving of governin themselves in all local matters, with as little interferenc as possible from the central authority.

JNO. GEO. BOURINOT.

EDITORIAL REVIEW.

The French Language and Separate Schools in Manitoba.

The proposal to discontinue the official use of the French language in Manitoba and to abolish separate schools raises the question as to the constitutional right of the Provincial Legislature to effect the change.

It is necessary, in order to get a proper view of the position of the Province, to look at the legislation by which it was created. By the 146th section of the B. N. A. Act it is declared that the Queen in Council, on addresses from the Houses of the Parliament of Canada, might admit Rupert's Land and the north-western territory into the union effected by the Act, upon such terms as might be expressed in the addresses and approved by the Queen, and subject to the provisions of the B. N. A. Act. In 1868 an Act was passed by the Imperial Parliament (31-32 Vict. cap. 105; see Stat. Can. 1869), to provide for the rights of the Hudson's Bay Company, and the authority to admit the territory was reiterated; "and thereupon it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain, and establish within the land and territory so admitted all such laws, institutions and ordinances, etc., as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein."

The Houses of the Parliament having presented their addresses (see Stat. Can. 1872), an order of the Queen in Council was passed on 23rd June, 1870, declaring that "from and after the 15th July, 1870, the said north-western territory shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the first hereinbefore recited address, and that the Parliament of Canada shall from the day

aforesaid have full power and authority to legislate for the future welfare and good government of the said territory.'

By an Act of the Parliament of Canada in 1869, in anticipation of the order in council, the Lieutenant-Governor of the Territory was empowered to make laws for the Territory, the same to be laid before Parliament. By the same Act, all laws in force at the time of the admission into the union were to remain in force as far as consistent with the B. N. A. Act, and with the terms of admission.

In 1870 an Act was passed by the Parliament of Canada, cap. 3, forming out of the new Territory to be admitted the Province of Manitoba. It was given a legislature, and the B. N. A. Act was to apply, except in so far as varied by this Act, in the same way and to the like extent as it applied to the several Provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the B. N. A. Act. An exception is made of these portions of the B. N. A. Act which specially affect one or more of the original Provinces but not the whole.

Thus, the Province was formed by the Parliament of Canada, and she stood equipped for legislation with the same powers and subject to the same restriction as to the topics of legislation as the other Provinces of the Dominion. Naturally the education clauses of the B. N. A. Act would have applied. But, as the phraseology of several of the clauses related specially to a state of affairs at a previous date, the Manitoba Act repeated their principle with express reference to the new province.

Section 22 declares as follows:—"In and for the Province the said Legislature may exclusively make laws in relation to education, subject to and according to the following provisions:—Nothing in any such law shall prejudically affect any right or privilege with respect to denominational school which any class of persons have by law or practice in the province at the Union." The historical question, were there any denominational schools in the Territory now known as Manitoba at the time of its union

to the Dominion? must be answered before we can proceed; and we must also know whether they were mere voluntary schools, for the Act provides for two classes of schools—those established by law and those established by practice. The Province came into existence at the same moment as the territory was annexed to Canada (see sec. 1 of the Manitoba Act), and the laws at the time did not provide for separate schools which were known only to old Canada. But schools may have been established by practice. It is matter of fact to be ascertained whether there were any schools of the nature of separate schools, but a matter of construction as to what is meant by "practice." It was not intended to include voluntary schools, or at any rate if it was, it means nothing more than that voluntary separate schools are not to be interfered with. It is extremely difficult to give any other meaning to the term. For if there were schools having civil rights to separate maintenance, they must have had their rights by law.

It is certainly out of place in a statute *creating* a new Province to refer to any state of affairs as existing "in the Province at the union." The Province did not exist until the statute had been assented to, and it is a fair argument to urge that there were no existing schools "in the Province" at that time. To give these words a meaning, however, we may read them as "in the territory of which the Province has been formed," and this brings us back to the question, were there any denominational schools in the Province entitled by law or practice to exist.

If there were any, what right had the Dominion Parliament to place restrictions as to education upon the law making power? It was given power to make laws for the peace, order, and good government of the new territory, but not power to create a constitution for it; and the validity of the Manitoba Act might well have been questioned if it had not been for the Imperial Act of 1871, cap. 28, which declared it to be valid. The Manitoba Act has therefore the same authority as if it had been passed by the Imperial Parliament and its provisions are binding until released by the same authority.

But the restriction does not depend entirely upon th Manitoba Act and the legislation confirming it. For w must recollect that the B. N. A. Act provides for th admission of new Provinces and Territory subject to th provisions of the Act, one of which is that the right make laws respecting education is subject to the restrictio already mentioned. Any Act respecting separate school however, which has been passed by the Manitoba Legisla ture may of course be repealed.

The right of a subordinate legislature to introduce foreign language as an official language may well b doubted. If there is any fundamental right which is vit to a nation, it is the right to its race language. It is esse tial to its existence, and none but the supreme law-makin power of the nation can entrench upon the right. Th Manitoba Act, however, has the approval of the Imperi Parliament and has the same authority of the B. N. A Act.

It appears therefore that Imperial legislation is necessar in order to enable the Provincial Legislature to effect th changes in question, unless in fact there were no separa or denominational schools in the territory at the time the creation of the Province. The B. N. A. Act was passe because it was asked for, and if the full measure of respo sible popular government is to be given to Canada, there no doubt that the Imperial Parliament will give it, and thu divest itself of the responsibility of settling questio which are much better settled by the people for them selves.

The Law School.

Messrs. Marsh and Armour, have been appointed Lectu ers, and Messrs. Kingsford and Drayton, Examiners.

The first term will open at Osgoode Hall, on Monday th 7th October. The only course of lectures to be given th year is the first year's course and the subjects and te books are as follows:—Smith on Contracts, Anson on Co tracts; Leith's Williams' Real Property; Broom's Com mon Law, Kerr's Students' Blackstone, Books 1 and 3

Snell's Principles of Equity; Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

The lectures on one subject will be completed before those on another are begun and will be in the order above indicated. The lectures on Contracts and Common Law will be given by the Principal, those on Real Property by Mr. Armour, and those on Equity by Mr. Marsh.

No students or clerks serving outside of Toronto are required to attend during the coming term.

The students and clerks who are *required* to attend, are all those attending in Chambers or serving under articles in Toronto, who are entitled to present themselves either for their First or Second Intermediate Examination in any term before Michaelmas Term, 1890. The School examination to be held next May at the close of the term upon the above subjects and text books, if passed by these students and clerks, will stand in lieu of their First or Second Intermediate Examination, as the case may be.

Those students and clerks attending in Chambers or serving under articles elsewhere than in Toronto, and who are entitled to present themselves either for their First or Second Intermediate Examination in any term before Michaelmas Term, 1890, *may* attend the school during the coming term, and the school examination in May next, upon the above subjects and books, if duly passed by them, will stand in lieu of their First or Second Intermediate Examination, as the case may be.

In future the scholarships to be offered by the Society will be in connection with the Law School examinations only.

At the first school examination next May, there will be offered fourteen scholarships in all; seven to those who pass the examination as their First Intermediate Examination, and seven to those who pass it as their Second Intermediate Examination. The amounts will be one of $100, one of $60, and five of $40 for each.

Inspection of Public Offices.

We have received the sixth annual report of the Inspe tor of Public Offices, which contains the usual lar amount of information. All must agree that the annu inspection has been productive of great benefit to the pub service. But the inspection does not extend far enough. is now many months since the joint committee of t Bench and Bar recommended that the inspector should a referee to decide upon the minute, unmeaning but ver tious differences in practice which exist in offices Osgoode Hall which are divided only by walls of plast The assimilation of the practice will never take place long as independent minds, clogged with ancient traditio are set to interpret the rules.

In its statistics, too, the report is of great service. V may have occasion to refer to these again when the que tion of abolishing separate sittings in the Chancery Di sion arises again, as it will shortly.

BOOK REVIEW.

Lawyers' Reports Annotated. Book III. All current cases of general value and importance decided in the United States, State and Territorial Courts, with full annotations, by ROBERT DESTY, Editor; EDMUND H. SMITH, Reporter, etc., etc. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1889.

This is the third volume of this series, to which we have before referred. For the character of the work, of which we have before spoken, we have nothing more to say, except that this volume maintains it. But it is somewhat alarming to find reports turned out at such an alarmingly fast rate.

REVIEW OF EXCHANGES.

American Law Register.—March, 1888.

Certification of Bank Checks, by W. H. Bryant. The certific tion need not be in writing. The leaning of the authorities is toward putting the certifying bank in no worse position than an acceptor. the certification is improperly made it gives notice to holders, and th bank will not be liable to any subsequent holder if in the first place was not bound. Where the payee or subsequent holder obtains the cert fication the bank becomes the principal and only debtor, the holder thu discharging the drawer, and the cheque thus circulates as the represent tive of so much cash in bank. When the cheque is certified at th request of the drawer, the bank becomes primarily liable to the pay and subsequent holders; the drawer and indorsers are not discharge except by such acts of the holder as would discharge the drawer an indorsers of an uncertified cheque; and the cheque circulates as th representative of so much cash in bank payable on demand to the holde with the drawer as surety.

Ibid.—April, 1888.

Discretionary charitable bequests, by Edmund H. Bennet The English law is reviewed showing the existence of a prerogati right of the Crown to administer such legacies. In America where n prerogative right exists, the next of kin take when this discretion is no exercised.

Ibid.—May, 1888.

Gas and Water Companies: their relations with consum ers, by Solon D. Wilson. The English cases hold that (apart fro statutory regulations) the obligation arises in contract, and if the co sumer may refuse to take, the company may refuse to supply. Th American cases hold that it is mandatory to supply all without distin tion, under reasonable regulations.

Ibid.—June, 1888.

Law Schools and Legal Education, by Henry Wade Roger A strong plea for law schools as a medium of instruction.

Ibid.—July, 1888.

A Reply on the subject of Legal Education, by HENRY BUDD. A reply to Prof. Rogers in which the writer maintains that he has not been shaken in his assertions, one of which is that two years at a law school does not constitute adequate preparation for admission to practice.

Ibid.—August, 1888.

The true character of Divorce Suits, by RUFUS WAPLES. The learned writer concludes that the divorce suit is not *in rem* since it is not against a *res*: that it is always in *personam* but as it fixes *status* it is *quasi in rem*; that publication notice is sufficient; that when the complainant only is in Court the decree fixing his *status* as that of a single person incidently changes that of the other, *ex necessitate rei*; that the jurisdiction of a state over the *status* of its own citizens is not such as to defeat this incidental effect of divorces against them by *ex parte* proceedings in foreign jurisdictions.

Ibid.—September, 1888.

Citizens, their Rights and Immunities, by D. H. PINGREY. Cites American cases.

Ibid.—October, 1888.

Ogden v. Saunders reviewed, by CONRAD RENO. The decisions affecting the constitutional phrases, "due process of law" and "obligation of contracts" are discussed.

Ibid.—November, 1888.

The illegal issue and over-issue of Capital Stock of Corporations, by LEWIS PUTZEL. English and American cases are cited.

Ibid.—December, 1888.

Marshalling Assets with reference to the rights of successive part Purchasers and Incumbrancers, by JOHN MARSHALL GEST. The learned writer states the following proposition as his conclusion:—If a paramount incumbrancer of two funds, by his election of remedies, disappoints a junior creditor who has a lien upon one of them only, the latter shall to that extent, be substituted to the lien of the paramount incumbrance upon the other fund bound by it, as against the debtor and all claiming under him by lien of title subsequent in time.

Ibid.—January, 1889.

Privileged Communications, by G. W. FIELD. The rule as to communications to attorney and counsel is stated, with numerous examples, from English and American cases, of its application. Communications made to physicians and clergymen are governed by statutes in the various states, and the extracts from the statutes with notes of decisions thereon are given. The statutes are noted by JOHN B. UHLE.

The Element of Locality in the Law of Criminal Jurisdiction, by HENRY WADE ROGERS. American cases and statutes are cite

Ibid—February, 1889.

The Law Relating to Telephones, by WILLIAM M. ROCKEL. Tel phone is telegraph in law though the statutes relating to telegraph we passed before telephones were invented. Land may be condemned in t states for the purpose of erecting poles, and it has been held *pro* and *c* that the erection of poles on the highway is an additional burden on t adjoining owner, to whom compensation must be made. Stretching wire over the premises of another is trespass. The telephone is a com mon carrier and is bound to treat all persons alike. They may limited by statute as to the charges they may make, and the user bound to use the instrument subject to reasonable regulations. T statutes are noted in this and succeeding numbers by JOHN B. UHLE.

Ibid.—March, 1889.

The Sovereign State, by A. H. WINTERSTEEN. Some Americ constitutional cases are cited.

THE

CANADIAN LAW TIMES.

NOVEMBER, 1889.

INAUGURAL ADDRESS TO THE LAW SCHOOL, ONTARIO (a).

IN making a few observations introductory to the Course of Lectures to be delivered in the first term of the Law School, the thought which naturally presents itself at the outset is one which relates to the objects of the establishment of such an institution here at the present time. In other countries the foundation of law schools has taken place at an early period in the history of educational progress. In the case of England and the United States it has been, I think, at an earlier period having regard to the rate of advancement in other fields of intellectual enterprise than has been the case with us. Sir Edward Coke speaks of schools of law which were kept by learned men in the city of London, after the making of Magna Charta. The Inns of Court were themselves schools, Lincoln's Inn dating back to the time of Edward II. and Gray's Inn to the time of Edward III.; while we are told by a writer of the time of Henry VI. that in that day there were ten Inns of Chancery, to each of which belonged one hundred students at least, and to some more than that number; that most of these were young learning the first principles of law, and that as they advanced in learn-

(a) Addressed by the Principal of the School to the members of the profession and students present at the opening of the School at Osgoode Hall.

ing and grew to riper years they were admitted into th
larger Inns, called the Inns of Court, and that these large
Inns, which were four in number, had two hundre
students apiece, or nearly so. Speaking of these institu
tions, Blackstone describes them as forming a Universit
of Law, founded by a kind of collegiate order, compose
of the Professors of the Municipal Law, who, havin
formerly been dispersed about the kingdom when the Sup
rior Courts had been wont to follow the King's person to th
different palaces, had been brought together by the fixin
of the Court of Common Pleas to be held in one certa
spot, and who soon brought the laws to a comparative
high state of perfection under Edward II., whom
styles "Our English Justinian." "Here," he says, "exe
cises were performed and lectures read, and degrees we
at length conferred in the common law as at other unive
sities in the canon and civil law. The degrees were tho
of barristers who answered to bachelors, as the state a
degree of a serjeant, *servientis ad legem*, did to that
doctor."

In the United States there was no law school at t
time of the Revolution. The first one established was
Litchfield, Connecticut, in 1784. This school prosper
greatly. Many of the leading men of the day were educat
there, and it continued to be the only one in the count
until 1817, when the law department of the University
Harvard was founded. The law school of Yale College w
established in 1824, that of Virginia in the following ye
the one at Cincinnati in 1833, that of Columbia College
the City of New York, in 1858, and one in connection wi
the University of Michigan in 1859.

There are now some fifty law schools in operation in t
United States. The total number of students in 1886 w
3,054 as against 1,611 in the year 1870.

It would not be correct to say that the foundation of th
school is an entirely new departure so far as this Province
concerned. I well remember with what pleasure and pro
as a student some twenty-five years ago, I listened to t
lectures of an able staff, including the present Treasurer

the Law Society, which were regularly delivered every term. I can still recall how many cherished delusions resulting from slight misunderstandings between the text-writers and myself were effectually dispelled in the lecture room, and what a source of interest and profit it was to be able to go from the lecture room to the Court room where we could hear the great principles of law, which we had just had so lucidly expounded to us, practically applied in the argument of cases before the Court in banc by the leading counsel of the day. For years before that time and during most of the years which have elapsed since, the Society has to a greater or less extent provided instruction for students, sometimes making it compulsory, (as it was in my own student days) sometimes leaving it optional, but never practically abandoning its declaration in favour of the duty of affording to students of the law the training which in all other professions has always been considered essential.

It is quite true that there has been and is, not only here, but in other places were law schools have multiplied and flourished, some difference of opinion among lawyers as to the necessity for such schools, and as to the comparative values of the school and the office in affording the means of education for the practice of the profession.

Probably in no other country have the advocates of the office as the best and only needed school of law been in times past more tenacious of their opinions than in the United States, and yet although in that country, compulsory attendance is I believe unknown, although in most instances graduation at the school is not accepted in lieu of any of the ordinary requirements for admission to practice the profession, yet we see the schools there have greatly multiplied, and we find the large number of students I have mentioned voluntarily attending them, and in many instances paying large fees for the privilege of doing so.

Rightly considered there is no conflict between the educational functions of the office and those of the school. Both are necessary. Each is the complement of the other. No one will dispute that the duties of the office are neces-

sary to train the student to habits of business and accuracy in matters of detail, and to impart a ready knowledge of what we call the practice. How to do that which the school has taught him the reason for doing is the province of the office. In the hurry of office work it is not always that the young student or clerk can manage to pick up the reason or philosophy of even the simple proceedings which are entrusted to his care, to say nothing of the reasons for the larger proceeding which includes them, as witness the case of the clerk who under our old system of pleading endorsed upon the plaintiff's declaration a notice to the defendant to plead thereto in the following words: "Take notice that you are required to plead to this declaration within eight days, otherwise *all proceedings against you will be stayed.*"

It is often said of course that the only way to learn how to do anything properly is to do it. If this proposition be granted to the fullest extent, it still remains an important question how we are to learn whether or not the thing ought to be done at all. If that which we are doing, is a thing which under the existing circumstances is not the proper thing to do, the fact that we are doing it well may afford but little consolation in the end. Indeed it may turn out that the better it is done the worse it will be for those concerned. It is just here perhaps that the weakness of office training standing alone is most apparent. It may be cheerfully admitted that the office is the best school for learning the practice of law in the narrow sense; but imagine the young lawyer who has just listened to a complicated narrative of some client's grievance appealing to knowledge thus acquired to aid him in obtaining the needed redress. With a memory freshly stored with the rules and forms of various kinds of actions and proceedings, he is hopelessly at sea if he does not know whether any, and if so which of these various actions or proceedings ought to be instituted. He of course remembers the actions which were brought, some of them interesting and important ones, which he assisted in bringing to a successful conclusion, but in none of them

were the facts exactly similar to those now presented for his advice, and he does not know how much or how little importance to attach to those facts in which they differ. If he could only decide what his client's rights are, and what remedy he is entitled to crave, he would have no further difficulty. But what a large and terrible "if" that is. It stands before him like an inaccessible rock, cutting off the path of the mere practitioner from that of the true lawyer.

Now this result, a not uncommon one I venture to say, springs not from the fault of anyone in particular, but from an illogical system, which begins by laying down the perfectly true proposition that the best if not the only way to learn how to do anything properly, is to do it, and ends by sending out the young lawyer to practise his profession without ever having compelled or even allowed him to do that which is of paramount importance, viz.: to decide what are the client's rights, whether he has any remedy, and if so, what that remedy must be. The language of Blackstone may be appropriately quoted here, in which he says: "Making due allowance therefore for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the Bar in subservience to attorneys and solicitors will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be misinstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any argument drawn *a priori* from the spirit of the laws, and the natural foundations of justice."

Thus far we have supposed the student's experience of cases to be mainly confined to those with which he has come in contact in the office, but imagine him if you please to be placed in our excellent library with leisure to ransack the volumes of reports with their thousands of cases there

recorded, and how much better is he off? Hundreds of these cases turn upon special facts. Those which really exemplify important principles are few and far between, and the student, dazed and bewildered by the multiplicity of decisions with their fine distinctions depending upon complicated differences of fact, is apt in the confusion to lose sight entirely of the true principles which do lie hidden somewhere in the heterogeneous mass. Now, the remedy for all this is proper teaching, by which the reasoning faculties will be cultivated and allowed their due share in the matter by which the great fundamental principles of Law will be discussed until they are properly understood and so impressed upon the mind as to be available for daily use through life, so that when the student or young lawyer when a new case is presented to him, instead of at once flying as a matter of course to the reports to search until he finds a case exactly similar in its facts, and considering it hopeless to do anything else until that is done, will first sit calmly down, and applying the test of general principles form some opinion of his own, not of course to take the place of authority, but to enable him to intelligently apply such authorities as he finds. No doubt the candid advocate of purely office teaching would here say that the decision of the rights and remedies of clients must in the necessity of things rest mainly with the principals, and cannot be entrusted to students, except in comparatively few and unimportant matters, and that to learn law as distinguished from practice a resort to Text Books is admittedly necessary. The former part of such a proposition is probably verified by the experience of most lawyers. The latter part is recognized as true by those who control matters of legal education in every country where English Law is administered. But another truth which is practically acknowledged everywhere, is that every science which needs a study of books to acquire it, needs also a teacher to assist the study, as witness our colleges and schools of theology, of medicine, of military and naval science, of technology, of the fine arts, of pharmacy, of agriculture. It would seem strange indeed if the profound and universal science of Law

e the only one in which the student might safely be left is books without a school.

erhaps, broadly stated, the chief function of the Law ool may be said to be the cultivation of the right under- ding of legal principles. In no other department of ning can the knowledge of fundamental principles be reater importance than in this. I am not sure that it not be truly said that a thorough understanding of ciples is of special importance and necessity in this, use legal principles are in more peril than others. A rture from principle in mathematics will demonstrate f and cover the erring one with confusion. Not so in Law is a matter of opinion—the opinion of the ges. The law in any case is just what the Court of last t thinks it is; and it is the Law *because* the Court ks it is. In no other science does the fact of any man t of men thinking that a thing is so make it so. That culiar to law. I am speaking of course of the practical lt. There is a theoretical sense in which the law is pendent of and above the Courts and remains the e and unchangeable by any judicial power. Hence, principles may be practically and for a time at least ridden with seeming impunity, and though not royed, may be so long suppressed as to be in danger of g forgotten. Instances are not wanting in which ges in the decision of cases, either from want of appre- on of the real principles involved, or from a desire to ess grievances for which the law had not provided any ess, have departed from long established rules of deci- Such a judgment has become a precedent, which has followed in case after case through a long period of s, until at last the error has been detected and the ent of decision once more turned into the safe channel rinciple.

hat is the secret of the enduring fame of that great written a century and a quarter ago and still consid- essential to the education of every lawyer, still ed in the hands of students, running through the whole iculum as the foundation work for the various subjects

of the course? Great works had been written before it, a great works have been written since, but none has preserv so much vitality at such an age, none has so firmly held place in the midst of so much change. Bracton and Fle and Selden and Coke produced works which were rich mi of legal learning, but Blackstone alone took his reader t lofty height, and shewed him spread out below the wh noble outline of the kingdom of English law. Seen fr this point of vantage this outspread map of legal princip stamps itself upon the mind to remain forever.

A few words now in regard to our curriculum and propo method of study. The course of study prescribed by Law Society some years ago as the basis of the regu intermediate and final examinations is an excellent one, I believe the curriculum of the Law School is an impro ment upon it, as of course it ought to be. In the first pl there are some important additions to the subjects the selves particularly in the third year of the course. In second year a work entirely devoted to criminal law (t of Mr. Harris) has been introduced which, in the ot curriculum, is not taken up until the final examination call to the Bar. Some authorities pronounce in favour placing such a work in the hands of beginners, but with the intermediate view has prevailed and it is placed in second year. Mr. Smith's work on Contracts, which in other curriculum is down for the final examination for ce ficates of fitness, is in the new one placed in the first yea the course, as being a book from its popular style eminen suitable for beginners. Then again, practice and procedu which in the older course is deferred to the final exami tion, has in the new one been put down in both the seco and third years with the design of co-operating as far possible with the office in this important subject.

By way of additional subjects we have private internatio law and the construction and operation of statutes both the third year. In a country situate like ours, consisting its of different Provinces, having on many important subje diverse laws, and with so many States upon our border d fering in their laws, not only from us but from each oth

lawyer can hardly be considered fully equipped for the ractice of his profession here without some knowledge private international law. So in the multiplicity of tatutes, Imperial, Dominion, Provincial, the study of the les which govern the interpretation and operation of Acts Parliament, is one which is ever on the increase in in- rest and importance. So far as regards the subject of nstitutional History and Law, we have confined our- lves to those of Canada. Roman Law and Public Inter- tional Law have been omitted altogether. The impor- nce of those studies cannot well be over-estimated. Many ink that the proper place for them is in a university cur- culum, as being a legitimate part of a liberal education. owever that may be, in view of the compulsory feature of e scheme and circumstances of the country and profes- n, the omission at all events at present seems justified. e aim has been while making somewhat liberal additions the course of study, to add nothing except what may be tly considered a part of the education needed to fit the yer to properly practise his profession in this Province. The first year's course of lectures on which we are about enter is divided into four distinct series. One upon Con- cts, a second upon Real Property, a third upon Com- n Law and the fourth upon Equity. Two of these jects, Common Law and Equity, are great compre- nsive divisions, which embracing as they do great gen- l principles governing civil rights and remedies, seem cover most of the field of English law. Hence thus ly in the curriculum they are presented to the student's w as the more salient outlines and important features a map to be filled in from a study of special subjects er in the course.

The Common Law of England described by Blackstone "that admirable system of maxims and unwritten cus- ns which is known by the name of the Common Law extending its authority universally over the whole lm," is also said to be one of two great systems of law, ich between them practically rule the civilized world. has been admiringly called by the eminent American

legal author, Dr. Bishop, "The Common Law of Reason. It has had an elastic element of adaptation to the need and changing circumstances of the country and its people which, while rendering it somewhat grotesque in point o architectural effect, has no doubt been largely the secre of its perpetuity and power. "Imagine," says anothe eminent lawyer, "any material structure erected upon n settled plan, begun in a remote age, put up bit by bi here a little, and there a little, a wing at one time, porch at another, here a tower and there a steeple, roof raised a storey in one part, and lowered a storey i another, the materials of brick, of wood, of stone by turns and built by workmen of every century. From such mode of building we would not expect a very harmoniou whole. Yet such a structure is the law of England, an considering the way in which it has been erected it i perfectly marvellous that the fabric should challenge as i does the admiration of the world."

In regard to the great subject of Equity, casting ou thoughts back to a time before legislation abolished th distinction between Courts exercising common law jurisdic tion and those exercising equitable jurisdiction, as we mus do in order to obtain a correct notion of Equity, we ca perhaps derive a better general idea of it from a few word of Blackstone and a few words of Story than in simila compass elsewhere.

Blackstone says, "Courts of Equity are established t detect latent frauds and concealments, which the proces of Courts of Law is not adapted to reach; to enforce the exe cution of such matters of trust and confidence as are bind ing in conscience, though not cognizable in a Court o Law; to deliver from such dangers as are owing to misfor tune or oversight, and to give a more specific relief, an more adapted to the circumstances of the case than ca always be obtained by the generality of the rules of th positive or Common Law."

And Story says:—"It has jurisdiction in cases of right recognized and protected by the municipal jurisprudence where a plain, adequate and complete remedy cannot be had

e Courts of Common Law. The remedy must be plain, it be doubtful and obscure at Law, Equity will assert isdiction. It must be adequate, for if at Law it falls of what the party is entitled to, that founds a jurisdic- n Equity. And it must be complete: that is it must the full end and justice of the case. It must reach hole mischief and secure the whole right of the party in fect manner at the present time and in future, other- Equity will interfere and give such relief and aid as xigency of the case may require."

e other two subjects of the year—Contracts and Real erty—represent a subsidiary division, not upon the of the great principles upon which relief is granted, ather in regard to the subject-matter of such relief, ased more upon the classification of remedies into those *sonam* and *in rem*. Although, of course, contracts affect nds of property, and in that way the Law of Contracts include some law which also relates to real property, the majority of cases founded on contract it is a per- liability that is sought to be enforced rather than a to property.

ill not dwell upon these two subjects, but merely k that both of them, dry as they may seem, have romantic elements, if we have the industry to trace their early history, as we ought to do with every sub in order to have a philosophical and intelligent view e whole. This element is supplied in regard to real rty by its connection with the Feudal system, and in se of contracts by those learned attempts which are made to trace back the English Law of Contracts to entage in the Civil Law of Rome, while counter pts, equally learned and interesting, are made to that the English Law of Contracts is a product of al development, owing little or nothing to Roman or foreign sources. An instance of the working of this s of development is given in the fact that at one period r law, although an express promise for consideration nade by one man to pay money to another, yet no would lie on the *promise* not being under seal, but

an action of debt only would lie upon the *consideration* other words, that the law did not consider the debt having bound himself to pay; but the law itself cast him the obligation to pay, because he had received some of value for which he ought to pay, and that his pr could be used only as a piece of evidence against hi the obligation he was already under. But in cour time this notion was changed, and the debtor is now liable to pay the price of what he has had, becau promised to do so, and if no express promise has made, the law does not even then pretend of its own to cast upon him the obligation to pay, because, h had something of value from the other, it is just right that he should pay for it; but the law implies he has promised to do so, and thus holds him liable the promise by which he has bound himself by acts, th not by words.

I have not observed that the opponents of the theo the Roman origin of our Contract Law have yet point this substitution of a self-imposed for a law-imposed bility as being in harmony with the political develop of the English idea of self-government, but it affords a gestion of the possibilities there are of relieving the ness of legal subjects open to those who pursue the torical and philosophical aspects of it.

One word as to our proposed methods of instruc The word lecture is used by us in a somewhat elastic s It will cover recitations, discussions and oral examinat Different lecturers will always have somewhat diff modes of conveying instruction, and it is perhaps wel to push any one mode to extremes. In some of the les schools in the United States, recently visited, the le in the strict sense of the term is not the prominent fe which it once was. Speaking for myself, I am convi that, as an every-day means of conveying instruc there are more effective modes than the smooth, broken delivery of lectures or essays upon legal sub valuable and desirable as those are upon occasion. our law is founded upon reason, it is by the exerci

on that we must hope to master it, and without at all ervaluing the aid of memory in gathering in stores of vledge, in this as well as in other departments of ning, I attach the highest importance to the cultivation e reasoning faculties. To be compelled to think is the mount need of the student of law, and the oral ination by the lecturer of the student from day to day the frequent discussions of questions by the students ng themselves, together with constant explanations by ecturers of points not fully understood, I believe are r methods of securing this object than a steady ad- nce to the plan of reading or delivering uninterrupted res, strictly so called, during which the student may as much or as little as he pleases. I know that in ioning oral examinations I am in danger of awakening easant recollections connected with this particular fea- of our regular Law Society examinations, but I have oubt that many a lawyer of long standing, if asked points of law were most indelibly impressed upon his l, would answer those which formed the subjects of his examinations when a student. Now, when stripped of errors with which it has heretofore been invested as crucial test of the student's right to advancement in his se or admission to practice, it will prove, I am confi- , a powerful stimulus to interest and ambition.

nother proposed feature is that of the Moot Court. This institution inseparable from the best schools in the ed States. A case is stated by the lecturer. Two ents are appointed to argue it as counsel for the plain- and two others as counsel for the defendant, and the ion is given by the presiding lecturer. It is obvious this is an exercise calculated to bring into full play faculty and every habit which require cultivation in r to produce successful counsel. Industry in procuring orities, thought in preparing the arguments, coolness self-possession in delivering them, the habit of intelligent ngement and lucid expression of ideas, in all these the ent thus obtains such a training as nothing else can . If the best way to learn how to do a thing properly

is to do it, he is here learning in the best way the v
important lesson of how to prepare and argue a case.

In conclusion, let me express the hope that we will
both teachers and students, bend our energies to m
a success of the new law school which the Benchers of
Law Society, with so much anxious effort on their p
have at length established. Nothing is needed but a
responding effort on our part, to do our duty as they h
done theirs. What spot more favourable to the succes
operation of a school of law could be selected on this c
tinent? To begin with, in a great educational centre
Toronto—the educational centre of the Dominion—
effort towards intellectual progress feels itself in sympa
and emulation with similar enterprises going on around
This is no small matter in itself. Then, what more
cient extraneous aids could be desired than those by wh
we are surrounded here? A large commercial city, conta
ing more than one-fourth of all the practising lawyers i
Province of two million people, affords in its numer
offices ample opportunity to learn every variety of pract
Frequent Courts, with their heavy dockets, embrac
every kind of cause, both civil and criminal, present an
viting field wherein to study the best methods of the b
nisi prius counsel, while in the same building where
school is held—the official home of all the judges of
higher Courts within the Province—the sittings of
Queen's Bench, Common Pleas and Chancery Division
the High Court of Justice and the Court of Appeal, furn
to the ambitious student, in the most elaborate argume
of the leaders of our Bar, the stimulating example of w
he himself may hope one day to become. Then, too, if
turn to the matter of books, what law school in Amer
ever at its inception had such ready access to so large
varied a library as ours? We are told that when
great Story commenced his lectures as Dane Professor
Law at Harvard Law School, all the books pertaining
that now famous institution would not have made m
than one good load for an ordinary wheelbarrow, and
day we have more books in Osgoode Hall—some thousa

re I believe—than are at present contained in the ary of Harvard school, which is at once the oldest, the t celebrated and probably the wealthiest law school in United States.

or is our school less fortunate in the constitution of its erning body. Many law schools are controlled by men rely separated from the practice of the law, and in e instances not belonging to the legal profession at all. urs, on the contrary, the government is in the hands nen engaged in active practice at the Bar, capable of reciating the needs of the student, and keenly alive to hat affects the interests and honour of the profession.

urrounded by favourable circumstances like these, there be no excuse for anything like failure. The most un-lified success must be the only legitimate sequence to ortunities so great. I trust that these opportunities be equalled by our determination to improve them; the Benchers will never find cause to regret having nitted us to a share in that trusteeship by which they l in their keeping the ancient honour of the Law Society Upper Canada; that, animated by the bright example hose great men of our Bench and Bar, whose eyes look n upon us from these time-honoured walls, we may roach our work with the same unconquerable spirit, the e unflinching devotion to duty, which achieved for m high position and renown, and which for us must at least self-approval and success.

W. A. REEVE.

EDITORIAL REVIEW.

The Law School.

On the 7th October last the Law School, after ma
delays, was formally opened. The many difficulties whi
presented themselves, not exactly in establishing the scho
but rather in smoothing over the objections upon min
matters, were at length disposed of, and the opening d
was the day fixed for the first lecture.

Upon the platform were the Treasurer of the La
Society, Mr. Irving, Q.C., Mr. Moss, Q.C., Mr. Martin, Q.C
and Mr. Lash, Q.C., representing the Benchers, and t
staff of the school. The Treasurer who was in the cha
addressed the members of the profession and the studen
who were present, and was followed by Messrs. Moss a
Martin. Mr. Reeve, Q.C., the Principal, then delivered
excellent address which we print in this number.

The compulsory attendance to some extent disturbed t
course of study upon which many of the students ha
entered, and in consequence of this many exemptions fro
attendance were granted, and it was thought that
attendance of fifty or sixty students would probably be t
maximum. But the results have been most gratifying
the way of attendance, no less than one hundred and thir
students being on the roll at the time of writing.

The advantages, which the students were somewhat slo
to perceive at first, may shortly be summed up as follows :-

The Law Society requires them to pass an examinatio
upon certain prescribed books; it furnishes lecturers
explain the text and give such additional instruction
may be necessary; therefore the students who attend t
lecturers have an immense advantage over those who
not. That gratifying results would have been attained eve
without compelling attendance may well be conjectured.

addition to the explanations of the text, which in any must be advantageous to the student, Moot Courts ish instruction and practice which he can get no re else. Perhaps no better method, short of actual tice, can be devised of applying knowledge than this. not always essential that a case capable of satisfactory sion should be propounded, if it awakens the faculties nalysis, invites research, and enables the counsel to stom themselves to state their arguments. The test of vledge by examination is a poor one compared with this. his, however, is not neglected. A weekly oral examion is held by which the lecturer can test the result of fforts. He is thus enabled to correct wrong impres- which he may have conveyed to his hearers, or reiterwhat they may have but inattentively observed.

the whole the results are encouraging, and the Law ety has so far no reason to repent of what it has done. has become evident, however, even at this stage, that session when the full attendance of all classes takes more extensive and liberal arrangements will have to ade both for accommodation and instruction.

A Justice's Justice.

subscriber sends us the following copy of a document h is now on record amongst the curial archives of ish Columbia:—

Whereas was this day charged before me of Majestres Justries of the Peace in and for the said rict of New Westminster on the oath of Hung Yen and rs for that "the Cham Gow steal chickens from several ys and the sam pruven by savrel partes the oter cases e poven hear after in the mantime his santance is six ts in common gael with *hard laber*."

hese are therefore to command you the said Constables eace officers or any of you to take the said Hung Yen him safely convey to the common gaol at new westminaforesaid and there to deliver him to the Keeper

thereof together with this precept and do here
command you the said Keeper of the said Common Ga
to receive the said Hung Yen into your custody in the sa
Common Gaol and there safely to keep him until he sh
be thence delivered by due course of law.

Given under my hand and seal this 25 day of Octaber
the year of our Lord one thousand eight hundred and
at Port Moody in the District aforesaid.'

And this is the interpretation thereof:—"Hung Y
(*quære*—did the magistrate mean *Yung Hen*), keeps chi
ens at Port Moody, and Cham Gow stole a number fr
him. Cham Gow was arrested and the charges agai
him proven by witnesses. The presiding magistrate, w
it is said, had no jurisdiction, sentenced the offender to
months in gaol with hard labour, and followed this up
committing Hung Yen, against whom there was no char
to stand his trial at the assizes for no offence whatev
As the warrant, or whatever it may be called, expres
directs the constable to imprison Hung Yen, he is probal
sorry by this time that he laid the charge. It would se
from this that the magistrate considers the unfortun
complainant a greater criminal than the thief.

BOOK REVIEW.

The Law of Torts. By J. F. Clerk, of the Inner Temple d the South Eastern Circuit, Barrister-at-law; and W. B. Lindsell, of Lincoln's Inn and the Midland Circuit, arrister-at-law. London: Sweet & Maxwell, Limited. 89.

This is a book without a preface which usually contains apology, and none is needed. One is apt to treat the w of Torts not so much as a systematized part of juris-udence, but as an aggregation of instances in which the urts have given relief in the case of wrongs done apart om contracts. That under our system of law every anch may be considered as in a state of development is ue, but that the development proceeds by means of connected instances of the application of remedies is true. The common law of reason pervades the whole, d the cases are illustrative of it. The law respecting srepresentation—the action of deceit—exhibits in a arked degree the progress of development, and the apter on this, to which the writer turned first, expecting find the late decision of the House of Lords in *Derry* v. *ek* incorporated in it, is an interesting chapter for this son. Unfortunately, as the authors point out, the deci-n came too late for incorporation, but it is treated of in appendix.

The book is welcome as an additional effort to systema-e and reduce to order the principles upon which the right relief for a wrong depends.

REVIEW OF EXCHANGES.

American Law Register.—April, 1889.

Matters requiring Judicial Notice, by E. W. METCALFE. Co tinued in June and July numbers. The existence of Sovereign Sta and Acts of States, and the national flags and seals are judicia noticed. The law of nations is universally recognized, and the l merchant. The accession and demise of the Sovereign, the correspon ence of the year of the reign with the year of our Lord, the prerogatives the Crown, and royal proclamations are judicially noticed by the Engl Courts, but not Orders-in-Council. The commencement of the sessi of Parliament, its prorogations, customs and privileges are noticed, b not its journals. Treaties are judicially noticed and cannot be affected any legislative Acts. Customs universally known are noticed, but n local usages. Municipal ordinances will not be noticed though t power under which they are made will. Courts take judicial notice the prominent geographical features of the country, its boundaries a the extent of its territorial jurisdiction, its division into counties, et and the public surveys. Instances are given of the various events connection with the civil war in the United States which have been ju cially noticed. The appointments of various officers are judicia noticed. Notice is also taken of the times of holding Court, and t establishment of judicial tribunals. Many other instances are given.

Ibid.—May, 1889.

Commercial Agencies, by CHARLES A. ROBBINS. The learn writer says that the result of the decisions is that "notification sheet are not privileged when made to all subscribers. Malicious reports s of course unprotected by privilege, if otherwise privileged. Commerc agencies are liable to subscribers if they fail to use ordinary care a diligence in furnishing the information asked for.

American Law Review.—March-April, 1889.

The Use and Value of Authorities, by SAMUEL F. MILLER. very useful review of the proper mode of using authorities before t Court. Mr. Justice Miller speaks feelingly of the injustice of coun who cite a long list of cases to the Court without having previously sift out those which are inapplicable, thus shifting their labour on the Cou

ad-Letter Laws, by IRVING BROWNE. Refers to many laws h cannot be enforced for want of public sentiment to back them, as as to obsolete Acts.

pairment of Contracts by Change of Judicial Opinion, by D RENO. Cites American Cases.

e Scope of the Present Law of Re-Sale, by NATHAN NEW- The American rule as to reselling goods on default made by the r is that the vendor is not bound to allow the goods to perish in his s or to become reduced in value; he may sell them and hold the r responsible for the difference between the price brought and the act price.

—May-June, 1889.

mparative Merits of Written and Prescriptive Constitu-s, by THOMAS W. COOLEY. This is mainly a comparison of the British the American constitution, the latter of which the learned writer s the best on earth. While the excellence of the constitution is an tted fact, its being written gives it a conservative characteristic, and cts it from passionate attacks and alterations; and the power to ge by gradual process brings it into touch with the sovereign people. immediate responsibility of the administration of the day to the e which is a feature of the British constitution will be introduced he American when the people see that it is needed. So thinks the ed writer.

Continental Review of the Cutting Affair, by ALBERIC , translated by THOMAS W. BROWN, JR. An argument in support e view that the Mexican Government had no right to arrest and ct Cutting for the offence of publishing a libel by circulating in co a paper containing it which was printed in Mexico.

iticism of Public Officers and Candidates for Office, by E CHASE. Citations of the law respecting libels of public men.

rface Waters, by J. C. THOMSON. Surface waters are distin-ed from waters which flow in defined channels and are called courses. In some states it is held that the owner of a lower piece nd may pen back the surface waters which would naturally flow on nd from a higher piece, while in others a contrary view is main-d. Cases respecting the pollution of surface waters are cited.

—July-August, 1889.

dification of the Common Law, by GEORGE HOODLY. A r in favour of codification.

The Dignity of the Law, by Chauncey M. Depew.

The Charging Part of an Indictment, by Stewart Rapalje. C
are cited illlstrative of the necessity for particularity in this part o
indictment when alleging an offence at Common Law. When cha
a statutory offence it is necessary to follow the words of the sta
but this may not be sufficient. Sufficient particularity is require
point out the offence so clearly that the same indictment would no
for another offence under the statute. Other phases of the subjec
treated of, and many American cases are cited.

The Liability of an Undisclosed Principal for Goods chased by his Agent, by John W. Beaumont. The rule that
principal may be resorted to, besides two well known exceptions,
subject at one time to a third, viz., that the principal cannot be
liable, where he has in good faith settled with, paid or credited
agent while the credit was still extended to the agent, and befor
third party intervened with his claim. This exception no longer e
in English law as recent cases do not countenance it. But the
recent authority in the States in direct opposition to the English
which the learned writers criticizes.

Libel of the Dead, by H. Campbell Black. A civil action wi
lie for such a libel, but an indictment will, on the ground that it
to stir up the relatives of the deceased and endanger the peace. I
been held that the danger to the peace does not exist where the rel
are in a foreign country.

Interest in Advance on a Demand Note, by Epaphroditus
Where interest for six months in advance was paid on a demand
it was held that that circumstance did not prevent a recovery o
note within the six months.

The Independence of the Departments of Governm
by Wm. M. Meigs.

Central Law Journal.—14th June, 1889.

Prosecution by Information, by Stewart Rapalje. The case
stated in which an information will lie. The requisites and pr
are then dealt with.

Ibid.—21st June, 1889.

Communications between Attorney and Client, by Nath
Miller. The privilege extends to all communications made b
client to his attorney for the purpose of obtaining advice, though
facts have been revealed which are not essential; the client not
presumed to know what is relevant and what is not. The attorney

mpelled to testify respecting dealings between his client and a third as to all communications made at that time. Other cases are oned in which the attorney must testify. Cases are cited to show when the service rendered by the attorney is for a criminal or ulent purpose, the privilege does not exist.

-5th July, 1889.

Facto Corporations, by WILBER STONEX. Where an associa- f individuals act as a corporation, the authorities seem to show hey should not be subject to an attack by any other party than tate, to test the corporate existence, and then only when called in a direct proceeding for that purpose, to show by what author- ey assume to be a corporation. Instances of what constitutes a to corporation are given.

-12th July, 1889.

ditional Sales of Personal Property—rights of the parties o where the seller retains the title as a security for the purchase y, by NOBLE SMITHSON. The effect of such sales is stated. When ndor retains the goods for default, after a portion of the purchase y has been paid, it seems that he may retain enough out of the nts to compensate him for the use of the goods by the purchaser, r any damages he may sustain, but must account for the residue purchaser.

-19th July, 1889.

gotiable Instruments, by JAMES M. KERR. English and Ameri- ses are cited.

-26th July, 1889.

urts of Record, by W. F. ELLIOTT. The learned writer after ining definitions of a Court of Record, ventures the following:— organized tribunal invested with the power of making judicial ons, of which it is required to keep a record, and possessing the rity, by seal or otherwise, to authenticate its records, which when henticated, impart absolute verity."

-2nd August, 1889.

Situs of insured property. Cases are cited as to the liability insurer when property is removed from the place designated, for urpose of using it, and also when it is removed from threatened r.

-9th August, 1889.

niting Liability of Express Companies. It has been held that ss companies may limit their liability by contract. The authorities onflicting as to whether they may limit their liability for negligence.

Ibid.—16th August, 1889.

Forcible Entry and Detainer, and Unlawful Detainer, by R. N. Blackburn. Forcible entry is defined. Cases are cited from various States shewing what is, and what is not, considered a forc entry.

Ibid.—23rd August, 1889.

Jurisdiction of Federal Courts over Estates of Deceas Persons, by Russell H. Curtis. Concluded in the following num

Law Journal.—27th April, 1889.

Disclosing the Confidences of the Camera. The right print and sell photographs from a negative not copyrighted having b denied, the learned writer after commenting on the case, conclu "There remains the contractual relation, which must largely depend the circumstances of each case, but if the present case lays down the is necessarily implied from a photograph being paid for that the ph grapher undertakes not to use the negative except for the purposes of customer, it seems to go further than can at present be accepted."

Ibid.—11th May, 1889.

Compulsory Settlements by Wards of Court. "As theprope which a husband acquires by marriage since the Married Wom Property Act, 1882, is *nil*, nothing appears to remain of the jurisdict to order a husband who has married a ward of Court without consent to settle property on her." As to the marriage of a n ward the opinion is expressed that there is no jurisdiction to comp settlement.

Ibid.—18th May, 1889.

"Volenti non fit injuria" in the Lords. Lord Bramwell pressed his extra-judicial opinion that the maxim applied to every c in which a person knowing the danger of doing certain work, and be under no physical compulsion to do it, nevertheless did it. This opin was not accepted by the other Law Lords.

Ibid.—25th May, 1889.

The Fictitious Payee of a Bill of Exchange. A discussion this phrase in connection with the case of *Vagliano* v. *Bank of Engl* where the payee's name was forged.

THE

CANADIAN LAW TIMES.

DECEMBER, 1889.

MECHANICS' LIEN ACT: OWNER'S LIABILITY FOR TEN PER CENTUM OF THE CONTRACT PRICE.

THE vexed question of the owner's liability to sub-contractors under this Act is hardly as yet capable of a satisfactory solution. The general opinion seems to be that the expressions of the Judges of Court of Appeal in *Goddard* v. *Coulson* (*a*), make in the direction of freeing the owner from the consequences of a contractor's default. Unfortunately, that case was presented to the Court in such a way as to invite an adverse decision. It was there attempted to construe the Act as rendering an owner responsible for ten per cent. of the whole contract price, notwithstanding that the contractor had involved him in loss by abandoning the contract, and that work to the value of the contract price had not been done. The position subsequently arrived at by the Chancery Divisional Court in *Re Cornish* (*b*), was not presented to the Court of Appeal; nor was any attempt made to confine the responsibility to ten per cent. of the value of the work actually accomplished, and the latter Court, in the words of Hagarty, C.J., declined to charge the owner by implication with "ten per cent. on a price for work which has never been done, and which, to the great injury of the owner, his contractor wrongfully declined to do."

(*a*) 10 A. R. 1.
(*b*) 6 O. R. 259.

The recent case of *Truax* v. *Dixon* (*c*), however dealing with the case of payments by an owner contractor of over ninety per centum of the contract p professes to follow *Goddard* v. *Coulson* as an authority that question, and in effect decides that such payments protected, so that a sub-contractor can only claim enforce a lien upon the actual balance due the contra at the date of filing his lien.

It is proposed in this article to discuss the liability owner to sub-contractors for ten per centum of the pri be paid for the work in case the owner has paid over ni per centum thereof, as well as the right of an owner t off the damages occasioned by his contractor's default.

It may be assumed that, if the owner be in any liable to a sub-contractor for ten per cent. of the pri be paid, the basis of the calculation will not be that ass by the plaintiffs in *Goddard* v. *Coulson*.

It was not, in view of the claim asserted in that case sidered necessary to define upon what exact price or the ten per cent. was to be calculated, and consequ the case is not inevitably in conflict with the decisi *Re Cornish*. There it was decided that the ten per should be calculated not upon the whole contract pric upon the amount justly due the contractor when he n default. There does not seem to be at present any re to question the correctness of that decision.

Assuming therefore that the basis of the calculati fixed, it is essential to ascertain how the mode of imp on the owner the liability for ten per cent. is express the Act. The section dealing with it is sec. 9, sub-s cap. 126, R. S. O., and is as follows:

"All payments, up to ninety per centum of the pri be paid for the work, machinery, or materials, as defin section 4 of this Act, made in good faith by the o to the contractor, or by the contractor to the sub tractor, or by one sub-contractor to another sub-contra before notice in writing by the person claiming the has been given to such owner, contractor, or sub-contr

(*c*) 17 O. R. 366.

he case may be), of the claim of such person, shall ate as a discharge *pro tanto* of the lien created by this ; but this section shall not apply to any payment made he purpose of defeating or impairing a claim to a lien ing or arising under this Act."

is positive in its quality only so far as it protects pay- ts up to ninety per cent., and therefore its action in ging an owner beyond that percentage is negative .

his distinction is referred to in the judgment of McDou- Co. J., in *Harrington* v. *Saunders* (*d*), where he says, 90, "I am of opinion that in all cases where there been a failure on the part of the principal con- tor, and the completion of his contract has occasioned owner an outlay beyond the balance of the original ract price, *and at the same time the payments to the con- or or for the work actually performed have been 90 per or under of the value of such work*, then in every such the claim of any lien holder (other than claims for es, which I do not deal with) must be postponed until wner's damage is satisfied, and if such damage absorbs amounts due the original contractor, under his con- t for the work performed by him, then such lien will attach."

, therefore, payments are made exceeding ninety per um of " the price to be paid," it would seem necessary rder to give effect to the wording of this section to ex- e them absolutely and to treat them as not having been e in dealing with cases coming under it.

he owner is now empowered, in the absence of a stipu- n to the contrary in his contract, to retain ten per cent. ie price to be paid for thirty days after the completion he contract (sec. 7), and consequently cannot be com- ed to pay it until the expiration of that time.

, owing to a contractor's default, it costs the owner e than the balance of the contract price to complete, this ten per cent. in his hands would not be payable his completion of the contract. Then his claim against

7 C. L. T. 88.

the contractor will be complete and ascertained, and unle
it be intercepted by the lien by a sub-contractor, it is in h
hands and may be set off.

In *Harrington* v. *Saunders* (*ante*) McDougall, Co. J
decided that the owner's claim for damages can be so s
off to the prejudice of a lien (if not a lien for wages). The
the defendant Baillie contracted to erect for the defenda
Hewlett a building for $2,183. Baillie sub-let the mason
and brick work to the defendant Saunders for $956. T
defendant Saunders bought and had delivered to him
the plaintiff bricks which went into the building to t
value of $240. Baillie, after doing part of the wor
became embarrassed and made an assignment for the ben
fit of his creditors. Hewlett, the owner, then, under t
terms of his contract, re-let it to Baillie's brother. T
value of the work done when Baillie stopped work, by bo
him and Saunders, was $770, and the amount paid there
$543, and the increased cost to Hewlett of completing t
house, beyond the balance of original contract price
Baillie's default, was $360. His Honour refers to *Godda*
v. *Coulson* (*ante*) and reading the Statute then in force
the light of 45 Vict. cap. 15, sec. 4 (now sec. 9, sub-sec.
which gave priority to wages liens over the owner's clai
for damages for non-completion, holds the lien invalid, a
the owner entitled to set off his damages against ten p
centum of the price to be paid, *i.e.*, ten per cent. of $77
the value of Baillie's work done (*e*).

A phase of the question which did not arise either in
Cornish, or in *Harrington* v. *Saunders*, namely, the effe
of payments over ninety per cent. in ascertaining the tr
state of accounts, upon which to determine the owne
liability has been considered and decided as it appea
in *Truax* v. *Dixon*, (*ante*). It therefore becomes necessa
to discuss some of the cases mentioned in order to ascerta
how far they are consistent with the latest decision of t
Queen's Bench Divisional Court.

(*e*) Rose, J., at the Toronto Assizes, in January, 1889, gave a *nisi pr*
judgment to the same effect, though professedly based on *Goddard*
Coulson, in a case then tried by him of *Salmon* v. *Patterson*.

In *Re Cornish* the contractor had done work to the value $2,350. The owner would under the present statute entitled to retain ten per cent. of that amount, viz., 35, until thirty days after the completion of the con- ct, which would no doubt mean the entire contract. *Re rnish* is entirely based upon the assumption that the ner had not to pay more than the original contract price obtain completion of his contract (*f*). His payments to rtin over ninety per cent. (*g*) were not protected (as men- ned *ante*), by this section, and it was declared that on a full ten per cent., namely $235, the lien lders had, when Martin abandoned, a valid claim, they ing all sub-contractors of Martin. If, however, the ner on completion had found that he had paid $235 re than the original contract price to complete, would have the right then to claim that the $235 so paid sorbed the $235 which the statute required him to keep? At the time Martin made default, the owner in the eye the law had $235 in his hands. His abandonment then s a breach of contract. Martin could not have sued for at amount and recovered it on account of the non-per- rmance of his obligation (*h*), and the owner had then a sted right to damages (*i*). Strictly construed, sec. 8 uld defeat the sub-contractor's claim to compel payment the ten per cent. to be retained by the owner. It limits sub-contractor's claim "to the amount payable to e contractor." This amount would (says Ferguson, J., *Re Cornish* p. 270), be ascertained in the ordinary way, mely, by adding the extras to the contract price, then ducting what has been paid to the contractor, and from at remains deducting such sum as would, when the ent occurred upon which the contractor ceased to carry the work, have been fairly and justly necessary to expend completing the work according to the contract.

But here, as the learned Judge points out, comes in the ended section 11 (now sec. 9, sub-sec. 1), and where the

(*f*) See Ferguson, J., at page 270, and Boyd, C., at p. 263.
(*g*) In this case very small. He paid $2125 instead of $2115.
(*h*) Emden Bdg. Contracts, 2nd ed., page 137.
(*i*) *Ibid.* page 141.

owner's payments exceed ninety per cent., then those p
ments in excess do not operate to discharge *pro tanto*
lien created by the Act.

The right of an owner is to refuse payment of any s
to the contractor, if the latter makes default. He is
bound to pay the $2,350 and claim a set-off or coun
claim for damages as to that sum. He has an absol
defence in law to such a claim, if made by the contrac
and consequently his technical right to set-off, need no
resorted to, and his liability, if any, must be expressly fo
in The Mechanics' Lien Act. It is certainly not found th
But if he have paid over ninety per cent. when the c
tractor abandons, those excess payments do not (in
words of the Act) operate to discharge the lien; h
left without the right to say that he has paid more t
ninety per cent., and if he re-lets the contract and compl
it for the contract price, then ten per cent. of the amo
payable to the defaulting contractor is, under *Re Corn*
chargeable by the sub-contractor's lien, although he h
paid that sub-contractor 100 per cent. To illustrate: I
Re Cornish, Martin had done $2,350 worth of work,
had been paid $2,300, and the owner had to pay $34
complete the work making up his original contract pr
$2690, the sub-contractors with Martin would have a lie
$235, *i.e.*, ten per cent. of the price to be paid Martin,
not only on $50, the balance in the owner's hands, on
default, and the owner would therefore have to pay $2,
$235 and $340, in all $2,875, or $185 more than his c
tract price. Under this section his excess payments w
not protected, but yet he suffered no damage (except tho
his neglect to observe the law as laid down in the Statu
For if he had paid only ninety per cent. on $2,350,
$2,115, then the ten per cent. $235 and the balance requi
to complete $340 would have made up his original cont
price. This accords with the Chancellor's remark at p. 2
"Sub-contractors are limited to such sum as is justly
to each chief contractor with whom they are in priv
and in cases under the 11th section as amended to
further limitation of ten per cent. upon that sum, wh

ld in every case be retained by the owner to answer claimants." And to the same effect are the views Macdougall, Co. J., in *Harrington* v. *Saunders*, where ays down, as one of the conditions of his decision the payments to the contractor or for the work actually ormed shall have been ninety per cent. or under of the e of such work.

his result would apparently be in consonance with the s of the Judges in *Goddard* v. *Coulson* (*j*). Hagarty, C.J.O., p. 7: "The ten per cent. can be literally held liable part of the price to be paid by the owner, provided a portion remains or is in existence, but should not tended by implication to ten per cent. on a price for which never has been done, and which, to the great y of the owner, his contractor wrongfully refused to Patterson, J.A., points out, p. 8, that the lien on ten cent. thereon (*i.e.*, of the price to be paid), given by 2, cannot be fairly said to do more than "charge in ur of the mechanic ten per cent. of the money which mes payable by the owner to the principal contractor, here the contract price agreed upon never became the to be paid, because the contractor failed to do what necessary to earn it or to earn more than he was in faith actually paid, that amount being under ninety cent."

he recent case of *Truax* v. *Dixon*, (*ante*), remains to be idered. In it Mr. Justice Robertson allowed the contractor ten per cent. on the contract price and as, namely: $165.40 upon a total of $1,654.00. The contract price had been earned by and paid to the contor, but thirty days had not elapsed between the finish- of the work and the payment for it. The lien, how-, was filed within the thirty days. The conditions, efore, for fairly raising the question of an owner's ility to pay over again were before the Court. None of cases cited by counsel are given, nor is there any indica- of the line of argument adopted. The decision is d on sections 9 and 10 of the Mechanics' Lien Act and

on *Goddard* v. *Coulson*, (*ante*), and it is stated as a conclusio of law from the facts as given above that the lien claime did not attach so as to make the owner liable to a greate sum than the sum payable by the owner to the contractor But, as pointed out, the case cited therein does not deal a all with the question of payments beyond ninety per cent but rather with the endeavour to make the owner liable fo ten per cent. of the whole contract price whether the wor were done or were still undone. There are expressions o opinion by the Judges in Appeal, which might warrant th inference that under the Act then in force the ten per cen may be a fund for the owner to resort to in case of loss b reason of the contractor's default, in priority to a sub-con tractor's lien. But it should be borne in mind that tha was not the question before the Court for decision, nor even if it were, do the judgments deal with the poin decided in *Truax* v. *Dixon*. The latter case arise under statutory enactments differing wholly from th law which bound the Court of Appeal. Since th latter Court has spoken sec. 7, enabling the owner t retain ten per cent. for thirty days, has been passed an that part of section 6 in the Statute of 1877, which limite the owner's liability, has been radically altered by the addi tion to it of the words, "save as herein provided." T what these words refer is a fair subject of argument, bu that they should be interpreted in discussing the sectio can hardly be doubted. Some attempt is made in the suc ceeding paragraphs to deal with them, but until they ar judicially expounded the case of *Truax* v. *Dixon* must, it i submitted, be treated more as a decision than an authority

It is of course impossible to say that these consideration and the cases now referred to have not been weighed by th Queen's Bench Division, but the absence of any referenc to them in the judgment makes the attempt to support th views submitted in this article much less presumptuous.

The same reasoning will not apply to a set-off or clain for damages by an owner where his payments are ninet per cent. or under. It is entirely based on the expressed exclusion of excess *payments* in this section, which, as abov

ted out, may clearly be said to override those sections
nd 10) which limit the owner's liability to the sum or
unt payable by the owner to the contractor. If in the
given above the owner had only paid ninety per cent.
2,350 to Martin, who had then abandoned the contract,
owner would, as mentioned, have had a vested right to
ages from him, and if he completed and the cost of so
g were $235 more than the entire original contract
e, then the amount or sum payable to the contractor
ld be (i) nothing at all upon the ground that he, not
ing fulfilled his contract, could never recover (*k*), or, if
rtained as pointed out by Ferguson, J., *ante*, (ii) $235, if
rd be had to the fact that the retention and user by the
er of the work and material of the defaulting contractor,
ld render him liable to pay for them: subject in the
r case to the owner's right to damages, which would
rb the contractor's claim for such work and materials,
so leave nothing for the contractor, even before the
icature Act (*l*), and certainly since then.

fair deduction from the foregoing would be—

Payments made in excess of ninety per cent. of the
e to be paid, as defined in *Re Cornish* (*ante*), shall be
olutely excluded in dealing with the state of accounts
veen the owner and contractor when considered in refer-
e to the sub-contractor's lien under the present statute.

If such excess payments be so disregarded or be not
le, the right to set-off damages seems to follow and the
contractor's lien is (except in case of a wages lien)
uded.

ut has a sub-contractor then no right in any case to
ch or intercept the ten per centum? It may be said
he has a qualified right, provided he adopt the pro-
ure laid down in sub-sec. 2 of sec. 9, which is as
ows:

A lien shall in addition to all other rights or remedies
n by this Act, also operate as a charge to the extent of

(*k*) See Emden, 2nd ed. p. 142.

(*l*) *Hill* v. *Featherstonhaugh*, 5 M. & P. 541; Addison, p. 677, and cases
Emden Bdg. Conts., 2nd ed. pp, 142, 143, 144.

ten per centum of the price to be paid by the owner f
the work, machinery or materials, as defined by section
of this Act, up to ten days after the completion of t
work, or of the delivery of the materials in respect of whi
such lien exists, and no longer, unless notice in writing
given as herein provided."

The reference in this sub-section to the rights given a
remedies provided is evidently to those created against t
land of the owner and against prior mortgagees, as w
as the right to dispute payments of over ninety per cen
and possibly to other rights and remedies given by sec
11, 12 and 28, and other sections of the Act.

To those rights and remedies there is something adde
It is a charge which is to operate to the extent of this ten p
cent. up to ten days after the completion of the work or t
delivery of the materials. This charge, being an addition
remedy to the lien, can only be made available by adm
ting a direct personal claim against the owner. The notice
the owner must be given directly, and it must be in writin
The time for giving it is limited to ten days. If given
charges the ten per cent., and if payment be not made the
seems no reason why a personal order should not be grant
against the owner; in fact, that is the only method
which this charge can be enforced. No right against t
land is provided for herein, and this additional reme
is super-added to the lien on the land.

By the previous sub-section the owner is in law assum
only to have paid ninety per cent. The additional ten p
cent. in his hands is evidently here aimed at. That ten p
cent., as already pointed out, would be a fund out of whi
the owner could recoup himself for loss occasioned by h
contractor. But this sub-section creates upon it a liabili
which comes into competition with that right to recou
ment, and is undoubtedly superior to it. It is an invasi
of the owner's common law right, and the time with
which it must be enforced is a very limited one, viz., t
days. The policy of the Act is evidently to ma
this ten per cent. a fund which cannot be diminished
payments by the owner, and it is not unreasonable to su

e that it can, if great promptness is exercised by the holder, be secured to him against the owner's set-off. his view receives additional sanction from the sec- (10) which follows: "*Save as herein provided*, the lien l not attach so as to make the owner liable *to a greater* than the sum payable by the owner to the contractor." ow this 9th section does provide ways in which an er may be compelled to pay more than he has agreed ay the contractor. They are (*m*), where he has inad- dly paid over ninety per cent. before the thirty days wed by the statute has elapsed (*n*); (*o*), where the lien is wages, in which case the owner's claim for damages is essly postponed to the lien. It is not unlikely there- that sub-sec. 2 may provide another mode for attaching ten per cent. within a very limited period, and making owner responsible to the active lien holder as a reward his promptness.

he charge arises by virtue of there being a lien. It is bsolute one, but it only lasts for ten days, unless the ce is given. If it be not, then the right of the owner to off revives, and except in the case of wages liens proves to defeat the lien holder's claim.

sub-contractor's lien exists by virtue of doing work or ishing materials. He has thirty days from the com- ion of the doing or furnishing to register this lien, but ecure and preserve the charge here given him he has ive notice in ten days after the work is done or the mate- s are furnished. He has a lien during those thirty s without registration, and he can, by this provision, vely enforce it against the owner, but unless thereafter egister, his lien will fall to the ground (sec. 22), and n it this charge. It is probable that when this sub-sec- comes to be judicially discussed, the doctrine of post- ement by virtue of the Registry Act will be found in- licable to the charge upon this specially created fund ch is superadded to the claim on the land.

) Sub-sec. 1.
) Unless *Truax* v. *Dixon*, 17 O. R. 366, disposes of that question.
) Sub-sec. 3.

It is true that the wording of this sub-section has ambiguity characteristic of the Mechanics' Lien Act. T fund on which the charge is created is not defined, exc by the phrase, "to the extent of ten per cent. of the pr to be paid." No other construction, however, see possible, than one paraphrasing the words as follows: charge on the price to be paid to the extent of ten cent. thereof."

The results suggested by the consideration of these secti and cases may be again briefly stated.

1. The ten per cent. is calculated on the value of work done at the time the contractor makes default.

2. Payments over ninety per cent. on that value treated, in dealing with a sub-contractor's lien and rights, as not having been made.

3. The ten per centum is applicable to the own claim for damages, unless the charge created on by sub-sec. 2 be preserved by notice within ten d after the completion of the sub-contractor's contract work or material, followed by the registration of his cl within thirty days from the same date.

It is not infrequently said that the Act is of no r benefit either to the workman or the owner. The inabil to reach a result tolerable by either class is patent. T weakness is, if possible, intensified by the want of cl and authoritative decisions on the questions discussed this article.

FRANK E. HODGINS

EDITORIAL REVIEW.

Canadian Constitutional Documents.

We are promised, under the editorship of Mr. Wm. Houston, M.A., Librarian to the Legislature of Ontario, a volume containing an exact reprint of the historical and legislative documents bearing upon the constitution of Canada.

It is not unusual for writers in the public press and other well-informed people to refer in a vague way to "treaty rights" which are supposed to stand in the way of the advancement towards perfection of our constitution; and it is confidently asserted that the language, religion and laws of the French inhabitants were guaranteed to them by the Treaty upon the acquisition of Canada by the British Crown. Such ideas are difficult to dispel, as a reference to the documents themselves at all times is out of the question, and the works in which they are to be found are unknown to many and difficult of access. Not a word is said in the Treaty about language and laws; and the free exercise of the Roman religion was assented to only so far as the laws of Great Britain should permit. That a right understanding of the contents of the Treaty is a part of the essential knowledge of every one, in a country where every man is a politician and a prospective statesman, goes without saying, and that the Treaty as well as the constitutional Acts which followed it should form a fundamental part of the education of every student of constitutional law will also be admitted without dispute.

The Editor proposes, therefore, to put within the reach of all who care to read them the following documents :— Articles of Capitulation of Quebec, 1759 ; Articles of Capitulation of Montreal, 1760; Treaty of Paris, 1763 ; Royal Proclamation of George III., 1763 ; The Judgment of the

Queen's Bench in *Campbell* v. *Hall* upon the effect of proclamation; The Quebec Act, 1774; The Constitutio Act, 1791; The Union Act, 1840, and the amending A 1854; the British North America Act, 1867, and supp mentary Acts; and the Governor-General's instruction

The Editor has taken the precaution to procure fr the Public Record Office in England certified copies of original articles of capitulation, in order that the phra ology may be beyond debate.

No comment on the text will be made, and so documents will be presented without appearance of pa zanship, and will appeal to the candid judgment of reader. Notes of decided cases upon the British No America Act will be appended.

In addition to the foregoing there will be printed tracts from treaties relating to Canadian boundar fisheries, extradition, commerce, etc., as well as other historical interest.

The work cannot fail to be of the greatest value all Canadians, and of unusual interest at the pres period.

A Unique Card.

A correspondent has furnished us with a unique c which we hope is not a sample of those usually made of in the rural districts. We really think that the L Society should exercise some supervision over such matt This is the card, but as the learned gentleman has not p for an advertisement we regret that we cannot give name :—

Crown Attorney,
—— County —— Ontario, Canada,
—— Stock Farm
—— Stations Grand Trunk & — — Railways.
Breeder of
Horses, Sheep, Cattle, Pigs, etc.
of Highest Quality and best approved strains.

The breeder of lawsuits is a nuisance, but as a rule does not so advertise himself; but the breeder of appro

strains of pigs, *et hoc genus omne*, should not advertise it in connection with law.

The Distribution of Business.

At the time of the consolidation of the rules of practice an earnest effort was made to bring about a complete fusion of the Courts for the despatch of business. It was asserted then that the business was not evenly distributed amongst the Divisions of the High Court especially in the case of trials. The Judges of the Chancery Division having refused to take any jury business, those cases which naturally fell into that Division by issue of the writ in the due course of rotation, and which required a jury, were and still are sent to a Judge of the other Divisions to be tried. In addition to such cases many non-jury cases in the Chancery Division come down for trial before the Judges of the other Divisions, and it was asserted that a compensating number were not sent for trial before the Judges of the Chancery Division.

Without statistical evidence these assertions carried little weight; but the report of the Inspector of Legal Offices for the year 1888, supplies some evidence though not complete proof of the assertions.

The number of writs issued in Ontario during 1888 was 7,506, of which 2,552 were issued in the Chancery Division. Of these 7,506 cases, there were entered for trial 1,556, of which 811 were entered for trial by jury, and so came before the Judges of the Queen's Bench and Common Pleas Divisions for trial. Of the remaining 745, some went for trial before the same Judges, and some went before the Judges of the Chancery Division; but in what proportions is not stated. Of the 1,556 cases entered for trial, if the work allotted to each Division were equal, the Chancery Division Judges should have tried one-third or 518⅔, the other Judges 1,037⅓. But allowing for the extra strength of the Chancery Division, the Judges being four in number to the six of the other Divisions, they should have tried 622⅖ to the others' 933⅗. That is to say, out of the 745 non-jury cases the Chancery Division Judges should have tried 622⅖ in

order to equalize the work. Even then there would have been a disparity, for the Judges of the other Divisions tried, in addition to the civil business, all the criminal cases.

The return in question assumes to give the total number of days occupied in trials at each circuit town by the Judges of the Queen's Bench and Common Pleas Divisions and those occupied by the Chancery Division Judges. But as the returns in some cases are incomplete, it is impossible to arrive at an exact conclusion as to the amount of time occupied by each. The total number of days returned as the sittings of assize is 647, while that of the Chancery Division sittings is 152. In Toronto alone the assizes occupied 148 days, while the Chancery sittings occupied but 56 days.

The chief omissions are those of places which are the most desirable places from which to obtain information. Carleton occupied 22 days at the assizes, but the number of days of the Chancery Division sittings is not given. Middlesex had 38 days of assize, and Simcoe 29; but the length of the Chancery Division sittings is not given in either case. In one of the most litigious places, Belleville, the sittings occupied less than half the time of the assizes. In one county only was the Chancery sittings longer, and that by one day, than the assizes, namely, Frontenac. If, then, we allot to the Chancery sittings an equal number of days with the assizes, in Carleton, Simcoe and Middlesex, we will increase the total length of time occupied by the sittings to 241 days, and if we add 60 days, or 25 per cent., to this to cover any other mistakes there may be, we shall obtain a total number of days for the Chancery Division sittings of 301 days, as against 647 days occupied by the other Judges.

Assuming that five of the six Judges of the Queen's Bench and Common Pleas Divisions went the circuits, and that one remained in Toronto for the weekly Courts; and that three of the four Chancery Division Judges went the circuits on the same principle, the average number of days on which one of the former Judges sat for trial was 129¾, while the average number for the Judges of the Chancery

Division was 100⅓; or, if we divide the whole number of days in each case by the whole number of Judges in each case, the average number of days' work at trials for each of the Chancery Division Judges was 75¼, while that of the others was 107⅔.

In Toronto alone, for which we have exact returns, out of about 249 working days—*i.e.*, all the days in the year, less the long vacation and ten days of the Christmas vacation and Sundays—there were only 101 days on which a Judge of the Queen's Bench or Common Pleas Division did not sit for trial. Of the same number of days there were 198 on which a Judge of the Chancery Division did not sit for trials.

These figures demonstrate that, though the principle of issuing writs in rotation in the three Divisions operates to allot the work in equal proportions to the ministerial officers, the principle ends there. It is quite true that in making such a computation we should not speak without certain information, and the exact information has not been given in the return. But one has only to glance at it in order to come to the conclusion, undoubtedly correct in the general result, that there is an immense disparity in the proportions, even if we cannot arrive at the figures with mathematical accuracy. It is very remarkable in some individual instances. For example, Brant assizes, 16 days, Chancery sittings, 2 days; Bruce assizes, 15 days, Chancery sittings, 4 days; Elgin assizes, 20 days, Chancery sittings, 9 days; Essex assizes, 13 days, Chancery sittings, 8 days; Lincoln assizes, 12 days, Chancery sittings, 2 days; Northumberland and Durham assizes, 16 days, Chancery sittings, 3 days; Stormont, etc., assizes, 16 days, Chancery sittings, 3 days; Wellington assizes, 30 days, Chancery sittings, 3 days. If we doubled the time for the Chancery sittings in each case there would still be a disparity.

We must not be understood as finding fault with the Chancery Division Judges, nor to hint that they are less diligent or industrious than the other Judges. The profession themselves are accountable for a great deal of the disproportion, which is occasioned by their voluntarily

setting down cases for the assizes which might well go to the sittings. It is the system that is to blame. There is no reason why the Queen's Bench and Common Pleas Division should be classed together. The old exclusive jurisdiction of the Chancery Division has disappeared as such and is exercised by the other Divisions as well; and cases are now properly divisible into jury cases and non-jury cases; and the sittings of the High Court should be arranged accordingly.

If there is to be an even distribution of business the only way to accomplish it is to fuse the sittings, as the profession suggested and urged, and have all cases brought down to trial without regard to the Division in which the writ was issued.

We have assumed throughout that the business of the weekly Court in the Chancery Division is equal to that in the other two, which is pretty generally conceded to be correct—at least not to do an injustice to the Chancery Division.

There is another lesson to be learned from this return. The total number of days occupied with trials in Toronto alone in 1888 was 204, leaving a little over a month of the working year unoccupied. This establishes the justice of the claim made on behalf of the profession that there should be a series of sittings for Toronto, jury and non-jury sittings alternating, without regard to the Divisions of the High Court, and at more frequent but regularly recurring intervals.

The joint committee of the Bench and Bar, which some time ago partially dealt with these matters, should again sit, having now the advantage of some more tangible evidence than the general (though correct) impression upon which they were previously acting.

Queen's Counsel.

His Excellency the Governor General has been pleased to appoint the following gentlemen to be Queen's Counsel:—

Hon. J. R. Gowan, of Barrie; Messrs. Nicol Kingsmill, George Tate Blackstock, Nicholas Murphy, N. G. Bigelow, R. M. Wells, Alex. J. Cattanach, Huson W. M. Murray, A. R. Boswell, Joseph H. Ferguson, Thomas D. Delamere, Francis Arnoldi, Jas. M. Reeve, Adam R. Creelman, John A. Worrell, D. A. O'Sullivan, James S. Fullerton, Alfred H. Marsh, Toronto; W. H. Walker, Alex. Ferguson, J. J. Gormully, Ottawa; James Hy. Fleck, Duncan McMillan, London; George Mackenzie Clark, Montreal; Alex. Millar, W. Hamilton Bowlby, Berlin; Joseph Deacon, Brockville; John Davidson, Goderich; J. E. Farewell, Whitby; Geo. Moncrieff, M.P., Petrolia; R. Vashon Rogers, Kingston; John Burnham, Peterborough; D. H. Preston, Napanee; Hy. W. C. Meyer, Wingham; Josh. Jamieson, M. P., Almonte; F. J. French, Prescott; A. H. MacDonald, Guelph; Geo. L. Tizard, Oakville; W. F. Walker, Hamilton; James Muir, Fergus; William R. White, Pembroke; Colin G. Snider, Cayuga; F. E. P. Pepler, Barrie; A. R. Lewis, Port Arthur; Jas. Leitch, Cornwall; Wm. H. Kingston, Mount Forest; E. Sidney Smith, St. Mary's; A. B. Klein, Walkerton; J. A. Lougheed, Calgary, N.W.T.; and R. E. Jackson, Victoria, B.C.

Harvey's Case.

Painful as this case undoubtedly is in all its details, we cannot but think that the decision of the Minister of Justice in refusing to advise the Governor-General to commute the sentence was a wise one.

No doubt those who advocated the commutation of the sentence were sincerely of the belief that the man was insane; but the only possible answer to be given is that he had a fair trial, and that the testimony as to the state of his mind was before the jury, and was considered by them. As to this, it said that they found a verdict against overwhelming evidence of his insanity. The reply to this again is that the jury are the only judges of the facts, and if they were not convinced of his insanity they were bound to find him guilty. Then they say the system is wrong and

the test is wrong; but of that we are not convinced by anything that has been advanced.

That his mind was a perfect blank as to his awful crime, and that he believed that he murdered his wife and children only because he heard convincing testimony at the trial, may be true; and it gains a little in probability from the fact that he continued to make this assertion after all hope of saving his life was gone. But it may be true, without by any means establishing the fact of insanity. A man in the transports of rage, joy, or despair, might do many things which he would utterly forget and repudiate afterwards. The sudden accession of great fortune has been known to have such an effect upon the possessor that he has done the most absurd and irrational things. Yet no one would think of putting such a man and his estate in the hands of a committee. Harvey, for some time systematically robbed his employers. When discovered and arrested, he deliberately purchased a pistol and committed the murder. It is said that he was excessively proud and sensitive, and the only known motive for his crime was the desire to avoid the disgrace into which he had brought his family. In this condition he no doubt was not capable of forming a righteous judgment. A man in a frenzy of rage is perhaps not more uncontrollable than a man in a frenzy of despair. But it does not follow that because a man cannot control his passions he should be adjudged irresponsible. It is begging the question to use this argument. In the midst of his robberies he exhibited the same want of judgment and moral strength. But so far as we have seen, no one excuses his pilfering on the ground of insanity. While in gaol and during the trial he exhibited no symptoms of insanity unconnected with his crime. There is great suspicion, then, that those who humanely plead his insanity have no other evidence of it than the enormity of the crime. It would be very unsafe to say that a man who appeared to be of sound mind and able to discern right from wrong, both before and after the crime, was insane at the time he committed it. It is said that no expert alienist could be found who would say that he was sane.

But, without any disrespect to such eminent men, we may venture to say that there was no expert alienist who testified who was not fully aware of the hideous circumstances, and took them into consideration, and who, under such circumstances, would not have a pre-conceived notion, from which experience tells us it is almost impossible to rid the mind, that "no man in his senses would kill his wife and children."

BOOK REVIEWS.

Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English Law, the Law of Criminal procedure, and the law of summary convictions, with Table of offences, their punishments and statutes, Tables of cases, statutes, etc. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.), Author of "A Concise Digest of the Institutes of Gaius and Justinian." Fifth edition by AVIAT AGABEG, LL.B., of St. John's College, Cambridge, and of the Inner Temple, and of the Northern Circuit, Barrister-at-law. London: Stevens & Haynes, 1889.

It is three years only since the fourth edition of this useful book appeared, and the present edition takes in all the new English Statutes, and recent decisions. It has already established its value as a book of instruction and reference.

The Principles of Equity, intended for the use of students and the profession. By EDMUND H. T. SNELL, of the Middle Temple, Barrister-at-law. Ninth edition by ARCHIBALD BROWN, M.A., Edin. and Oxon., and B.C.L., Oxon., of the Middle Temple, Barrister-at-law. London: Stevens & Haynes, 1889.

With great regularity the new editions of this standard book appear as the old are exhausted. As in the last edition the editor has omitted the chapters on practice and has amplified the text on jurisprudence.

REVIEW OF EXCHANGES.

Criminal Law Magazine.—January, 1889.

The Doctrine of Reasonable Doubt, by SEYMOUR D. THOMPSON. The learned writer gives with great detail the various phases of this subject, and concludes with some very severe remarks. He says that it "affords a striking illustration of the exuberant, untrained, unpruned and fantastic growth of ideas in American jurisprudence." The minute distinctions are not to be found in English law.

Ibid.—March, 1889.

International Duties of Extradition, by D. H. PINGREY. The learned writer summarizes his remarks as follows:—Apart from treaty stipulations, all nations should surrender fugitives from justice on proper demand; the Anglo-American doctrine is that the matter is controlled by treaty; in the United States extradition is a federal prerogative, and treaties are the law of the land; a person extradited under a treaty can only be tried for the crime specified in the warrant; apart from treaty stipulations, heinous offenders are sometimes surrendered through international courtesy; political offenders have never been surrendered, though this usage may be abrogated in the near future, to provide for the punishment of dynamiters; when neither nation is a party, a criminal kidnapped and brought into the United States gives the Courts jurisdiction.

Larceny of Illuminating Gas, by SOLON D. WILSON. Some cases on the fraudulent abstraction of gas amounting to larceny are cited.

Presence of the Accused in Court, by W. F. ELLIOTT. The cases are cited in which the right to be present is discussed. It is said that in felony or treason the prisoner cannot waive his right to be present, but otherwise he can.

Law Journal.—15th June, 1889.

Dividends or Returned Capital. A case of *Lee* v. *Neuchatel Asphalte Co.*, 58 L. J. Ch. 409, affords the text for this article. It is said not to be true, as an abstract proposition, that no dividend can be properly declared out of moneys arising from the sale of property bought by

capital. "Capital" has either the meaning attributed to it in a memorandum of association, or that which is divided into shares. From the accountant's point of view, the Company is debtor to capital. But where the capital is expended in the purchase of mines which some day must be exhausted, it is not correct to say that the produce cannot be converted into money for dividends.

Ibid.—6th July, 1889.

Fraud or Honest Inaccuracy. The case of *Derry* v. *Peek*, lately decided in the House of Lords, is discussed. The defendants stated that a company had the right to use steam power instead of horses for a tramway. As a fact, it had not the absolute right, as the defendants knew, but had it only on approval by the Board of Trade. It was decided that they were not liable. After commentary on the case, the learned writer concludes as follows:—"The extension attempted from giving the effect of fraud to statements made in reckless ignorance of their truth or falsehood to mistaken statements honestly made, ignores the element of intention in fraud. A mistaken statement honestly made may give a ground for the rescission of a contract, but not for affixing to the whole contract the ill-savour of fraud. Upon the rescission of a contract, the rights of the parties can be adjusted, but fraud cuts down everything, and exposes those guilty of it to the stringent and, if successful, degrading remedy by an action of deceit. Commercial morality is better forwarded by following a level standard than by setting up the unattainable in every-day life, and calling things by names which would be scouted by the social opinion of honourable business men."

Ibid.—20th July, 1889.

Injurious Combinations and Freedom of Trade. A discussion of *Mogul Steamship Co.* v. *McGregor*, 57 L. J. Q. B. 541, in which it was held that a combination designed to keep the trade amongst those who had combined, and not to maliciously injure another, was not unlawful.

INDEX OF SUBJECTS.

[Ed., *following a title, denotes that it will be found in the* EDITORIAL REVIEW; Ex., *that it will be found in* REVIEW OF EXCHANGES; L. A., *that it is a* LEADING ARTICLE.]

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THE

CANADIAN LAW TIMES

NOTES OF CASES.

AND

INDEX-DIGEST FOR 1889.

Edited by

E. DOUGLAS ARMOUR,

Of Osgoode Hall, Barrister-at-Law.

AND

E. B. BROWN,

Of Osgoode Hall, Barrister-at-Law,

VOL. IX

TORONTO:

CARSWELL & CO., PUBLISHERS.

1889.

PRINTED BY
THOS. MOORE & CO., LAW PRINTERS,
22 & 24 ADELAIDE ST. EAST,
TORONTO.

THE

CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature

COURT OF APPEAL.

C. C. HASTINGS.] [13TH NOVEMBER, 1888.

EMBURY v. WEST.

Chattel mortgage to secure indorser—Relation back to prior agreement—Renewals.

A chattel mortgage to indemnify an indorser or to secure the mortgagee against liabilities otherwise incurred for the mortgagor, if given in good faith in pursuance of an antecedent absolute promise is not avoided by the Act relating to assignments and preferences by insolvents, merely because it was not given contemporaneously with the indorsement or other liability.

The requirements of the Chattel Mortgage Act as to setting forth an agreement in the mortgage apply only to mortgages to secure future advances for the purposes therein mentioned.

In the case of a mortgage under that section as security against liabilities incurred by indorsing, or in any other way, all that is necessary is that the liability shall be one not extending for a longer period than one year from the date of the mortgage and shall be sufficiently described or identified therein.

The head note in *Barber* v. *McPherson*, 13 A. R. 366, corrected.

The reference in such a mortgage to a possible future renewal or extension of the liability which has not been agreed for and to which the mortgagee is not bound to accede to does not invalidate the mortgage if in other respects sufficient.

G. T. Blackstock, for the appellant.

Aylesworth, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 22d DECEMBER, 1888.

SMITH v. FLEMING.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award—Costs of action for arbitrators' fees.

The judgment of FERGUSON, J., 12 P. R. 520, affirmed on appeal, substantially on the same grounds.

Marsack v. *Webber*, 5 H. & N. 1, referred to as an authority for the disposition made of the costs of the arbitration.

In re Autothreptic Steam Boiler Co., 21 Q. B. D. 182, distinguished.

J. K. Kerr, Q.C., and *Arnoldi*, for the appellants.

S. H. Blake, Q.C., and *Tilt*, Q.C., for the respondent.

LEITCH v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of corporation—R. S. O. (1877) c. 50, s. 156—Railway conductor—Discovery before second trial from witnesses examined at first trial.

Held, (1) Affirming the decision of MACMAHON, J., 12 P. R. 541, that the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured

was an officer of the defendants' within the meaning of R. S. O. (1877) c. 50, s. 156, examinable for discovery in an action for damages for the injuries sustained.

(2) Reversing the decision of MACMAHON, J., (FALCONBRIDGE, J., *dubitante*), that such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, and been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession.

W. R. Meredith, Q.C., for the plaintiff.

Aylesworth, for the defendants.

ISBISTER v. SULLIVAN.

Courts—Interpleader—Jurisdiction of District Court of Thunder Bay—Jurisdiction of High Court of Justice—R. S. O. c. 91, s. 56.

The District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader under R. S. O. c. 91, s. 56; for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877) c. 43, s. 19, s-s. 6, "in interpleader matters as provided by the Interpleader Act;" and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Courts and not by the amount for which the recovery was had or the process issued. See R. S. O. (1877) c. 54, s. 22.

The High Court of Justice has no jurisdiction, by virtue of R. S. O. c. 91, s. 56, s-s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue.

Delamere, for the plaintiff.

Aylesworth, for the defendant.

CHANCERY DIVISION.

[BOYD, C., 28th NOVEMBER, 1888.

BUTLAND v. GILLESPIE.

Mortmain Act—Toronto General Hospital—16 V. c. 220—Devise of Land.

The Act 16 V. c. 220, incorporating the Toronto General Hospital, provides that it shall and may be capable of

receiving and taking from any person * * by grant, devise, or otherwise any lands or interest in lands * * which any such person may be desirous of granting or conveying for the support and use of the hospital.

Held, that the plain meaning of this provision is to capacitate any person to devise land to the hospital and to qualify the hospital to receive and enjoy beneficially lands so devised, notwithstanding the Mortmain Act, and a devise of lands to the hospital held valid.

S. H. Blake, Q.C., and *W. Creelman*, for the plaintiff.

Moss, Q.C., and *W. Barwick*, for the defendants.

TOTTEN v. TRUAX.

Assessment and taxes—Tax sale—Indian lands—R. S. C. c. 43, s. 77—Reeve purchasing at sale.

Held, that R. S. C. c. 43, s. 77, s-s. 4, exempting Indian lands from taxation, only so exempts such lands while the title and interest is wholly in the Crown, but if the Crown sells or locates, then the interest of the purchaser or locatee is subject to taxation by the local Government. Recent legislation at Ottawa is in recognition of the right thus to sell the interest of holders of Indian lands while yet unpatented, such sales being subject to the recognition of them by the Superintendent General of Indian affairs. 51 V. c. 22.

Held, also, that the Reeve of the municipality was not disqualified from purchasing at a sale for taxes. He had no powers or duties with reference to the taxes or to the sale of a personal or official nature, and no interference in fact was proved.

Masson, Q.C., for the plaintiff.

H. P. O'Connor, for the defendant.

[ROBERTSON, J., 20th DECEMBER, 1888.

DOMINION BANK v. DODDRIDGE.

Notice of motion for judgment—Dispensing with service of—Rule 467—"Sufficient cause."

Upon a motion to the Court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under Rule 467. It was not shown that the defendant could not be served. The order was refused.

Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the Rule.

W. N. Miller, Q.C., for the plaintiff.

IN CHAMBERS.

[ROSE, J., 14th DECEMBER, 1888.

PATTERSON v. GILBERT.

Report—Confirmation—Order—Consent.

Unless by consent, a report cannot be confirmed until after the lapse of time limited by Rule 848.

It is an undesirable practice for an officer to make an order confirming his own report.

H. H. Robertson, for the plaintiff.

W. H. Blake, for the defendant.

[ROBERTSON, J., 18th DECEMBER, 1888.

BAXTER v. CAMPBELL.

Discovery—Action of seduction—Interrogating plaintiff as to communications made to her by her daughter.

The plaintiff appealed from an order of the Master in Chambers, directing her to attend and be re-examined for

discovery and to answer certain questions which she refused to answer on her former examination, claiming that she was not obliged to reveal what had been told her by her daughter, for whose seduction she sued, with regard to such seduction.

C. J. Holman, for the plaintiff.

Shepley, for the defendant.

ROBERTSON, J., dismissed the appeal, applying and following *Betts* v. *Grand Trunk R. W. Co.*, 12 P. R. 86 and 634; 7 Occ. N. 155; 8 Occ. N. 404; and holding that the plaintiff should have made discovery of matters communicated to her by her daughter.

General Sessions, Brant.

[JONES, Co. J., CHAIRMAN, 15th DECEMBER, 1888.

REGINA v. LYON.

Appeal from summary conviction—Recognizance—Incompetence of non-resident sureties—R. S. C. c. 179—Forfeitures and estreats.

Persons non-resident within the jurisdiction of the general sessions of the peace to which the appeal is given, are not competent sureties in a recognizance to prosecute an appeal from a summary conviction of a justice of the peace.

Where, therefore, the recognizance in such a case disclosed the fact of the residence of one of the proffered sureties being in the county of Oxford, and beyond the jurisdiction of the court, it was held that the requirement of the statute that an appellant, in order to the perfecting of his appeal, "shall" (in addition to the giving of notice) "have entered into a recognizance with two sufficient sureties" was not fulfilled, and that the appeal, consequently, had not been properly lodged.

The law in relation to forfeitures and estreats in criminal matters (R. S. C. c. 179) referred to, and its bearing on the question pointed out and considered.

Harley, for the appellant.
Mackenzie, Q.C., for the respondent.

(Reported by J. B. Mackenzie, Esq., Brantford.)

NOVA SCOTIA

In the Supreme Court.

In re LENNOX.

Costs—Order on appeal from Judge of Probate in a matter relating to costs set aside—Probate Act, R. S. c. 100, s. 64.

An *ex parte* order was made by a Judge at Chambers allowing an appeal from the decision of a Judge of Probate, relating to a matter of costs, the attention of the Judge who granted the order not having been called to the Probate Act, R. S. c. 106, s. 64, under which a party dissatisfied with a taxation of costs or order relating to a matter of costs, is enabled to apply to the Court or a Judge at Chambers for a review of such taxation or order without perfecting an appeal.

The order allowing the appeal was set aside as improvidently granted.

DORAN v. CHAMBERS.

Illegal contract—Action to recover stakes—Contract held void as contrary to R. S. c. 48, s. 7—Amendment at trial raising defence under, upheld—Order 38, Rule 12—Terms as to costs imposed on appeal—Imperial Act, 13 Geo. II. c. 19.

The plaintiff and D. G. entered into an agreement to trot a race on the Wentworth road, for the sum of $50 a side,

between the plaintiff's horse "Charley" and a horse owned by W. G. known as "Royal Harry." The money was deposited in the hands of defendant as stakeholder.

In an action brought by the plaintiff in the County Court to recover the stakes, it appeared that the Wentworth road was a public street within the limits of the town of Windsor.

Held, that the contract was tainted with illegality and incapable of being enforced, as being made in violation of the provisions of R. S. c. 48, s. 7, which makes it penal to drive a horse at full speed on the public street or highway of any town or village.

An amendment to the grounds of defence having been allowed by the Judge of the County Court at the trial, raising the defence under the Act;

Held, that the amendment was properly made, being one necessary for determining the real question at issue, within the meaning of Order 28, Rule 12.

Held, also, no terms having been imposed in allowing the amendment, that the Court could now make such an order as would do justice between the parties.

Quære, whether the Imperial Act, 13 Geo. II. c. 19, is in force in this Province.

Supreme Court of Canada.

EXCHEQUER COURT.] [14th DECEMBER, 1888.

GRINNELL v. REGINAM.

Revenue—Customs duties—Importation of article composed of parts—Rate of duty—Duty on completed article—Subsequent legislation.

G., manufacturer of a device made of brass and called an automatic sprinkler, wishing to import it into Canada, interviewed the appraiser of hardware at Montreal, exhibited to him the sprinkler and explained its construction and use, and was told that it should pay duty as a manufacture of brass. G. imported a number of the sprinklers in parts, and paid the duty as directed by the appraiser. After three shipments had been made, the sprinklers and tools for making them were seized by the customs officials, and an information laid against G., under ss. 153 and 155 of the Customs Act of 1883, for smuggling, making false invoices, undervaluation, and knowingly keeping and selling goods illegally imported. There was no provision in the Act imposing a duty on parts of articles imported.

Held, reversing the judgment of the Exchequer Court of Canada, that the customs law not imposing a duty on parts of a completed article, imported as this was, and the importer having acted in good faith and taken all possible steps to ascertain his liability to the custom authorities, there was no foundation for the charges laid in the information, which should be set aside and the claimant's property restored to him.

Held, also, that the passing of an Act subsequent to the proceedings against G., providing for the imposition of duties on such parts of completed articles, was a legislative declaration that such duty was not previously provided for.

Girouard, Q.C., for the appellant.

W. D. Hogg, for the Crown.

ONTARIO.]

HALDIMAND DOMINION ELECTION CASE. WALSH v. MONTAGUE.

Elections—Dominion Controverted Elections Act—Agency—Scrutineer—Wilfully inducing voter to take a false oath—Farmer's son—Loss of qualification—R. S. C. c. 8, ss. 90, 93.

At the trial of an election petition alleging that F. H., an agent of the respondent, did, at a polling station, induce one T. N. to take a false oath at the poll and to vote at said election, though not qualified to do so, it was proved that F. H. represented the respondent as scrutineer at the poll under a written authority, and that J. N., who was on the list qualified as a farmer's son, offered himself to vote at the polling place in that capacity. His vote was objected to, and he hesitated when requested to take the farmer's son's oath "T.," and then F. H. told him to take the oath and that his vote was perfectly good. The farmer's son's oath "T." was then read to him by the returning officer, and he took it and voted. As a matter of fact T. N.'s father had died before the final revision of the list, and at the time of the election T. N. was in occupation of the land as owner.

Held, reversing the judgment of Street, J., that for the purposes of the election F. H. was the respondent's agent, and that he was guilty of a wilful offence against s. 90 of R. S. C. c. 8, and the election was declared void under s. 93; STRONG and GWYNNE, JJ., dissenting.

Per STRONG, J., that at the scrutiny of the votes before the trial Judge the petitioner is entitled to prove that voters whose names were on the list as farmer's sons were not qualified as such at the time of the election.

Aylesworth and *Colter*, for the appellant.

McCarthy, Q.C., for the respondent.

MERCHANTS' BANK OF CANADA v. McKAY.

Principal and surety—Bank customer—Course of banking business—Renewals of notes—Forged renewals—Negligence of bank—Relief of surety.

M. became surety to a bank to secure a named indebtedness of a firm dealing with the bank and also future

advances. By the terms of his agreement of suretyship M. was to be liable for all promissory notes, etc., of the customers, of a certain date, and "all renewals, substitutions, and alterations thereof." The renewals of certain of the notes proved to be forgeries. In a suit by the bank against the surety,

Held, *per* RITCHIE, C.J., FOURNIER and TASCHEREAU, JJ., affirming the judgment of the Court of Appeal, that the bank having parted with the good paper of the customer to which the surety had a right to look for security, and accepted therefor forged and worthless paper, the surety was, to the extent of such forged paper, released from his liability to indemnify the bank.

Per STRONG, J., that as the evidence showed the bank to have acted without negligence the surety was not so relieved.

Per GWYNNE, J., that a reference having been ordered to take an account of the amount of the paper said to be forged, the consideration of the surety's liability should be postponed until a report was made on such reference.

Robinson, Q.C., for the appellant.

D. J. McIntyre, for the respondent.

PURDOM v. NICHOL.

Partnership—Dissolution—Debt of retiring partner—Mortgage of partnership property for—Liability of remaining partner—Accommodation note—Collateral security—Voluntary payment of.

N. borrowed an accommodation note from P., and gave it as security for part of the purchase money of a mill. N. and B. afterwards went into partnership and gave a mortgage on partnership property for the debt partly secured by said note which remained in the hands of the mortgagees. The partnership was eventually dissolved, B. assuming the payment of the debts, including the mortgage. P. paid the note, and the amount was credited on the mortgage. In an action by P. to recover the amount so paid from B., the latter denied all knowledge of the note.

Held, reversing the judgment of the Court of Appeal, 15 A. R. 244, RITCHIE, C.J., and FOURNIER, J., dissenting, that there was evidence to show that B. had, in settling the partnership accounts, agreed to pay the amount represented by the note, but if that was not so, the payment of the note by P. could not be regarded as a voluntary payment, and he could recover the amount from B.

D. Mills, for the appellant.
Idington, Q.C., for the respondent.

WALLBRIDGE v. GAUJOT.

Mining lease—Construction of—Reservation of rent—Conditional on quantity of ore raised—Dead or sleeping rent—Right to terminate lease.

In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of the said iron stone or ore for every ton mined and raised from the said lands and mine, payable quarterly on" (specifying the days).

The lessees covenanted as follows: "That they will dig up and mine and carry away in each and every year during the said term a quantity of not less than 2,000 tons of such stone or iron ore for the first year, and a quantity of not less than 5,000 tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid." There was a proviso in the lease that in case ore should not be found or obtained in reasonable or paying quantities, the lessee could terminate the lease, and also a provision that if the rent paid in any quarter should exceed the quantity of ore raised, such excess should be applied towards payment of the first quarter thereafter in which more than the said quantity should be taken.

Held, affirming the judgment of the Court of Appeal, 14 A. R. 460, RITCHIE, C.J., and FOURNIER, J., dissenting, that the proper construction of these provisions was to make the lessees liable to pay the rent reserved in any event, and not

having exercised the right of terminating the lease, they were not relieved from the rent by the fact of ore not being found in reasonable or paying quantities.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellant.

Robinson, Q.C., and *G. D. Dickson*, Q.C., for the respondent.

Burdett, for a third party.

QUEBEC.] [15TH DECEMBER, 1888.

BARNARD v. MOLSON.

Attachment of debts—Opposition en sous ordre—Moneys deposited in hands of prothonotary—C. C. P. Art. 753.

Held, per RITCHIE, C.J., and STRONG and TASCHEREAU, JJ., that where moneys have been voluntarily deposited by a garnishee in the hands of the prothonotary, and the attachment of such moneys is subsequently quashed by a final judgment of the Court, there being then no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition *en sous ordre*: the claimant's recourse in such a case is by *saisie arret*, founded upon the affidavit and formalities required for that proceeding; FOURNIER and GWYNNE, JJ., dissenting on the ground that, as the moneys were still subject to the control of the Court at the time the opposition *en sous ordre* was filed, such opposition was not too late.

Lacoste, Q.C., and *Beique*, for the appellant.

Laflamme, Q.C., and *Robertson*, Q.C., for the respondent.

ALLEN v. MERCHANTS' MARINE INSURANCE COMPANY.

Insurance—Marine—Conditions of policy—Validity of—Art. 2184, C. C.

A condition in a marine policy that all claims under the policy should be void unless prosecuted within one year from date of loss, is a valid condition and not contrary to Art. 2184,

C. C.; and all claims under such a policy will be barred if not sued on within the said time.

Per TASCHEREAU, J.—The debtor cannot stipulate to enlarge delay to prescribe, but the creditor may stipulate to shorten that delay.

Ritchie, for the appellants.

Hatton, Q.C., for the respondents.

REGINA v. BRISEBOIS.

Criminal law—Crown case reserved—Irregularity in impanelling jurors—R. S. C. c. 174, ss. 246, 259.

B., having been found guilty of feloniously having administered poison with intent to murder, moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. The general panel of jurors contained the names of Joseph Lamoureux and Moise Lamoureux. The special panel for the term of the Court at which the prisoner was tried contained the name of Joseph Lamoureux. The sheriff served Joseph Lamoureux's summons on Moise Lamoureux and returned Joseph Lamoureux as the party summoned. Moise Lamoureux appeared in Court and answered to the name of Joseph Lamoureux and was sworn as a juror without challenge when B. was tried. On a case reserved it was

Held, affirming the judgment of the Court of Queen's Bench, that s. 246 of c. 174, R. S. C. clearly covered the irregularity complained of; STRONG and FOURNIER, JJ., dissenting.

Held, also, *per* RITCHIE, C.J., and TASCHEREAU and GWYNNE, JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of s. 259 of c. 174, R. S. C.

Leduc, for the appellant.

Gormully and *Mathieu*, for the Crown.

LONGUEUIL NAVIGATION COMPANY v. CITY OF MONTREAL.

Constitutional law—39 V. c. 52 (P.Q.)—Constitutionality of—Municipal corporation—By-law—Ultra vires—Taxation of ferry boats—Jurisdiction of harbour commissioners—Injunction.

By 39 V. c. 52, s. 1, s-s. 3 (P.Q.), the city of Montreal is authorized to impose an annual tax on "ferrymen or steamboat ferries." Under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of $200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant from the same, and obtained from the Recorder's Court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of $200 for each steamboat employed by them during the year as ferry boats between Longueuil and Montreal. In an action brought by the appellant company, claiming that the Provincial statute was *ultra vires* of the Provincial Legislature and that the by-law was *ultra vires* of the corporation, and asking for an injunction, it was

Held, 1. Affirming the judgment of the Court below, that the Provincial legislation was *intra vires*.

2. Reversing the judgment of the Court below, that the by-law was *ultra vires*, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked.

3. Affirming the judgment of the Court below, that the jurisdiction of the harbour commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits.

F. X. Archambault, Q.C., for the appellant.

Ethier, for the respondents.

Roy, for the Attorney-General of the Province of Quebec.

JOLIETTE DOMINION ELECTION CASE.

Elections—Dominion Controverted Elections Act—R. S. C. c. 9, s. 33—Commencement of trial—Order of Judge staying proceedings during session of Parliament—Power to adjourn recriminatory charges—Bribery by agent.

Where the proceedings for the commencement of the trial of an election petition have been stayed during a session of Parliament by an order of a Judge, such trial, if commenced within six months from the date of the presentation of the petition (the session of Parliament being excluded in the computation of time) is a valid trial and within s. 33 of R. S. C. c. 9.

After the trial has been commenced the trial Judge may adjourn the case from time to time, as to him seems convenient.

The Judge at the trial of the election petition against the return of the sitting member cannot proceed to adjudicate upon recriminatory charges against the defeated candidate, when the claim to the seat for such candidate has been abandoned by the petitioners.

An act of bribery committed by an agent of the sitting member, who has been cautioned by him to comply strictly with the law, will avoid the election.

Cornellier, Q.C., and *A. Ferguson*, for the appellant.

Choquette, for the respondent.

NOVA SCOTIA.]

FOOT v. FOOT.

Will—Construction of—Absolute bequest—Subsequent restrictions—Effect of—Repugnancy.

A will contained the following clause:—"I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to C. M., four of which I give and devise to A. E. F. * * But in no case shall any creditor of either of my children or any husband of either of my children, daughters,

(C. M. and A. E. F.) have any claim or demand upon the said executrices, etc., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually. * * * *"

In an action by C. M. and A. E. F. to have the said shares paid over to them untrammelled by any trust, they claiming that the absolute bequest could not be cut down by doubtful words or by implication, and that the restriction as to claims of husbands and creditors was repugnant and illegal:

Held, affirming the judgment of the Court below, 20 N.S. Rep. 71, that the clear intention of the testator was that the principal should be retained by the executors and only the rents, etc., paid to the devisees during their lives.

Henry, Q.C., for the appellants.

Graham, Q.C., for the respondents.

ROBERTSON v. PUGH.

Insurance—Marine—Warranty as to date of sailing—Limitation of action—Proof of loss—Protest—Inaccurate statement in.

A policy on the hull of a vessel contained this clause—"Warranted to sail not later than 3rd December, 1882." And that on the freight the following:—"Warranted to sail from Charlottetown not later than 3rd December, 1882." The vessel left the wharf at Charlottetown on 3rd December, but meeting with bad weather she came to anchor some two or three miles from the wharf, but within the harbour of the port, and proceeded on her voyage on 4th December.

Held, affirming the judgment of the Court below, 20 N. S. Rep. 15, that there was a compliance with the warranty in the policy on the hull, but not with that in the policy on freight.

An action on a marine policy was prescribed to twelve months from claim for loss or damage being deposited at the office of the assurers. The vessel being lost a protest was deposited at the office of the insurers, which stated the voyage to have commenced at a date later than that warranted by the policy. Subsequently the master who had signed the protest deposited with the insurers a declaration stating that

the vessel had sailed at a date within the policy, and that he had misstated the date in the protest through ignorance of the language of the country in which it was made. An action was brought on the policy within twelve months from the depositing of the amended statement but more than twelve months from the service of the protest.

Held, also affirming the judgment of the Court below, that the protest was a claim for loss or damage within the meaning of the condition in the policy, and the action was too late.

Henry, Q.C., for the appellants.
Graham, Q.C., for the respondents.

REGINA v. PREEPER.

Criminal law—Trial for felony—Jury attending church—Remarks of clergyman—Witness—Medical expert—Admissibility of evidence of.

During the progress of a trial for felony the jury attended church in charge of a constable, and at the close of the service the clergyman directly addressed them, remarking on the case of one Millman who had been executed for murder in P. E. I., and told them that if they had the slightest doubt of the guilt of the prisoner they were trying, they should temper justice with equity. The prisoner was convicted.

Held, affirming the judgment of the Court of Crown Cases Reserved for Nova Scotia, that although the remarks of the clergyman were highly improper, it could not be said that the jury were influenced by them so as to affect their verdict.

A witness on a trial for murder by shooting, called as a medical expert, stated to the crown prosecutor that "there were indicia in medical science by which it could be said at what distance from the human body the gun was fired." This was objected to but the witness was not cross-examined as to the grounds of his statement. He then described what he found on examining the body of the murdered man, and stated the maximum and minimum distances at which the shot must have been fired.

Held, STRONG and FOURNIER, JJ., dissenting, that the opening statement of the witness established his right to speak as a medical expert, and it not having been shown by cross-examination, or by other medical evidence, that his statement was untrue, his evidence was properly admitted.

Henry, Q.C., and *Harrington*, Q.C., for the appellant.

J. W. Longley, Attorney-General, for the respondent.

MANITOBA.] [14TH DECEMBER, 1888.

CAMERON v. TAIT.

Principal and agent—Authority of agent—Excess of—Ratification by principal—Agent for two principals—Contract by.

M., a machine broker at Winnipeg, was appointed, by authority in writing, agent for P. T. & Co., manufacturers of mill machinery at Port Perry, to sell their machinery in certain districts. M. was also agent for the D. Engine Company, manufacturers of steam engines and steam machinery at Toronto.

C. T. & Co., lumber manufacturers at Rat Portage, ordered from M. a saw mill and machinery complete, of a specified cutting capacity, for which they agreed to pay a fixed price. M. agreed by letter to furnish such mill and machinery for the price named.

M. procured the mill and machinery from P. T. & Co., and the power for working it from the D. Engine Co., and delivered them to C. & M. at Rat Portage. It proved, however, that the mill would not cut the quantity of lumber agreed on, and P. T. & Co. undertook to put in new machinery, but on C. & M. refusing to make certain payments before delivery of the same, it was not put in. In an action by C. & M. against P. T. & Co. for breach of warranty,

Held, affirming the judgment of the Court below, RITCHIE, C.J., and FOURNIER, J., dissenting, that the contract by M. for the sale of both the mill and power as a single transaction and for a lump sum was in excess of his authority as agent of P. T. & Co.; and the contract was, therefore, one with M. personally, and the judgment of non-suit in the Court below was right.

Held, also, that unless both P. T. & Co. and the D. Engine Co. joined in adopting the contract and in warranting each other's goods as well as their own, there could be no ratification of the sale by either.

Robinson, Q.C., for the appellants.

Moss, Q.C., and *Daly*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [8TH MAY, 1888.

DUNKIN v. COCKBURN.

Trespass—Free Grant and Homestead Act— R. S. O. 1877, c. 24, s. 3—Patent —Reservation by Order in Council.

The plaintiff was a locatee of a free grant and homestead lot which at the time he located it, in May, 1877, was subject to a regulation of an Order in Council of the 27th of May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, etc. The patent in favour of the plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals, and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the Order in Council.

Held, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the Order in Council.

Semble, that such regulations apply only before the issue of the patent to lands located under the Order in Council,

and then only so far as rights of way, etc., may be expressly conferred upon the licensee by the terms of his license.

Judgment of the Court below, 13 O. R. 254, affirmed.

McCarthy, Q.C., and *Moss*, Q.C., for the appellant.

J. K. Kerr, Q.C., and *J. A. Paterson*, for the respondent.

[12TH SEPTEMBER, 1888.

REGINA v. CITY OF LONDON.

Criminal procedure—Indictment for nuisance—Appeal—New trial.

The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's Bench Division by *certiorari*, moved for a new trial, which was refused.

Held, that no appeal would lie to this Court from the judgment refusing the new trial, and that it could make no difference that the indictment had been removed by *certiorari* and tried on the civil side.

Regina v. *Eli*, 13 A. R. 626, and *Regina* v. *La Liberte*, 1 S. C. R. 117, referred to.

Quære, whether in any case of misdemeanour a new trial can now be granted.

W. R. Meredith, Q.C., for the appellants.

Hutchinson and *Aylesworth*, for the respondent.

CH. D.] [8TH FEBRUARY, 1888.

ST. DENIS v. BAXTER.

Insufficient findings of jury—New trial—Costs.

The judgment of the Chancery Division, reported 13 O. R. 41, was reversed, and judgment directed to be entered for the plaintiff on the findings of the jury for $100, with County Court costs, unless the defendants elected within a time named to take a new trial; HAGARTY, C.J., O., dissenting.

Per HAGARTY, C.J., O.—There had been a miscarriage at the trial. Neither party was entitled to judgment on the findings of the jury, and there should be a new trial.

Aylesworth, for the appellant.

W. Cassels, Q.C., for the respondent.

[3RD APRIL, 1888.

HALL v. FARQUHARSON.

Tax sale—Sale honestly and fairly conducted—Sale for more than was due—R. S. O. c. 180, ss. 137, 155—Double assessment—Identity of parcel sold with that taxed—Payment of taxes—Statute labour.

The plaintiff was the owner of a group of small islands in Lake Rosseau, in the township of Medora, containing in all less then fifty acres. The island in question was patented to one Pope by the description of Island D. The plaintiff purchased it from Pope and called it Oak Island, and built a house and made other improvements thereon, and resided there for some months in each year.

The assessor, having been erroneously informed that Pope was the owner of an island in Lake Rosseau called D., put down Island D. in the non-resident division of the assessment roll with the name "Robert T. Pope." This was done to distinguish it from another Island D. in the same lake and township. He did not know that this Island D. was one of the group belonging to Hall, though he knew that Hall was putting improvements on one of the islands, which was in fact Island D. or Oak Island. He supposed that the name of the improved island was Flora; and this was the name of one of Hall's islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed, and actually assessed though under a wrong name. The taxes so assessed were actually paid. In 1883 the Island D. was sold for arrears of taxes for the years 1879, 1880, 1881, and 1882. The purchase money was $1, although the value with the improvements was about $1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll.

Held, affirming the judgment of the Chancery Division, that Island D. being identified as that intended to be assessed, and being that on which the improvements had been made, the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid, the sale was void.

Semble, per HAGARTY, C.J., O., PATTERSON and OSLER, JJ.A., that the sale would also be void as not having been under the circumstances openly and fairly conducted within the meaning of s. 155.

The duty of the county treasurer in reference to tax sales observed upon.

Hall v. *Hall*, 2 E. & A. 569; *Haisley* v. *Somers*, 13 O. R. 605, considered.

Semble, a sale for more taxes than are actually due cannot be supported under s. 137, where s. 155 does not apply in consequence of the sale not having been openly and fairly conducted.

Yokkam v. *Hall*, 13 Gr. 235; *Edinburgh Life Ins. Co.* v. *Ferguson*, 32 U. C. R. 253, followed.

Semble, that Island D. or Oak Island should have been assessed on the resident instead of the non-resident division of the assessment roll.

Per PATTERSON, J.A.—Observations as to assessment of several parcels of non-resident land less than 200 acres for statute labour.

McCarthy, Q.C., and *Pepler*, for the appellant.
McMichael, Q.C., for the respondent.

C. P. D.] [8TH MAY, 1888.

DOMINION SAVINGS & INVESTMENT SOCIETY v. KILROY.

Husband and wife—Married Women's Act—R. S. O. 1877, c. 125, ss. 5-7—Wife's separate property.

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock in trade, and which the vendors sold to her upon her credit exclusively, and not to her husband.

Held, that even though the business might not be the business of the wife carried on by her separately from her husband, within the meaning of section 7, so as to protect the earnings from her husband's creditors, the goods so sold

to the wife were her own property, under section 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors.

Whether this would be so with regard to goods purchased and to be paid for out of earnings of such a business, *quære?*

Meakin v. *Sampson*, 28 C. P. 360, doubted.

Judgment of the Court below, 14 O. R. 468, affirmed.

Osler, Q.C., and *W. M. Douglas*, for the appellants.

Moss, Q.C., for the respondent.

[29TH JUNE, 1888.

FOLLET v. TORONTO STREET RAILWAY CO.

Negligence—Damage by street car—Contributory negligence—Accident by carelessness of plaintiff.

While a car of the defendants in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the plaintiff, whose carriage was waiting at the kerb stone, without observing the near approach of the car, got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north intending to cross, but in such a close proximity to the car that, but for the prompt action of the driver in charge in turning his horse off the track, his horse would have collided with the plaintiff's carriage; as it was, notwithstanding the brake was applied to the car, the whiffletree struck the wheel of the carriage, when it was upset, and the plaintiff thrown to the ground, and her leg was fractured.

In an action for damages the jury found in favour of the plaintiff, which verdict the Divisional Court refused to disturb. On appeal this Court, OSLER, J.A., dissenting, being of opinion that there was no evidence of negligence on the part of the defendants, reversed the judgment of the Common Pleas Division and dismissed the action with costs.

Osler, Q.C., and *Shepley*, for the appellants.

Robinson, Q.C., and *Fullerton*, for the respondents.

BATE v. CANADIAN PACIFIC R. W. CO.

Railways—Negligence—Return ticket at reduced rate—Condition limiting liability.

The plaintiff, with her father and brother, went some hours before the departure of the train on which she was a passenger, to a ticket office of the defendants in O., in order to procure a ticket to W. and return. The only kind of return ticket issued on the route by the defendants was called a land-seeker's ticket for which thirty dollars less than the fare each way separately was charged. These tickets were not transferable, and were subject to a number of conditions printed on them, among which was one limiting the baggage liability to wearing apparel not exceeding one hundred dollars in value; and another condition required the signature of the passenger to the ticket for the purpose of identification and to prevent its transfer. The plaintiff's brother purchased the ticket for her, and at his request the time for using it was extended beyond the time limited by the ticket. The defendants' agent then asked for and obtained the plaintiff's signature to the ticket, by which she agreed, in consideration of the reduced rate, to all its provisions, explaining to her that it was for the purpose of identification. The plaintiff did not read the ticket, having sore eyes at the time, and the agent did not read or explain the conditions to her further than by mentioning that she alone could use it.

On the trip to W. an accident happened to the road-bed of the defendants' railway by reason of which the train was overturned, and the plaintiff's baggage valued at over one thousand dollars caught fire and was destroyed. The railway had been constructed by the government and transferred to the defendants. There were no indications before the accident of any defect in the road-bed.

In an action for damages for such loss the jury found a verdict for the full amount of the alleged value, which on application to the Divisional Court was set aside, Rose, J., dissenting, and the action dismissed with costs. On appeal to this Court it was

Held, by the majority of the Court, affirming the judgment of the Court below, 14 O. R. 625, that there was no evidence of any negligence with which the defendants were chargeable.

Held, also, BURTON, J.A., dissenting, that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage.

Per BURTON, J.A.—The delivery of the ticket with any condition, by itself, amounted only to a proposal to carry on certain terms, and until brought to the notice of the party intended to be bound was not a contract.

McCarthy, Q.C., for the appellant.

Robinson, Q.C,, and *Watson*, for the respondents.

BULL v. NORTH BRITISH CANADIAN INVESTMENT AND IMPERIAL FIRE INSURANCE COMPANY.

Insurance—Fire—Mortgagor and mortgagee—Subrogation clause—4th statutory condition—Assignment by way of mortgage—Proofs of loss—Waiver.

The right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause referred to below, depends upon whether they have good defence against the claim of the mortgagor, who as between himself and the insurance company is the party insured.

Omnium Securities Co. v. *Canada Fire and Marine Insurance Co.*, 1 O. R. 494, observed upon.

The fourth statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided.

Held, that the assignment meant by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition.

Sands v. *Standard Ins. Co.*, 26 Gr. 167, approved.

Held, also that an agreement for sale by the mortgagees under their power of sale, which was never carried out by conveyance, was not within the conditions.

After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objection to them for many months after, and gave no notice that any further

proofs were required; when making payment of the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognize any claim on the policy by the mortgagor, by reason of non-compliance with the statutory condition as to proof of loss.

Held, that they must be taken to have dealt with the mortgagees as agents of the mortgagor, and that they had waived further proofs of loss, and that the payment enured to the benefit of the latter.

Judgment of the Court below, 14 O. R. 322, affirmed.

McCarthy, Q.C., for the appellants, the defendants the Insurance Company.

Robinson, Q.C., and *C. Millar*, for the plaintiff.

J. Maclennan, Q.C., and *D. Urquhart*, for the defendants the Loan Company.

[13TH NOVEMBER, 1888.

SHEARD v. LAIRD.

Deed obtained by threats of legal proceedings—Undue influence.

The defendant had become liable as accommodation indorser for the husband of one of the plaintiffs, who, with his wife, became maker of a joint note to the defendant as security, and which it was agreed should be paid out of the proceeds of certain lands that had been previously conveyed by the husband to his wife. Instead of doing so, however, the husband sold the lands and absconded, leaving his wife behind.

The defendant, on learning this, went to the wife in a state of excitement, threatened to take proceedings criminal as well as civil unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter.

This the mother, after persuasion by the daughter, agreed to give the defendant, advising the plaintiff's legal adviser should not be consulted, and on the evening of the following day a deed absolute in form was executed by both the mother and daughter, the latter having dower in the land, in favour of the defendant, who, at the mother's request, gave a separate memorandum of

defeasance. There had been no direct communication between the defendant and the mother; nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security.

In an action impeaching this deed as having been obtained by threats and undue influence, the trial Judge, ARMOUR, C.J., dismissed the action with costs, which judgment was set aside by the Divisional Court of the Common Pleas Division.

On appeal to this Court the judgment of the Common Pleas Division, 15 O. R. 533, was reversed, and the judgment of the trial Judge restored with costs.

W. H. Bowlby, for the appellant.

C. A. Durand, for the respondents.

FERGUSON, J.] [6TH MARCH, 1888.

RYAN v. COOLEY.

Will, construction of—Vested interest—Contingent interest—Maintenance.

The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which would have gone to his, her, or their parent." The will also directed the said four children should be maintained and educated out of the income of such property during their minority, and the surplus to be invested during such their minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one, to divide the personal estate, share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, etc. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands.

Held, (1) affirming the judgment of the Court below, 14 O. R. 13, that one of the sons, who had attained twenty-one, was not entitled to maintenance out of the estate.

Held, (2) varying the same judgment, that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue.

Clute, for the appellant.

J. K. Kerr, Q.C., for the infant devisees.

Lash, Q.C., for the future heirs.

[3RD APRIL, 1888.

DONOVAN v. HOGAN.

Assessment and taxes—R.S. O. c. 180, ss. 155, 156, 114, 129, 130, 131—Tax sale, invalidity of—Limitation of time for impeachment—Payment of taxes—Resident and non-resident roll—Distress for payment of taxes.

The two years limited by section 156, R. S. O. c. 180 for impeaching a tax sale, runs from the time of making the tax deed, not from the time of the auction sale.

The word *sale* in that section can be properly understood only in the sense of *conveyance*.

Hutcheson v. *Collier*, 27 C. P. 249; *Church* v. *Fenton*, 28 C. P. 204, approved of. The contrary view expressed in *Smith* v. *Midland*, 4 O. R. 498: *Lyttle* v. *Broddy*, 10 O. R. 530; *Claxton* v. *Shibley*, 10 O. R. 295; and *Deverill* v. *Coe*, 11 O. R. 222, dissented from.

Unoccupied land divided into lots was assessed for the year 1879, and entered in the non-resident division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued, and without the name of the owner it was entered with the name of the owner prefixed, and valued *en bloc*.

The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax-roll, and transmitted to the county treasurer. The owner became also the

occupant of the lands, before the delivery to the collector of the collector's roll for 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned them to the county treasurer in a "list of non-resident taxes returned from the collector's roll," and they were so entered in the treasurer's books. In the treasurer's list of lands liable to be sold for arrears of taxes in 1882 sent to the township clerk the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed as occupied land for the years 1880, 1881, and 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to section 111, in the list of non-resident lands, which appeared by the assessment roll of 1882 to have become occupied.

The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation, and being ignorant of the sale or that the taxes were alleged to be in arrear.

Held, (1) that the taxes having been entered in the collector's roll, with the name of the person assessed, the payment to the collector was valid, and, consequently, that there were no taxes in arrear for which the land could lawfully be sold.

(2) The duties of the assessor and township clerk, under sections 109, 110, and 111, are imperative and conditional to the validity of a tax sale, and are not directory merely.

The spirit and true effect of section 130 is that lands which have been occupied and on which there is distress sufficient to satisfy the taxes are not to be sold; BURTON, J.A., dissenting on this point.

Per PATTERSON, J.A., *semble*, under the circumstance in evidence, that the sale had not been properly conducted, and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155.

The judgment of FERGUSON, J., affirmed,

Moss, Q.C., and *J. E. Robertson*, for the appellant.
Delamere and *E. Taylour English*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 22nd December, 1888.

REGINA v. SMITH.

Canada Temperance Act—R. S. C. c. 106, s. 100, construction of—"Not less than $50"—Penalty—Powers of magistrate.

The words "not less than $50" and "not less than $100" in the Canada Temperance Act, R. S. C. c. 106, s. 100, should be construed as "$50 and no less" and "$100 and no less"; and a summary conviction by a police magistrate for a first offence against the Act was quashed because the penalty imposed, $75, was beyond the jurisdiction of the magistrate; Falconbridge, J., dissenting.

Regina v. *Cameron*, 15 O. R. 115, not followed.

Stimpson, qui tam v. *Pond*, 2 Curtis 502, referred to and approved.

S. A. Jones, for the defendant.

Delamere, for the complainant.

REGINA v. PERRIN.

Justice of the Peace—Summary conviction under R. S. O. c. 214, s. 15—Dog killing sheep—Award of compensation—Proving character of dog—Territorial jurisdiction of justices—R. S. C. c. 178, s. 87.

The owner of a sheep killed or injured by a dog can under R. S. O. c. 214, s. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep.

It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed.

Held, that the saving provisions of s. 87 of R. S. C. c. 178 should be applied; and the order *nisi* to quash the conviction was discharged.

Shepley, for the defendant.

No one contra.

[THE DIVISIONAL COURT, 19TH NOVEMBER, 1888.

MARSHALL v. McRAE.

Master and servant—Wrongful dismissal—Written contract—Consideration—Remedy on covenant—Construction of contract—Right to dismiss—Reasonable grounds—Bonâ fide exercise of power—Manner of exercise.

The plaintiff agreed to obtain patents for certain improvements in a machine of his invention and to assign them to the defendant, and the defendant in consideration thereof agreed to employ the plaintiff for two years for the purpose of demonstrating and placing the patents on the market, the defendant covenanting to pay the plaintiff a certain sum per month and expenses during the two years, and to give him a share of the profits, and the plaintiff covenanting to devote his whole time and attention to "the business of the defendant."

By the 10th clause of the agreement it was provided that the defendant should be the absolute judge as to the manner in which the plaintiff performed his duties and should have the right at any time to dismiss him for incapacity or breach of duty.

The defendant summarily dismissed the plaintiff within three months for alleged breach of duty in relation to work not within the terms of his employment, as above specified.

Held, that the work to be performed not being the only consideration for the wages to be paid, but for the tenth clause the defendant would have had no right to dismiss the plaintiff at all, but would have been left to his remedy upon the plaintiff's covenant. "The business of the defendant" meant the business for which the plaintiff was employed, and the defendant had no legal right to dismiss the plaintiff for alleged breach of duty in connection with work not within the terms of his employment; and even if such work was within the terms of his employment, the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff.

Held, also, that where one party puts himself in the power of the other, the latter should exercise the power with entire good faith; and, upon the evidence, that the defendant had not exercised the power given him by the 10th clause in good faith; but even if he had, that he had not exercised it in a legal manner; for he was bound to give the plaintiff an opportunity to be heard and to explain his alleged misconduct, which he did not do.

Carscallen, for the plaintiff.

Osler, Q.C., and *J. J. Scott*, for the defendant.

BANK OF HAMILTON v. ISAACS.

Evidence—Action against indorser of promissory note—Denial of indorsement—Admissibility of evidence as to circumstances connected with the indorsement—New trial.

I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement.

At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such consideration was paid.

Held, that it was competent for F. to shew what the indenture was given for, that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness.

I. was asked whether F. did not say to him when he asked him to indorse one of the series of notes of which the one in question was a renewal, that he, F., never backed anybody's note.

Held, that this question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible.

Held, also that, having regard to the whole case and the charge of the trial judge adverting to evidence improperly

received and to its importance, substantial injury and miscarriage were thereby occasioned, and there was sufficient ground for granting a new trial.

McCarthy, Q.C., for the plaintiffs.
Lount, Q.C., for the defendant F.

[22ND DECEMBER, 1888.

ANDERSON v. FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

The defendants, unpaid vendors of goods, shipped the goods over the Grand Trunk Railway to the vendee at W. When the goods arrived the railway company's agent at W. sent an advice note to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff as soon as the assignment was delivered to him produced it to the railway company's agent and claimed the goods, offering to pay the freight, but producing no advice note. The agent did not refuse to deliver the goods, but said that, according to the rules of the company, when the person claiming the goods was as an assignee for the benefit of creditors, his duty was to telegraph to the company's solicitor for instructions; he did so telegraph, but before he received an answer, and on the same day, the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu.

Held, FALCONBRIDGE, J., dissenting, that the action of the railway company's agent in delaying till he received instructions from the solicitor was not wrongful, that the transitus was not at an end when the defendants intervened, and the right of stoppage was well exercised.

G. T. Blackstock, for the plaintiff.
J. B. Clarke, for the defendants.

McDIARMID v. HUGHES.

Company—Power to hold lands—Statutes of mortmain—Constitutional law—Powers of Dominion Parliament—Statute of Limitations—Defendant setting up—Estoppel by assenting to conveyance.

A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void, under the

statutes of mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

Semble, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license.

By an arrangement made within ten years before this action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

Held, that he was estopped from setting up a prior adverse possession in himself, as effectually as if he had been a conveying party.

Per ARMOUR, C.J.—At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was as tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto.

W. H. Walker, for the plaintiff.

Aylesworth and *Wyld*, for the defendant.

[ARMOUR, C.J., 25TH JANUARY, 1889.

In re SOLICITORS.

Solicitor—False affidavit of disbursements—Payment of witness fees by contra account—Consent of witness.

Motion to strike two solicitors off the rolls on the ground that they attempted to use upon the taxation of costs in a certain

action an affidavit which the plaintiff in that case (the now applicant) alleged they knew to be false.

The affidavit was one made by the defendant in that action setting forth the cash disbursements, and it was therein stated that the deponent had paid a certain sum as witness fees to one Creighton.

This alleged payment was made after the trial, but before swearing to the affidavit, and was in fact not an actual handing over of cash, but a setting-off, with the consent of the witness, a sum due by him to the defendant.

S. R. Clarke, applicant in person.

F. H. Thompson, contra.

ARMOUR, C.J., held that the consent made the transaction quite differeut from a mere set-off, and that it was payment of the witness fees. The affidavit of disbursements was therefore true, and the application should be dismissed with costs.

CONMEE v. CANADIAN PACIFIC R. W. CO.

Solicitor—Refusal to answer questions—Privilege.

Motion by the plaintiffs to commit one of the solicitors of the defendants for refusal to answer certain questions upon his cross-examination upon an affidavit sworn to by him upon a motion pending to appoint a new arbitrator.

The affidavit of the solicitor exhibited a telegram to his firm from Walter Shanly, one of the original arbitrators, saying that he was willing to continue to act as such.

The solicitor was asked to explain what led up to this telegram being sent; he said that he did not know anything about it, except what he had heard in consultation with his partner about this action.

W. M. Douglas, for the plaintiffs.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the defendants and solicitor.

ARMOUR, C.J.—I think the solicitor ought to have answered. There was no privilege for communications between him or his partner and Shanly. The solicitor should disclose his know-

ledge of any communication made by any person to Mr. Shanly as arbitrator in this suit.

Order made for re-attendance of the solicitor to be examined, at his own expense.

[ROSE, J., 31ST DECEMBER, 1888.

CONMEE v. CANADIAN PACIFIC R. W. CO.

(FOUR ACTIONS.)

Arbitrator—Disqualification—Offer by party of solicitorship pending reference—Subsequent acceptance—Order of reference, construction of—Judicature Act, 1881, s. 48—C. L. P. Act, ss. 189, 209—9-10 Wm. III. c. 15—Interim finding of facts—Time for moving against—Waiver of objections to.

By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under section 189 of the C. L. P. Act; and by clause 8, that the reference should be considered as made in pursuance of s. 48 of the Judicature Act, 1881, and also, in so far as the same is applicable, as under the provisions of s. 189 of the C. L. P. Act.

Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III. c. 15, but under s. 48 of the Judicature Act and s. 189 of the C. L. P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and *certify* their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887,

reported "we do hereby find and certify that the plaintiff moved the respective quantities hereinafter mentioned," etc.

Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of s. 209 of the C. L. P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and, apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

Held, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendants' company, and had after the finding accepted it, and was thus disqualified from acting.

McCarthy, Q.C., and *Wallace Nesbitt*, for the plaintiffs.
Robinson, Q.C., and *S. H. Blake*, Q.C., for the defendants.

[STREET, J., 11TH JANUARY, 1889.

In re PRITTIE TRUSTS.

Trustees—Remuneration—Exchange of securities—Collection of rents.

Trustees under a marriage settlement exchanged an investment of the estate in Manitoba lands into the stock of a land company. Nothing by way of income had ever been realized from either land or stock, and it was stated that both were valueless. The responsibility of making the exchange was taken away by the consent of the persons interested.

Held, that a percentage upon the nominal value of the stock was not the way to arrive at the trustees' remuneration, but that they should be allowed a sum to cover their trouble in making the exchange; and the allowance made by a referee was reduced from $162.50 to $50.

Certain rents were collected by the trustees through an agent, whom they paid by commission.

Held, that they were justified in employing an agent to make the actual collections for them, but were bound to look after the agent, and for their care, trouble, and responsibility were entitled to an allowance of two and a half per cent. upon the rents collected.

Moss, Q.C., for the trustees.

W. H. C. Kerr, for the *cestui que trust*.

[22ND JANUARY, 1889.

HARRIS v. HARPER.

Receiver by way of equitable execution—Interest of husband in lands of wife dying intestate.

The plaintiff, who had obtained judgment against the defendant in a County Court for $111, brought this action on behalf of himself and all other creditors of the defendant for equitable execution, and moved for an order restraining the defendant from parting with his share of the real and personal estate of his deceased wife (who died intestate in November, 1886) to which he had taken out letters of administration, and appointing a receiver to receive the share of the defendant of such estate.

Kappele, for the plaintiff.

E. T. English, for the defendant, contended that the interest which the defendant had in his wife's lands was exigible under the ordinary writ of execution, and it was not necessary to bring this action.

It was not shown what election the defendant had made, if any, under R. S. O. c. 64, s. 25.

STREET, J., held that it was not established that the interest of the husband in his wife's lands could be sold under the ordinary writ of execution; it could not be so sold if he elected to take a third as personalty; and he made an order appointing the sheriff of Toronto receiver of the defendant's interest, the sheriff to act as under the Creditors' Relief Act.

GIBSON v. McCRIMMON.

Mortgage—Judgment for immediate foreclosure and possession without consent.

A motion for judgment for immediate foreclosure of defendants' equity in a mortgage action and for immediate possession of the mortgaged premises. It was shown that the mortgage debt was in excess of the value of the land.

One of the defendants was served personally, and service upon the other was dispensed with.

Middleton, for the plaintiff.

No one appeared for either of the defendants.

STREET, J., pronounced judgment for immediate foreclosure and possession, without any consent being given.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 22ND SEPTEMBER, 1888.

HUGHES v. ROSE.

Mortgagor and mortgagee—Power of sale—Notice of sale—Effect of second mortgage taken as collateral to first.

A., being a mortgagee from B., made him a further advance and took a second mortgage for the amount of both advances, and as collateral to the first.

Held, that the remedies under the first mortgage were not surrendered and that a sale under notice given under the first mortgage was a good sale.

The notice of sale was a double one: (1) "That the mortgagee would without further notice enter into possession and sell and dispose of the lands;" and (2) "That the sale would take place on 28th January." The latter became inoperative because service was not made two months (the required time) prior to that date. A sale was subsequently had two months after the notice, which was not complained of as being otherwise improper or improvident.

Held, a good sale.

The plaintiff in person.

Moss, Q.C., *Delamere*, *Shepley*, *J. B. Clarke*, *G. H. Smith*, *J. M. Clark*, *Dean*, and *G. C. Campbell*, for the defendants.

[14TH DECEMBER, 1888.

HUTCHINSON v. CANADIAN PACIFIC R. W. Co.

Railways—Negligence—Contributory negligence—Travelling by freight train.

The plaintiff was going from Ingersoll to Montreal by train in charge of cattle. At Toronto the train on which he had come from Ingersoll was partly broken up, to be remade with some cars which were standing on another track at Toronto. While at the station at Toronto, the plaintiff went into the caboose at the end of the cars which were to be added to the portion of the train which had come from Ingersoll, and though the plaintiff knew there would be a shock when the connection was made between these two parts of the intended train, he stood up in the caboose, and was washing his hands when the connection was made, and the resulting shock caused the injury.

The evidence did not show that the defendants knew he was in the caboose at all, nor did the plaintiff prove neligence in any other way than as above.

Held, affirming the decision of ROSE, J., that the mere fact of the accident happening to him was not of itself sufficient evidence of negligence, and the action must be dismissed.

Held, also, that there was evidence of contributory negligence, in that the plaintiff knew he was in a freight train where there would not be so much care shown, and yet stood up instead of sitting down as he might have done while the connection was being made.

W. Nesbitt, for the plaintiff.

Aylesworth, for the defendants.

In re PUBLIC SCHOOL BOARD OF TUCKERSMITH.

Schools—Public Schools Act, R. S. O. c. 225, s. 63—Township school board—By-law—Repeal.

Case submitted by the Minister of Education under s. 237 of the Public Schools Act.

Held, that the plain meaning of s. 63 of the Public Schools Act, R. S. O. c. 225, is that after the township Public School Board has existed for five years at least, there may be at any

time the submission of a by-law for the repeal of the by-law under which that board was established, upon the presentation of a properly signed petition therefor.

The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists.

Moss, Q.C., for certain ratepayers.

W. H. Blake, for the Township Council.

[15TH DECEMBER, 1888.

CLARKE v. FREEHOLD LOAN & SAVINGS CO.

Mortgage—Right of payment off to obtain partial release—Assignee of equity of redemption—Running with the land.

A mortgage on five stores and expressed to be for $10,500, contained a provision that on payment of $2,500 the mortgagees would release the easterly store mortgaged, and any one or more of the other four stores on payment of $2,000 each at any time on receiving a bonus of three months interest on the sum so paid.

Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it.

It appeared that the whole $10,500 had not been advanced.

Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately.

S. R. Clarke, plaintiff in person.

Hoyles, for the defendants.

JONES v. DALE.

Specific performance—Written contract—Omitted term—He who comes into equity must do equity.

In an action for specific performance of an agreement for the sale of lands, it appeared that the parties intentionally omitted from the writing a part of the agreement, as to the tenor of which both parties agreed; and the defendant asked to have this

inserted in the judgment for specific performance, but the plaintiff objected.

Held, that on the principle that he who comes into equity must do equity, it was proper that the omitted portion of the agreement should be inserted as claimed.

Where both parties concur in an action such as this for specific performance that there is a material ingredient of the transaction left unexpressed because one party chose to trust the other without writing, it is eminently proper for the Court to deal with the whole contract and not to pass over any part for technical reasons.

Watson, for the appellant.

J. A. McGillivray, for the respondent.

JONES v. McGRATH.

Husband and wife—Deed of land—Consideration—49 V. c. 20, s. 6—R. S. O. c. 100, s. 6.

In an action for the recovery of land, one of the deeds in the chain of title was a conveyance from the defendant direct to his wife, dated 18th October, 1884, which the defendant contended was a void conveyance. It purported to be for the consideration of $100, the receipt being acknowledged in the usual way in the body of the deed and in the margin. The plaintiff got his conveyance from the wife of the defendant on 28th March, 1887, and therefore after the enactment of 49 V. c. 20, s. 6, which makes a receipt for consideration money in the body of a conveyance sufficient evidence to an innocent purchaser, such as the plaintiff was in this case, of the payment thereof.

Held, that under this enactment the consideration of $100 must as against the plaintiff be held to have been truly paid, and, this being so, the conveyance from the husband to the wife was good, as the Court would declare a trust in favour of the grantee who had paid the consideration.

F. Taylour English, for the plaintiff.

MacGregor, for the defendant.

[8TH JANUARY, 1889.

GIBBONS v. WILSON.

Insolvent debtor—Preference—Principal and agent—R. S. O. c. 124, s. 3—Chattel mortgage—Assignment for creditors.

C. being insolvent was taken by one of his creditors to the office of S., a solicitor, and there it was arranged that S. should find some one who would lend C. $600 on his stock in trade, S. at the same time taking from C. a written authority to pay the claim of the said creditor in full out of the moneys advanced. S. accordingly got one W. to lend the money on chattel mortgage of the stock in trade; W., however, knowing nothing of C.'s circumstances, or of why the money was wanted, or how it was to be applied. Out of the money S. paid off the creditor in question in full. C. afterwards made an assignment for the benefit of his creditors to G., who brought this action to set aside the chattel mortgage.

Held, that the action must be dismissed, for the mortgage was made in consideration of a present *bona fide* advance of money within the meaning of R. S. O. c. 124, s. 3. It could not be said that the "effect of the mortgage" was to prefer the creditor, for this was the effect solely of the act of S. acting apparently altogether for another principal.

The rule is that the fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, and unless the principal knows of or assents to it, or takes an advantage by reason of it.

Moss, Q.C., for the plaintiff.

W. F. Walker, for the defendant.

[BOYD, C., 9TH JANUARY, 1889.

VILLAGE OF EAST TORONTO v. TOWNSHIP OF YORK.

Erection of new municipality—Division of assets—School fund.

On the erection of two village municipalities out of a township:

Held, that the moneys derived from "The Ontario Municipalities Fund," which had some years before been by by-law

appropriated to the school purposes of the township, were assets properly divisible between the township and the new village municipalities.

Re Albemarle, 45 U. C. R. 133, referred to and distinguished.

E. D. Armour, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

In re PRITTIE and CRAWFORD.

Equitable interest in land—Agreement to purchase—Not saleable under execution—Vendor and purchaser.

An application under the V. and P. Act. The husband of the vendor had an equitable interest in the lands, by reason of an agreement to purchase them from one R. He assigned the benefit of this agreement to his wife, and she in selling the lands was met with the objection that executions against the lands of her husband had attached upon his equitable estate before his assignment to his wife.

Held, that the husband's interest in the lands was not saleable under writs of *fi. fa.* lands; and therefore the objection to the title failed.

Moore v. *Clarke*, 11 Gr. 497; *Wilson* v. *Proudfoot*, 14 Gr. 630, referred to.

W. N. Miller, Q.C., for the purchaser.

D. Macdonald, for the vendor.

[ROBERTSON, J., 25TH JANUARY, 1889.

MALONE v. MALONE.

Dower—Action against executors—Devisees as parties—Judgment of seisin—Detention—Damages.

An action by the widow of Michael Malone against his executors for dower. The deceased devised his land to his two sons, subject to an annuity in favour of the widow of $125 a year in lieu of dower. The widow elected against the will and claimed dower and damages for detention.

The defendants denied detention and said they had always been and were ready to assign dower. They also submitted that the sons were necessary parties.

The plaintiff moved for judgment on the pleadings for seisin, or in the alternative for a gross sum in lieu of dower, and for a reference to the Master to assess damages for detention.

Held, (1) that since the Devolution of Estates Act the sons were not proper, or, at all events, necessary parties.

(2) That the plaintiff was entitled to judgment of seisin.

(3) That there never having been any demand of dower, and the defendants always having been ready to assign it, there could be no damages for detention.

Bishoprick v. *Pearse*, 11 U. C. R. 306, referred to.

Anglin, for the plaintiff.

Kappele, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 7TH JANUARY, 1889.

WILSON v. McDONALD.

Foreign commission—Evidence of a defendant—Application of co-defendant—Material on application—New material on appeal—Costs.

The Court will not hesitate to make an order for a foreign commission for the examination of a witness who is abroad, and whose presence cannot be procured for the purpose of giving evidence in Court, because such witness is a co-plaintiff or co-defendant of the person applying.

The Divisional Court, on appeal, admitted evidence which was not formally before the Master or Judge in Chambers below, and being satisfied that the defendant McD. could not be induced to return from abroad to give evidence, and that his evidence was important to the defendant C., were of opinion that the latter was entitled to a commission to examine McD. abroad; but gave no costs of the appeal,

H. E. Ridley, for the plaintiff.

W. H. Blake, for the defendant Clark.

[STREET, J., 16TH JANUARY, 1889.

PRITCHARD v. PRITCHARD.

Promissory notes—Overdue in hands of plaintiff—Fraud—Delivery up of notes—Counter-claim—Recovery of land—Joinder with other cause of action—Demurrer—Costs.

Action to recover the possession of land.

The defendant, by the 10th paragraph of his counter-claim set up that he was induced by the fraud of his solicitor to make certain promissory notes, now overdue and in the hands of the plaintiff, who took them with knowledge of the circumstances under which they were given; and he claimed that the plaintiff should be restrained from negotiating them, and that they might be given up and cancelled.

The plaintiff demurred to this paragraph.

Held, that it showed a good cause of action, the mere fact that the notes were overdue in the hands of the plaintiff not having the effect of destroying the right to have them delivered up.

Jervis v. *White*, 7 Ves. 412; *Bromley* v. *Holland*, 7 Ves. 22; *Simons* v. *Credland*, 5 L. T. N. S. 523; *Simpson* v. *Lord Howden*, 3 My. & Cr. 104; *Joyce* on Injunctions, ed. of 1872, p. 1,817, referred to.

Held, also, following *Goring* v. *Cameron*, 10 P. R. 496, that a defendant against whom an action is brought to recover possession of land may set up a counter-claim for another cause of action, without leave, notwithstanding Rule 341.

Held, however, that the defendant, by claiming possession of the land and asking for relief in respect of the notes in the same counter-claim, without leave, had violated Rule 341.

Semble, that the plaintiff instead of demurring on the last two grounds should have applied in Chambers to strike out the counter-claim, and that a demurrer was not the proper manner of raising the question.

The defendant was allowed *nunc pro tunc* to set up both matters in his counter-claim.

The defendant was allowed no costs of the demurrer, because the demurrer book was seriously incomplete and inaccurate.

C. J. Holman, for the plaintiff.

T. W. Howard, for the defendant.

[23RD JANUARY, 1889.

JOHNSON v. KENYON.

Costs—Scale of—Action for damages for failure to return promissory note—Recovery of $314—Ascertainment of amount—Jurisdiction of County Court—Offer of costs, effect of.

The plaintiff held the defendant's note for $300, and gave it back to the defendant to hold until he should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for breach of his contract to return the note. The action was referred to a referee, who found the plaintiff entitled to $31 damages, being the amount of the note and interest.

Held, that so soon as the facts relating to the note had been arrived at, the quantum of damages was a fixed amount ascertained by calculating the amount of the defendant's liability upon the note; and therefore the claim was within the jurisdiction of the County Court, under R. S. O. c. 47, s. 19, s-s. 2; and the plaintiff was entitled to costs upon the County Court scale only. The defendant was entitled to set off the difference between County Court and High Court costs of his defence.

Before a motion for costs was made, the defendant offered to pay the plaintiff's costs upon the County Court scale.

Held, that this was not an offer which the plaintiff was bound to accept, and the plaintiff was entitled to the costs of the motion on the County Court scale.

J. B. Clarke, for the plaintiff.

Aylesworth, for the defendant.

[24TH JANUARY, 1889.

HANNAFORD v. NEELEY.

Foreclosure—Mortgage account—Repairs—Costs under power of sale—Reference.

This was a mortgage action in which the plaintiff claimed foreclosure and other remedies, and claimed to include in the amount due upon the mortgage, and to have a lien for $135 88 for costs of proceeding under the power of sale, and $400 spent

in executing repairs upon buildings by the plaintiff as mortgagee in possession.

The plaintiff set out full particulars of his claim in the indorsement of his writ, and served a notice in lieu of statement of claim, stating that his claim appeared by the indorsement.

The defendant not delivering a defence, the plaintiff set the case down on motion for judgment.

Notice of the motion was served on the defendants following *Dominion Bank* v. *Doddridge*, ante p. 5, but no one appeared for them on the return.

H. Symons, for the plaintiff, referred to Rules 718, 727; and as to mortgagee being allowed for repairs to *Sandon* v. *Hooper*, 6 Beav. 248; *Romanes* v. *Herns*, 22 Gr. 473.

STREET, J.—I think the claim for costs of proceeding under the power of sale and the item of $400 for repairs rendered it necessary that the action should be set down for judgment. There will be a judgment for foreclosure in the usual form, with a reference to the Registrar to take the mortgage account, in doing which he will make all proper allowances to the mortgagee in respect to these items as well as to the others.

IN CHAMBERS.

[BOYD, C., 10TH JANUARY, 1889.

QUEEN VICTORIA NIAGARA FALLS PARK COMMISSIONERS v. HOWARD.

Discovery—Particulars—Title—Form of order—Disclosing evidence relied on.

The practice in ordering particulars depends in this Province on the inherent jurisdiction of the Court to prevent injustice being done; the rules in force in England not having been adopted here.

In an action of trespass to land the defendants pleaded a lease from the Dominion government, and that the lands had been vested in the government as ordnance lands. This was pleaded in an unexceptionable manner, and no affidavit was filed by the plaintiffs to shew that they were unable to reply without further disclosure; yet an order was made by the Master in Chambers for particulars of the facts and means by which and

the time at which the lands became ordnance lands. It did not appear that the defendants had any special means of information as to the matter of title, not open to the plaintiffs.

Held, that the order was wrong in form; the utmost should have been to declare that the defendants should not be allowed to give evidence in support of this part of their defence except in so far as they furnished particulars.

But even such an order as indicated should not have been made in this case; for a party is not obliged to disclose upon what evidence he relies, or by what means he is going to prove his contention.

Irving, Q.C., for the plaintiffs.

H. Symons, for the defendants.

[14TH JANUARY, 1889.

SKEAD v. HOLLAND.

Report—Master amending his own report after confirmation—Material on which amendment made.

An action by the vendor for specific performance of a contract for the sale and purchase of land.

Judgment was pronounced on the 8th June, 1888, referring it to the local Master at Ottawa to "inquire and state whether a good title is or can be made" to the lands in question.

On the 8th November, 1888, the Master made his report, finding that "a good title can be made" to the land.

On the 22nd December, 1888, the same Master made an order in Chambers amending his report by substituting "has been" for "can be," the report as amended reading that "a good title has been made."

This order was made on the application of the plaintiff, and on an affidavit by his solicitor stating that he was advised by counsel that the report should be amended in the way it was amended.

The defendants appealed from this order upon the grounds, 1. That the Master had no authority to amend his report after it was confirmed by the lapse of a month and more; and 2. That

the material upon which the Master acted was, at all events, insufficient.

Middleton, for the appeal.

Arnoldi, contra.

BOYD, C.—The report as originally made was responsive to the judgment, and therefore could not be amended by the Master after it was confirmed; if it had not been responsive to the judgment, or if something referred to him had not been reported upon, he might have made a new report or added to the original one. The practice here pursued is not one that ought to be encouraged; if we are to have any practice at all, a thing like this should not be done. A mere clerical error in a report may be corrected on a certificate of a Master, but the Master here did not act upon any discovery of his that he had made a mistake, but on an affidavit of the plaintiff's solicitor. I do not deal with the merits, but I think the Master had no jurisdiction to do as he did, and the order and amendment made will be vacated and the report will stand as it was, without any prejudice to any one making a proper application to put it right if it is wrong. I express no opinion as to whether that can be done after confirmation. Costs to the defendant in any event.

In re ANDERSON AND BARBER.

Interpleader—Intercepting rent—Action for rent in County Court—Application by tenant to High Court for interpleader order—Entitling of affidavits—Garnishment by Division Court creditors—Charging order—Rules 1141 et seq., 1162 et seq.—Costs.

Rent being due by A. to B., A. was served as garnishee with Division Court summonses by E. and G., each claiming part of the rent. A. refusing to pay his rent unless he was protected from these claims, he was sued by B. for the full amount of the rent in a County Court. Before this action was begun G. presented to A. an order upon him signed by B. for part of the rent due.

A. applied to a Judge of the High Court of Justice in Chambers for an interpleader order. The affidavits on which he moved were entitled "In the H. C. J., Chy. Div., between A., applicant, and B. and others, claimants."

Held, that A. was entitled to be relieved by calling on the rival parties to interplead, under the procedure indicated by Rules 1141 *et seq.*, and an objection to the manner of entitling the affidavits was overruled. There was no jurisdiction in the County Court to give relief by way of interpleader in the action brought by B.; the jurisdiction in that Court being limited by Con. Rules 1162 *et seq.* to proceedings against absconding debtors, and after judgment when execution has issued. G.'s claim might have been litigated in the County Court, and would not have been the subject of interpleader proceedings; but the order made being for a stay of the County Court action and payment into Court by A. of the rent, G.'s claim should be the subject of inquiry in the High Court.

Held, also, that A.'s costs of the application should be borne by E. and G., who submitted to have their claims barred, and who had been the cause of the expense and delay, and that there should be no costs to either party of the County Court action.

Justin, for the applicant.

W. R. Meredith, Q.C., *Hoyles*, *F. R. Powell*, and *Robinette*, for the respective claimants.

[FERGUSON, J., 4TH JANUARY, 1889.

In re HIME AND LEDLEY.

Priorities—Execution creditor—Mortgagee—Removal of fi. fa. lands for renewal—Neglect to replace—Mistake—Time.

Rule 894 providing for the renewal of writs of execution necessarily intends the removal in each case of the writ out of the actual possession of the sheriff for the purposes of such renewal. This is an exception to the general rule, and the time during which a writ may for the purposes of renewal be kept out of the hands of the sheriff without interference with the right of priority is commensurate with the time reasonably necessary to effect the renewal; but the exception cannot be made to extend so as to cover mistakes, never so honestly made, the consequence of which is a failure to replace the writ in the hands of the sheriff for so long a period as six or seven months.

And where H. placed a writ of *fi. fa.* lands in the hands of a sheriff in November, 1883, and renewed it from year to year till

October, 1886, when he removed it for the purposes of renewal only, and by mistake did not replace it till April, 1887;

Held, that he had lost his priority over L., a mortgagee whose mortgage was registered against the land of the execution debtor in July, 1885; and it made no difference that no new rights had in the meantime intervened.

Aylesworth, for Hime.

Carson, for Ledley.

[ROBERTSON, J., 9TH JANUARY, 1889.

ODELL v. BENNETT.

Counter-claim — Slander — Mortgage action — Inconvenience — Delay — Rule 374.

A counter-claim for damages by false and depreciatory statements with regard to the value of the mortgaged premises having been set up by the defendants in an ordinary mortgage action, an order striking it out under Rule 374 was affirmed, as well on the ground of inconvenience in trying the action and counter-claim together, as on the ground that the counter-claim was filed for delay.

McLean v. *Hamilton Street Railway Co.*, 11 P. R. 193, and *Central Bank* v. *Osborne*, 12 P. R. 160, followed.

E. Taylour English, for the plaintiff.

Hoyles, for the defendants.

MOSES v. MOSES.

Costs—Scale of—Jurisdiction of Division Court—Ascertainment of amount.

The defendant signed a writing in these words:

"Brantford, Oct. 9th, 1886.

"If anything happens to me sudden, this is to insure my son Joseph (the plaintiff) to take $100 from his sister Hannah's share, to repay money lent to her; if I live until this time next year I will settle it with him."

Held, that this was not a sufficient ascertainment of the amount due, by the signature of the defendant, within the meaning of R. S. O. c. 51, s. 70, to allow of a claim upon it and other items (amounting to about $60) being joined in a Division Court action.

McDermid v. *McDermid*, 15 A. R. 287, followed.
Re Graham v. *Tomlinson*, 12 P. R. 367, referred to.
Aylesworth, for the plaintiff.
Fullerton, for the defendant.

[25TH JANUARY, 1889.

McNALLY v. McDONALD.

Discovery—Examination of defendant before statement of claim.

An appeal by the defendant from an order of the Master in Chambers requiring the defendant and one Tracey to attend for examination before delivery of statement of claim, for the purpose of enabling the plaintiff to frame his statement of claim.

Action for a partnership account and to have a deed of dissolution set aside.

J. A. Macdonald, for the appeal.
C. J. Holman, contra.

ROBERTSON, J., (after stating the facts).—In my judgment this is not a case in which such an order would be in furtherance of justice. On the contrary I can see in it an element which may work a very great injustice. Taking the whole of the facts as spread out before me, I think the plaintiff is now clearly embarked in what may be called a voyage of discovery. He does not pledge his oath that he has a good cause of action even. He says he has "just learned from various sources that a considerable profit was made," etc., but he does not condescend to particulars; nor does he show why it is necessary to put this defendant and his bookkeeper (Tracey) to all the annoyance and trouble which an examination of them and the old books of the concern will entail. * * * * *

This is quite a different case from that presented by a defendant who asks for an examination of a plaintiff after statement of claim and before he prepares his defence; and the plaintiff must, in my judgment, always show at least two things: 1st, that he has a good cause of action; and 2nd, that for want of particular information he is not able properly to frame his statement of claim and that the examination of the defendant is absolutely necessary in order to afford the particular information required. Here the plaintiff has not done this; he in fact does not know whether he has any cause of complaint or not, and

the examination is only wanted to set at rest certain misgivings.

* * * * * *

I think it would be a great abuse of the rights which have been given to parties under the new law if this examination were to be permitted, and I fully agree with the remarks of the learned judges who have disposed of the several cases of *Hooey* v. *Gilbert*, 12 P. R. 114; *Boulton* v. *Blake*, 11 P. R. 196, and others cited; and I feel it incumbent upon me to allow the appeal with costs to the defendant in any event of the action.

[STREET, J., 11TH JANUARY, 1889.

HYNE v. BROWN.

Infant—Defendant in action of tort—Appointment of guardian—Rule 261.

In an action of seduction brought against an infant, the defendant was served personally and entered an appearance in person.

Held, that the common law practice referred to in Rule 261 meant the practice by which a real guardian and not a fictitious one was appointed: and an order was made requiring the defendant to appear by guardian within six days, and in default for the plaintiff to be at liberty to appoint a guardian for him, the consent of such guardian being shewn and that he had no interest adverse to the defendant.

Kappele, for the plaintiff.

[MACMAHON, J., 31ST DECEMBER, 1888.

REGINA v. WARREN.

Criminal law—Keeping house of ill-fame—Husband and wife—Joint conviction.

There may be a joint conviction against husband and wife for keeping a house of ill-fame: the keeping has nothing to do with the ownership of the house, but with the management of it.

Rex v. *Williams*, 10 Mod. 63, and *Rex* v. *Dixon*, ib. 335, followed.

Badgerow, for the Crown.

W. G. Murdoch, for the prisoner.

NOVA SCOTIA.

In the Supreme Court.

KAULBACH v. SPIDLE.

Writ of possession—Refused against a party occupying under contract to purchase.

On appeal from the refusal of a Judge of the Supreme Court to grant a writ of possession under R. S. c. 124, s. 21, it appeared that the plaintiff held a mortgage on the defendant's property, and that the property was sold under foreclosure proceedings and bought in by the plaintiff, who received a deed from the sheriff, but that the defendant continued in possession subsequently under an alleged contract to purchase.

Held, that the writ was properly refused and that the appeal must be dismissed.

McLACHLAN v. KENNEDY.

Motion to re-enter cause—Security held a matter for a separate application.

On a motion for leave to re-enter a cause on the docket, made on behalf of the defendant, the plaintiff's counsel applied for security on the ground that the defendant, who was carrying the appeal, was absent from the Province.

Held, that there must be a separate application.

JOHNSON v. ARCHIBALD.

Action against sheriff— Failure to give material evidence—New trial—Costs.

On appeal from a judgment in favour of the plaintiffs, in an action against the sheriff to recover goods taken by him under execution, it appeared that the defendant at the trial had omitted to prove that he represented execution creditors.

Held, that he could not succeed in his appeal.

A new trial was allowed on payment of the costs of the argument and costs of the day at the trial.

REGINA v. PORTER

Canada Temperance Act—Conviction under set aside—Penalty in excess of that authorized by Act—Conviction made in the absence of defendant and without notice—Motion to amend conviction refused—Construction of s. 117—Statute 13 Geo. II. c. 18, held not in force in this province—Objection by substantive motion—Imprisonment in default of distress cannot be imposed until after return of distress warrant.

The defendant was convicted for unlawfully selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878, and adjudged for such offence to forfeit and pay the sum of $100, and also to pay the prosecutor $7.19 for his costs, and if such sums were not paid on or before a day appointed, it was ordered that the same should be levied by distress of the goods and chattels of the defendant, and in default of distress, that the defendant should be imprisoned for the space of two months unless such sums were sooner paid.

Held, that the conviction, if for a first offence, was bad on the ground that the penalty imposed was in excess of that authorized by the Act, and, if for a second offence, on the ground that it was made in the absence of the defendant and without notice.

A motion having been made to amend the conviction under the Act, ss. 117 and 118, by reducing the amount of the fine,

Held, that the power of the Court to make such amendment was taken away by the words of s. 117 "provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by such Act."

Held, also, that the latter part of s. 117 must be read as if the words "for the offence charged" were added.

The ground having been taken on the part of the prosecution, that the writ of *certiorari* on which the motion to quash the conviction was based had not been sued out within six months after the date of the conviction, as required by the English statute 13 Geo. II. c. 18:

Held, that the statute is not in force in this province, not being obviously applicable and necessary to our condition, and the

legislature of this province in legislating upon the subject of *certiorari* having adopted the provisions of many English statutes while omitting to re-enact the provisions of the Act in question.

Held, also, that the objection, if available, must have been taken by a substantive motion to set aside the writ of *certiorari* and not in opposition to a motion to quash a conviction returned in obedience to the writ.

The magistrate making the conviction having imposed two months' imprisonment in default of distress :

Held, that his jurisdiction, so far as related to the trial and conviction, ceased when he made the conviction and imposed the penalty, and that he had no authority at that time to fix any term of imprisonment.

After the conviction application may be made to the same or to any other justice in the same territorial division for a warrant of distress, whereupon the justice applied to will consider the effect of the warrant upon the defendant and his family, but, if he decides to grant the warrant, can impose no term of imprisonment until after the return is made, and he knows the amount remaining unpaid.

Regina v. *Hyde*, 9 E. C. L. & E. R. 305, distinguished.

COMMERCIAL BANK OF WINDSOR v. BORDEN.

Promissory note—Action against indorser—Verdict for defendant sustained—Contradictory evidence—Preponderance—Costs.

Action against the defendant as indorser of a promissory note made by the firm of E. B. & Sons. Two issues of fact were submitted to the jury at the trial and found in favour of the defendant. The plaintiff appealed from the findings.

The evidence being in some respects contradictory, but the preponderance being in favour of the defendant, the Court dismissed the appeal with costs, and referred the cause back to the Judge before whom it was tried for final judgment.

WEBSTER v. MUTUAL RELIEF SOCIETY.

Insurance—Life—Action on membership bond—Defences of misrepresentation, concealment, etc.—Judgment for defendant reversed with costs—Pleadings—Conditions—Warranty—Variance.

The defendant society, a company doing life insurance business, was sued by the plaintiff, as widow of J. R. L. W., to recover an amount payable to her under a bond of membership issued to the deceased in his lifetime.

The main defences raised were concealment, an error in the statement of the date of birth of the deceased, misrepresentation as to the nature and severity of an attack of appoplexy by which he had been seized, and the date of its occurrence.

At the trial judgment was given in favour of the defendant on the sole ground that the attack in question was proved to have occurred four years before the date of the application, and not five years, as represented, the medical testimony showing that the greater the length of time elapsing after such an attack the less likelihood there would be of its recurrence.

On appeal, the judgment below was reversed, and judgment ordered to be entered for the plaintiff with costs of the appeal and of the trial below, on the ground that the issue on which judgment was given for the defendant was not raised by the pleadings, and that the other issues were properly found in favour of the plaintiff.

The defence also set up an express condition of the bond of membership on which the action was brought, that the bond should be null and void if any of the answers in the application should be untrue or evasive, or if the applicant should conceal any facts.

There was no such warranty in the bond, but the application contained a condition to that effect.

The language of the plea was "if any of the answers made in the application for the same should be untrue, evasive, or if the applicants should conceal any facts." The language of the application was "if there be in any of the answers herein made any untruth, evasion, or concealment of facts."

Quære, whether this was not a variance.

SINGER SEWING MACHINE CO. v. McLEOD.

Bills of Sale Act, R. S. c. 92, s. 3—Not applicable to a contract made out of the Province—Sewing machine lease—Removal of machine without consent of owner.

The plaintiff company leased a sewing machine to McB., at Belfast, Maine, taking a bill of sale by way of security. The lease was made upon a written undertaking that the machine was not to be removed from the house in which it was placed without the written consent of the company.

McB. subsequently removed to Truro, N. S., taking the machine without having obtained such written consent, and pledged it at Truro to the defendant.

The plaintiff having brought an action claiming the return of the machine and damages for its detention, the ground was taken that the plaintiff's bill of sale had not been registered in this Province in compliance with the requirements of the Revised Statutes c. 92, s. 3.

Held, that the provisions of the Act relied on were not applicable to a bill of sale made between parties and in respect to a subject matter out of the Province.

Held, also, that the removal of the machine to this Province without the plaintiff's consent was an act of trespass which precluded any subsequent dealings with it on the part of the lessee from affecting the plaintiff's right.

JEYKAL v. NOVA SCOTIA GLASS CO.

Work and labour—Contract for—Wrongful dismissal—Measure of damages—Res judicata—Incapacity—Burden of proof—Verdict for plaintiff sustained.

The plaintiff was engaged by the defendants, through an agent at Prague, Bohemia, to work in their employ in the capacity of journeyman and assistant superintendent in their glass works at New Glasgow, Nova Scotia. The engagement was made to continue for a period of three years from the arrival of the plaintiff at New Glasgow, at a specified rate of wages, payable bi-monthly. The plaintiff commenced work 1st May, 1883. The defendants having failed to give him the work contracted for, or to pay wages as agreed, the plaintiff brought an action, and on the 29th November, 1884, recovered judgment for the

amount of wages due him at that date. In February, 1885, the defendants dismissed the plaintiff from their employ, and on the expiration of the period of three years he brought a second action claiming wages at the rate agreed on from the date of the judgment in the former action to the date of his dismissal, and damages at the same rate from the date of the dismissal to the expiration of the period for which the original contract was made.

Held, that if the first suit had determined any issues raised in the second it would be fatal to any attempt to raise the same questions again, but that as in the first suit the plaintiff had only claimed for wages due up to that date, the principle of *res judicata* did not apply, the plaintiff having the right, under the contract providing for the payment of wages twice monthly, to sue whenever the defendants failed to pay at the times or in the amounts agreed on.

The defendants having sought to justify the dismissal on the ground that the plaintiff was incapable of doing the work he had contracted to perform;

Held, that the burden of proving incapacity was on the defendants.

It appearing that the system and appliances in use in New Glasgow for producing glass were different from those to which the plaintiff had been accustomed in Bohemia;

Held, that the plaintiff was not guilty of a breach of the implied covenant that he was reasonably skilled and competent for the work he had engaged to do.

Damages having been allowed the plaintiff in the full amount of the wages agreed to be paid him, and it appearing that he could not speak or understand the language of the country and was incapable of doing any other work;

Held, that there was no reason for disturbing the decision.

JONES v. JOHNS.

Duress—Assignments procured from a father, as a condition of withdrawing criminal proceedings against his son—Set aside.

M. J. S. made an assignment to T. M. J., in trust for the benefit of his creditors, subject to a preference in favour of J. M. S., his father, for a large amount.

M. J. S. was arrested at the instance of Montreal creditors from whom he had purchased goods a short time previously to the making of the assignment, charged with having procured goods under false pretences.

As a condition of procuring his son's release, the father was induced to make an assignment of his preferential claim for the benefit of the creditors, and also to assign for the same purpose and for the purpose of defraying the expenses of the son's arrest, a mortgage which he held on the property of one T. M.

Held, that the father, under the circumstances under which the assignments were made, was not a free agent, but that the assignments were void as having been procured by duress and must be set aside.

REGINA v. CALHOUN.

Canada Temperance Act—Appeal from refusal of Judge to allow certiorari—Proceedings held to be of a criminal nature—Preliminary objection—Costs.

The defendant having been convicted of selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, 1878, application was made to a Judge of the Supreme Court, at Chambers, for a writ of *certiorari* to remove the proceedings into the Supreme Court. The application having been refused, the defendant appealed.

Held, that the matter was a criminal one and there was no appeal.

The appeal having been dismissed on a preliminary objection, of which no notice has been given, the order was made without costs.

SHATFORD v. NELSON.

Bill of sale—Wrongful removal of goods covered by—Liability of a partner for tortious act of his co-partner.

The defendant sold a quantity of goods to H., who previous to receiving delivery made a bill of sale to the plaintiffs, covering after-acquired property, and the plaintiffs after the goods had been delivered went into possession.

The goods were removed by one of the defendants, without the knowledge of his partner. Judgment was given in the County Court against both defendants as for a wrongful removal. The defendants having appealed, the appeal was dismissed with costs.

MUNRO v. ELLIOTT.

Penalty—R. S. c. 4, s. 96—Sub-collector of customs an employee.

In an action against the defendant to recover a penalty for an alleged illegal voting at the election of a member of the Provincial Legislature, contrary to the provisions of R. S. c. 4, s. 96, it appeared that the defendant was a sub-collector of customs.

Held, that the defendant was an employee of the custom house within the meaning of the Act.

EASTERN DEVELOPMENT CO. v. McKAY.

Wharfage—Insufficient tender—Costs refused where point as to was not taken below.

In an action for replevin for goods of the plaintiff, which the defendant was proceeding to sell under a claim for wharfage, the plaintiff made a tender of an amount which he considered sufficient to satisfy the defendant's claim.

Judgment was given in the County Court in favour of the plaintiff, from which the defendant appealed.

On the hearing of the appeal a point, not raised below, was taken as to the insufficiency of the tender.

The Court being of opinion that the defendant was entitled to a further amount, ordered judgment to be entered in his favour accordingly, with costs of the trial, but without costs of the argument.

SHATFORD v. LE BLANC.

Bill of lading—Action for short delivery—Consignment to sell for owner—Amendment.

In an action brought by the plaintiffs, as assignees of a bill of lading, against the defendant, the master of a vessel, for the short delivery of a cargo of produce, the evidence showed that the cargo was the property of T., and was merely shipped to the plaintiffs to sell on his account, and that the short delivery complained of resulted from sales made by H. with the knowledge and consent of T.

Held, that the plaintiffs could not recover.

The Court on appeal may make an amendment which has been refused below, if it appears that the interests of the parties litigant demand such an amendment.

WHITE v. FLEMING.

Evidence—Telegrams—Proof of—New trial ordered where secondary evidence was refused.

In an action claiming damages for wrongfully procuring the plaintiff's son to leave his service and refusing to allow him to return, secondary evidence was offered and rejected of a telegram sent by the plaintiff to the defendant demanding the son's return.

Held, on appeal that the evidence should have been received.

A new trial was ordered.

The same principal that admits proof that letters were deposited in the post office duly addressed, as tending to show that they were received by the persons to whom they are addressed, applies to telegrams.

NEW BRUNSWICK.

In the Supreme Court.

In re CURRIE.

***Bastardy**—Consol. Statutes c. 103, ss. 7 and 10—Time of trial—When imperative—Prohibition—County Courts—Absence of Judge—Power of clerk to adjourn—Consol. Statutes c. 51, s. 16.*

Section 7 of the Consol. Statutes c. 103, providing that a charge of bastardy shall be tried at the next term of the County Court after the birth of the child, is imperative, unless the trial is postponed to a subsequent term, as therein provided.

Therefore, where on hearing such a charge the jury disagreed, and it was postponed to the next term, when, owing to the illness of the Judge, no Court was held, a writ of prohibition was granted to restrain the Judge of the County Court from afterwards trying the information.

Quære, whether the power given to the clerk of the County Court by s. 16, c. 51 of the Consol. Statutes, in case of the unavoidable absence of the Judge, to adjourn the Court from time to time, authorizes him to adjourn it to the next term.

McLEOD v. SANDALL.

***Assessment and taxes**—St. John Assessment Acts—Foreign corporation having agency in St. John—Whether shareholder therein liable to assessment as such—Execution for taxes—Inclusion of more than one year's taxes—Replevin—Nominal damages.*

The owner of shares in a foreign corporation doing business in the city of St. John, is not liable to assessment in the city in respect to such shares, either under "The St. John City Assessment Act of 1859," and the Act 31 V. c. 36, or under "The St. John City Assessment Act of 1882." Where a foreign company is liable to be assessed because it carries on business in St. John, a stock-holder in such company is exempt from taxation in respect of his stock therein.

The words "Incorporated Companies outside the limits of the Province" in Schedule (A) of the Assessment Act of 1882, mean such companies not doing business in St. John, and therefore not liable to be assessed under s. 30.

Quære, whether an execution for non-payment of taxes can include more than one year's taxes.

Where goods are illegally seized under an execution, but are not taken out of the actual possession of the owner, he can only recover nominal damages in an action of replevin for them.

O'BRIEN v. MALONEY.

Justice of the Peace—Affidavit for review from a Justice's Court—Jurat—Commissioner, how described.

An affidavit to obtain an order for review of a magistrate's judgment is sufficient if the commissioner before whom it is sworn, is described in the jurat as a "Commissioner, &c., in the Supreme Court," though the affidavit is not entitled in the Court; WETMORE, J., dissenting.

WILSON v. CODYRE.

Action for assault—Previous trial and dismissal of complaint by a magistrate under 32 & 33 V. c. 20, s. 43—Request to magistrate to proceed summarily—Plea of dismissal—Demurrer—Statement of ground—Consol. Statutes c. 37, s. 90—Criminal law—Summary trial for assault—Jurisdiction of Dominion Parliament—32 & 33 V. c. 20, s. 45.

In an action for assault and battery the defendant pleaded that an information had been laid against him by the plaintiff before a magistrate in respect to the trespass declared on, under the Dominion Act 32 & 33 V. c. 20, s. 43, and that the magistrate, after hearing, dismissed the information and gave the defendant a certificate of dismissal, whereby and by force of the statute he was released from the action.

Held, on demurrer, by ALLEN, C.J., WETMORE and KING, JJ., (TUCK, J., dissenting), that the plea was insufficient in not stating that the complainant had prayed the magistrate to proceed summarily.

Where the ground of demurrer stated was that the magistrate had no jurisdiction to grant the certificate;

Held, by ALLEN, C.J., and WETMORE J., that it was open to the plaintiff to argue that the plea did not show that the magistrate had jurisdiction to try the complaint.

Per TUCK, J., that other grounds of demurrer beside those stated might be argued.

Held, by ALLEN, C.J., and TUCK, J., that s. 45 of the Act 32 & 33 V. c. 20, declaring that a certificate by a magistrate dismissing an information for assault should release the defendant "from all further proceedings, civil or criminal, for the same cause" being part of the criminal law and procedure, was not *ultra vires* as interfering with civil rights.

In re WESTMORELAND DOMINION ELECTION PETITION EMERSON v. WOOD.

Elections — Dominion Controverted Elections Act — Time allowed for commencement of trial of election pet tion—Computation of—When time occupied by session of Parliament excluded—Enlargement of time—Right of appeal from Judge's order—Entitling of affidavits.

The Supreme Court has appellate jurisdiction over orders made by Election Court Judges under "The Dominion Controverted Elections Act." Affidavits to be used on an application to set aside an order made by an Election Court Judge may be read if sworn before a commissioner for taking affidavits in this Court, though entitled "In the Election Court." Such entitling is an irregularity only, and may be treated as surplusage.

Section 32 of the Dominion Controverted Elections Act enacts: "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the Court or a Judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof, as aforesaid, the time occupied by such session of Parliament shall not be included."

Section 33 enacts: "The Court or a Judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on application for that purpose supported by affidavit, it appears to such Court or Judge that the requirements of justice renders such enlargement necessary."

Held, 1. That in the computation of time allowed for the commencement of the trial, the time occupied by a session of Parliament will not be excluded, unless it appears that such session interferes with the necessary presence of the respondent at the trial.

2. The power given to a Judge by s. 33, to enlarge the time for the commencement of a trial, can only be exercised on a distinct application for that purpose supported by affidavit. The fixing of the time of trial for a day after the expiration of the six months, under a misapprehension by the Judge as to the construction of s. 32 relative to the allowance of the time occupied by the session of Parliament, is not an enlargement of the time for commencing the trial under s. 33, no time having been previously fixed for the trial, and no application made to enlarge the time; KING, J., dissenting.

3. If an order fixing the trial for a day after the expiration of six months from the presentation of the petition is illegally made, the Court will not enlarge the time for trial under s. 64—the power to proceed on the petition having ceased at the expiration of the six months.

In re YORK DOMINION ELECTION PETITION. RUEL v. TEMPLE.

Elections—Dominion Controverted Elections Act, s. 33—Election petition—Where six months allowed for commencement of trial expire during term—Effect of.

By s. 33 of "The Dominion Controverted Elections Act," no trial of an election petition shall be commenced or proceeded with during any terms of the Court of which the Judge who is to try the petition is a member, and at which he is by law bound to sit.

Where the six months allowed by s. 32 for the commencement of the trial expired during a term of the Supreme Court of

which the Election Judge was a member, and no application had been made to enlarge the time for trial;

Held, that the power to try the petition had ceased,

(See the preceding case.)

MANITOBA.

In the Queen's Bench.

[FULL COURT.

WATTS v. ANDERSON.

Foreign commission—Interrogatories—Suppression—Waiver.

Under an order to take evidence on commission, the evidence can only be taken on interrogatories unless otherwise ordered.

Under such an order, a commission was issued to take the evidence *viva voce*.

Held, 1. That it was irregular and the depositions were suppressed.

2. That the objection had not been waived by cross-examining the witnesses after raising the objection and subject to it; nor by omitting to object after the commission had been informally returned, upon an application to send it back for a proper return; or upon a further application to extend the time for the return of the commission.

3. *Per* BAIN, J.—Waiver, as a general rule, is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It may consist, too, of lying by, and allowing the other party to take a fresh step in the case.

CLARKE v. SCOTT.

Homestead and pre-emption—Agreement to convey—Lien of vendee for purchase money—Laches—Issue to try fact—Costs.

A statute declared that "All assignments and transfers of homestead rights before the issue of the patent except etc." shall be null and void. By another clause the homesteader might acquire a pre-emption right to other lands, "but the right to claim such pre-emption shall cease and be forfeited upon any forfeiture of the homestead right."

A homesteader before patent agreed to sell both homestead and pre-emption. $50 was paid at once and the balance was to be paid when a deed given with a good title.

The vendor applied for a certificate of title to the pre-emption and the purchaser filed a caveat, and on it a petition claiming a lien for the purchase money.

Held, 1. That the agreement was not illegal.

2. That the Crown having taken advantage of the forfeiture, but issued the patents, the purchaser acquired a lien upon the pre-emption, although probably not on the homestead.

3. The petition was defective in not showing the petitioner's chain of title.

4. Such a petition need not show upon its face that it is filed in time.

5. Lapse of time which would disentitle a purchaser to specific performance may not affect his lien.

6. A disputed question of fact not tried upon affidavit, but an issue directed and form given.

7. No costs of appeal given when point upon which case disposed of was not argued.

SHAW v. CANADIAN PACIFIC R. W. CO.

Pleading—Damages—Departure—Objection to appeal.

If a carrier's contract provide that he will not, in case of loss, pay more than a certain sum, this limits the *amount* of the liability only, and need not be set out in the declaration; but if

it provide that he will not pay anything upon goods which exceed a certain value, this limits the *liability* itself, and must be alleged in the declaration.

Therefore, where to a declaration against a carrier in contract, not alleging any limitation, the defendants pleaded a term of the contract, viz., that the baggage liability should be limited to wearing apparel not exceeding $100, to which the plaintiff replied negligence under the Railway Act.

Held, that the replication was a departure and bad upon demurrer.

Semble, the Consolidated Railway Act, 1879, s. 25, s-s, 4, probably introduces an implied term in contracts to which it is applicable.

ELLIOTT v. WILSON.

Jury fee after new trial.

49 V. c. 4, s. 2, provides that no civil cause shall be entered to be tried by a jury, or shall be tried by a jury until the party requiring a jury shall have deposited with the sheriff the sum of $25, to be applied towards the payment of jurors, and shall have filed with the prothonotary the sheriff's receipt for the $25.

The defendant complied with this enactment. The action was tried with a jury, and a verdict rendered for the defendant. A new trial was ordered in term. The defendant did not pay in any further sum. The plaintiff then moved to strike out the jury notice.

BAIN, J., made the order. The defendant appealed.

Per CURIAM.—Appeal allowed with costs. A second payment was not necessary.

ROYAL CITY PLANING MILLS CO. v. WOODS.

Appeal—Preliminary objection.

A garnishee attaching order having been issued in this case, a subsequent attaching creditor moved to rescind the first order upon the ground of irregularity and of misrepresentation.

BAIN, J., made an order amending the attaching order by reducing the amount attached from $11,000 to $3,600.

The applicant took out the order, served a copy of it upon the plaintiffs, and also a copy upon the attorneys who usually acted for the garnishees, but who had not acted for them as attorneys in connection with this case.

The applicants then appealed from the order amending the attaching order, claiming to have it set aside altogether.

Per CURIAM.—The case of *Shaw* v. *Canadian Pacific R. W. Co.* is not in point. The applicants having acted upon the order cannot appeal from it.

KILLAM, J., thought the order had not in fact been served upon the garnishees, but that having been served upon the plaintiffs' attorneys, the applicants were estopped.

Appeal dismissed with costs.

[TAYLOR, C.J.

ORR v. BARRETT.

County Court—Appeal—Time—Mandamus.

Proceedings in appeal from the County Court had been taken and an unsigned certificate of the County Judge filed with the prothonotary within the proper time, under the belief that it had been properly signed. Upon discovery of the fact, but after the time for filing the certificate, an application was made to the Judge to affix his signature. He refused.

Held, that the Judge was right in so refusing, and an application for mandamus was dismissed.

ONTARIO BANK v. McARTHUR.

Bill of exchange—Acceptance when debentures sold—Evidence—Identity of debentures—Amendment.

The defendants accepted a bill of exchange over the seal of the town of P., and the signatures "J. R. T., Mayor, and W. A. P., Secy. Treas., payable when the balance of debentures ($37,000) in our hands are sold by us, and proceeds received, and our claim as at this date and interest to date of payment has been paid." The defendants at that time held debentures of the town of P. as security for certain advances, and with power to sell them at a certain figure. They assumed the debentures at that figure; notified the town that the debentures had been sold; and enclosed

an account crediting the town with the amount. The defendants asserted that their claim included certain other debentures of the town which they then held as owners.

Held, 1. That evidence was admissible to identify the debentures referred to in the acceptance.

2. That the debentures had been sold, and the proceeds had been received within the meaning of the acceptance.

3. Upon the evidence the "claim" must be limited to the advances and did not include the other debentures.

3. If there was any doubt as to the bill being that of the town, the plaintiffs should have leave to amend by alleging it as a bill of the signatories.

SCHULTZ v. CITY OF WINNIPEG.

Interest—Constitutional law—Municipal taxes.

The local legislature has no power to provide that municipal taxes are to bear interest at any rate higher than the rate of interest fixed by the Dominion Parliament; and calling the sum or rate to be charged damages, increase, or addition, does not alter the case.

[DUBUC, J.

CAMPBELL v. HEASLIP.

Payment by cheque—Dishonour—Pleading.

The defendant, being indebted to the plaintiffs, sent them the cheque of B. for a portion of the amount. Subsequently the plaintiffs rendered accounts showing a credit of the amount of the cheque, but stating that it had not been paid, and still later rendered other accounts showing the amount charged back. The defendant in an earlier letter said that he had not seen B. since getting the cheque, but "will go and see him to-morrow, and when I see him will remit to you at once." His later letters made no objection to the re-charging of the amount.

Held, 1. That the conduct of the parties showed that the cheque had not been received as payment.

2. That under a plea of payment the plaintiff was not bound to prove presentment of the cheque and dishonour.

3. That the correspondence might be considered as an admission that everything had been done to entitle the plaintiff to sue.

[KILLAM, J.

HUDSON'S BAY COMPANY v. STEWART.

Goods sold to firm —Admissions by one partner—Books as evidence—Goods for private use.

S. was a member of the firm of S. & Co. He purchased goods for the use of the firm but said that they were for J. S. & Co., of which firm he said that his partners were members.

Held, that the firm was liable.

It was alleged that some of the goods were purchased by S. for his own use. He having admitted, however, the correctness of accounts delivered to the firm, including these goods, and the books of the firm, which he kept, having recognized the indebtedness as of the firm:

Held, that the onus was on the defendants of proving that goods were so purchased by S.

A partner has power to borrow money for the purposes of the firm, but if borrowed upon his own credit, even if applied for the purposes of the firm, he alone is liable.

[BAIN, J.

WHITLA v. SPENCE.

Execution issued in bad faith—Motion against by third party—Attachment obtained by misrepresentation.

Where an execution was issued in face of an order that it should not issue for a certain time:

Held, that this was not merely an irregularity, and that another execution creditor might move against it.

2. The sheriff having seized and sold goods under the writ, it could not be set aside, but was declared to be deemed to have been placed with the sheriff on the earliest day on which it properly could have reached him.

3. During a contest for priority between execution creditors, if the sheriff proceeds and sells, an agreement that the rights of the parties are not to be affected will almost be presumed.

An attachment obtained by an attorney who appeared for the plaintiffs, but who was in reality the defendants' attorney, upon the ground that the defendants had assigned their property with intent to defraud their creditors, concealing the fact that the assignment was to the plaintiffs themselves, was set aside with costs to be paid by the attorney.

Exchequer Court of Canada.

[BURBIDGE, J., 30TH JUNE, 1888.

BOURGET v. REGINAM.

Compensation and damages—Dedication of highway—Similarity of law of England and Province of Quebec respecting the doctrine of dedication or destination.

This was a claim for $681.00 for 2724 square feet of land in the village of Lauzon, county of Levis, P.Q., expropriated by the Crown for the purposes of the St. Charles branch of the Intercolonial Railway, and for $1,350 for damages to other lands of the claimant caused by the construction thereof.

Some time not later than the year 1877, the claimant, being possessed of property in the village mentioned, divided it into 41 lots. Through these lots a street was laid out, known by the name of Couillard Street, and which connected St. Joseph Street with Port Jolliette, a small cove or harbour on the River St. Lawrence. The plan of this division of the claimant's lands was duly recorded in the Registry office for the county of Levis.

In the construction of the railway the Crown diverted Couillard Street, purchasing for that purpose one of the 41 lots in the aforesaid division of the claimant's lands. The village corporation had never taken any steps to declare Couillard Street a public way. It was however used as such, was open at both ends, and formed a means of communication between St. Joseph Street and Port Jolliette, and work had been done and repairs made thereon under the direction of the village inspector of streets. The village council had also at one time passed a resolution for the construction of a sidewalk on the street but nothing was done thereunder.

Upon the hearing of the claim the claimant contended that Couillard Street at the time of the expropriation was not a highway or public road within the meaning of "The Government Railways Act," 44 V. c. 25, but was her private property, and that she was entitled to compensation for its expropriation.

The Crown's contention was that at the date of the expropriation Couillard Street was a highway or public road within the meaning of "The Government Railways Act," and that the Crown had satisfied the provisions of s. 5, s-s. 8, and s. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation.

Held, (1) That the question was one of dedication rather than of prescription, that the evidence shewed that the claimant had dedicated the street to the public, and that it was not necessary for the Crown to prove user by the public for any particular time.

(2) That the law of the Province relating to the doctrine of dedication or destination is the same as the law of England.

Semble, that 18 V. c. 100, s. 41, s-s. 9, D., is a temporary provision having reference to roads in existence on 1st July, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. See *Myrand* v. *Legare*, 6 Q. L. R. 120, and *Guy* v. *City of Montreal*, 25 L. C. Jur. 132.

F. X. Drouin, Q.C., and *C. P. Angers*, for the Crown.
I. N. Belleau, Q.C., for the claimant.

[18TH DECEMBER, 1888.

REGINA v. POULIOT.

Information—Statutory defence—Demurrer—Illegality of contract—Dominion Elections Act, 1874—Crown rights—Interpretation of statutes.

This was an action at the suit of the Crown to recover $352.20 from the defendants due upon a contract for the carriage of passengers between certain stations on the Intercolonial Railway, which is owned and operated by the Government of Canada. The defendants by their pleas admitted the contract and its performance by the Crown but sought to avoid their liability by alleging: (1) That the passengers were carried on *bons*, and that the action should have been brought upon such *bons*, and not upon the agreement set out in the information; (2) That the contract was for the carraige of voters to attend the nomin-

ation proceedings at an election then pending with intent to corruptly influence such voters at such election, and was illegal and void under the provisions of ss. 100 and 122 of the Dominion Elections Act, 1874. A demurrer to these pleas was filed on behalf of the Crown.

Held, (1) That the defendants having admitted the breach of contract, their liability was not in any way affected by the fact that the passengers were carried on *bons* signed by one and not by all of the defendants; and that the cause of action was properly averred in the information.

(2) That the Crown is not bound by s. 100 of the Dominion Elections Act, 1874 (37 V. c. 9) which avoids every executory contract, promise, or undertaking in any way referring to, arising out of, or depending upon any election under the Act, even for the payment of lawful expenses, or the doing of some lawful act; or by section 122 thereof, which enacts that *all persons* who have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims within one month after the day of the declaration of the election to the agent of the candidate, otherwise such persons shall be barred of their right to recover such claims.

(3) That the language of the 46th clause of the 7th section of the Interpretation Act (R. S. C. c. 1) which enacts that no provision or enactment in any Act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not to be construed by reading into the Act the exceptions to the common law rule that the Crown is not bound by a statute unless expressly mentioned, which exception is laid down by Lord Coke in the *Magdalen College* case, 11 Rep. 74-b, viz., that the King is impliedly bound by statutes passed for the general good; the relief of the poor; the general advancement of learning, religion, and justice; or to prevent fraud, injury, or wrong.

Quære—Does the clause in the Interpretation Act, R. S. C. c. 1, clause 46, s. 7, preclude the Crown from being bound by a statute in which it is included by necessary implication only?

Hogg, for the Crown.

Gormully, for the claimant.

[5TH FEBRUARY, 1889.

MAGANN v. REGINAM.

Revenue—Customs duties—Tariff Act, Schedule C.—Shaped lumber.

By item (Departmental No.) 726, Schedule "C." of the Tariff Act it is provided that the following articles shall be admitted into Canada free of duty, that is to say:—

"Lumber and timber, plank and boards, sawn, of boxwood, cherry, walnut, chestnut, gumwood, mahogany, pitch pine, rosewood, sandalwood, Spanish cedar, oak, hickory, and whitewood, not shaped, planed, or otherwise manufactured, and sawdust of the same, and hickory lumber, sawn to shape for spokes of wheels, but not further manufactured."

The plaintiff having entered into a contract with the Grand Trunk Railway Company to supply the company with a certain quantity of white oak plank and boards and white oak lumber of specified thicknesses, widths, and lengths, arranged with certain mill men in the State of Michigan to saw such plank, boards, and lumber from the log in accordance with orders given to them by the plaintiff. The plank, boards, and lumber were intended to be used principally, but not wholly, for the construction of cars and railway trucks, and they were ordered to be sawn and were in fact sawn of such thicknesses, widths, and lengths as to admit of their being used in such construction without waste of material. The lengths called for by the contract varied, the shortest being two feet two inches, and the invoices on which duty was collected and paid under protest indicated that the lumber when imported was cut to these exact lengths, but the fact as proved by the plaintiff and not denied by the defendant, no witnesses for the Crown being called, was that while the invoices disclosed the correct quantity of material imported, there being in each importation the equivalent of the number of pieces shown in the invoice, they did not show accurately the shape of the different pieces, and that, with perhaps a few unimportant exceptions, the lumber was imported in lengths in which it would be commercial or merchantable: care being taken only that the lengths would be such that the lumber

could in Canada be sawn into the shorter and specified lengths without waste.

With reference to the lumber, it was proved that after it had been cut to the specified lengths the pieces could not be used in the construction of cars without being recut and fitted.

For the Crown it was contended that the sawing of the lumber from the log at the mill of such thicknesses, widths, and lengths that it could be re-cut in specified lengths so as to be used for a specific portion of a car was a shaping of the lumber within the exception contained in the item (726) of the tariff referred to.

On the other hand the plaintiff contended that this did not amount to a shaping within the meaning of the statute; that if, as did not appear to be denied, the lumber in question in the shape and condition in which it was would be free of duty if imported for general purposes, or for no definite purpose, it would not become dutiable because its length was such that it could be conveniently and without waste cut up and used for a specific purpose, and that the importer in giving his order to the millman had this in view; that a piece of white oak lumber could not at one and the same time be shaped or not shaped, dutiable or not dutiable, according to the use to which it was to be put; Parliament not having enacted as it had done in other cases that the article should be dutiable or not according to the use to which it was intended to be applied by the importer or his customers, as for instance that a white oak plank 30 feet long which, being imported for no specific purpose, or for general purposes, would be free of duty, would not become dutiable because the importer intended to cut it into five pieces six feet long, each of which was adapted to, and intended to be used, for some specific purpose.

Held, that the plank, boards, and lumber in question in the form in which they were imported were not shaped within the meaning of the statute, and that they were not dutiable.

McCarthy, Q.C. (with him *Robinson*, Q.C., and *MacKelcan*, Q.C.), for the claimant.

Sedgewick, Q.C., and *Hogg*, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [6TH SEPTEMBER, 1888.

JENNINGS v. GRAND TRUNK R. W. CO.

Railway company—Negligence—Compensation for death caused by accident—R. S. O. c. 135—Measure of damages—Life policy—Setting off insurance against damages — Administration— R. S. O. (1877) c. 46—Express messenger—Duty to carry—Common employment.

Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect or default of another is, under the R. S. O. c. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on viewing the whole question of pecuniary loss or gain in consequence of the death.

The deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in the province; the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York.

Held, that the grant of letters by the Surrogate Court of York was valid and effectual; and,

Semble, that even if the deceased had left real or personal estate in some other county, the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked: R. S. O. (1877), c. 46.

The deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company.

Held, that the deceased being lawfully on the train, the defendants were liable for negligence in causing his death.

Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company.

Osler, Q.C., for the appellants.

J. J. Maclaren, for the respondent.

[Affirmed by the Judicial Committee of the P. C.]

[22ND DECEMBER, 1888.

ARCHBOLD v. BUILDING AND LOAN ASSOCIATION.

Mortgagor and mortgagee—Redemption—Six months' notice or six months' interest after default.

An appeal by the plaintiff from the judgment of the Queen's Bench Division, 15 O. R. 237, was heard before this Court on the 21st September, 1888.

THE COURT allowed the appeal with costs, holding that upon the evidence the parties, after the maturity of the mortgage, continued to deal upon the terms therein contained, as far as applicable; and therefore that the option to pay off at any time the moneys secured by the mortgage still operated after maturity in favour of the plaintiff.

S. H. Blake, Q.C., and *Foy*, Q.C., for the appellant.

Allan Cassels, for the respondents.

ADAMS v. WATSON MANUFACTURING COMPANY.

Amendment—Adding parties—Ontario Judicature Act, 1881, Rule 103—Costs.

An appeal by the plaintiff from the judgment of the Queen's Bench Division, 15 O. R. 218, came on to be heard before this Court on the 23rd November, 1888.

THE COURT dismissed the appeal with costs, being unanimously of opinion that, under the circumstances set out in the report of the case in the Court below, the terms as to payment of costs imposed as a condition precedent to being allowed to amend were proper.

G. T. Blackstock, for the appellant.

John Crerar, for the respondents.

CH. D.]

JONES v. GRAND TRUNK R. W. Co.

Negligence—Carelessness contributing to accident—Railways — Approach to station.

To reach from the highway the station of the defendants at Point Edward, it is necessary to go through the railway yard and cross eleven railway tracks, and a planked way runs across these tracks extending from the street to the east end of the station platform. The planked way is unfenced and unguarded. J., the husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this planked way upon reaching the track nearest the platform in order to walk around the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the planked way, walking between the tracks and near the rails of the track second from the platform, J. was struck by the buffer beam of a shunting engine and killed. This shunting engine had been standing some 150 feet to the west of the planked way and was passing slowly to the east for the purpose of being switched on to the track nearest the platform and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the planked way for the purpose of convenience in giving orders to the engineer; its head-light was burning and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed.

Held, HAGARTY, C.J.O., dissenting, reversing the decision of the Chancery Division, that the accident was due to the carelessness of the deceased, and not to the negligence of the defendants, and that the plaintiff could not recover.

The extent of the duty of railway companies in providing safe access to their stations considered.

McCarthy, Q.C., and *W. Nesbitt*, for the appellants.

W. R. Meredith, Q.C., and *R. M. Meredith*, for the respondents.

C. P. D.

DUNCAN v. ROGERS.

Way—Easement appurtenant to land conveyed—Agreement, construction of by Court.

An appeal by the plaintiff from the judgment of the Common Pleas Division, 15 O. R. 699, was heard before this Court on the 21st November, 1888.

THE COURT allowed the appeal with costs, being unanimously of opinion that upon the evidence it was clear a defined right of way existed at the time of the grant to the plaintiff, and that under the terms of the grant it passed to him. The Court were also of opinion that the finding of the jury as to the location of the extension of the lane should not have been disturbed, the written agreement in regard to this extension being ambiguous, and both parties having given evidence as to its real meaning and allowed the question to be submitted to the jury.

Fullerton and *W. Nesbitt*, for the appellant.

Tilt, Q.C., for the respondent.

GREEN v. TOWNSHIP OF ORFORD.

Municipal corporations—Drainage—Work done in excess of contract—Necessary work—Liability of corporation.

An appeal by the defendants from the judgment of the Common Pleas Division, 15 O. R. 506, was heard before this Court on the 30th November, 1888.

THE COURT allowed the appeal with costs, being of opinion that the work in question was work that the plaintiff was bound to perform under the contract itself.

Quære, whether the work in question was in any event "necessary" in such a sense as to impose liability for payment therefor upon a municipal corporation without express contract. The correctness of the decision of the Court below upon this point doubted.

W. R. Meredith, Q.C., and *Douglas*, Q.C., for the appellants.
Moss, Q.C., and *Shoebotham*, for the respondent.

BOYD, C,]

In re OAKWOOD HIGH SCHOOL AND TOWNSHIP OF MARIPOSA.

High Schools—Application for municipal grant—R. S. O. c. 226, ss. 25, 35.

Held, that the words "maintenance, accommodation, and other necessary expenses" in s-s. 6 of s. 25, R. S. O. c. 226, include the purposes mentioned in section 35 (I) and consequently that an application under section 35 (I) must be made before the first day of August.

Held, also, that an application under section 35 (I) must be the corporate act of the School Board, not merely the verbal request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required.

Held, also, MACLENNAN, J.A., dissenting, that to come within the provisions of section 35 an application must be an independent application for purposes mentioned in that section, and that an application combining other purposes with these purposes may be rejected by a simple majority vote.

Held, also, that an application under section 35 may be rejected by the Council, although no formal by-law relating to the purposes of the application is before the Council, and the meeting at which the rejection takes place has not been called for the special purpose of considering such a by-law.

Per MACLENNAN, J.A.—*Quære*, whether a township comes within the Act.

Decision of BOYD, C., 15 O. R. 686, reversed.

Moss, Q.C., and *D. J. McIntyre*, for the appellants.

Hudspeth, Q.C., and *Watson*, for the respondents.

PRATT v. CITY OF STRATFORD.

Municipal corporations—Jurisdiction over streets—Changing level of street—Damage to adjacent owners—Absence of by-law—Remedy by action or arbitration.

Held, BURTON, J.A., dissenting, affirming the decision of BOYD, C., 14 O. R. 260, that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully re-building, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act, R. S. O. c. 184, notwithstanding the absence of any by-law for the prosecution of the work.

Per BURTON, J.A.—There was no obligation cast upon the defendants to re-build the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law for that purpose.

Yeomans v. *County of Wellington*, 4 A. R. 301, followed.

McGarvey v. *Town of Strathroy*, 10 A. R. 636; and *Adams* v. *City of Toronto*, 12 O. R. 243, discussed.

Van Egmond v. *Town of Seaforth*, 6 O. R. 610, distinguished.

W. Cassels, Q.C., for the appellant.

Idington, Q.C., for the respondents.

ROBERTSON, J.]

In re CLARK AND TOWNSHIP OF HOWARD.

Municipal corporations—Drainage Acts—By-law for repair of old drain—Assessing land benefited.

On the 21st September, 1868, a by-law was passed by the Township Council under the provisions of the Municipal Act of 1866, 29-30 V. c. 51, ss. 281 and 282, for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the township council passed a by-law for repairing and cleaning this drain and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1886, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain, so as to enable the assessment for repairing and cleaning the drain to be made more equitably, and the assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it.

Held, that the provisions of the Act of 1869, 32 V. c. 43, s. 17, as to maintenance and repair, now R. S. O. c. 184, s. 583 (1) are not retroactive and do not apply to drains constructed before the date of that enactment, and that therefore the township council had no power to pass the by-law in question.

Decision of ROBERTSON, J., 14 O. R. 598, affirmed on other grounds.

Pegley and *D. Mills*, for the appellants.

M. Wilson, for the respondents.

TOWNSHIP OF NOTTAWASAGA v. HAMILTON & NORTH-WESTERN RAILWAY COMPANY.

Railways—Agreement to erect and establish stations—Admissibility of oral representations to vary written agreement—Res adjudicata.

By agreement bearing date the 19th day of May, 1873, the defendants, in consideration of a bonus of $300,000 granted to them by a section of the county of Simcoe of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight" at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations;" and to "well and sufficiently keep and maintain the said five stations above mentioned, with all such suitable, necessary, and proper buildings as the business done, or capable of being done, at the said stations respectively may require for seven years after the said trains shall have commenced to run on the said road, and (to) undertake to do the passenger and freight business of the county at the said stations."

By a further agreement bearing date the 25th day of May, 1878, the defendants, in consideration of a bonus of $20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build, and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township"—five places being specified—and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township, as defined in the former agreement, might be deviated from to such an extent as to admit of the stations being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

The defendants erected stations at the points specified, three of these stations being respectively called A., G., and N. Trains commenced to run on the line in the year 1878.

In 1880 the plaintiffs, being dissatisfied with the mode in which the stations at G. and N. were being maintained, brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted restraining the defendants from ceasing to maintain the stations, except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action.

In 1885, after the expiration of the seven years, the defendants made changes in their mode of maintaining the station at A. The plaintiffs were dissatisfied, and this action was thereupon brought by them to compel specific performance.

Held, reversing the judgment of ROBERTSON, J., that the word "establish" does not in itself mean "maintain and use forever;" that the seven years' limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time.

Bickford v. *Town of Chatham*, 14 A. R. 32, and in the Supreme Court (not reported); *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128; and *Geauyeau* v. *Great Western R. W. Co.*, 3 A. R. 412, considered.

Wallace v. *Great Western R. W. Co.*, 3 A. R. 44, distinguished.

Held, also, that the decree in the former action did not constitute the question of the seven years' limitation *res adjudicata*, there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action.

Concha v. *Concha*, 11 App. Cas. 541, considered and followed.

At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time.

Held, that this evidence was clearly inadmissible.

W. Cassels, Q.C., and *R. S. Cassels*, for the appellants.

McCarthy, Q.C., and *Pepler*, for the respondents.

C. C. WENTWORTH.] [12TH SEPTEMBER, 1888.

CONNELL v. HICKOCK.

Chattel Mortgage and Bills of Sale Act—Marriage settlement of personal property—Description of property settled—Interpleader issue—Equitable title—Possession.

By an ante-nuptial settlement executed 25th March, 1885, made between James Connell, of the first part, Mary Harrington (the plaintiff), his intended wife, of the second part, and one Malone, of the third part, in consideration of the intended marriage, certain lands and the goods in question, consisting of horses, cows, and several articles of household furniture described as being in and upon and around the premises and appurtenances used by the said James Connell, and being city number, etc., were conveyed and assigned to Malone to hold to the use of James Connell until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators, and assigns.

The marriage took place on the 27th of March. Within five days from the execution of the assignment it was duly registered in the proper office as a bill of sale. The affidavit of *bona fides* was made by the plaintiff after the marriage, being described therein as the bargainee.

The goods were afterwards seized by an execution creditor of the husband; the plaintiff claimed them, and an interpleader issue was directed by the High Court to be tried in the County Court.

At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant.

Held, reversing the judgment of the Court below, that the plaintiff's beneficial interest in, and possession of, the property was sufficient to enable her to maintain her claim in the issue. *Schroeder* v. *Hartnett*, 20 L. T. N. S. 702, followed.

2. That the settlement was a sale of personal property within the meaning of the Act; and that the plaintiff was a person who, as bargainee, might properly make the affidavit of *bona fides*.

3. That the goods were sufficiently described and identified.

Semble, per HAGARTY, C.J.O., and OSLER, J.A., that a marriage contract or settlement in the form of the instrument in question was not a sale of personal property within the Act, and that registration therefore was not necessary.

Per PATTERSON, J.A. (1) That the transaction was within the statute; and (2) that the legal title to the goods was in the plaintiff.

Whiting v. *Hovey*, 12 A. R. 119; *Dominion Bank* v. *Davidson*, 12 A. R. 90, referred to.

J. W. Nesbitt, for the appellant.

Lynch-Staunton, for the respondent.

High Court of Justice

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 7TH FEBRUARY, 1889.

HILLIARD v. BECK.

Landlord and tenant—Covenant for renewal of lease and to pay for improvements—Liability of purchaser from landlord.

Action by a lessee to recover the amount awarded to him by an arbitrator for improvements on the demised premises, under a covenant in the lease for renewal or payment for improvements. The defendant Beck, as rector of Peterboro', made the lease on the 1st of December, 1866, for 21 years, the lands being outside the town of Peterboro'. On 17th February, 1875, while the lease was still current, the Synod of Toronto, with the consent of the defendant Beck, sold the land to the defendant Stothart subject to the plaintiff's lease, the plaintiff being in possession at the time, and the lease being registered. After the purchase Stothart received the rent from the plaintiff until the plaintiff gave up possession to Stothart at the expiration of the term.

The plaintiff's contention was that the amount awarded as the value of improvements on the demised premises was a lien on the land, and that Stothart in his purchase assumed Beck's covenant and agreed to pay for the buildings as a part of his purchase money, and that he was liable therefor.

The action was tried at Peterboro before BOYD, C., who gave judgment for the plaintiff against the defendant Stothart, and also ordered Stothart to pay the costs of his co-defendant Beck.

The defendant Stothart appealed, and his appeal was heard before a Divisional Court composed of ARMOUR, C.J., and STREET, J., on the 6th February, 1889.

Watson, for the appeal. Stothart is owner free from the charge of the lease or any of its covenants. The lease was of rectory lands and was made in pursuance of 27 V. c. 87, and was not valid in so far as it exceeded 21 years; the covenant for renewal made it in law a lease for more than 21 years, and the right to claim for improvements arises out of the covenant to renew. [ARMOUR, C.J.—The rector is still alive and a party to the action; he can't bind his successor to a lease of more than 21 years, but he can make a lease good for his lifetime.] The lease may be good against the rector, but the covenant does not run with the land. I refer to *Kirkpatrick* v. *Lister*, 16 Gr. at p. 18; *McClary* v. *Jackson*, 13 O. R. 310, and cases there cited; *Moore* v. *Clench*, 1 Ch. D. 447; *Furnivall* v. *Coombes*, 5 Man. & G. 736; *Williams* v. *Hathaway*, 6 Ch. D. 544; *Berrie* v. *Woods*, 12 O. R. 693.

D. W. Dumble, for the plaintiff, referred to *Woodfall's* L. & T. 11th ed., p. 18; *Smith* and *Sowden*, p. 13; *Smith* on L. & T. p. 38; *Re Cozier*, 24 Gr.

H. T. Beck, for the defendant Beck.

On the 7th February, 1889, the judgment of the Court was delivered by

ARMOUR, C.J.—It is clear on the evidence that Stothart had notice of the lease to Hilliard, which was read over to him; he denies that he knew of the covenant to pay for improvements, but the weight of the evidence is in favour of the view that he knew what the lease contained. The contention was that the lease was void altogether, or at least so far as the covenant to renew and consequently the covenant to pay for improvements was concerned. It was either valid or invalid. The covenant

probably did not run with the land, because assigns were not mentioned; but, if invalid, Hilliard became tenant from year to year on the terms of it; and, if valid, it bound Mr. Beck, and he being still alive and a party to this litigation would be liable upon it, and would in turn be entitled to indemnity from Stothart.

It was complained that no demand for the value of the improvements had been made upon Mr. Beck, but that would have been an idle ceremony. It is quite clear that Stothart took subject to the lease, and that it entered into the consideration of the parties to the sale to him. All parties being before the Court, we can give the relief directly, without circuity.

The judgment of the Chancellor is right, and the motion must be dismissed with costs.

[STREET, J., 15TH JANUARY, 1889.

ANDERSON v. GLASS.

Bankruptcy and insolvency—Assignment for benefit of creditors—Assignee not a sheriff—Requisite number of creditors not assenting—R. S. O. c. 124, s. 3, s-s. 2, construction of—Chattel mortgage—Jus tertii—Costs.

The meaning of R. S. O. c. 124, s. 3, s-s. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur throughout the Act, "an assignment for the general benefit of creditors under this Act" are to be governed by this construction.

Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R. S. O. c. 124, s. 3: but

Held, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution.

The assignee having failed in the action, because the mortgagee's rights disentitled him to succeed; and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable; no costs were given to either party.

Parkes, for the plaintiff.

Hoyles, for the defendant Glass.

W. W. Fitzgerald, for the defendant McLoghlin.

[9TH FEBRUARY, 1889.

In re PETERBOROUGH REAL ESTATE CO. AND BATTEN.

Will, construction of—Tenancy in tail male.

Case stated under the V. & P. Act as to whether Richard Batten could make a good title in fee to the west half of lot 21 in the 3rd concession of the township of Dummer.

Richard Batten claimed to be tenant in tail male under the will of his deceased father, the material part of which was as follows:

"To my second son, Richard, I will, devise, and bequeath all my real estate, being * * * and after his death to his issue male in succession one after the other, beginning with the oldest son of my said son Richard; and in case my said son Richard should have no issue male at the time of his decease, then my will is that the aforesaid real estate * * * shall revert and stand hereby devised to any issue of my said beloved son Richard, who may be alive at the time of his death."

The will was dated 25th September, 1862, and the testator died on the 21st March, 1864. At the time the will was made and at the testator's death the son Richard had both male and female children alive, and others were afterwards born to him, both male and female, who were living at the time the case was stated.

The case was argued before STREET, J., in Court on the 1st February, 1889, and judgment was delivered on the 9th February.

W. H. Moore, for the vendor.

G. M. Roger, for the purchasers.

STREET, J.—It is contended that the testator has himself in effect shown that when he uses the words "male issue" he treats them as meaning "sons," and there is certainly something to be said in favour of that view. * * * * The cases do not establish that upon a devise to sons in succession an estate tail is created; they do establish that if an estate is given to sons in succession with words showing an intention to give the sons an inheritance in the lands in succession to one another, an intention to give estates tail to them may be inferred: *Ginger d. White* v. *White*, Willes 352.

I think the difficulties in the way of treating the words "male issue" as being restricted to sons are greater than those which arise when the words are given their *prima facie* meaning as including the whole line of descendants to whom an estate in tail male would go. If the will is treated as giving by force of the rule in *Shelley's* case, an estate in tail made to Richard Batten, then the eldest son and his male descendants take the same estate in due course of descent from Richard Batten, and upon failure of the estate in them, the second and other sons and their male descendants take in the same way, unless the estate tail is barred, either by Richard Batten or some one of the persons who may become entitled.

This is the construction which I think should be placed upon the will, and I therefore certify and declare that in my opinion Richard Batten, upon the facts stated, is entitled to an estate in the lands in question as tenant in tail male.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 14TH DECEMBER, 1888.

WEBBER v. McLEOD.

Malicious arrest—Unlawful and malicious injury—Findings of jury—Reasonable and probable cause—R. S. C. c. 168, s. 59.

The plaintiff was in occupation of a house on a farm of the defendants, and cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the

ends rested on the ground. The defendant had the plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case.

In an action for malicious prosecution the jury found in answer to questions submitted by the Judge that the defendant did not have reasonable ground for believing that the plaintiff had unlawfully and maliciously injured the property and did not take care to inform himself as to the facts and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100.

A motion to set aside the verdict was dismissed.

Per BOYD, C.—It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved, the plaintiff was not chargeable under R. S. C. c. 168, s. 59.

Held, also, that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of the defendant to inform himself of the true state of the case, was a sufficient justification for holding that there was want of reasonable and probable cause.

Per FERGUSON, J.—The jury virtually found that the property said to be injured was of no appreciable value, and that being the case, such facts and circumstances did not exist as are necessary to constitute reasonable and probable cause for the prosecution.

Moss, Q.C., for the motion.

W. Nesbitt, contra.

[22ND DECEMBER, 1888.

YOUNG v. SPIERS.

Assignment for benefit of creditors—Filing of claim—Right to rank—Collateral securities.

Wardlaw made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, Harvey filed a claim

against the estate, claiming (1) upon two mortgages on l
(2) upon an open account and certain notes made by Ward
(3) upon certain notes made by Turnbull in favour of War
and indorsed over by Wardlaw to him, which were mad
Turnbull for Wardlaw's accommodation, and were deliver
Harvey as a general collateral security for Wardlaw's inde
ness to Harvey. Since filing the claim the mortgage debts
been paid to Harvey, who had thereupon assigned the mortg
and the Turnbull notes had been paid by Turnbull to Ha
and Turnbull had thereupon filed a claim in respect to
against Wardlaw's estate. The mortgages had been give
secure payment of entirely separate and isolated debts
Wardlaw to Harvey.

Harvey afterwards made an assignment to trustees fo
creditors, and these latter now brought this action, claiming
notwithstanding all the above circumstances they were
entitled to rank on and receive a dividend from the War
estate on the whole of the above indebtedness, and on Har
claim as originally filed.

Held, that as to the mortgage debts they were not entitl
receive a dividend, these being separate and distinct debts
that as to the Turnbull notes they were still entitled to ran
the authority of *Eastman* v. *Bank of Montreal*, 10 O. R. 79,
vided that they did not in all receive more than 100 cents o
dollar; and this did not prevent Turnbull also rankin
respect to the sum he had paid as accommodation maker.

John Crerar, for the plaintiff.

A. R. Creelman, for the defendants.

[FERGUSON, J., 6TH NOVEMBER,

JONES v. TOWN OF PORT ARTHUR.

*Municipal corporations—Right to purchase land—By-law—Ultra vires—
office—Custom-house—"For the use of the corporation"—R. S. O.
s. 479 (1).*

Held, that a municipal corporation has no power to p
by-law for the purchase of land to be presented to the Dom
Government as a site for a post-office and custom-house.

"For the use of the corporation" in R. S. O. c. 184, s. 479 (1), oes not mean merely "for the benefit of."

A by-law should state its purpose on its face.

H. Symons, for the plaintiff.

Watson, for the defendants.

COMMON PLEAS DIVISION.

[The Divisional Court, 8th February, 1889.

CLARKE v. JAMIESON.

Report—Appeal—Divisional Court—Costs.

Held, that a Divisional Court has no power to hear an appeal om the report of a referee or master. Such Court has a strictly mited jurisdiction. The appeal is to a single Judge in Court.

An appeal from a report brought before a Divisional Court as dismissed, with costs to the respondent as of a motion to rike out the appeal.

Ball v. *Cathcart*, 8 Occ. N. 409, followed.

S. R. Clarke, plaintiff in person.

Delamere, contra.

IN CHAMBERS.

[Street, J., 31st December, 1888.

REGINA *ex rel.* JOHNS v. STEWART.

Municipal elections—Corrupt practices—Bribery by agents—Presumption as to candidate's intention—Gifts by candidate—Payments to canvassers.

A candidate for a municipal office, though not required by law o make his payments through a special agent, is not absolved rom keeping a vigilant watch upon his expenditure; and a andidate who, on the eve of a hotly contested election, places a onsiderable sum of money in the hands of an agent capable of eeping part of it for himself and of spending the rest improperly r corruptly, who never asks for an account of it, gives no direc-

tions as to it, and exercises no control over it, must b personally responsible if it is improperly expended.

And where money given to agents by the candidate fact used in bribery;

Held, that the presumption that the candidate intend money to be used as it was used became conclusive in the a of denial on his part.

Gifts by a candidate to one who is at the time exerti influence in the candidate's behalf are naturally and p open to suspicion; and in the absence of any expl such gifts must be regarded as having been made for the p of securing or making more secure the friendship and in of the donee.

In the election in question every member of certain c tees was paid a uniform sum of $2, nominally for his ser a canvasser, but apparently without regard to the time he to the work, and without inquiry as to whether he had canvassed at all.

Held, that these payments were corruptly made and cons the offence of bribery as defined by s-s. 2 of s. 209 of the cipal Act.

Under the circumstances above referred to and other c stances of the case, the defendant was found personally g acts of bribery, and to have forfeited his seat as Mayor City of Ottawa.

Aylesworth, for the relator.

Chrysler, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

P. D.] [1st March, 1887.

SUTHERLAND v. COX.

tock-brokers—Agreement to buy and carry stock on margin—Failure to purchase.

The plaintiff employed F. as his broker to purchase shares in Federal Bank stock, and to carry the same for him until 1st December on margin, depositing with him a large sum of money for that purpose.

F. transferred his business to the defendants in July, and with it paid over to them the whole of the money which had been left in his hands by the plaintiff, and they assumed F.'s contract with the latter. On the 10th of August they informed him of this by letter, stating "We took over your 500 Federal from F. on the 19th July," etc.

On the 12th October the defendants called upon the plaintiff to put up $2,000 additional margin, the stock having fallen in value, and on default they professed to sell, and represented to him that they had sold his shares at a loss, and charged him with the difference thereon—upwards of $2,000.

It appeared that F. had never bought shares for the plaintiff; that he had not transferred and that the defendants had never

received any shares from him for the plaintiff. The allege of these shares with the loss or difference on which the d dants had charged the plaintiff, was a mere pretence, the d dants never having had any shares of the plaintiff to sell the broker with whom he had made the arrangement to be the pretended purchaser having bought none from him.

Held, that the plaintiff was entitled to recover the mon had deposited with F. and which the defendants had rec from him, as money had and received.

A contract by a broker to purchase stock for a customer i satisfied by the broker holding himself liable to account fo market value of the stock when the customer calls upon hi do so, or then purchasing stock to comply with the demand

If any such custom existed among brokers, of which there no evidence, it would not be binding on a customer unless he of it and specially submitted to its conditions.

Judgment of the court below, 6 O. R. 505, affirmed.

Lash, Q.C., and *W. Cassels*, Q.C., for the appellants.

D. E. Thomson and *D. Henderson*, for the respondents.

[8TH JANUARY,

MERCHANTS' BANK v. LUCAS.

Bill of exchange—Forgery—Ratification.

H. Y., after having for some time carried on business as ' Hamilton Cotton Co." in partnership with the defendants, re from the company and entered their employ as general man blank drafts, etc., signed by the company being placed in hands for the financial purposes of the company. In June, H. Y., for his own purposes, drew a bill in the name o defendants on M. at Montreal for $2,760, which was discou by the plaintiffs, and the draft sent by them to Montrea acceptance. The same was duly honoured by the drawee, was to mature on the 28th of September. About a month b the maturing thereof, H. Y. waited on the bank authorities,

l them to recall the draft, alleging that the company
ling with the acceptor. On the same day the solicitor
mpany obtained from H. Y. an order or letter addressed
fendants, informing them of the fact of his having so
r name on the draft, and requesting them to retire and
e same to his account, and, as it had been discounted
commodation and proceeds applied to his own use, they
ndants) should not pay any part of it.

y afterwards the defendants on distinct occasions called
nk, L. asking to be shewn the draft, which was handed
osely examined by him, and when asked why he was so
his examination answered that the signature of J. M. Y.
lly not so shaky ; that he would call in a day or two and
draft was taken up. J. M. Y. on visiting the bank, after
g the draft very carefully, when he was asked by one of
rs of the institution if he would send a cheque for it,
that it was too late that day but would send a cheque
ving day.

eque was sent, however, and on or about the 15th of
r the manager of the bank and the bank solicitor called
M. Y., and asked why the cheque had not been sent by
n he admitted having promised to send such cheque ;
e time he had thought he would send it, and could not
it had not been sent. He declined to say whether or
gnature to the draft was his. H. Y. subsequently left
ry. It was shewn in evidence that at the time the
returned, and for some time afterwards, H. Y. had a
ount to his credit in the books of the firm, and con-
have a balance at his credit until after the present
s commenced.

reversing the judgment of Court below, 13 O. R. 520,
conduct of the defendants was not such as to preclude
n setting up the defence of forgery.

the act of forgery not being an act professing to have
e for or under the authority of the person sought to be
is incapable of ratification.

TY, C. J. O., dissented.

thy, Q.C., and *Bruce*, Q.C., for the appellants.

on, Q.C., and *Martin*, Q.C., for the respondents.

C. C. WENTWORTH.] [22ND M

MOLSONS' BANK v. McMEEKIN.

Division Courts Act, R. S. O. (1877) c. 47, ss. 163, 165, 166, 168, 2
script of judgment to County Court—Division Court executio
of nulla bona after expiration of writ—R. S. O. (1877) c. 5
223, 224, 226, 380—Third party moving to set aside judgment

The plaintiffs recovered judgment in the Division C
issued an execution thereon, under which nothing was r
which expired by lapse of time. At the request of the p
solicitor the bailiff returned the writ *nulla bona*, althou
alleged that there were goods out of which the debt mi
been levied. Upon this return the plaintiffs procure
script of their Division Court judgment in regular f
filed the same in the office of the clerk of the County C
sued out a writ of *fi. fia.* goods in order to obtain the b
the provisions of the Creditors' Relief Act.

The respondent S., the holder of a warrant of exe
the Division Court, then moved to set aside the plaint
ceedings and they were accordingly set aside by the
Court Judge on the ground that the judgment in the C
void, being founded on a return to an expired execution

Held, that a return of *nulla bona* where there were g
no more than an irregularity to be complained of by th
dant.

Ontario Bank v. *Kirby*, 16 C. P. 35, followed.

Nor could a third party object that such a return was
the instance of the solicitor of the plaintiffs.

Held, also, reversing the judgment of the County Co
a return of *nulla bona* could be properly made after t
ation of the writ; and that the transcript and judgme
County Court founded thereon were valid and regular.

Muir, for the appellants.

Carscallen, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 4th February, 1889.

ANDS v. LAW SOCIETY OF UPPER CANADA.

and solicitor—Professional misconduct—Exercise of disciplinary diction by Law Society—R. S. O. c. 145, ss. 36, 44—Constitution of pline committee—Evidence under oath—Action at law by complainant estion whether wrongful acts done in professional character—tution—Waiver.

laintiff, a barrister and solicitor, was charged before the s of the Law Society with professional misconduct in his with certain shares of bank stock entrusted to him by a oman. The charges were referred to the standing com- f the Benchers on discipline, who inquired and reported onvocation of Benchers. Convocation adopted the report olved that the plaintiff "is unworthy to practise as a , and that he be disbarred as a barrister." This action ught to have the resolution declared void, and to restrain ndants from taking further proceedings under it. The objected to the proceedings of the committee and of tion as illegal, defective, and improper.

per Boyd, C., the trial Judge, that the discipline com- as properly constituted without notice of its meetings ven to the treasurer of the Law Society, who was an member of all standing committees, but who was absent nada at the time; and that no valid objection arose from that the other members of the committee, though notified eetings, were not advised of the particular business they lled to transact; and at all events any cause of com- to procedure was removed by the fair and just conduct nal proceedings before Convocation at large, where the had ample opportunity to explain and defend himself.

is not essential to the jurisdiction of domestic tribunals y should have the powers of ordinary courts of justice in l of litigated matters. R. S. O. c. 145, s. 36, is not ve; it confers the power to examine witnesses under

oath, which may or may not be employed according to the discretion of the particular tribunal. Where there is or is to be any conflict in the evidence, the witnesses should be But in this case the salient facts were not controverted plaintiff; his counsel stated in his presence that he did no that he could differ from the conclusions which the com had come to; and the evidence derived from admission party is sufficient to found even a decree of the Court. objection that the discipline committee had taken ev without oath, therefore, failed.

3. The intervention of the Law Society upon the solic of the person aggrieved was quite warrantable, notwithst that such person had brought an action for pecuniary red

4. The jurisdiction of the Law Society should not be les that of the Court; and the latter is exercised not merely i arising out of purely professional employment, but whene transaction is so connected with the professional chara the solicitor as to afford a presumption that that character a ground and reason of the employment. It is for the Be to determine and adjudge what is and what is not becomi duct in a member of the society, under R. S. O. c. 145, and any act of any member that will seriously compromi body of the profession in public estimation is within the p of this law. Any misconduct which would prevent a from being admitted to the society justifies his removal; conduct which unfits a man to be a solicitor should *a* preclude his being a barrister. The plaintiff, according own statements before the committee, was acting as a s in the transactions complained of; and the objection that not engaged in that capacity, or in the capacity of a ba failed.

5. The fact that the plaintiff prior to the resolution Benchers had made restitution to the complainant did n the jurisdiction to discipline.

Certain minor objections to the proceedings were als ruled and the action dismissed by the trial Judge.

Held, however, by the Queen's Bench Divisional Co appeal, FALCONBRIDGE, J., dissenting; 1. That the re of the Discipline Committee and the proceedings of Conv founded upon it were irregular because of the failure to

surer of the meetings, and to notify the members gen-
the particular business for which they were called
; and as the form of the notice was not known to the
he could not be taken to have waived any right to

at by the provisions of R. S. O. c. 145, s. 36, the legis-
tended that the evidence in inquiries such as the one in
should be taken upon oath, and not to confer upon the
ts a discretion to take it upon oath or without oath as they
ink proper; and they could not by arrangement between
es and the plaintiff adopt a different mode of obtaining
than that which the legislature prescribed in conferring
hority upon them.

the grounds, therefore, of irregularity in calling the
e together, and illegality in not taking the evidence
th, the Court reversed the decision of BOYD, C., and gave
t for the plaintiff.

Holman, for the plaintiff.

Q.C., and *Walter Read*, for the defendants.

EAU v. CITY OF LONDON FIRE INSURANCE CO.

ration—Lapse of appointment and taxation—Long vacation—Notice of taxation—Revision—Fund in Court—Rule 1207.

laintiff's costs were being taxed by one of the taxing
at Toronto, when he applied to stop the taxation in
at he might have the order for taxation varied. The
was stopped, the officer gave up to the plaintiff the bill
which he had brought in for taxation, and nothing
vas done.

that the effect of this was that the appointment to tax
taxation lapsed, and no further proceedings could have
without a fresh appointment; and therefore the taxing
as not thereafter seised of the taxation, and the local
r in whose office the action had been begun and was
could properly issue his appointment and tax the plain-
ts.

also, that the taxation was properly had during the
ation.

The defendants objected that they had not a reasonab
of the taxation by the local Registrar, but did not as
enlargement of it, relying instead on objections they to
proceeding at all, in letters to the plaintiff's solicitors a
local Registrar, and the taxation proceeded in their abse

Held, that having taken the risk they must also
result.

A certain sum of money had been paid into Court as
for the defendants' appeal to the Court of Appeal, wh
afterwards abandoned; and by an order made on the co
both parties it was provided that the plaintiff's costs s
paid out of this money after taxation.

Held, ARMOUR, C.J., dissenting, that this money was
Court within the meaning of Rule 1207, and there sho
revision by one of the taxing officers at Toronto of the
of costs by the local Registrar.

Per ARMOUR, C.J.—The object of Rule 1207 was for
tection of a fund in Court where the parties to the ta
costs payable thereout were none of them sufficiently i
in the fund in Court to protect it.

T. Langton, for the plaintiff.

C. Millar, for the defendants.

[12TH FEBRUA

CALLICOTT v. McKINLAY.

*Trespass to goods—Chattel mortgage—Damages—Equity of re
Costs, scale of.*

An action of trespass by a mortgagor of chattels ag
mortgagee for illegal seizure of the chattels, the plaintif
that the mortgage was not due when the seizure was m

The action was tried at Toronto before GALT, C.J., an
and a verdict was found for the plaintiff. The value of
was found to be $100. The mortgage being for $50,
plaintiff's interest in the goods being therefore only
trial Judge entered judgment for the plaintiff for $50,
the plaintiff costs on the County Court scale, with t

o the defendant of the excess of his costs over County
sts.

e 6th February, 1889, a motion was made by the defen-
fore a Divisional Court composed of ARMOUR, C.J., and
J., to set aside the verdict and judgment.

son, for the motion.
Roaf, contra.

e 12th February the judgment of the Court was delivered

ER, C.J.—It is clear the only amount recoverable was
e value of the plaintiff's equity of redemption in the
This is established by *McAulay* v. *Allen*, 20 C. P. 417;
v. *Bettinson*, 30 C. P. 438; *Moore* v. *Shelley*, 8 App.
. Therefore the plaintiff's costs should not be as upon a
of $100 but of $50; and as $50 damages could have been
d in the Division Court, the costs should be on the
Court scale unless "good cause" is shown. There was
cause for giving the plaintiff more costs than he is
to by law—indeed, there would be more cause for
g him of costs altogether. The Consolidated Rules on
ject are essentially different from the rules in force when
v. *Bailey*, 12 P. R. 535, was decided. That case is now
ne Court of Appeal.

laintiff must have judgment for $50, with Division Court
nd the defendant must have a set-off in the usual way,
ule 1172.

[15TH FEBRUARY, 1889.

BARTLETT v. THOMPSON.

and tenant—Overholding Tenants' Act—Dispute as to date when tenancy commenced—"Colour of right."

roceedings were removed from before the Judge of the
Court of Oxford under the Overholding Tenants' Act,
c. 144, and a motion was made by the tenant to set
e proceedings and the writ of possession granted by the
Judge to put the landlord in possession.

The dispute between the parties was as to whether the t
began on the 1st or 15th of October. If it began on th
sufficient notice to determine the tenancy had not been gi
the landlord.

Held, that there being a dispute between the parties as
tenancy, there was that "colour of right" which the Act co
plated, and the County Judge should have dismissed the

Price v. *Guinane*, 16 O. R. 264, approved and followed.
Wallace Nesbitt, for the motion.
C. J. Holman, contra.

[FERGUSON, J., 4TH JANUARY

TOWNSHIP OF NORTH DORCHESTER v. COUNT MIDDLESEX.

Municipal corporations—Duty of erecting and maintaining "brid rivers"—R. S. O. c. 184, s. 535.

Section 535 of the Municipal Act, R. S. O. c. 184, p
that "It shall be the duty of County Councils to ere
maintain bridges over rivers forming or crossing boundar
between two municipalities (other than in the case of a
separated town) within the County."

The question in this action was whether the bridge
Doty's Creek, Kettle Creek, and Caddy's Creek, each of w
a stream crossing a boundary line between two township
cipalities, were "bridges over rivers" within the meaning
enactment.

At Doty's Creek the span of the bridge was 67 feet; at
Creek, 31 feet 9 inches; and at Caddy's Creek, 9 feet
evidence shewed that at Caddy's Creek a culvert wo
sufficient.

Held, that the bridges over Doty's and Kettle Creek
"bridges over rivers" within the meaning and intention
statute, and that the duty of erecting and maintaining

pon the County Council; but the bridge over Caddy's Creek such a bridge.

ardy v. *Ellice*, 1 A. R. 628, applied, notwithstanding in the statute, and followed.

. Meredith, Q.C., for the plaintiffs.

om, for the defendants.

[STREET, J., 12TH FEBRUARY, 1889.

In re FARLINGER AND MORRISBURG.

—Notice of motion to quash—Time—Waiver—Demand of copies.

otion to quash a by-law of the village of Morrisburg. of motion was served on Friday the 25th January, for the 29th January, and the motion was enlarged until 1 February.

that this was not a four days' notice within the meaning 2 of the Municipal Act, and was too short.

Peck and Ameliasburg, 12 P. R. 664, referred to.

however, that the objection taken by the township to ce of motion was waived by their having, after the return argement of the motion, served a demand for copies of erials on which the motion was based.

nter v. *City of Hamilton*, 2 Ch. Chamb. R. 282, followed.

Clarke, for the applicant.

. Blake, Q.C., and *Fullerton*, for the township.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 14TH DECEMBER, 1888.

DALZIEL v. MALLORY.

—Duties of clerk and assessor—Omission to comply with R. S. O. . 193, s. 140—Curative effect of R. S. O. c. 193, ss. 188, 189.

of land was sold for taxes in 1882, the deed being made 3, and an action of ejectment was brought by the pur- against the owner in 1888. On the trial it was proved

that the list of lands required by s. 140 of R. S. O. c. 193, sent by the treasurer to the clerk of the village in which land was situate, but that it was then lost, and although land was occupied it was not returned "as occupied," nor the owner notified that it was liable to be sold for taxes, as vided for by section 141.

Held, affirming MACMAHON, J., (BOYD, C., dissenting), that sale was irregular and could not be sustained, and that defect was not cured by s. 188 or s. 189.

Haisley v. *Somers*, 13 O. R. 600, and *Fenton* v. *McWain* U. C. R. 239, referred to.

Per BOYD, C.—The omission to raise within the proper t the objection that s. 141 was not complied with is cured b 189, and the deed is valid and binding. That section is in nature of a Statute of Limitations as to such objections. decision of the majority of the Court is reached by givir construction to s. 193, which in effect adds to the languag the statute, and in so far invades the distinction which ough obtain between making and administering law.

Haisley v. *Somers*, *supra*, distinguished.

Aylesworth, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

[BOYD, C., 9TH JANUARY, 1

In re PONTON AND SWANSTON.

Vendor and purchaser—R. S. O. c. 112—Production of deeds—Eviden trusts by recital in memorial twenty years old—Discharge of mortga Mortgage in fee by tenant for life—Necessity for discharge after dea life tenant.

On an application under the Vendor and Purchaser Act, R. S c. 112, it appeared that the contract of sale provided that vendors should not be bound to produce any deeds or evidenc title except such as they might have in their possession, should show a good title, etc. A. P., by indenture of January, 1858, conveyed the lands in question to trustees certain trusts, which deed was registered by memorial not taining the trusts; by deed of appointment dated 4th July, 1

in pursuance of the deed of 1858, also registered by
ial, which purported to contain a full copy of the deed, in
were recitals which set out what purported to be the
of the former deed and showed a life estate in A. P., with
of appointment after, A. P. appointed to trustees, who
epresented by the vendors, with directions to sell after his
which had recently occurred; neither of these deeds was
possession or power of the vendors, the trustees.

, that the vendors were not bound to produce the two
f January, 1858, and July, 1862; and that the produc-
the memorial of the latter, being twenty years old, recit-
trusts of the former, was sufficient evidence of what those
ere, and as there was an absolute trust for sale the pur-
should take the title.

in 1873 assumed to mortgage the lands in fee and died
.

that the mortgage only bound his life estate, and that
dors were not bound to procure a discharge thereof. The
ns of the purchaser were therefore overruled and the
held to have shown a good title.

. *Armour*, for the vendors.
ne for the purchaser.

[FERGUSON, J., 2ND FEBRUARY, 1889.

COURSOLLES v. FOOKES.

*nt mortgage—Set aside by execution creditor—Priority between exe-
creditor and subsisting second mortgage—Costs—Salvage money.*

n execution creditor, brought an action to set aside two
ges made by his execution debtor to F. and H. respectively,
ceeded as to the mortgage made to F. In an application
e the priority between C. and the remaining mortgagee
which it was claimed that C. was entitled to the benefit
ligence, and that to the extent of the mortgage set aside
ld have priority over H.

that C. was not entitled to any such priority, but that
entitled out of the fund realized by setting aside F.'s

mortgage, to the difference between his solicitor and clie
and such costs as he should recover from the defendant
the nature of salvage.

Shepley, for the motion.

S. H. Blake, Q.C., contra,

[13TH FEBRUAR

MEIR v. WILSON.

Administrator ad litem—Rule 311.

It is not intended by Rule 311 that the business of the
gate Court should in a large measure be transferred to t
Court; the intention was to provide for necessities arisin
progress of an action, where representation of an estate is
in the action, and there has not been carelessness or ne
on the part of the party who may require the appointmer

Under the circumstances of this case an application
appointment of an administrator *ad litem* was refused.

Re Chambliss, 12 P. R. 649, distinguished.

A. H. Marsh, for the motion.

Hoyles, contra.

[ROBERTSON, J., 25TH JANUAR

In re CENTRAL BANK.

CAYLEY'S CASE.

Banks and banking—Winding up—Proof of claim—Cheque accepted after suspension—Set-off—Subsequently accrued liability of cheque—Fraudulent preferences.

On 15th November, 1887, Donovan gave his cheque
Central Bank payable to Cayley for $3,440. Cayley fo
deposited the cheque in the Dominion Bank, and the
advanced him $3,000. The Central Bank suspended p
on 16th November, 1887, and in afterwards filing their c
the winding-up proceedings, the Dominion Bank inclu
amount of this cheque. On 23rd November, 1887, the

ad marked the cheque good, and charged it against
n's account, leaving a balance of $30 in his favour, and
g the Dominion Bank with the amount of the cheque.
ile Donovan became indebted to the Central Bank on
omissory notes, and the liquidators objected to allow the
the above cheque for $3,440 in the Dominion Bank claim
Thereupon the Dominion Bank withdrew this part of
im, and the Master disallowed it. Cayley never heard
vithdrawal by the Dominion Bank of their claim on the
ill after the first dividend was declared and made payable,
filed his claim against the Central Bank on the cheque
September, 1888. The liquidators claimed the right to
ne amount of Donovan's notes.

that they were not entitled to do so. The fact of the
Bank having accepted the cheque and credited the
to the Dominion Bank and charged the amount to Dono-
wed conclusively that at that time the Central Bank was
editor of Donovan's; nor did the clauses in the Winding-
oncerning fraudulent preferences help the liquidators.

for Cayley.

. *Meredith*, Q.C., for the liquidators.

In re CENTRAL BANK.

HENDERSON'S CASE.

l banking—Winding up—Contributories—R. S. C. c. 120, ss. 45, 77.

ppellant, having been placed on the list of contributories
winding-up of the Central Bank, appealed upon the
hat the transfer of the shares in question to him was a
nt transaction, perpetrated in the face of s. 45 of the
Act, inasmuch as the bank was trafficking in its own
or the purpose of keeping up the appearance of *bona fide*
nd so enhancing the price at which the shares of the
re being quoted in the market, and that the bank took
ellant's notes for the price of the shares, undertaking
notes should not be enforced, but on a re-sale of the
ould be delivered up to be cancelled, and that the said
ons were *ultra vires* of the bank.

Held, that all this amounted to no defence against th dators, who represented the creditors of the bank and bank alone: what rights the appellant might have as agai directors of the bank or other shareholders was a d matter.

As to certain other shares in respect to which the ap had been placed upon the list of contributories, he appeale the ground that he had acquired them within one month the suspension of the bank, referring to s. 77 of the B Act; and also on the ground that those who had tran their shares to him within the period of one month bef suspension should have also been placed on the list.

Held, that the appellant was rightly placed upon the li these shares; but that those also who had transferre shares within the month should be likewise put upon it.

A. C. Galt, for the appellant.
W. R. Meredith, Q.C., contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 16TH FEBRUARY

SCHUHL v. ROSENSTADT.

Disagreement of jury—Motion for non-suit—Rule 739—Stay of new

At the trial of this action the jury disagreed, and the p proposed to take it down for a second trial, notwithstandi the defendant had served notice of a motion for judgment suit under Rule 739. The motion was not heard at the s of the Divisional Court following the first trial, because th of evidence were not ready in time. The defendant mo stay the trial.

The Court was of opinion that the effect of making the was to stay the trial and make no order.

F. Fitzgerald, for the plaintiff.
Aylesworth, for the defendant.

IN CHAMBERS.

[FALCONBRIDGE, J., 20TH FEBRUARY, 1889.

CANADA COTTON CO. v. PARMALEE.

ment of debts—Unadjusted insurance moneys—Appeal by garnishees.

rance moneys alleged to be due to a judgment debtor for where the claim has not been adjusted, acknowledged, or ed, are not attachable under Rule 935 or otherwise.

garnishee has the right to appeal against an order direct- trial of an issue between the judgment creditors and a nt of the moneys attached.

sworth, for the garnishees.

V. Saunders, for the plaintiffs.

In re McGREGOR v. NORTON.

ion—Division Court—Money paid into Court by defendant—Plaintiff's ntion to proceed—Failure to notify in writing—R. S. O. c. 51, ss 125, —Attorning to jurisdiction.

defendant in a Division Court suit paid $5 into Court as atisfaction for the plaintiff's demand under R. S. O. c. 51,

The plaintiff notified the clerk of the Court, but not in , as required by s. 126, that he intended to proceed for nainder of his claim. The defendant was not notified of d did not attend the trial. Judgment was given for the ff, and the defendant moved for and was granted a new terms.

, that the defendant had attorned to the jurisdiction of vision Court by moving for a new trial; and that prohibi- ould not be granted, as the Division Court could, on the ial, adjudicate upon the objection of the defendant to the ff's failure to notify in writing.

M. Douglas, for the defendant.

vele, for the plaintiff.

[STREET, J., 16TH FEBRUARY, 1

LUCAS v. CRUICKSHANK.

Security for costs—Rule 1243—Identity of cause of action.

The plaintiff, as administrator of his late wife, brought action under R. S. O. c. 135 to recover compensation for having been killed by reason of alleged negligence of the de dants.

Previous to his obtaining letters of administration to his w estate he had brought an action in his own name against same defendants for the same purpose, but discontinued it. costs of the first action being unpaid, the defendants applied security for costs under Rule 1243.

Held, that the cause of action in the two cases was not same, and an order staying proceedings till the plaintiff sh give security for costs was set aside.

W. H. Blake, for the plaintiff.

Aylesworth, for the defendants.

[MACMAHON, J., 5TH FEBRUARY, 1

RICE v. FLETCHER.

Arrest—Foreigner in Ontario temporarily—About to return home—Inte defraud—Order to hold to bail.

The plaintiff claimed $20,000 damages from the defend the cause of action being criminal conversation with the p tiff's wife. The defendant lived in the United States, but here for a temporary purpose, when the plaintiff had arrested under an order to hold to bail. The plaintiff in affidavit, sworn on the 30th January, on which the order granted, stated that the defendant had arrived in Toronto morning and that he intended to leave for his own country night with intent to defraud the plaintiff of the damages he sustained. Upon a motion for the defendant's discharge,

Held, that in leaving Ontario he was not doing so with intent to defraud the plaintiff, and was therefore entitled t discharged.

Ex p. Gutierrez, 11 Ch. D. 298, specially referred to.

Bigelow, for the plaintiff.

Tilt, Q.C., for the defendant.

[23RD FEBRUARY, 1889.

ROBINSON v. ROBINSON.

Solicitor and agent—Service of notice—Costs.

A notice of taxation of costs was served on a firm of solicitors in the town where the taxation was to be held as agents of the defendant's solicitors, who lived elsewhere. The solicitors served were not the booked agents of the defendant's solicitors, but had on several occasions acted as their agents in this action. The notice did not come to the knowledge of the defendant's solicitors until the day of the taxation.

Held, that the service of the notice was bad; and the taxation pursuant to it was set aside.

No costs were given against the plaintiff, because on the return of the notice the solicitors served as agents appeared, though without instructions, and obtained an enlargement, and this misled the plaintiff.

Rules 202, 203, 204, 461; *Smith* v. *Rowe*, 1 U. C. L. J. N. S, 155; *Hayes* v. *Shier*, 6 P. R. 42; *Omnium Securities Co.* v. *Ellis*, 2 C. L. T. 216, referred to.

W. H. Blake, for the defendant.

J. M. Clark, for the plaintiff.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 19TH FEBRUARY, 1889.

In re HOBBERLIN AND HURST.

Vendor and purchaser—Vendor not bound to furnish abstract of title—When title first shewn.

Case under the Vendors and Purchasers Act.

Bain, Q.C., and *Laidlaw*, Q.C., for the purchaser.

J. B. Davis and *Meek*, for the vendor.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—In this case I find that having reference to the contract, the vendor was not bound to furnish an abstract of title, but to answer all proper requisitions.

The purchaser required proof of the discharge of a mort dated 17th January, 1846, and on the 28th November last vendor answered that the mortgage had been paid, and tha would supply a statutory declaration to that effect; that mortgage had long since ceased to be a charge on the l being over twenty years old, and possession having been adv thereto. The draft of the proposed statutory declaration, sustaining the statements in the vendor's answer, was read t purchaser's agent on the 7th or 10th December last.

When a good title is first shown depends upon whether abstract alleges all facts essential to a good title, whic proved, would make a good title to the property in questio good title is made when the alleged matters are proved: *Pa Lovegrove*, 4 Drew. 170.

But in this case the vendor is not bound to furnish an abst but he is bound to answer all proper requisitions as to title. the answers are the first statements of title made by the ve to the purchaser, I think the rule I have referred to sh apply to the answers, and the vendor should set forth in t all material facts properly applicable to the requisition, wh if proved, would make out a good title.

This I think the vendor has done by his answer of the November last, and I therefore find that he then first show good title to the property in question.

NOVA SCOTIA.

In the Supreme Court.

McINTOSH v. COMMISSIONERS OF THE COURT HO AT HALIFAX.

Corporation—Parol contract made in the ordinary course of duties bind Pleading.

The defendants were created a body corporate for the pu of being invested with the title of the County Court H Halifax, with power to enlarge and improve the building fo

e use, and to provide all necessary accommodation for the
, the municipal council, etc., and to make such contracts as
necessary for that purpose from time to time.

e defendants employed the plaintiffs, verbally, to make
n alterations and improvements in the building, coming
n the class of work that they were authorized by the Act of
oration to perform.

ld, that as the work done was within the ordinary range of
of the defendants, a contract under seal was not required.

ld, also, that if the absence of a contract under seal would
been a valid defence, it must have been pleaded in order to
e the defendants to avail themselves of it.

REGINA v. ORR.

n Temperance Act—Conviction under, set aside—Excess of jurisdiction—First offence.

e defendant was convicted of a first offence under the Can-
emperance Act, 1878, and for such offence was adjudged to
ne sum of $50 and costs, and if the said several sums were
aid forthwith that the same be levied by distress and sale of
oods and chattels of the defendant, and, in default of sufficient
ss, that the defendant be imprisoned in the common jail for
pace of three months, unless the said several sums and all
and charges of such distress, and of the commitment and
ying of the defendant to jail, be sooner paid.

ld, that the conviction should not have gone further than to
se the fine and costs, leaving subsequent proceedings in the
er for a further application to the same or another justice.

ere, whether imprisonment could be awarded in such a
for a first offence.

DEVINE v. McKENZIE.

ent by default—Irregularity—Indulgence—Opening up—Amendment.

er the issue of the writ in the cause, the defendant's solicitor
nded a statement of claim, and agreed that the plaintiff's

solicitor should have time beyond that allowed by law to in, on the condition that the defendant should have furthe to plead. The statement of claim was filed on the 14th O 1887, and the defendant's solicitor was requested to deli defence not later than the 29th October. In consequ illness he was prevented from doing so until 3rd Novemb judgment by default having been entered the previous day cation was made to the Judge of the County Court for the in which the writ was issued, to set the judgment as irregularity.

Held, that the application was wrongly made, there be irregularity apparent on the record.

That the proper course under the circumstances woul been to apply to the Judge, on affidavit, to open up th ment, and to allow the defendant to come in and defend Order 27, Rule 14.

That the Judge would have been justified in allow amendment for that purpose if moved so to do.

That under Order 28, Rule 12, the defendant might allowed to amend if he saw fit, and that, after such amen thejudgment should be opened up, and the defendant allo come in and defend.

DARLING v. GILLIES.

Promissory note—Action by indorsee against indorser—Statement of Defects in statement of claim by omission of essential facts—Plead

In an action brought by the plaintiff as indorsee, again defendant as indorser of a promissory note, it appeared th note was made payable "at the Merchants' Bank, Hawkes There was no allegation in the statement of claim to sho the note was made payable at that place, or that it was du sented for payment there, or that any notice of dishono given to the defendant.

Held, that, in the absence of such averments and pro plaintiff could not recover.

Held, also, that under the present system of pleading not incumbent upon the defendant to deny facts essential plaintiff's right to recover, unless such facts were alleged statement of claim.

RTH-WEST TERRITORIES.

In the Supreme Court.

[MACLEOD, J., 4TH FEBRUARY, 1889.

BRADEN v. HETHERINGTON.

rom summary conviction—Right of justice of the peace to file and return a second conviction.

as on 12th January, 1889, convicted under the N. W. T. having intoxicants in his possession without the leave of utenant-Governor. Notice of appeal was served, and on nuary the convicting justice returned the papers to the the Court with the conviction, which after imposing a further adjudged that unless the said penalty and costs id immediately B. should be imprisoned for the term of months. On 27th January the justice returned a second ion, in which the adjudication of imprisonment was d by the addition of the words " unless the said penalty ts shall be sooner paid."

V. G. Haultain, for the appellant. The second convic- ould not be allowed to be put in. The first conviction is he adjudication not being in accordance with the statute.

. *P. Conybeare*, for the respondent, cited *Regina* v. *Ben-* O. R. 45: *Selwood* v. *Mount*, 9 C. & P. 75; *McLellan* v. *on*, 1 O. R. 224; *In re Ryer and Plows*, 46 U. C. R. 206.

that a justice who has returned and filed a conviction urn and file a second one at any time before the hearing ppeal.

Supreme Court of Canada.

QUEBEC.]

MUIR v. CARTER.

Appeal—Matter in controversy—Bank shares—Actual value—Op
Shares held "in trust"—Substitution—Res judicata.

In this case the appeal arose out of an opposition file
appellant to the seizure of thirty-three shares of Molso
stock, part of a larger number seized under a writ of exe
levy $31,125 and interest pursuant to a judgment obtai
suit of *Carter* v. *Molson*. The par value of the stock
per share, equal to $1,650, but it was shewn by affidavi
satisfaction of the learned Chief Justice of the Court of
Bench of the Province of Quebec, that at the time the o
was filed and the appeal brought the shares were worth
The Chief Justice therefore allowed the appeal.

On a motion to quash for a want of jurisdiction on th
that the value of the matter in controversy did not ar
$2,000;

Held, that under s. 29 of the Supreme Exchequer Co
the sum or value of the matter in controversy determi
right to appeal, and such value was the actual valu
shares, which was properly established by an affidavit to
$2,000.

TASCHEREAU, J., dissented, on the ground that the
appeal was governed by the statutory value of the sha
per share, and not by their market value.

The appellant as curator to the substitution create
will of the late Hon. John Molson by his opposition clai
the shares seized were the property of the substitutio
respondent contested the opposition pleading *chose jugee*
the stock never belonged to the substitution.

At the trial it was proved that the shares had been pu
when A. Molson was solvent with moneys belonging to
stitution and had been entered in the books of the
shares belonging to "A. Molson, Esq., in trust;" that

y dealt with them as his own property and pledged
out that at the time of the seizure the shares had been
erred to the account of " A. Molson in trust for E. A. M.

s also admitted that the interest on these shares had
eviously seized and that, upon an opposition filed by A.
as institute under the will and upon petitions to inter-
ed by E. A. M. and E. A. M. *et al.*, claiming that the
being interest on shares forming part of six hundred and
ares belonging to the estate of the late Hon. J. Molson.
arrestable for A. Molson's debts. The Privy Council
d the opposition and rejected the petitions to intervene
ed that anything decided with regard to the validity of
stitutions would not be binding upon the petitioners as
ata : *Carter* v. *Molson*, 10 App. Cas. 674.

peal to the Supreme Court it was

reversing the judgment of the Courts below, that the
es judicata was not available.

at the words " in trust " import an interest in some
e, and that the evidence clearly established that the
appellant as curator to the substitution was the owner of
us of the shares in question.

y v. *Bank of Montreal*, 12 App. Cas. 617, followed.

nme, Q.C., for the appellants.

bott, Q.C., for the respondent.

DANSEREAU v. BELLEMARE.

of invention—Carriage tops—Combination of elements—Novelty.

action for damages for the infringement of a patent
Dansereau's Carriage Tops," consisting in the combina-
carriage top made in folding sections as described in
fications with posts arranged to turn down, the defen-
the present appellant, pleaded *inter alia* that there was
ty, and that the invention was well known and had been
r a considerable time. At the trial after considerable
had been given for both parties, the Judge appointed

two experts to examine and compare the four carriage
by D., and alleged by B. to be infringements on his p
also to examine the carriage top of one carriage in the
of one C. A. D., alleged to be made on the same princi
invention and to have been in use long prior to B
One of the experts, a solicitor of patents, reported in
B.'s invention, showing the difference between B.'s ca
C. A. D.'s, and in what consisted the improvement. T
carriage maker, reported that B.'s carriage was an im
on C. A. D.'s carriage, but both agreed that D.'s carr
infringements of B.'s patent. The Judge awarded
$100 damages, and enjoined D. not to manufactu
carriages in infringement of B.'s patent.

On appeal to the Court of Queen's Bench (appeal
Court held that the patent for the infringement of
respondent sought by his action to recover damages fr
closed no new patentable invention or discovery.

On appeal to the Supreme Court of Canada it was

Held, reversing the judgment of the court below, Rr
and GWYNNE, J., dissenting, that the combinatio
previously in use and was a patentable invention.

Geoffrion, Q.C., for the appellant.

St. Pierre, for the respondent.

GILBERT v. GILMAN.

*Appeal—Payment by instalments—Rights in future—Supreme a
Courts Act, s. 29 (b).*

A judgment of the Court of Queen's Bench for Lo
(appeal side) in an action for $1,339.36, being for the
one of the money payments which the defendant was
the plaintiff every year so long as certain security gi
plaintiff for the defendant remained in the hands of t
ment, is not appealable. The words "where the
future might be bound" in sub-section "b" of sectio
Supreme and Exchequer Courts Act relate only to
matters" as are previously mentioned in the sub-secti

C. Robinson, Q.C., and *Archibald*, Q.C., for the appe

Irvine, Q.C., for the respondent.

RUNSWICK]

LEWIN v. HOWE.

r and mortgagee—Foreclosure—Sale subject to lease—Lease of mortgaged lands without assent of mortgagee.

foreclosure suit the Judge in Equity of New Brunswick l the mortgaged premises to be sold subject to a lease to he defendants made after the execution of the mortgage, hout the consent of the mortgagee.

ppeal to the Supreme Court of Canada,

, that the decree was bad in directing the lands to be sold to said lease, and the case should be sent back to the n Equity for a decreee directing a sale of the mortgaged s generally.

on, Q.C., and *Gormully*, for the appellants.
Palmer, for the respondents.

BA]

TOBA MORTGAGE Co. v. BANK OF MONTREAL.

hip—Buying and selling lands on speculation—Lands considered in ty as personalty—Cheque—Payable to order of three—Indorsed by one ght of bank to pay—Acquiescence by drawer—Monthly statements.

.., and M. formed a partnership for the purpose of buying ing lands on speculation. R. held a power of attorney . authorizing him to buy, sell, and mortgage, and use M.'s n so doing. R. negotiated a loan with the Manitoba ge Co., and assigned as security certain mortgages given hree partners and executed the assignments in M.'s name ttorney. A cheque for the amount of the loan was by the Mortgage Co., payable to the order of R., K., and ch cheque was delivered to R., who indorsed it in his own nd as attorney for the other payees, and received the cash. rwards successfully defended a suit by the mortgage com- n the covenants in the assignments of mortgage, his being that he had received no benefit from the proceeds heque given to R. The company then sued the bank on he cheque was drawn for the amount of the same as an balance of the deposit in said bank.

Held, 1. That lands acquired by partners engaged in
and selling lands on speculation are, in equity, consid
personalty and may be so dealt with by the partners.

2. That from the nature of the business R. had p
effect the loan and make an equitable assignment of th
gages, which a court of equity would compel the other
to clothe with the legal estate.

3. That R. having such power, and having a right to
cash for the loan, could use the names of his partners in
ing the cheque, and the bank was justified in assuming
did so for the purposes of the partnership business and in
it on such indorsement.

Held, also, that the company, having for two years
monthly statements from the bank in which the cheque
affected his balance on deposit, must be considered
acquiesced in the payment, R. having failed in the meanti
the position of the bank as to recourse against him being
for the worse.

Ewart, Q.C., for the appellants.
Robinson, Q.C., for the respondents.

In re PROVINCE OF MANITOBA AND CANAD
PACIFIC R. W. CO.

Constitutional law—Manitoba Statutes, 1888, c. 5—Railway-cros

Question submitted by the railway committee of the
Council for Canada, under s. 19 of the Railway Act, 51 V
upon the following case :—

Under c. 5 of the Statutes of Manitoba, passed on t
day of April, 1888, the railway commissioner of that pro
constructing a railway known as the Portage extension of
River Valley Railway from Winnipeg to Portage la Prair
places being within the Province of Manitoba, and he ha
application to the railway committee of the Privy Cou
Canada, under s. 173 of the Dominion Railway Act of 1
the approval of the place at which and the mode by whi
proposed that the said Portage extension shall cross the P
Mountain Branch of the Canadian Pacific Railway (t
branch being part of the Canadian Pacific Railway) at

the said province, whereupon the following question is ed :—

e said statute of Manitoba, in view of the provisions of R. S. C., particularly s. 121 thereof, and in view of the Act of 1888, particularly ss. 306 and 307, valid and effec- as to confer authority on the railway commissioner in tute of Manitoba mentioned, to construct such a railway said Portage extension of the Red River Valley Railway, the Canadian Pacific Railway, the railway committee proving of the mode and place of crossing, and first giving rections as to the matters mentioned in ss. 174, 175, and the said Railway Act ?

nswer to the said question : This Court, having heard for the Province of Manitoba and also for the Canadian Railway Company, is unanimously of opinion that the tute of Manitoba is valid and effectual so as to confer y on the railway commissioner in the said statute of a mentioned, to construct such a railway as the Portage n of the Red River Valley Railway crossing the Cana- cific Railway, the railway committee first approving of de and place of crossing and first giving their directions e matters mentioned in ss. 174, 175, and 176 of the said Act.

Blake, Q.C., *C. Robinson*, Q.C., and *G. M. Clark*, for the n Pacific Railway Company.

t, Q.C., A.-G., *Martin*, A.-G., *McCarthy*, Q.C., and *elier*, Q.C., for the Province of Manitoba.

Exchequer Court of Canada.

[BURBIDGE, J., 5TH MARCH, 1889.

PETERSON v. REGINAM.

Petition of right—Waiver by the Crown—Jurisdiction

Superintendent-General of Indian affairs, on 30th July, ld to P. certain lots of land being part of the Indian at Sarnia for $1,000, the sale being subject to the n that P. would, within nine months from the date of ct thereon buildings for manufacturing purposes. One-

fifth of the purchase money was paid at the date of the sa in August, 1881, although the condition to erect buildin not been performed, W., the Indian agent at Sarnia, r the balance of the purchase money from P., stating to hi ever, that the sale would not be complete until such conditi complied with.

Held, that the acts of officers of the Crown may const waiver by the Crown, and that the receipt of the balance purchase money was under the circumstances a waiver time within which the condition was to be performed, bu the substance of the condition.

Quære, has the Court jurisdiction to declare that a su is entitled to have letters patent issued to him.

Clarke v. *Reginam*, (*per* RITCHIE, C.J., in the Exchequer unreported); *Canada Central R. W. Co.* v. *Reginam*, 20 G and *Attorney-General of Victoria* v. *Ettershank*, L. R. 6 P. referred to.

S. H. Blake, Q.C., and *J. Adams*, for the suppliant.

Wallace Nesbitt, for the Crown.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [5TH MARC

LIVERNOIS v. BAILEY.

Costs, scale of—Setting off costs—R. S. O. (1877) c. 50, s. 347, s-s. 3- Judicature Act, 1881, Rule 428.

An appeal from the decision of the Common Pleas I 12 P. R. 535, was dismissed, the members of this Cour divided in opinion.

Held, *per* HAGARTY, C. J. O., and BURTON, J. A., that t Judge had to deal with the costs, and that power havi exercised was not reviewable; and the appeal should be

Per OSLER and MACLENNAN, JJ.A., that the appeal sh dismissed.

J. W. Nesbitt, for the appellant.

H. H. Collier, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 8th March, 1886.

PURDOM v. NICHOL.

Principal and surety—Promissory note—Novation—Partnership.

e plaintiff in 1875 indorsed a promissory note for the
modation of the defendant Nichol, and the latter delivered
collateral security to mortgagees of his freehold. The
agees procured the defendant Baechler to enter into
rship with Nichol, and threw off $1,000 of their mortgage
releasing their original securities and taking a new mort-
om both defendants for $1,000 less than the amount of
laim. This was in 1876. In 1879, when the note fell
he plaintiff paid the amount to the mortgagees, who
d it in reduction of their mortgage debt. At the time the
ff paid he did not know of Baechler's connection with
atter.

d, that the plaintiff was entitled to recover against both
ants for the amount paid as money paid at their request.

s judgment was reversed by the Court of Appeal, 15 A. R.
7 Occ. N. 439; but was affirmed and restored by the
me Court of Canada, *ante* p. 11.

s, Q.C., for the plaintiff.

H. Blake, Q.C., for the defendant Baechler.

[7th March, 1889.

SUNBURY v. MANUFACTURERS' INSURANCE COMPANY.

Jury notice—Second trial—Rules 670, 671.

s action was entered for trial at the Toronto Autumn
s, 1888. Before it was reached the solicitors agreed that
al should be put off until the January Assizes, and at
request the clerk of assize struck the case off the list for the
n Assizes. No notice for jury had been given, and the

assent of the Court was not obtained to the postponement trial.

Rule 670 provides that where an action has been entei trial, it may be withdrawn by either the plaintiff or def upon producing to the proper officer a consent in writing by the parties, but not otherwise except by order.

Held, that the object of this rule was to entitle the def to insist upon the trial of the case which the plainti entered being proceeded with, unless the Court should gi plaintiff leave to withdraw it, and what took place here w a withdrawal within the meaning of the rule; and the having been entered for trial and not having been tried posed of, remained to be tried, and under Rule 671 might down for trial and notice thereof given for any subsequent without payment of any further fee.

The plaintiff, before the January Assizes, filed and se jury notice. R. S. O. c. 44, s. 78, s-s. 2, provides that a to an action desiring to have it tried by a jury shall, "a eight days before the sittings at which the action is to be file and serve a notice therefor. R. S. O. c. 52, s. 148, pr that no record containing issues to be tried by a jury sh entered for trial unless the fee of $3 required by that sect first paid.

Held, that Rule 671 was not intended to overrule sectio but was only aimed at protecting litigants from being re to pay a new fee for entering their actions for trial a secon and not to relieve them from the payment of any other fees. The plaintiff had the right to give the jury notice f January Assizes, paying the jury fee and annexing th notice to the record at the time of setting down.

C. Millar, for the plaintiff.

T. P. Galt, for the defendants.

In re CRAWFORD v. SENEY.

Prohibition—Division Court—Title to land.

The plaintiff agreed to sell to the defendant a parcel o for $1,750, of which $10 was paid on the execution of the ten agreement. The agreement contained no provisi

ssession, but the defendant went into possession as the aser. The plaintiff was unable to make title and the dant continued in possession for a considerable time. The iff brought a Division Court action for use and occupation. defendant set up that the contract had not been rescinded he gave up possession and that he never became tenant to laintiff nor liable to pay rent.

ld, that the plaintiff was bound to prove a contract, express plied, to pay compensation for the use and occupation, and, ler to do so, it may have been necessary to show when the act of sale went off; but that was not a bringing of the title uestion so as to oust the jurisdiction of the Division Court.

That in prohibition the Court must be satisfied that the eally comes in question; it is not enough that some ques- raised by the defendant's notice.

rser v. *Bradburn*, 7 P. R. 18, distinguished.

tson, for the appeal.

Sweyn, contra.

[STREET, J., 15TH FEBRUARY, 1889.

FARLINGER AND VILLAGE OF MORRISBURG.

pal corporations—By-law—Bonus to manufactory—51 V. c. 27, s. 16—gistration—R. S. O. c. 184, s. 351—Debentures—R. S. O. c. 184, 342, s-s. 1.

y-law granting a bonus to a manufacturing industry was l by the municipal council of a village on the 29th October, after having been submitted to and approved by the rs. It provided on its face that it should take effect on ecember, 1888. For this and similar by-laws an annual vas required of an amount exceeding ten per cent. of the nnual municipal taxation of the village.

d, that although the by-law was in contravention of s-s. 4 16 of 51 V. c. 28, yet having regard to the provisions of s. l by the operation of s. 16, s-s. 5, the by-law was with- from the effect of s-s. 4.

That s. 351 of R. S. O. c. 184 is merely directory; and -law having been passed by a council having jurisdiction to ; all the conditions entitling them to pass it having been

performed; their power to pass it not having been impr
exercised, and the by-law itself being in substantial comp
with the provisions of the Act; it would not be proper to
it invalid for non-registration under a section which d
declare that a non-compliance with its provisions shall ha
effect.

3. That the object of s-s. 1 of s. 342 of R. S. O. c. 18
prevent the burthen of the debt incurred by borrowing mo
pay the bonus from being unequally distributed or unduly
poned to later years; and that the by-law in question,
provided for the raising of $25,000 by the issue of twenty
tures for $2006.10, to fall due one in each year for twenty
it being estimated that the sale of such debentures will
the said sum of $25,000," and for levying $2006.10, i
year by a special rate, substantially complied with s-s. 1 of

J. B. Clarke, for the applicant.

S. H. Blake, Q.C., and *Fullerton* for the Township.

[19TH FEBRUARY

In re PRYCE AND CITY OF TORONTO.

*Municipal corporations—Damages to land by construction of pav
Method of estimating—Increase in value—Set-off.*

In an arbitration under the arbitration clauses of the M
pal Act a land-owner claimed that certain lands had been
ously affected by the construction of a block pavement.

Held, that in estimating the land-owner's compensatio
arbitrator should set off against the land-owner's clai
damages sustained, the increase in the value of the land
from the construction of the pavement in which this
shared in common with all the other lands benefitted, a
merely such direct and peculiar benefit as accrued t
particular land.

Re Ontario & Quebec R. W. Co. and Taylor, 6 O. R. at
and *James* v. *Ontario & Quebec R. W. Co.*, 12 O. R. at
followed.

J. E. Robertson, for the land-owner.

C. R. W. Biggar, for the City of Toronto.

PLIN v. PUBLIC SCHOOL BOARD OF TOWN OF WOODSTOCK.

schools—Seats of trustees—Contracts with school board—R. S. O. c. s. 247, construction of—Declaring seats vacant—Powers of remaining tees—Powers of Court—Injunction—Quo warranto—Parties.

an action brought by a ratepayer against a school board, of the persons elected as trustees, and one G., the statement m alleged that the three defendant trustees had, by reason ir being interested in certain contracts with the board, *ipso* vacated their seats by virtue of s. 247 of the Public Schools . S. O. c. 225; that they nevertheless continued to sit and nd had voted in favour of certain resolutions which were whereby the Principal of the schools was dismissed and fendant G. appointed in his place; and that but for the of the three defendant trustees the result would have been nt. The prayer was that the seats of the three should be ed vacant and the votes and resolution declared void, and injunction restraining the defendants the trustees from r acting as members of the board.

l, upon demurrer, following *Hardwick* v. *Brown*, L. R. 8 406, that the seat of a trustee does not under s. 247 ly become vacant until the other members of the board declared it to have become vacant; and in this case, no having been taken by the remaining members of the that the seats of the three defendant trustees were full; ing full, that the Court would not interfere by injunction rain the occupants of them from acting as trustees.

That *quo warranto* proceedings were the only means by which ats could be declared vacant by the Court; that the duty of ing them vacant, if the facts charged were established, ed upon the remaining individual members of the board, ere not parties to the action, and were not sufficiently made s by the fact that the school corporation was a party lant.

ina v. *Mayor of Hereford*, 2 Salk. 701; *Rex* v. *Smith*, 2 M. & S. referred to.

That the defendant G. was an unnecessary and improper to the action.

llace Nesbitt, for the defendants.

J. Holman, for the plaintiff.

[11TH MARCH

In re COLLARD AND DUCKWORTH.

*Appointment by will — Covenant not to revoke—Title to land—
c. 100, s. 19.*

Petition under V. & P. Act by C. S. Collard and W
praying for a declaration that they had a good title
respective portions of certain land and could convey the
Wm. Duckworth, the purchaser, in fee simple free from
brances.

Mary Dean, the mother of the petitioners, devised the
trustees to hold the portion claimed by C. S. Collard to
and benefit during his life and after his decease to con
same to his children "or to such of my other three
their children as my said son Solomon may by his last
testament appoint." The devise under which the petitio
Dean claimed was in precisely the same terms, his name
ing in the place of that of C. S. Collard.

Each of the petitioners appointed his parcel of the
the other by will duly executed, and each conveyed to th
his life interest and covenanted in the conveyance not to
the appointment made by the will.

STREET, J.—It is well settled law that a power to app
will cannot be executed in any other manner. The inte
the creator of such a power is taken to be that the don
shall not deprive himself until the time of his death of h
to select such of the objects of the power as he ma
proper: *Sugden* on Powers, 8th ed., p. 210; *Reed* v. *S*
10 Ves. 370; *Doe* v. *Thorley*, 10 East 438; *Walsh* v. *W*
2 Russ. & Myl. 78; *Archibald* v. *Wright*, 9 Sim. 161.

Notwithstanding the covenant of the vendors here wit
other or with the purchaser that they will not revoke the a
ment, a subsequent appointment by will to one of th
objects of the power would be a perfectly good executi
and would cut out the title of the purchaser. * *

The vendors have no estate in the inheritance of this pr
they have only a power to direct to whom of certain pers
trustees are to convey it; that power is * * *
be executed only by will; it is of the very nature of a w
it shall be revocable during the testator's life, and any

donee to execute the power by an irrevocable instrument bind the persons taking under a later will.

hese reasons I think it clear that the petitioners cannot good title to the land in question.

uld add that the position of the vendors is not aided by f c. 100, R. S. O. * * * which only gives donee of a power the right to release or to contract not rcise it. Whatever might be the effect of the vendors releasing or contracting not to exercise the power which ssess, it would certainly not confer upon themselves the give the purchaser a good title.

rmack v. *McRae*, 11 U. C. R. 187; *Robinson* v. *Ommanney*, Ch. D. 780; 23 Ch. D. 285, also referred to.

rquhart and *E. J. B. Duncan*, for the petitioners.
rimmon, for the purchaser.

McINTOSH v. ROGERS.

Vendor and purchaser—Contract—Interest—Taxes.

on for judgment on further directions upon questions interest and taxes in an action for specific performof contract for purchase of land by the defendant. By ms of the contract (see 14 O. R. 97) the existing mortgage be assumed by the purchaser and the balance of the purnoney was payable "on completion and tendering a con-e."

, that this meant that the purchaser should assume the ge from the time when the purchase money became pay-The tendering of the conveyance meant the offer to the er of a properly executed conveyance at a time when the deemed the purchaser bound to accept the conveyance title and to pay over the purchase money; and the having done this before action, and the purchaser having to accept the conveyance or to pay his purchase money time, on the ground that the vendor could not then make title, and the purchaser's position having been sustained, subsequent offer of the conveyance having been made, rchaser was not obliged to accept possession until the natter was closed, because he would then from the time

of possession become liable to pay interest contrary to
gations of his contract.

That as soon as the litigation should reach such a sta
enable the parties to ascertain exactly the balance due f
purchaser, he should at once assume the mortgage,
balance, and accept conveyance; and until that period
he was not bound to pay any interest nor to become liab
any taxes.

That the vendor was not liable to pay interest u
deposit.

Hoyles, for the plaintiff.

G. W. Marsh, for the defendant.

CHANCERY DIVISION.

[FERGUSON, J., 18TH JANUAR

NELLES v. ONTARIO INVESTMENT ASSOCIAT

Company—Shareholder—Misrepresentation—Rescission of contract

Action by a shareholder of the Ontario Investment Ass
to have it declared that his subscription for shares h
obtained by fraud and misrepresentation, and that it
binding upon him, and for other relief. It appeared that
the said association had amalgamated with the Superi
and Savings Society, and under the terms of the amalg
the shareholders in the latter became entitled on payme
premium of 17 per cent. to an equivalent number of sh
the former.

It was thus the plaintiff became entitled to his shares
association, having previously been a shareholder
manager of the Superior Loan and Savings Society; and
an assenting party to the amalgamation, which he now
as *ultra vires* and brought about by misrepresentation an
It was proved that there were many material misrepresen
in a certain report of the association dated 31st Decembe
which had been an important factor in bringing about th
to the amalgamation by the society, and in inducing the
tiff to subscribe for the shares in the association, and t
plaintiff had not become aware of their falsity until

ringing this action. It was not shewn that the associa-
s insolvent or on the eve of insolvency.

that the plaintiff was entitled to a rescission of the con-
ade by his subscription for stock in the association.

rd Blake, Q.C., *W. Cassels*, Q.C., and *Gibbons*, for the
.

Q.C., and *W. R. Meredith*, Q.C., for the defendant
ion.

Q.C., and *T. G. Meredith*, for the defendant society.

[12TH MARCH, 1889.

GRAHAM v. DEVLIN.

Receiver—Share under will—Precatory trust.

n by the plaintiff, who had obtained judgment against
ndant, for an order continuing the Sheriff of Toronto as
of the share of the defendant in the estate of his father,
is will.

lause of the will under which it was claimed the defen-
ok an interest was as follows: "I give, devise, and
n to my beloved wife Eleanor Devlin all my ready money
rities for moneys that I may die possessed of for her sole
benefit, and it is my will and wish that my wife Eleanor
hall divide the real estate and money and securities for
mongst our surviving children before her death."

naterial filed by the plaintiff showed that he had ob-
dgment for $1,525.40 debt and $222.66 costs against
ndant, and had placed writs of fi.fa. in the sheriff's hands
ere unsatisfied; that the defendant had been examined
gment debtor and had deposed that he was unable to
he judgment and had no property. The plaintiff swore
only way he had of realizing his judgment was by the
nent of a receiver to receive the share of the defendant
he will of his father, William Devlin.

appeared that the defendant was one of seven children
am and Eleanor Devlin, whose estate amounted to
r $6,000, and that the defendant had received no part
tate.

J. M. Clark, for the plaintiffs, referred to *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 214; *Re Hutchings*, W. N. 1887, p. 217; *Lewin* on Trusts, 8th ed. pp. 130, 387.

C. J. Holman, for Eleanor Devlin, referred to *Re Diggles*, 39 Ch. D. 253; *Re Adams*, 27 Ch. D. 394; *Jarman* on Wills (4th Eng. ed.) p. 396; *Mussourie Bank* v. *Raynor*, 7 App. Cas. 321; *Lamb* v. *Eames*, L. R. 6 Ch. 597.

No one appeared for the defendant or the executors of his father, though duly notified.

FERGUSON, J.—This application asks more than any application hitherto. I am really asked to construe a will in a way that at present does not seem to me to be the meaning of it, to make out that the defendant has even a prospective estate of any value whatever. The will cannot be construed upon a motion of this kind at all, I think. The application, in my opinion, fails, for the reason that it is not shown that there is any estate that might or could be received, and the Court will not appoint a receiver in a case where it cannot be perceived or it does not appear that any good purpose will be served by so doing. See *Smith* v. *Port Dover, etc., Railway Co.*, in appeal, 12 A. R. 288, and my judgment appealed from, 8 O. R. 256, referring to a case decided by the late Chief Justice Spragge.

Motion refused with costs.

SYLVESTER MF'G. CO. v. McEACHON.

Receiver—Equitable execution—Creditors' Relief Act.

The plaintiffs, having judgment against all the defendants, applied for a receiver by way of equitable execution to receive the share of the defendant Clemens of his deceased father's estate in the hands of the administratrix. The plaintiffs showed by affidavit that none of the defendants were worth anything except the defendant Clemens and that Clemens had no assets except his share in the estate of his father.

W. H. P. Clement, for the plaintiffs, referred to *Kincaid* v. *Kincaid*, 12 P. R. 462; *Trust & Loan Co.* v. *Gorsline*, 12 P. R. 654.

No one appeared contra, though the defendants and administratrix were notified.

son, J.—All the Judges of this Division agree that a t creditor cannot in this Province now have equitable n by means of the appointment of a receiver. There s in which the order has been made, *e. g.*, *Kincaid* v. C. L. J. 144. The most that a judgment creditor can in such a case as this is to have a receiver to receive and e the estate, which he will have to do according to the s' Relief Act. In the teeth of that statute we cannot equitable execution" to do an inequitable thing.

ne question as to the circumstances under which a should be appointed, I refer to *Manchester, etc., Bank-. Parkinson*, 22 Q. B. D. 173, and *Stuart* v. *Grough*, 15 9. I think the order may go appointing a receiver, and ppoint the Sheriff of Waterloo, but not in his official He will act under the direction of the Court in distri-ne money he receives, and not as a sheriff does under itors' Relief Act. The receiver will give security to the on of the Master at Berlin, and the appointment will effect till after the security is given. The costs of this will be added to the plaintiffs' judgment debt.

—In *Lucas* v. *Setterington*, Armour, C. J., and in *Block* , Falconbridge, J., have given opposite decisions to the

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IN CHAMBERS.

[GALT, C.J., 13TH MARCH, 1889.

GREEN v. THORNTON.

Counter-claim by defendant—Cross-counter-claim.

l by the defendant from an order of the local Judge at allowing Sarah Green, the plaintiff's wife (who was lefendant by counter-claim) to amend her reply to the defendant's counter-claim by asserting therein another claim against the original defendant.

C.J.—I can see no objection whatever to the proposed ent; it is not bringing any new parties before the Court, ly allows the respondent, Sarah Green, to allege other

grounds of defence to the counter-claim of the defendant, and cannot interfere with the trial of the rights of the parties.

Appeal dismissed with costs to Sarah Green in the cause.

W. H. Blake, for the appeal.

W. M. Douglas, contra.

TAYLOR v. GRANT.

Venue—Change of—Convenience.

Appeal by the plaintiff from an order of the Master in Chambers changing the place of trial from Walkerton to Woodstock.

GALT, C.J.—There is no dispute as to the terms of the contract; it is admitted that the goods in question were manufactured by the plaintiff; the contention is that when they were delivered to the defendants at Woodstock they were not according to the contract. The goods are now at Woodstock, and on the trial the question will not be as to the manner in which they were made, but as to what is their condition now that they have been delivered; and in my judgment the learned Master was right in holding that this question can be better tried at Woodstock than at Walkerton.

Appeal dismissed with costs to the defendants in the cause.

D. C. Ross, for the appeal.

W. M. Douglas, contra.

[FERGUSON, J., 11TH MARCH, 1889.

IMPERIAL LOAN CO. v. BABY.

Judge in Chambers—Motion to extend time for moving Divisional Court.

A motion to extend the time for moving before a Divisional Court against the judgment of the trial Judge should not be made to a Judge in Chambers but to the Divisional Court itself.

Hoyles, for the defendant.

E. B. Brown, for the plaintiffs.

[13TH MARCH, 1889.

Re WHITLING v. SHARPLES.

ion—Division Court—Right or title to incorporeal hereditament.

ı by defendant for prohibition to the First Division the County of Wentworth to restrain proceedings in this ı the ground that the right or title to an incorporeal nent came in question, and the Division Court had no on, by s. 69 of the Division Courts Act, R. S. O. c. 51.

efendant was a bailiff, who seized goods of the plaintiff and the plaintiff sued him for damages for so doing. nce was a justification under a warrant of distress, and e in the defendant's principal to the land demised by a n the plaintiff's landlord.

aintiff did not dispute the title of the defendant's prin- he rent, but said that, before the date of the deed to the t's principal, he had made an agreement with his land- ay the rent by doing certain improvements and repairs remises, etc., and that before the distress the rent had sfied in this way.

that the contention of the plaintiff (which was the matter on) involved a consideration as to whether or not the nt was such an one as, if performed, would defeat the the defendant's principal, but did not invoke the question right or title to an incorporeal hereditament.

n refused with costs.

. *Douglas*, for the motion.

. *P. Clement*, contra.

[ROSE, J., 11TH MARCH, 1889.

DYMENT v. JERRETT.

debtor—Unsatisfactory answers on examination—Motion to commit —Material on motion.

n to commit the defendant for unsatisfactory answers on ination as a judgment debtor.

J.—The examination is most unsatisfactory. The nt's answer that he cannot account for what he has done

with the $2,200 in cash received from his brother is not such information as the plaintiff is entitled to. This, coupled with the unsatisfactory account of the possession of moneys by his wife, leaves a very unfavourable impression on the mind, especially as he says his non-payment of the debt "is a case of unwillingness."

If within one week after taxation he pay the costs of the examination and of this motion, and upon notice attend to be examined at his own expense, I will reserve the making of any order until I see the result of such further examination. In default I think I shall be able to make an order which will meet the justice of the case.

I may note that among the papers handed in appears a copy of an affidavit made by the defendant with certain exhibits. These I have not read, as the motion must, in my opinion, be disposed of on the examination—not on subsequent affidavits filed by the defendant.

Watson, for the plaintiff.
Reeves, for the defendant.

[FALCONBRIDGE, J., 6TH MARCH, 1889.

In re SOLICITOR.

Costs—Taxation—Appeal under Rule 854.

The practice upon appeals from pending taxations of costs to the Master in Chambers or the Master in Ordinary, under Rule 854, should be simple and inexpensive; there is no necessity for a formal order or a counsel fee upon such an appeal.

It is not desirable that any taxation should come more than once by way of appeal before a Judge; and where there was an appeal pending the taxation to the Master in Ordinary, and an appeal from his order to a Judge in Chambers, the latter was ordered to stand over till after the close of the taxation.

Haverson, for the appeal.
Nelson, contra.

[STREET, J., 11TH MARCH, 1889.

REGINA *ex rel.* DOUGHERTY v. McCLAY.

Municipal elections—Quo warranto—Powers of County Judge — R. S. O. c. 184, ss. 87 to 208—Rules 41, 1038—Motion to set aside proceedings.

Notwithstanding the provisions of R. S. O. c. 184, ss. 187 to 208, a County Judge has now no authority, as such, to give leave under Rule 1038 to serve a notice of motion to initiate *quo warranto* proceedings under the Municipal Act; and he has no authority at all to act in proceedings of that nature as a local Judge of the High Court, that power being expressly excepted from the powers conferred upon him as a local Judge by Rule 41.

A County Judge assumed to act in such proceedings, which were styled in the High Court of Justice.

Held, that he must be taken to have acted in his capacity as local Judge of the High Court, and objection to the proceedings was properly taken by motion to set them aside.

W. R. Meredith, Q.C., for the respondent.

Aylesworth, for the relator.

BLAKELEY v. INGRAM.

Costs—Trustee as plaintiff.

Upon a motion to dispose of the costs of this action it was not disputed that the costs of all parties should come out of the estate, but it was suggested that perhaps the rule as to trustee's costs was different where the plaintiff was the trustee and had not been brought into Court against his will. The plaintiff, who was appointed trustee of an estate by the Court, brought the action for a sale of land, an account, etc.

Held, that the plaintiff's costs should be taxed as between solicitor and client.

C. Millar, for the plaintiff.

T. C. Milligan, for the adult defendants.

F. W. Harcourt, for the infant defendants.

[The following authorities were referred to by the plaintiff's counsel:—*Re Love*, 29 Ch. D. 348, 350; *Lewin* on Trusts, 8th ed., 686-7; *Re Fleming*, 11 P. R. 272, 285; *Stanier* v. *Evans*, 34 Ch. D. 470, 477.]

[THE MASTER IN CHAMBERS, 11TH MARCH, 1889.

TRADERS' BANK v. KEAN.

Evidence—Examination—Motion to be made—Rule 578.

Immediately after appearance in the action a subpœna was issued and an appointment given for the examination of the defendant, and also of one M. D. Kean (not a party) before a special examiner at Barrie, to give evidence on behalf of the plaintiffs on a motion to be made by them under the rules respecting replevin for an order for replevying a certain guaranty, the subject of this action.

The subpœna and appointment were moved against on the ground that there was no motion, petition, or other proceeding pending in the action and the provisions of Rule 578 were therefore not applicable.

Held, that there must be a pending motion on which the examination is to be taken; and such was not the case here, as the subpœna spoke of a "motion to be made."

McMurray v. *Grand Trunk R. W. Co.*, 8 Ch. Chamb. R. 180; *Stovel* v. *Coles*, ib. 362, referred to.

Held, also, that the examination of the defendant at this stage was improper for another reason; the examination was manifestly on the merits of the action, and it was too early in the action for the plaintiffs to obtain discovery except by a special order under Rule 566.

Lefroy, for the plaintiffs.

F. A. Eddis, for the defendant.

NEW BRUNSWICK

In the Supreme Court.

REGINA v. BROWNELL.

(Crown case reserved.)

Railway—Obstructing and interrupting free use of—42 V. c. 9, s. 86 (D).

B., without the consent of a railway company, took a trolly or hand-car belonging to them, and ran upon the railway for a number of miles, at a time when, ordinarily, no train was

reasonably to be expected to be running upon that part of the road.

Held, KING, J., dissenting, that he was guilty of "obstructing and interrupting the free use of the railway," under s. 86 of the Dominion Act 42 V. c. 9, though his doing so did not actually interfere with any train.

In re COLIN CAMPBELL.

Summary Convictions Act—Summons—Service.

Service of a summons issued under the Summary Convictions Act held sufficient, where the door of the defendant's house was fastened, and the constable spoke to him through a closed window, explaining the nature of the process, and then placed a copy of it under the door, informing the defendant thereof; after which he returned to the window and showed the original summons to the defendant, who said, "That will do."

CROSSMAN v. HANINGTON.

Equity—Answer not signed nor sworn to.

Where an answer was put in neither signed nor sworn to by the defendant, and no order had been obtained allowing it to be so put in, it was removed from the files of the Court on application of the plaintiff.

BORDEN v. SUMNER.

Costs—Execution for non-payment of—Consol. Statutes, c. 38, s. 27—Delay.

An execution for non-payment of costs ordered under Consol. Statutes c. 38, s. 27, though the costs had been taxed nearly five years previously, it appearing that the delay was caused by an expectation that the costs would be credited against an account due to the execution debtor.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

McINTIRE v. WOODS.

Interpleader—Dispute as to amount due by garnishee—Procedure.

Under 49 V. c. 35, s. 10, a garnishee may have an interpleader as to the amount he admits to be due, although a larger amount may be alleged to be owing by the attaching creditor.

Merchants' Bank v. *McLean*, 5 Man. L. R. 219, overruled.

The garnishee should, however, upon affidavit, express his readiness to bring into Court the amount truly owing whatever that may be found to be. Such an affidavit was allowed to be supplemented. An issue may be directed to ascertain what is the true amount due.

MONKMAN v. BABINGTON.

Trespass and trover—Exemplary damages—Audita Querela.

The plaintiff and the defendant B. both claimed the ownership of a crop of wheat; the plaintiff as being tenant of B., and B. on the ground that the lease had expired. The question was whether the oral agreement between the parties was for one or five years. The defendants had cut and stacked eight stacks, but had not interfered with the rest of the wheat, which was cut and put up by the plaintiff in six stacks. The plaintiff had a verdict for $650.

Upon a motion for a new trial,

Held, 1. That the charge was not erroneous because the Judge refused to tell the jury that it was for the plaintiff to make out every part of the agreement, and not merely that part of it which he required for this case.

2. That the Judge was correct in telling the jury that if they found a verdict for the plaintiff they were not limited, in estimating damages, to the actual pecuniary loss but could allow exemplary damages in addition; that it was not necessary to point out the distinction between a *bona fide* assertion of right and wanton trespass.

3. That it was not necessary for the Judge to tell the jury that if their verdict was in trespass, the damage would be calculated to the whole crop, while in trover it would be limited to the part converted. The jury could not well have erred upon that point.

4. Some damage had occurred because of the occurrence of a hail storm, while a portion of the wheat was uncut. For this the defendants were not liable and the damages were reduced by $200, the amount estimated by the Court as attributable to that cause.

Just previous to the hour fixed for rendering judgment in term, affidavits were read by the defendants' counsel, showing that since verdict the plaintiff had thrashed seven of the stacks for his own use.

Held, that such a matter could be dealt with by the Court.

Affidavits having been filed and a further argument having taken place:

Held, 1. That under the charge the jury might well have given damages in trover for the whole crop, instead only of that part converted; and that the Judge's charge was therefore erroneous; DUBUC, J., dissenting.

2. The verdict was, therefore, further reduced to $225, being the value of the stacks converted by the defendants, less the value of one of them retaken by the plaintiff; DUBUC, J., dissenting.

[TAYLOR, C.J.

In re ASSINIBOINE VALLEY S. & D. F. CO.

Company—Winding-up—Removal of liquidator.

An application to remove a liquidator and appoint others was granted upon the grounds: (1) that creditors to the amount of

$29,123.23 out of a total of $29,451.39 requested the change; (2) that the proposed liquidator would act without remuneration; and (3) that the business connection of one of the proposed liquidators would be of value to the company.

[BAIN, J.

WATSON v. LILLICO.

Prohibition—Judge in Chambers.

A judge sitting in Chambers has no power to order the issue of a writ of prohibition to a County Court Judge.

BERNARDINE v. RURAL MUNICIPALITY OF NORTH DUFFERIN.

Municipal corporation—Contract not under seal.

While the defendant municipal council was in session it verbally contracted with the plaintiff for the construction by him of a bridge on a travelled road. During the work some payments were made upon account, and after its completion a resolution was passed accepting the bridge and directing payment. The Council afterwards repaired the bridge, and it was used by the public. In an action for the money:

Held, that the contract not being under seal, the plaintiff could not succeed.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [5TH MARCH, 1889.

THOMPSON v. ROBINSON.

Solicitor and client—Negligence of solicitor—Liability of partner.

R., a solicitor practising in Chatham, was employed in 1877 by the plaintiff to manage her business affairs, and he proceeded to invest the plaintiff's moneys upon mortgages. In 1878 he took the defendant W. into partnership with him, and the business of the plaintiff continued to be managed by him, but all entries were made in the books of the firm, and all legal charges went into the profits of the firm. Losses occurred in connection with these investments.

Held, BURTON, J.A., dissenting, affirming the decision of the Court below, 15 O. R. 662, that W. was liable. When the partnership was formed W., in order to escape liability, should have given warning to the plaintiff that he did not intend to accept liability.

In 1883 R. entered into an agreement with the plaintiff to purchase for her certain lands in Dakota, R. being entitled to a certain share in the profits of the speculation. The moneys were lost.

Held, reversing the decision of the Court below, that this transaction was not entered into by R. as a solicitor and that W. was not liable for the loss.

Moss, Q.C., for the appellant W.

Osler, Q.C., *Douglas*, Q.C., and *Aytoun-Finlay*, for the respondent T.

M. Wilson, for the respondents the trustees of R.

ROWLANDS v. CANADA SOUTHERN RAILWAY COMPANY.

Negligence—Railways—Workmen's Compensation for Injury Act—R. S. O. c. 141.

An engine-driver is a person who has charge or control of a locomotive or engine within the meaning of R. S. O. c. 141, s. 3, s-s. 5; and the plaintiff, a brakesman, who was injured in consequence of the cars being brought together without any warning signal from the engine, was held entitled to recover.

Cattanach, for the appellants.

R. M. Meredith, for the respondent.

[19TH MARCH, 1889.

CLARKSON v. THE ATTORNEY-GENERAL OF CANADA.

Revenue—Customs duties—Assignment for the benefit of creditors—Preference of Crown over subject—Writ of extent—R. S. O. c. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by B. and sold. The Crown claimed payment from the plaintiff as assignee of B. of the amount due for duties in priority to the payment of the claims of the general creditors of the estate.

Held, affirming the judgment of ARMOUR, C.J., 15 O. R. 632, that the Crown was not entitled to payment in priority to the general creditors of the estate, but that having come in under the assignment, the Crown was bound by the terms of the assignment and could take only ratably and proportionately with the other creditors.

By an agreement entered into before action the Crown was placed in the same position as if a writ of extent had been issued by the Crown against B. on the 19th day of February, 1887, for the recovery of the duty payable by B.

Held, in this also affirming the judgment of ARMOUR, C.J., that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned.

Robinson, Q.C., for the appellant.

Lash, Q.C., for the respondent.

CH. D.] [5TH MARCH, 1889.

McLEAN v. BROWN.

Sale of goods—Material condition in contract—Refusal to accept—Action for deposit and damages.

This Court being equally divided in opinion, an appeal from the judgment of the Court below, 15 O. R. 313, was dismissed with costs.

Per HAGARTY, C.J.O., and OSLER, J.A.—The stipulation as to consignment was a condition the breach of which justified the refusal to accept the lambs.

Per BURTON and MACLENNAN, JJ.A.—This stipulation was merely collateral to the contract.

Osler, Q.C., for the appellant.

Aylesworth, for the respondent.

C. P. D.]

SMITH v. MILLIONS.

Survey—Plan part of description in deed.

The decision of the Court below, 15 O. R. 453, was reversed with costs, this Court being of opinion that, having regard to the plan itself, the lots must be laid out in rectangular and not in rhomboidal shape.

Taylor McVeity, for the appellant.

Lash, Q.C., for the respondent.

POTTS v. BOIVINE.

Will—Cujus est solum ejus est usque ad cælum.

A testatrix, being the owner of certain lands and premises in the city of Belleville upon which a block of buildings was erected, devised the property in two parcels. The description of one parcel included an archway running through the centre of the block, but the rooms built over this archway were used with the premises devised as the other parcel.

Held, affirming the decision of the Court below, 16 O. R. 152, that the presumption *cujus est solum ejus est usque ad cœlum* is a rebuttable one, and that under the circumstances the rooms in question did not pass with the land.

Dickson, Q.C., and *Burdett*, for the appellant.

Northrup, for the respondent.

BOYD, C.]

In re CLARK AND THE UNION FIRE INSURANCE COMPANY.

Constitutional law—Dominion Winding-up Act—Intra vires—Application of Act to provincial corporation.

Held, affirming the decision of BOYD, C., 14 O. R. 618, that the Act 45 V. c. 23, now R. S. C. c. 129, is *intra vires* the Dominion Parliament, and applies to an insurance company incorporated by the Provincial Legislature.

Held, also, BURTON, J.A., dissenting, that the order having been made and the liquidator appointed by the Judge, the subsequent proceedings might properly be referred to the Master.

Lash, Q.C., for the appellant.

Bain, Q.C., for the respondents.

ROSE, J.]

In re CITIZENS' INSURANCE CO. AND HENDERSON.

Arbitration and award—Reference back to arbitrators—Time for moving—Delay—Discovery of new evidence—Fraud—Scope of reference back.

An application to remit a case back to arbitrators for reconsideration need not be made within the time limited for moving to set aside an award, but it must be made within a reasonable time and delay must be satisfactorily accounted for.

Leicester v. *Grazebrook*, 40 L. T. N. S. 883, approved and followed.

In this case a reference of the claims upon certain insurance policies was made by submission to two arbitrators, who disagreed, and in pursuance of the submission chose an umpire, who made his award on the 25th July, 1887. On the 29th May,

1888, the insurers moved for a reference back on the ground that they had then recently discovered evidence that a quantity of goods saved from the fire were not credited by the assured on their proofs of loss and were fraudulently concealed.

Held, that there should be a reference back to the arbitrators to consider the new evidence and determine its bearing on the questions originally submitted to them. The reference back should be general and not limited to an inquiry as to what goods were not destroyed by fire.

Bain, Q.C., and *Kappele*, for the appellants.

Aylesworth and *Hellmuth*, for the respondents.

C. C. HURON.]

In re McDONAGH AND JEPHSON.

Creditors' Relief Act—Executions against firm and against individual partners —Sale of firm property—Mode of distribution of proceeds.

The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class and not to alter the legal effect of the executions themselves or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy.

There were in a sheriff's hands executions (1) against R. alone; (2) against R., J. J., and G. J. on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partners and held it as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine purchased for the purpose of being used in another partnership business carried on by them, quite distinct from the partnership business to which the horse belonged; and (4) against G. J. and R. on a joint note in which R. was surety only for G. J. The horse was seized and sold.

Held, reversing the decision of the Court below that the proceeds of this sale were distributable ratably among the execution creditors (2) (3) and (4).

Moss, Q.C., and *James Chisholm*, for the appellants.

S. H. Blake, Q.C., for the respondents.

C. C. BRANT.]

BARTRAM v. HILL.

Sale of goods—Contract induced by false pretences—Purchaser for value without notice.

The plaintiff exchanged with one H. a horse belonging to the plaintiff for a mare supposed to belong to H. and gave H. $10.00 "to boot." As a matter of fact the mare had been stolen by H. and her owner subsequently reclaimed her. H. sold the horse to the defendant, who had no knowledge of the fraud.

H. had not been prosecuted under R. S. C. 174, s. 250.

Held, affirming the judgment of the Court below, that the plaintiff having intended to part absolutely with his property in the horse to H. and the defendant having purchased the horse in good faith, the fact that the transfer to H. was made by way of barter and exchange and not by way of sale, did not affect the matter, and the plaintiff could not recover.

Bentley v. *Vilmont*, 12 App. Cas. 471, considered.

MacKenzie, Q.C., for the appellant.

Aylesworth, for the respondent.

C. C. PERTH.]

GOLDIE v. JOHNS.

Tax sale—Replevin—Sale of safe held under lien agreement—R. S. O. c. 193, s-s. 122, 123, 124.

In December, 1886, the defendants sold to one H., who was a tenant to the defendant G. of certain premises in the city of Stratford, a safe under the ordinary lien agreement, the purchase money being payable in two instalments at six and twelve months. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H. (including the safe) at a valuation and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premises to the defendant P. and sold to him the chattels (including the safe.)

The defendant J. was collector of taxes for the city of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887.

It was provided by by-laws of the city that all taxes and assessments should be paid by 31st December in each year and that five per cent. should be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment.

On the 2nd November, 1887, J. served a notice on P. showing the amount of taxes and requiring payment of these taxes on or before 31st December "according to city by-law; after that date five cents on the dollar will be added to the above amount."

On the 9th March, 1888, the defendant J. issued his warrant to the defendant T. to distrain, and the safe was seized and sold on the 15th March to the defendant G. Five per centum was added to the amount of the taxes, but no demand was made after 31st December for payment.

On the 9th March the safe was demanded by the plaintiffs.

Held, that the sale (upon the evidence) was not made in good faith and was void.

Held, also, affirming the decision of the Court below, that the sale was bad, no demand being made after the time fixed for payment.

Idington, Q.C., for the appellants.
Aylesworth, for the respondent.

C. C. LINCOLN.]

MAY v. REID.

Prosecution under R. S. C. c. 8, s. 111.—Costs as against prosecutor.

The plaintiffs were tried at the Haldimand Assizes in the spring of 1887 for bribery, and acquitted. The information upon which the indictment was founded was laid against them by the defendant, and at the conclusion of the trial the presiding Judge at the request of the counsel for the plaintiffs indorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution and brought this action to recover payment of these costs from the defendants. The information and the indictment with the indorsement were the only evidence that the defendant was a private prosecutor.

Held, that the indorsement on the indictment had no force as a judgment or finding of fact, and could not be accepted as proof of the defendant's position.

Held, also, that the fact that the information was laid by the defendant did not in itself place him in the position of private prosecutor.

Decision of the Court below reversed.

Aylesworth, for the appellant.

Lash, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 4th February, 1889.

REGINA v. WASON.

Constitutional law—51 V. c. 32 (O.)—Ultra vires—B. N. A. Act, s. 91, para. 27—Criminal law.

Held, Street, J., dissenting, that the Act of the Ontario Legislature 51 V. c. 32, "An Act to provide against frauds in the supplying of milk to cheese or butter manufactories," is *ultra vires* as coming within the class of criminal law reserved exclusively to the Parliament of Canada by the B. N. A. Act, s. 91, para. 27.

Per Armour, C.J.—The primary object of this Act is to create new offences and to punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

Per Street, J.—The punishments imposed by the statute are directed to the enforcement of a law of the Provincial Legislature relating to property and civil rights in the Province; the offences created by it formed no part of the criminal law previously existing, and the apparent object is to protect private rights rather than to punish public wrongs.

E. B. Edwards, for the defendant.

C. J. Holman, for the complainant.

E. F. B. Johnston, for the Attorney-General of Ontario.

REGINA v. GIBSON.

Criminal law—Conspiracy—Trade combination—R. S. C. c. 173, s. 13, s-s. 2—Evidence—Crown case reserved—Form of case—Sufficiency of indictment—Motion to quash—R. S. C. c. 174, s. 259.

Held, 1. That a Crown case reserved should be reserved for the consideration of the Justices of one of the Divisions of the High Court, not of a Divisional Court, and when the Court is asked whether on the evidence the defendants were lawfully convicted, the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence.

2. That the sufficiency of an indictment upon a motion to quash it is not a question of law which arises on the trial, and therefore is not within R. S. C. c. 174, s. 259, and the Court has no power to entertain it; FALCONBRIDGE, J., *dubitante*.

Semble, also, that the indictment in this case was sufficient.

3. That the defendants, members of a trade union, in conspiring to injure a workman B., a non-unionist, by depriving him of his employment were guilty of an indictable misdemeanor, and that what they conspired to do was not for the purposes of their trade combination within the meaning of R. S. C. c. 173, s. 13, s-s 2; and that upon the evidence the conviction of the defendants for unlawfully conspiring together to injure B. in his trade and to prevent him from carrying it on was right.

John Crerar, for the Crown.

Osler, Q.C., and *Lynch-Staunton*, for the defendants.

[THE DIVISIONAL COURT, 4TH FEBRUARY, 1889.

CURRY v. CANADIAN PACIFIC R. W. CO.

Railway company—Negligence—Invitation to passenger to board moving train—Patent danger—Question for jury—New trial.

The plaintiff, who was a passenger on a train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavoured to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation. They

also found (2) that the plaintiff used a reasonable degree of care in endeavouring to get on, and (3) that he was injured while trying to get on, in pursuance of the request of the conductor.

It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation or to attempt to get on the train.

Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the questions involved in the action could not be determined upon the findings and that there should be a new trial.

Per ARMOUR, C.J.—Questions for the jury suggested.

J. W. Elliott, for the plaintiff.

G. T. Blackstock, for the defendants.

[GALT, C.J., 27TH MARCH, 1889.

MACDONALD v. ANDERSON.

Receiver—Equitable execution—Rents—Restraint on anticipation.

Motion by the plaintiff for the appointment of a receiver to receive the rents of certain property held in trust for the defendant, a married woman, and the judgment debtor of the plaintiff. The property in question was vested in trustees to be held by them upon trust, at the request of the defendant during her life, and afterwards at their discretion, to sell the premises, and to hold the moneys to arise from such sale upon trust to pay the income to the defendant during her life for her separate use independently of her present or any future husband, "and her receipts alone shall be sufficient discharges and she shall not have power to deprive herself of any part of the said principal money or of the income thereof by anticipation."

GALT, C.J.—It appears to me this case is concluded by the case of *Chapman* v. *Biggs*, 11 Q. B. D. 27. It is true, as argued by Mr. Shepley, that this application is for a receiver of the rents of the house, and that the house has not been sold; but if effect was given to such an argument the result might produce a serious loss and inconvenience to the defendant without in any degree benefitting the plaintiff, as the defendant could at once request the trustee to sell the property.

Motion dismissed. No costs.

Shepley, for the plaintiff.

C. J. Holman, for the defendant.

[STREET, J., 2ND MARCH, 1889.

YOUNG v. MIDLAND R. W. CO.

Railways—Compensation for land taken—Conveyance in fee by tenant for life—C. S. C. c. 66, s. 11—24 V. c. 17, s. 1—Estates in compensation money—Statute of Limitations—Will—Devise of land taken for railway—Inoperative to pass compensation—Parties.

Under the Railway Act, C. S. C. c. 66, s. 11, s-s. 1, as interpreted and explained by 24 V. c. 17, s. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money; and, therefore, a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money remained responsible for the payment.

The meaning of s-s. 22 of s. 11 is that the money value of the land is converted into real estate, which the railway company or the Court holds for the owners of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and upon the tenant for life, in this case, conveying the fee she became tenant for life in the compensation, and those entitled to the inheritance in the land became entitled to the reversion in fee in the compensation as against the railway company; and the Statute of Limitations did not begin to run against them till the death of the tenant for life.

The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company.

Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties.

J. K. Kerr, Q.C., and *Wm. Macdonald*, for the plaintiff.
Osler, Q.C., for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 5TH MARCH, 1889.

MACDONELL v. BLAKE.

Law Society—Retired Judge—Ex officio Bencher—R. S. O. (1877) c. 138, s. 4.

One who has been appointed a Judge of one of the Superior Courts of Ontario and has resigned before serving out fifteen years, not being afflicted with some permanent infirmity disabling him from the due execution of his office, and has resumed the active practice of his profession as a lawyer, is a retired Judge within the meaning of R. S. O. (1877), c. 138, s. 4, so as to entitle him to act as an *ex officio* Bencher of the Law Society.

James Reeve, for the plaintiff.

Lount, Q.C., and *Reeve*, Q.C., for the Law Society.

H. Cassels, for the defendant Blake.

[BOYD, C., 27TH MARCH, 1889.

HALL v. FORTYE.

Insolvent debtor—Assignment for benefit of creditors—Consent of creditors—Ratification.

Motion by the plaintiff, the Sheriff of Peterborough, for an injunction to restrain the defendant from selling the stock-in-trade of Porter Bros., insolvent debtors. The defendant was the assignee of Porter Bros. for the benefit of creditors, under R. S. O. c. 124, but the creditors did not execute the assignment to him or consent to it at the time. Subsequently, however, his appointment was ratified at a meeting of creditors, which was held before the execution of an assignment to the plaintiff by the debtors.

BOYD, C., held that it was not necessary to have the assignment executed or assented to at the time of execution, and so long as it received the consent of creditors before the execution of another assignment, it was not void as against such subsequent assignment, within s. 3, s-s. 2, of R. S. O. c. 124.

Hoyles, for the motion.

Shepley, contra.

COMMON PLEAS DIVISION.

[IN BANC, 22ND DECEMBER, 1888.

REGINA v. CARDO.

Criminal law—Rape on daughter—Evidence of.

The defendant was indicted and convicted for committing a rape on his daughter. The learned Judge left it to the jury to say whether on the evidence the act of connection was consummated through fear or merely through solicitation.

Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence given to sustain the charge, and it having been left to them with the proper direction in such a case.

N. Murphy, for the prisoner.

Irving, Q.C., for the Crown.

REGINA v. STEWART.

Physicians and surgeons—Practising medicine—Evidence of—Conviction—Costs.

The defendant attended a couple of sick persons, for which he received payment, but he neither prescribed nor administered any medicine nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient.

Held, that this was not a practising of medicine contrary to the provisions of R. S. O. c. 148, s. 45, and a conviction therefor was consequently quashed, and with costs against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction.

Hamilton Cassels, for the defendant.

Osler, Q.C., contra.

[THE DIVISIONAL COURT, 22ND DECEMBER, 1888.

MAIL PRINTING CO. v. DEVLIN.

Contract—Election to sue one of two persons—Evidence of.

The defendant D., after some correspondence with the plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with the plaintiffs as to entering into the same.

A contract had been drawn up by the plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated, it was at the plaintiffs' request signed by D., and the entry in the plaintiffs' books was "G. A. Devlin, Toronto Union Medicine advertising contract." The first and second payments were made by D., but on the third payment coming due, he stated his desire not to make it, as it might prejudice a claim he had against G., his partner, with whom he had a dispute about the partnership affairs, whereupon the plaintiffs saw G., and on his stating that it was D.'s business to pay their accounts, the plaintiffs sued D., and moved for judgment under Rule 80, stating in their affidavit in support of the motion that "the claim was under an agreement made between the parties," etc., and that "the defendant," etc., "was and still is justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial.

Held, that on the evidence the credit under the contract was given to D. alone; but even treating D. as agent for an undisclosed principal, namely, for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable but to rely on the individual liability of D.

J. B. Clarke, for the plaintiffs.

H. J. Scott, Q.C., and *W. D. Macpherson*, for the defendants.

FERGUSON v. ROBLIN.

Master and servant—Responsibility of master for act of servant—Joint wrongdoers.

The plaintiff's son on the 31st July, 1886, purchased from the defendant R. an organ for $120, payable in twenty-six monthly instalments of $5 each, a lien receipt being signed by the son, stating that the property was to remain in R. until all the instalments were paid, and authorizing R. in case of default of payment of said instalments to resume possession of the organ, which the son agreed to deliver up to R. when required; R. and

his agents and assigns to have full right and liberty to enter any house or premises in which the organ might be and remove same without resorting to any legal process. The organ was sent to the plaintiff's house, where the son was living, and remained there until the 30th November, when, no instalment having been paid, R. sent the other defendant, his bookkeeper, and two assistants to the plaintiff's house, with instructions to go and get the organ. The bookkeeper, taking the lien receipt as his authority, went to the plaintiff's house, opened the door, and entered the hall, but on his attempting to open the door of the room where the organ was, the plaintiff's wife, (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured.

Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty and were within the general scope of his authority.

Held, also, that the judgment against both R. and the bookkeeper was maintainable; for it was recovered against them as joint wrongdoers.

MacGregor, for the plaintiff.

Bigelow, for the defendant Ruse.

In re SHERWOOD v. CLINE.

Prohibition—County Court—Sum beyond jurisdiction—Balance within jurisdiction.

Where in an action in a County Court, judgment was given for a sum in itself within the jurisdiction of the Court, but which was the balance of a sum beyond the jurisdiction, and which was arrived at, not by any settlement or statement of account between the parties, but on the ascertainment of a disputed account;

Held, this was the allowance of a claim beyond the jurisdiction of the Court, and a writ of prohibition was granted.

Strathy, Q.C., for the plaintiff.

Aylesworth, for the defendant.

BOYD v. NASMITH.

Banks and banking—Cheque—Marking good by bank—Subsequent suspension and non-payment—Discharge of drawer.

The payees of a cheque drawn on the Central Bank took it between two and three o'clock of the day on which it was drawn to the bank, and at the payees' request the cheque was marked good, the bank in accordance with their custom charging the amount of the cheque to the drawer's account. The payees a few minutes before three o'clock took the cheque and offered it as part of a deposit at another bank, but it was refused, and on the same day, about five o'clock, the Central Bank suspended payment. On the following day the payees presented the check at the Central Bank, but on account of the bank having suspended, payment was refused.

Held, that the drawer of the cheque was discharged from all liability thereon.

Mowat, Q.C., A.-G., for the plaintiffs.

J. J. Maclaren, for the defendant.

WOOD v. McPHERSON.

Jury—Challenge—Bias of jury—Change of venue.

At the trial of an action the defendant's counsel challenged a juryman for cause. On the trial Judge stating that he did not think any cause was shewn, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the Judge, and the juryman remained on the jury.

Held, that on a motion for a new trial an objection to the juryman could not be entertained.

The action was tried at Brantford, and a new trial was moved for to take place at a place other than Brantford, because the jury there were biassed against the defendant.

Held, that this formed no ground for a new trial.

Wallace Nesbitt, for the plaintiff.

Ermatinger, Q.C., for the defendant.

FLANNIGAN v. CANADIAN PACIFIC R. W. CO.

Railways—Dry grass on side of track—Fire therefrom—Liability of company.

During the summer of 1888, which was a very dry one, little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country, the defendants allowed brush and long dry grass which had been growing for two or three years to remain on the side of the track adjoining the plaintiff's farm, while they had the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass, etc., there.

A spark from the defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended into the plaintiff's land, and destroyed his fences, growing crops, etc. In an action against the defendants therefor, the jury found for the plaintiff.

Held, that the case was properly submitted to the jury, and their verdict could not be interfered with.

Wallace Nesbitt and *Kidd*, for the plaintiff.

R. W. Scott, Q.C., and *Watson*, for the defendants.

LAMPMAN v. TOWNSHIP OF GAINSBOROUGH.

Executors and administrators—Action within six months by person beneficially entitled through death of intestate—Municipal corporations—Evidence of negligence—Contributory negligence.

An action for damages by reason of the death of a person can be maintained under R. S. O. c. 135, s. 7, by the persons beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased.

The action in this case was for damages sustained through the death of deceased by reason of the alleged neglect of the defendants in allowing a highway to be out of repair. At the place in question the highway was connected by a bridge crossing a creek, which had overflowed and had covered the bridge and

embankments on either side with water to the depth of from four to six inches. The deceased, who was driving along the highway with a horse and waggon, in attempting to cross the bridge, was thrown out of the waggon into the creek and killed. There was evidence of negligence on the defendants' part; and though contributory negligence was set up, it was merely inferential from the way the waggon went over the bridge and the position of the horse and waggon were in after the accident. The jury found for the plaintiff.

Held, under the circumstances, that the Court could not interfere.

German, for the plaintiffs.

J. K. Kerr, Q.C. and *Aylesworth*, for the defendants.

HARKIN v. DONEY.

Libel—Article in newspaper—Evidence of authorship—Refusal to answer as to authorship—Claiming privilege against criminal proceedings—Effect of.

Action of libel. The libel consisted in a letter published in a Boston, U.S., newspaper claimed to have been written by the defendant. The letter stated that it was written in answer to an anonymous letter dated 15th September, published in the same newspaper, which the writer stated he had seen the manuscript of, and which was a clumsy attempt to make the writer believe was written further off than Ottawa, and had also seen the manuscript of a letter written by an Ottawa shoe-dealer to a Boston firm, and that the handwriting of both was the same. The anonymous letter referred to a trip made by the defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened up a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the crescent heel plate machine, as "our machine." The letter had the defendant's name subscribed to it. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publisher, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant on his examination stated that both he and the plaintiff were boot and shoe dealers in Ottawa; that he was a subscriber and correspondent to this newspaper; that he had been on a trip to New Brunswick

and on his return saw an anonymous letter of 15th September in this newspaper, as also the manuscript thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that in addition to the above he intended proving that when the plaintiff came to Ottawa he stopped at the same hotel as the defendant; that the defendant was the sole agent and vendor of the crescent heel plate machine.

Held, that this was sufficient evidence to go to the jury of the defendant being the author of the letter in question.

Quaere, whether the refusal to answer the direct question as to authorship or the claim of privilege against criminal proceedings, afforded any evidence thereof by way of admission or estoppel or otherwise.

Taylor McVeity, for the plaintiff.

Aylesworth, for the defendant.

[BOYD, C., 27TH MARCH, 1889.

MOLSONS BANK v. DREW.

Married woman—Separate estate—R. S. O. c. 132, s. 4.

Action on a promissory note, the defendant Lewis, a married woman, being indorser thereon.

BOYD, C.—The property held by Mrs. Lewis, which was conveyed to her by her husband in 1879, was by the operation of the law, consolidated in R. S. O. c. 132, s. 4, s-s. 1, the separate estate of the wife, which, by the decisions referred to in the argument (*Bryson* v. *Ontario & Quebec R. W. Co.*, 8 O. R. 380; *Re Konkle*, 14 O. R. 183; *Re Gracey and Toronto Real Estate Co.*, 16 O. R. 226) she could convey and therefore bind without the intervention of her husband. There is a clerical or typographical error in the last clause of s-s. 2 of that section 4, wherein "section" is printed instead of "sub-section." That is manifest by reference to the use of the same word in s-s. 4 of that section and by reference to the original Act. The wife (defendant) is therefore liable on the note made in 1888 and the plaintiff is entitled to judgment as against her, adding costs to debt.

W. A. Reeve, Q.C., and *Lavell*, for the plaintiffs.

McClive, for the defendant Lewis.

[

HAMILTON PROVIDENT AND LOAN SOCIETY v.

Mortgage—Sale by mortgagor subject to mortgage—Further mortga
chaser—Lien of mortgagor on land for amount of mortgag

The defendant mortgaged certain lands to the plaintiff anting to pay the mortgage money, and then sold to assumed payment of the mortgage as part of the money. S. then gave a second mortgage to the plainti then further mortgaged the land. Default having bee the plaintiffs sued the defendant to recover the amou mortgage, and prayed for judgment for the whole but neither sale nor foreclosure was asked.

Held, that the plaintiffs were entitled to judgment covenant against the defendant for the amount of his m but that the defendant was entitled to a lien on the lan amount of the mortgage which, as between him and S bound himself to pay; and leave was given to the defe amend and bring the proper parties before the Court enforce his lien.

Muir, for the plaintiffs.
Creasor, Q.C., for the defendant.

WILBERFORCE EDUCATIONAL INSTITUTE v. HO

Corporation—Trustee, removal of—Dealing with trust funds—P
Attorney-General.

In an action by a corporation for the removal of on trustees, who also acted as secretary, for alleged improper with the corporate funds, judgment was given, but with finding of wilful misconduct, directing such trustee's on the ground that so much doubt was cast upon his with the trusts funds that it would not be proper to allo remain a member of the board.

The action is maintainable without making the A General a party.

Moss, Q C., and *Craddock*, for the plaintiffs.
W. R. Meredith, Q.C., and *J. B. Rankin*, for the defe

[STREET, J., 12TH FEBRUARY, 1889.

re PECK AND TOWNSHIP OF AMELIASBURG.

al corporations—Power to take stock in bridge company—Municipal ct—Special Act—Special rate to be levied each year—Form of.

', that s-s. 11 of s. 479 of the Municipal Act, R. S. O. providing that the council of a municipality may pass s for taking stock, etc., in an incorporated company in of any bridge, etc., "under and subject to the respective s in that behalf" only authorizes the passing of by-laws such stock where in any special or general Act under bridge company is incorporated, a provision is contained zing the municipal council to hold such stock, etc.

re, therefore, the Act incorporating the Bay of Quinte Company, 50 & 51 V. c. 97 (D.) did not profess to con- power on the municipality to take stock, etc., in such ny, no power was conferred under the Municipal Act to do d a by-law passed by the municipal council was therefore d, and directed to be quashed.

by-law instead of, as required by s. 340 of the Municipal recting specific sums to be levied each year for the payment debt and interest to be so raised in each year by a special fficient therefor, leaving the amount of the rate to be ined each year, directed that during the currency of the ures a special rate of so much on the dollar, (specifying it) d above all other rates, should be levied and collected in ear.

', that this also rendered the by-law bad.

. Marsh, for the applicant.

on, for the township.

IN CHAMBERS.

[Rose, J., 18th M

DELANEY v. MACLELLAN.

Security for costs—Nominal plaintiff.

The defendants in an action of ejectment, in whi
tiff claimed title as owner subject to a mortgage
moved for security for costs on the ground that the
not able to pay costs and that the action was not re
by him but by the bank.

It was shown that the plaintiff was financially wo
his interest in the land was so doubtful that he did
cient interest in the question to litigate it; that
structed their own solicitor to look into the title, too
of counsel, and were advised to have an action bro
name of the mortgagor, who was then for the fir
sulted about bringing the action; that the ordinar
the bank was retained to bring the action; and that
he knew the plaintiff was insolvent. It was also fai
from the evidence that the bank had really in fact
solicitor, and that the solicitor would look to the
costs.

Held, that, under these circumstances, the act
regarded as that of the bank, and not of the plaint
therefore required to give security for costs.

Parker v. *Great Western R. W. Co.*, 9 C. B. 766;
v. *Morris*, 7 Dowl. 712, followed.

W. H. P. Clement, for the plaintiff.

J. B. Clarke, for the defendant.

[The Master in Chambers, 27th M

REGINA ex rel. STONEHOUSE v. H

Costs—Scale of—Controverted municipal election—Quo warran

An appeal by the relator under Rule 854, pending
of costs by S. B. Clark, one of the taxing officers
The question was as to the scale upon which the cos

l relator of a *quo warranto* proceeding respecting a contro-
l municipal election were to be taxed.

e respondent contended that the old tariff of Michaelmas
, 35 V., still applied to such proceedings. The relator con-
d that the old tariff had been superseded, and the *quo*
nto proceeding having been instituted in the High Court,
he costs must be on the scale of that Court.

tion 208 of the Municipal Act R. S. O. c. 184 provides *inter*
hat the Judges of the High Court may by rules regulate
practice respecting costs of such proceedings, and that
isting rules shall remain in force until rescinded. By
1,217, the table of costs set forth in the tariff A. appended to
les shall be that according to which all costs in civil actions
e High Court shall be taxed. By Rule 4, the interpretation
es of the Judicature Act shall apply to these rules. By s-s. 3
of the Judicature Act, R. S. O. c. 44, "action" shall include
nd shall mean a civil proceeding commenced by writ, or in
other manner as may be prescribed by rules of court. Rules
to 1,044 prescribe the manner of commencing and carrying
o warranto proceedings in respect of controverted municipal
ons.

E MASTER IN CHAMBERS held that this proceeding was an
n within the meaning of the Rules, and that the costs
d be taxed according to tariff A., that is the tariff of costs
ions in the High Court.

Armour, for the relator.

B. Clarke, for the respondent.

Supreme Court of Canada.

RIO.] [18TH MARCH, 1889.

GOLDSMITH v. CITY OF LONDON.

ipal corporations—Construction of street crossing—Elevation above the dewalks—Injury to person crossing—Liability of municipality for.

brought an action against the city of L. for damages
d by striking her foot against a street crossing in said city
alling, whereby she was hurt. The principal ground on

which negligence was based was that the crossing
some three or four inches above the level of the s
rendered accidents of the kind in question more like
The jury gave G. a verdict with $500 damages, whi
sional Court and the Court of Appeal, the latter
equally divided, affirmed. On appeal to the Supre
Canada ;

Held, reversing the judgment of the Court of Ap
N. 303, STRONG and FOURNIER, JJ., dissenting, tha
the street crossing being higher than the street di
the city liable.

W. R. Meredith, Q.C., for the appellants.

R. M. Meredith and *Love*, for the respondent.

MURPHY v. KINGSTON & PEMBROKE R.

*Railways—Expropriation of land—Description in map or
42 V. c. 9.*

No land can be taken for the line of a railway
located, or for any deviation therefrom, at any po
until the provisions as to places and surveys prescrib
original line, by 42 V. c. 9, Railway Act of 1879, s
with as to every such deviation.

Therefore, where after a road had been completed a
pany obtained additional powers from Parliament as
could hold in K., they sought to expropriate the land
was not on the map or plan originally registered ;

Held, affirming the judgment of the Court of Ap
N. 418, that they were not entitled to such expropria

Robinson, Q.C., and *Cattanach*, for the appellants.

S. H. Blake, Q.C., and *Britton*, Q.C., for the respo

REGINA *ex rel.* FELITZ v. HOWLAND
O'BRIEN'S CASE.

*Appeal—Contempt of Court—Discretion—Jurisdiction—Constru
—Interference with a judicial proceeding—Proceedings f
Locus standi—Punishment—Infliction of costs.*

An appeal will lie to the Supreme Court of Cana
judgment of a Provincial Court in a case of constr

pt. Such a decision is not an order made in the exercise of judicial discretion of the Court making it, from which, by 7 of the Supreme and Exchequer Courts Act, no appeal shall TASCHEREAU, J., *hesitante*.

uch an appeal will lie, though no sentence was pronounced inst the party in contempt, but he was found guilty and ered to pay the costs of the proceedings.

I. was elected Mayor of Toronto and was unseated by the ter in Chambers on proceedings in the nature of a *quo warto* instituted for the purpose, the Master holding that the perty qualification of H., who had qualified in respect of proty of his wife, was insufficient. Notice of appeal was given, a declaratory Act having been passed by the Ontario Legisre removing such disqualification, such notice was counterded and the appeal abandoned. In the meantime O'B., citor for H., had written a letter to a newspaper in Toronto which the following expressions occurred, after stating that qualification condemned had always been held sufficient and never before been questioned :—

Chief Justice Richards, probably the best authority on such ters in Canada, had held in 1871 that under such circumces the husband had the right we contend for in the present . This decision has never been overruled, is consistent n common sense, and with the universally accepted opinion he subject.

You may naturally ask, why then was the decision the other ? This question I am unable to answer. The delivered gment affords no answer. The arguments addressed were ply ignored, and the authority relied on by us, so far from g explained or distinguished, was not even referred to. This minently unsatisfactory to both the profession and the public n officer of the Court overruling the judgment of a Chief tice, who, above all others in our land, was skilled in matters nunicipal law."

Proceedings were instituted by the original relator in the prolings to unseat H., to have O'B. committed for contempt; the ce of abandonment of the appeal had been given before such eedings were begun.

Held, 1. That the appeal being abandoned, the *quo warranto* eedings were at an end, and the relator had no *locus standi* uch proceedings to enable him to charge O'B. with contempt

in interfering with the judicial proceeding. In such case the Court could institute or instigate the proceedings.

2. That the publication complained of was a fair cri of a judicial decision which any person is privileged to m

3. That the infliction of costs was a punishment for the a contempt in the nature of a fine, so that the appeal was n costs only.

Judgment of the Court of Appeal, 14 A. R. 184, reversed

S. H. Blake, Q.C., for the appellant.

Bain, Q.C., for the respondent.

NEW BRUNSWICK.]

ELLIS v. BAIRD.

Appeal—Contempt of Court—Final judgment—Practice.

E. was served with a rule issued by the Supreme Court o Brunswick calling upon him to show cause why a writ of a ment should not issue against him, or he be committe contempt of Court in publishing certain articles in a newsp On the return of the rule, after argument, it was made abs and a writ of attachment was issued. E. appealed fro judgment making the rule absolute, and by the case on app appeared that the practice in such cases in New Brunsw that the writ of attachment is issued only in order to brin party into Court when he may be ordered to answer inter tions by which he may purge his contempt, and if he fails so the Court may pronounce sentence; but no sentence c pronounced until the party is brought before the Court o writ of attachment.

The counsel for the respondent moved to quash the appe want of jurisdiction.

Held, that the judgment appealed from was not a final ment, from which an appeal would lie to the Supreme Cou Canada under s. 24 (a) of the Supreme and Exchequer C Act, R. S. C. c. 135.

Appeal quashed without costs.

L. H. Davies, Q.C., for the appellant.

L. A. Currie, for the respondent.

INCE EDWARD ISLAND.]

TRAINOR v. BLACK DIAMOND S. S. CO.

ill of lading—Exceptions—Construction—Improper stowage—Negligence —Liability of shipowner.

A bill of lading acknowledged the receipt on board a steamer the defendant company of a number of packages of fresh meat pped in good order and condition at the Port of St. Johns, wfoundland, subject to the following exceptions, among others, respect of which the defendants would not be liable for nages:— "Loss or damage arising from sweating, decay, wage, or from any of the following perils, whether arising m the negligence, default, or error in judgment of the pilot, ster, mariners, engineers, or other persons in the service of ship, or for whose acts the shipowner is liable, (or otherwise vsoever).

Held, per STRONG, TASCHEREAU, and GWYNNE, JJ., that the rds "whether arising from the negligence, default, or error in gment of the pilot," etc., applied as well to the exceptions ich precede as to those which follow them, and would relieve defendants from liability for damage by stowage so arising. RCHIE, C.J., and FOURNIER, J., contra.

The damage to the meat shipped was occasioned by its being en on board during a heavy rain, stowed in uncovered hatch-ys, and the men stowing it trampled upon it with muddy boots l spit tobacco juice upon it.

Held, affirming the judgment of the Supreme Court of Prince ward Island, RITCHIE, C.J., and FOURNIER, J., dissenting, that loss arose from stowage arising from the negligence of per-s for whose acts the shipowners were liable, and the defen-nts were relieved by the exceptions in the bill of lading.

L. H. Davies, Q.C., and *Morson*, for the appellant.
Fred. Peters, for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 7th Ma

REGINA v. RYMAL.

Criminal law—False pretences—Contract to pay money—Giving note instead of money—Valuable security.

The defendant by untrue representations, made w ledge that they were untrue, induced the prosecutor contract to pay $240 for seed wheat. The defendant a sented that he was the agent of H., whose name ap the contract. H. afterwards called upon the prose procured him to sign and deliver to him a promisso his, H.'s, favour for the $240. The contract did n for the giving of a note, and when the representat made the giving of a note was not mentioned. The p however, swore that he gave the note because he ha into the contract.

The defendant was indicted for that he by false fraudulently induced the prosecutor to write his nam paper so that it might be afterwards dealt with as a security, and upon a second count for by false prete curing the prosecutor to deliver to H. a certain valuable

Held, upon a case reserved, that the charge of false can be sustained as well where the money is obtain note procured to be given through the medium of a c where obtained or procured without a contract; and th the prosecutor gave a note instead of the money, by a with H., did not relieve the prisoner from the consec his fraud; the giving of the note was the direct res fraud by which the contract had been procured; and dant was properly convicted on the first count as being an offence under R. S. C. c. 164, s. 78; but

ld, that the note before it was delivered to H. was not a ble security but only a paper upon which the prosecutor written his name so that it might be afterwards used and with as a valuable security; and the conviction of the dant upon the second count could not stand.

x v. *Danger*, Dearsley & Bell 307, followed.

rewell, for the Crown.

w, for the defendant.

[The Divisional Court, 4th February, 1889.

NTIES OF LEEDS AND GRENVILLE v. TOWN OF BROCKVILLE.

a Temperance Act—Application of fines—49 V. c. 48, s. 2—Construction of orders-in-council—County and town.

he Canada Temperance Act came into force in the d counties of L. and G. on 1st May, 1886. On 2nd June, the Parliament of Canada passed the Act 49 V. c. 48; f which provided that the Governor-in-Council might from to time direct that any fine, etc., which would otherwise g to the Crown for the public uses of Canada, should be "to any provincial, municipal, or local authority which, y or in part, bore the expenses of administering the law which such fine, etc., was enforced, or that the same d be applied in any other manner deemed best adapted to the objects of such law and to secure its due administra-

29th September, 1886, an order-in-council was passed ing that all fines, etc., recovered or enforced under the da Temperance Act within *any city or county* which had ed the Act, which would otherwise belong to the Crown for ublic uses of Canada, should be paid to the treasurer of the r county, as the case might be, for the purposes of the Act. the 15th November, 1886, a second order-in-council was d directing that the first should be cancelled, and that all etc., recovered or enforced under the Act within *any city unty or any incorporated town separated for municipal purposes the county*, should be paid to the treasurer of the city, porated town, or county, as the case might be, for the pur- of the Act.

The town of B. was at the time the Act was br
force an incorporated town separated from the cou
and G. for municipal purposes; and between the dates
orders-in-council the police magistrate of the town
treasurer of the counties $750, the amount of fines rec
enforced by him for violations of the Canada Temp
within the town.

Held, STREET, J., dissenting, that in the absence of a
tion by the treasurer of the counties of the money so p
the town of B. was entitled to recover it from the coun
passing of the second order-in-council was a complete
of the first, and the second was retroactive in the se
provided for the application of all fines, etc., theretofor
or enforced.

Per STREET, J.—The first order-in-council operate
from the Crown to the municipality, with an intima
as to the purpose to which it was expected the gif
applied, but carrying with it no legal obligation tha
be applied in any particular manner. It was a con
the money was finally at home, so far as the Crow
cerned, when the municipality received it, and the re
the order could not revoke a completed transaction,
that which had been actually done under it.

Shepley, for the plaintiffs.

Fraser, Q.C., and *Aylesworth*, for the defendants.

WELLS v. INDEPENDENT ORDER OF FORE

Insurance—Life—Benevolent society—Standing of deceased m
statement—Estoppel—Waiver—Costs.

W., who was a member of a subordinate court of
dant society, died on the 8th May, 1884. His adm
claimed in this action the amount of an endowment
upon his life, which was subject to a condition that t
should at the time of his death be a member of the
good standing. W. had not paid his monthly asse
1st March, 1884, and by his failure to pay had beco
suspended by virtue of one of the by-laws of the socie
name appeared in the minutes of a meeting held t
upon the list of suspended members. He had tak

mas, 1883, and by the end of February, 1884, it was ent that he could not recover, and he never rallied up to ne of his death. Shortly before the 25th April, 1884, a ufficient to pay his assessments due 1st March, 1st April, st May was paid in his behalf to the financial secretary of ubordinate court. The conditions to be performed by a nded member desirous of being reinstated after a suspension een in force for thirty days were, according to the by-laws, ent of arrears, passing medical examination, and being ved by two-thirds vote of the subordinate court. It was ssible for W. to have complied with the second condition, e did not attempt to do so.

d, that the by-laws were binding upon W. and the plain- nd that he, not having been reinstated in accordance there- was not a member in good standing at the time of his

as contended, however, that the fact of the receipt of the s by the financial secretary, and certain other circum- s, shewed a waiver or created an estoppel on the part of efendants.

ppeared that the financial secretary was not familiar with -laws and thought and informed W. that he was restored d standing by the payment of arrears; that he transmitted sessments paid to the supreme secretary of the society, who ed and retained them, but carried them to the credit of the linate court, instead of to the credit of W., because in his he reinstatement was not completed; and that W. was ed reinstated by the subordinate court on 25th April, 1884. inancial secretary had the right under the by-laws to e the arrears, but only as a first step towards reinstate-

d, that in view of the fact that W. was hopelessly ill when upreme secretary acknowledged the receipt of the assess- , there was no ground for the contention that the defen- were estopped from denying that they accepted the money he intention of keeping the policy alive and of waiving the al examination; and that under all the circumstances there either the intention nor the authority on the part of the ne secretary to waive the examination.

As the plaintiff had been led by the action of t
secretary and the officers of the court below to belie
had been reinstated, no costs were given against her.

Tremeear, for the plaintiff.

J. A. McGillivray, for the defendants.

WILLS v. CARMAN.

*Libel—Question for jury—New trial—Misdirection—Objecti
Pleading—Fair comment—Admissibility of evidence of tr
commented upon.*

In actions of libel new trials are not granted me
ground that the verdict is against evidence and th
evidence. It is for the jury to say whether alleged
matter published is a libel or not, and the widest
given to them in dealing with it.

When no objection is made at the trial to the Judg
the ground of misdirection is untenable on a motio
trial.

In this action of libel the defendant did not plead ju
but he said in his defence that the alleged libel was
ment upon matters of public and general interest.

Held, that he was entitled under this defence to sh
matters upon which he commented were true.

Lefroy v. *Burnside*, 5 L. R. Ir. 556; *Davis* v.
11 App. Cas. 187; and *Riordon* v. *Willox*, 4 Times
referred to.

Dickson, Q.C., and *Burdett*, for the plaintiff.

Clute, for the defendant.

ATKINSON v. GRAND TRUNK R. W. C

Railways—Negligence—Accident—Proximate cause—Im

The plaintiffs, husband and wife, sued for damages
sustained by the wife, charging the defendants with
in using their railway in shunting cars, etc., and in n
and protecting the public at crossings.

wife was being driven in a cutter by her son along a hich crossed three tracks of the defendants, and when er was thirty feet away a "silent" car passed along one acks. The son pulled the horse up suddenly, with the throwing his mother out of the cutter and so producing ry complained of.

ury found that the defendants were guilty of negligence, the son by his driving contributed to the accident.

that, upon the evidence, the finding of contributory ce could not be interfered with; and that the injury was te a consequence to be attributed to the negligence of ndants. It was not necessary to consider whether actual vas indispensable.

, Q.C., for the plaintiffs.
Q.C., for the defendants.

[STREET, J., 22ND FEBRUARY, 1889.

SCOTT v. BENEDICT.

Parties—Assignment pendente lite—Abatement.

er an agreement by a plaintiff with persons not parties to the specting the assignment of the subject of the suit, made *pendente* ers the suit defective, depends upon the nature of the agreement. al effect of the agreement is such as to render it impossible for the give the relief asked for without the addition of the other parties, becomes defective and cannot be proceeded with until proper e before the Court; but it is otherwise where the nature of the t does not prevent the Court from giving the relief asked for.

vas an action of redemption by a person claiming to be er of the equity of redemption in mortgaged property. the commencement of the action the plaintiff had agreed rd parties that they should have the option of purchasing y of redemption up to a certain date, which expired some er the action had been commenced. In lieu of this agree- e plaintiff then entered into a more formal agreement Dickson Company (limited), a lumbering company, in me of the parties with whom the former agreement had de were interested.

greement with the Dickson Company recited that the was entitled in fee simple to the lands in question, and

that he had agreed to sell and assign to the comp
lands, and it was therefore agreed that the plaintiff
cute this action to final judgment as speedily as
purchasers providing funds for carrying on the sui
hearing on the merits the purchasers were to be
withdraw, in which case they were to forfeit their
the agreement and all sums advanced by them u
soon as the plaintiff established his right he was t
lands to the purchasers at the price of $250,000.

The other provisions of the agreement were imm

After the case had been opened and some witnes
on the part of the plaintiff the above facts appeared

E. Blake, Q.C., and *S. H. Blake*, Q.C., for th
who were the mortgagees, and certain persons to
alleged the property had been sold under a powe
tained in the mortgage, moved for an order addi
defendant the Dickson Company, and if necessar
proceedings on the ground that the action had bec
until the company was added.

They contended that the plaintiff had no inter
various agreements and that the company would
by any judgment in the action and might after
the action as against the plaintiff, bring another
behalf.

Mowat, Q.C., A.-G., and *W. R. Meredith*, Q.C.,
tiff, contended that any agreement now existing was
lite and bound the assignees. The agreement was
gent on the plaintiff establishing his right, and he
an interest and was the proper person to bring the

The following cases were referred to:—*Eades* v.
& C. 230; —— v. *Walford*, 4 Russ. 372; *Solomo*
13 Sim. 516; *Johnson* v. *Thomas*, 11 Beav. 501.

STREET, J.—I have been able to look at some of th
were cited on the motion to stay the proceedings o
that they have become defective, and some others.
me that the interest which the Dickson Company
in the property must be taken to have been acqu
lite; because, although there were options which w
ence before the commencement of the suit, yet
were terminated and a new agreement was entered
commencement of the suit; the other agreement be

n not having been taken advantage of, and the new
nt being with new parties. At all events, whether with
ies or not, it is a new agreement, and the parties who
er it must be held to have taken *pendente lite*. Then
question whether or not the circumstances are such as
the suit defective; the cases I have looked at seem to
based upon this principle, that where a person insti-
nit praying certain relief, and during the progress of
he enters into an agreement which comes before the
ring the progress of the suit, and with regard to which
ected that the result is to render the suit defective, the
ll look at the relief that is asked for and at the nature
greement that has been entered into; and if the nature
greement which has been entered into is such as to
impossible for the Court to give the relief which is
in the original suit, that then the suit becomes defec-
, where the objection is taken, cannot be proceeded with
defect has been removed by bringing the proper persons
e Court; but that where the nature of the agreement
ch as to render it impossible for the Court to give the
at is asked for, the suit is not to be taken as having
defective. As an example of the two cases, I will take
instance of an action brought by a person claiming to
wner of an equity of redemption and asking to redeem
mortgage. There, where the plaintiff actually assigns
equity of redemption on which the relief he claims is
uring the suit, the suit becomes defective; because
ourt went on and pronounced a decree, the decree would
our of a person whose interest had actually ceased, and
e would be fruitless in that way. But where, as I
the case here, the plaintiff enters into an agreement
ovides for the prosecution of the suit in his own name
transfer at the expiration of the suit in case he suc-
ere as a matter of law the suit does not become defec-
use it is not inconsistent with the agreement he enters
he may himself prosecute the suit further and having
lly prosecuted it may carry out the agreement. So I
is suit has not become defective, under the circum-

COMMON PLEAS DIVISION.

[In Banc, 8th Mar

REGINA v. WINEGARNER.

Criminal law—Inquisition—Statement of holding inquest—Present oath—Sealing—Identification of body—Constable acting as witness.

The caption to an inquisition finding the prisoner murder stated that the inquest was held at H., etc., on and 15th days of January, in the 51st year of the reig Majesty Victoria; and the inquisition to be "an in indented taken for our Sovereign Lady the Queen, etc of the body of an infant child of A. W. (one of the then and there lying, and upon the oath of (giving the the jurymen) good and lawful men of the county duly ch who being then and there duly sworn and charged t for our said Lady the Queen when, where, how, and means the said female child came to her death, do up oath say," etc.

Held, that the statement of the time of holding th was sufficient; that it sufficiently appeared that the pre was under oath; and that it need not be under seal; th was a sufficient finding of the place where the allege was committed and of identification of the child murde that of the body of which the view was had.

L., the constable to whom the coroner delivered the s for the jury, was at the inquest sworn in as one of the and was also sworn as a witness; and Y., a juryman, sworn as a witness.

Held, that the fact of L. being such constable did clude him from being on the jury, nor did either of such preclude him from giving evidence as a witness, and s was not precluded.

S. A. Jones, for the prisoners.

A. M. Dymond, for the Crown.

REGINA v. EDGAR.

Temperance Act—Conviction without trial and in defendant's absence—Quashing.

defendant was summoned to appear before the police
rate of Lambton on the 14th April, at 10.30 a.m., at the
l chamber in the village of F., for unlawfully selling
contrary to the Canada Temperance Act. The defendant,
anxious, as he stated, to prevent the attendance of a
r of witnesses on his behalf, instructed C., who was in his
yment, to go to W., where the police magistrate resided,
y and arrange the matter with him so as to avoid a trial or
cording of a conviction, by paying to such police magistrate
um as he should demand. On 13th April, C. went and
e police magistrate, and in reply to C.'s inquiry as to what
ld cost to settle the case, the police magistrate stated $50,
C. paid. At the same time C. signed an indorsement on
formation in the defendant's name as his agent, which
that the written information had been read over to the
ant by the police magistrate, and that the defendant
l guilty to the same. Both C. and the defendant stated
had no authority from the defendant to sign anything,
said he signed the paper without reading it or its being
him. On the 14th April the police magistrate, without
any court or calling any witnesses in support of the
, and without the defendant being present, convicted him
offence charged and fined him $50 and costs, drawing up a
conviction, which was returned on the same day to the
f the peace. Subsequently the police magistrate returned
r conviction for the same offence, reciting that the con-
was made on 14th April at F. by the defendant admitting
arge, etc. The police magistrate, as the defendant stated,
t in F. nor did he hold any court there on that day.

l, that there being no court held for the trial of the
, and the defendant not being present thereat in person or
rney so as to make admission of guilt, under the circum-
there could be no conviction for the offence charged, and
nviction was therefore quashed.

sworth, for the defendant.

mere, for the Crown.

REGINA v. READ.

Quarter sessions—Appeal to, against conviction—Adjournme
sessions—Indorsing on conviction—Necessity for.

An appeal from a conviction for malicious injury
came on for hearing at the General Sessions of the
an adjournment was ordered to the next sessions.
adjournment was indorsed on the conviction, the
entering a minute of the order in his book. At t
sessions the appeal was heard and the conviction o
quashed.

Held, that the provisions in s. 77 of R. S. C.
indorsing the order of adjournment on the convict
imperative, but directory merely, and therefore the
make the indorsement did not affect the validity of
quash.

Mackenzie, Q.C., for the prosecutor.

No one contra.

REGINA v. MAYBEE.

Canada Temperance Act—Absence of defendant—Service on
of lapse of reasonable time between service and hear

A summons was issued for selling liquor contrary t
Temperance Act, which was served by leaving it wit
dant's wife at the defendant's hotel. The defendan
ing at the time and place mentioned in the sumn
hearing, and the constable proving on oath the mann
the summons had been served, the police magistrat
ex parte to hear and determine the case, and c
defendant of the offence charged, and imposed a
peared that the defendant was absent in the States
in a trial there. There was no evidence that t
informed by the constable of the purport of the su
the defendant stated he knew nothing of the matter
five days after the conviction had been made, when
a letter from his wife stating that some magistrate's
been left for him at the hotel.

, that under s. 39 of R. S. C. c. 178 in such case there e evidence before the magistrate that a reasonable time psed between the service of the summons and the day ed for the hearing, and there being no such evidence he magistrate acted without jurisdiction and the convic- ust be quashed.

. Barber, for the defendant.
ton, for the Crown.

[THE DIVISIONAL COURT, 22ND DECEMBER, 1888.

ES v. CITY OF LONDON FIRE INSURANCE CO.

e—Fire—Over-valuation—Prior insurance—Prior loss by fire— nership of goods—Warranty—False and fraudulent representations— noval of goods—Change of occupation—Proofs of loss—Sufficiency of alse swearing as to.

policy of insurance against fire on household furniture, a dwelling house at B., the defendants pleaded as a that by the application, which was made part of the the plaintiff falsely and fraudulently represented as a ty, amongst other things, that the furniture, etc., was of d value; that there was no prior insurance; that the f had never sustained any loss by fire; and that the f was the owner of the property destroyed, setting up a of a condition of the policy.

value of the furniture given in the application was proved espond with that contained in a book made up at the time urance was effected, which was shewn not to be extrava- nd no goods were shewn to have been afterwards removed. ior insurance referred to was effected while the plaintiff siding at M., where she resided before moving to B., but g to reside at B. the present insurance was taken out he belief that by the removal a new insurance was neces- nd it did not appear that the prior insurance was then in There had been a prior loss by fire of about $10 through er turning of an oil lamp or stove, thereby burning or g a piece of oilcloth, which being considered a small was overlooked. While the plaintiff was living at M. niture contained in the house occupied by her and her

husband belonged to the plaintiff. This was sold an derived therefrom received by the husband. After furniture was purchased and again sold, the husba the money. The husband also received certain mo plaintiff from her mother. Subsequently the furnit tion was purchased by the husband, and on the plai to B. the furniture was taken there. The husban instead of paying back the money so received by purchased the furniture for the plaintiff, and both wife said it was hers. There was no question as to t solvency, nor of any claim of creditors, and as to contract which was set up whereby the husband an to have and enjoy as their separate estates the respe ties then or thereafter owned by them, no evidence to its effect in the province of Quebec or this provin

Held, that the contract contained no such warrant and that the evidence failed to show any false an representations as alleged; that though the stateme vious loss by fire was technically untrue, it was in n or fraudulent, and it was a question whether it came meaning of the condition; and that as regards the must be deemed to be the plaintiff's, though differe tions might arise had the husband been proved t insolvent, and the contention been with his creditors

The defendants set up as a further defence that by of the policy any change material to the risk, etc., policy, alleging the removal of part of the goods also a change of occupation and consequent incre The plaintiff having become ill desired to consult the cal practitioner who had attended her while at M., purpose went with her children to her mother at M band remaining in the house—taking with her some ture and bed clothes. No claim was made for the removed, and the rest was not thereby affected.

Held, that this defence failed.

The defendants also set up as a further defence tha condition proofs of loss must be made by the assur they could only be made by an agent of the assure absence or inability to make them was satisfactori for, and that the loss should not be payable until six completion of proofs.

evidence showed that the proofs were not furnished by intiff in consequence of her illness, and that they were ned by the plaintiff's husband through a power of attorney he plaintiff, suggested by the defendants. Proofs were fur- by the husband together with the power of attorney on th November, which the defendants acknowledged on the On 10th December the defendants wrote requiring invoices ouchers, and on 16th December the husband wrote sending voices and vouchers he was able to give. This was wledged and further invoices and vouchers asked for. The in themselves were good and sufficient. The action was ought until after 14th January.

l, that this defence also failed; that the assured's absence ability to furnish proofs was satisfactorily accounted for; at the sixty days had expired before action brought, for ne proofs must be deemed to have been completed on the December, for that proofs otherwise good and sufficient not be considered as incomplete by reason of the failure to ce further invoices and vouchers, the condition which d to proofs merely stating that they are to be produced quired and practicable."

defendants further set up as a defence that there was, ry to a condition of the policy, fraud and false swearing proofs of loss, but the evidence failed to establish it.

s, Q.C., for the plaintiff.

H. Blake, Q.C., and *C. Millar*, for the defendants.

[8TH MARCH, 1889.

re BYRNE AND TOWNSHIP OF ROCHESTER.

ipal corporations—Drainage—Compensation—Municipal Act, ss. 591-2.

was the owner of certain lands in the defendants' township, as a petitioner with others for the construction of a drain. the drain had been made B. claimed that he had sustained ges thereby, and an arbitration was had under the Munici- ct and B. was awarded damages, the arbitrators holding t would be necessary for B. to construct a bridge so as to

cross from one part of his farm to another, to put in a
tain flood gates, and also that he had been deprived o
of about three and a half acres of his land.

Held, that the case came within ss. 591,592 of the
Act, and that B. was entitled to the damages awar
which must be assessed on the lands liable to assessme
drainage work.

Douglas, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

COLVIN v. McKAY.

Libel—Privilege—Excess of—Evidence of malice.

The plaintiff had been the treasurer of the township o
from May, 1882, to February, 1887, when by reaso
auditors' report of alleged defalcations by him, the pla
dismissed from his office. The auditors' report sho
sums unaccounted for, namely, $1,400 and $132.32.
quently a commissioner was appointed by the Li
Governor to examine into the matter, and after doi
ascertained that as to the $1,400 the auditors were
and in December, 1887, he made his report stating th
township moneys were accounted for by the defendant
exception of the $132.32, but having examined the pl
oath at a meeting of the council at which the defend
present, the commissioner was satisfied with the
explanation as to $125 of this sum, namely, that it was
on moneys of his own deposited with the township fund
stated at the time, and made an addition to his report
stating. In February following the plaintiff wrote to
paper stating that he was ready to pay over to the town
moneys the council, auditors, or commissioner could
owed, whereupon the defendant wrote to the paper sta
the commissioner, apart from the mixing of moneys, h
the plaintiff indebted to the township in the sum of $
that the plaintiff had made several thousand dollars o
township and could therefore well afford to pay his
and still have some thousands to the good. In an a
libel,

ld, that although, as the matter discussed in the defendant's was one in which the defendant was interested as a rate- and member of the council, it might give rise to questions alified privilege, still it was for the jury to say whether the circumstances the language employed in the letter within the privilege, or whether it was in excess of what the ion justified, and if in excess, they could properly draw the ence of malice.

e jury having found for the plaintiff, the Court refused to fere.

sh, Q.C., and *J. J. Stephens*, for the plaintiff.
Carthy, Q.C., for the defendant.

BLAKE v. CANADIAN PACIFIC R. W. Co.

lways—Negligence—Ringing bell or sounding whistle—Contributory negligence.

an action against the defendants for an injury sustained by laintiff being run over by the defendants' train at a highway ing, claiming that the statutory requirement as to ringing ell or sounding the whistle had not been complied with;

ld, per ROSE and MACMAHON, JJ., that no negligence on defendants' part was shewn, as the evidence disclosed that tatutory requirement had been complied with.

r GALT, C.J.—The plaintiff on the evidence was guilty of ributory negligence in not taking proper care in approaching rossing.

elling, for the plaintiff.
T. Blackstock, for the defendants.

[STREET, J., 15TH SEPTEMBER, 1888.

HUNTINGDON v. ATTRILL.

Foreign judgment—Action for penalty under foreign statute.

he defendant was a shareholder and director of a joint-stock pany incorporated under the laws of the state of New York, ng its head office in that state. The plaintiff, a creditor

of the company for money lent to the company, s
recovered judgment against the defendant for an all
certificate given by the defendant while such director,
amount of paid up stock in the company, whereby as al
defendant, under certain statutes of the state of New Yor
liable by way of penalty to all the debts of the company
action in this Province on the judgment,

Held, that as the only cause of action which the
alleged was based on an offence committed by the
against the laws of New York state, and the only sum
to recover was the penalty fixed by the statute of t
as the punishment for the offence, the judgment coul
recognized as creating a debt enforceable in this Provin

Cattanach and *H. Symons*, for the plaintiff.

McCarthy, Q.C., and *A. R. Creelman*, for the defenda

[15TH JANUARY

MURCHISON v. MURCHISON.

Marriage settlement—One of beneficiaries taking possession—appointment as trustee—Title by possession.

On 25th July, 1853, J. M. by marriage settlement
with other property, the Clyde Hotel property in T
trustees to permit J. M. to receive the rents for his life
a life annuity to his wife, and on his death subject
annuity to pay annuities of £60 to each of his two dau
M. and C. A. M., and subject thereto to divide the bala
rents annually into three equal shares, and to apply
to the support and education of the children of a dec
W. M. M., another share to a son R. D. M., and the t
to his daughter F. E. C., with limitations over. On
March, 1860, by a Chancery decree, W. and O. were
trustees in the place of the original trustees and the tr
was vested in them. J. M. died on 12th March, 1870. W
children all died in J. M.'s lifetime, and their one-th
having thereby reverted to J. M., he disposed of the
his will. On 10th May, 1882, a judgment of the Hi
was pronounced directing the removal of W., the

ee, the taking of an account, and appointing R. D. M. and . trustees ; and also directing that all lands, etc., and all assets, both real and personal, now vested in W. as such ee be vested in R. D. M. and R. C. upon the several trusts e said settlement and will. On the death of J. M., R. D. ad entered into possession of the Clyde Hotel property and nued in such possession receiving the rents to his own use out any question after the said judgment and up to his death 7th April, 1887. By his will and codicil, dated respectively April, 1880, and 25th October, 1881, he devised to his itors his real estate, consisting of the Clyde Hotel property, trust to pay the rents to his wife for life and after her death vide the same equally among his children. In 1888 an n was brought by three of his children to have it declared the Clyde Hotel was vested in R. C., the surviving trustee, r the trusts of the settlement, etc., and that an account ld be taken.

eld, that the action could not be maintained; for when R. D. ook possession in 1870 he did not go in under the trustees, adversely to them, and continued to so hold till his death; and judgment of May, 1882, whereby R. D. M. was appointed of the trustees and the trust estate vested in him, could not nd beyond its ordinary meaning, so as to take away a pro- of which he had become the absolute owner, and put it into the trust estate.

K. Kerr, Q.C., and *F. M. Morson*, for the plaintiffs.

H. Blake, Q.C., and *Walter Read*, for the defendants.

IN CHAMBERS.

[BOYD, C., 8TH APRIL, 1889.

HENDRICKS v. HENDRICKS.

master—Jurisdiction of—Rule 1187—Partition and administration—Taxed costs in lieu of commission.

eld, that a local Master has no jurisdiction to make an order er Rule 1187 allowing the parties to an action or proceeding administration and partition taxed costs, instead of the mission provided for by the Rule, "unless otherwise ordered he Court or a Judge."

This was an action in which a judgment for par
administration was pronounced by BOYD, C.

Held, that more especially in this case a local Mast
power to interfere, for by ordering taxed costs instea
mission he was varying the judgment.

Langton, for the plaintiffs.

F. W. Harcourt, for the infant defendants.

Hoyles and *W. H. Blake*, for the adult defendants.

[9TH AP

HEATON v. McKELLAR.

Joinder of parties—Action to set aside fraudulent conveyance—Seve

Action by the plaintiff on behalf of himself and all ot
tors of the defendant L. asking for judgment against L.
overdue promissory notes, and seeking to obtain exe
such claim and also a previously recovered judgment a
several parcels of land, alleged to have been fraudulently
to the other two defendants respectively. A motion wa
strike out the name of one or other of the alleged f
grantees as improperly joined in the same action.

Held, that it was possible under the present practice
bine two such causes of action, which, if well found
common root in the fraudulent transfer, and that there
no practical inconvenience in trying both on the sam
The motion was therefore refused.

Chaput v. *Robert*, 14 A. R. 354, remarks of OSLER
pp. 361, 362, specially referred to.

Hoyles, for the plaintiff,

Shepley, for the defendant McKellar.

[GALT, C.J., 28TH MAR

NELSON v. COCHRANE.

Parties—Action to charge annuity on land—Subsequent incumb

In an action for arrears of an annuity and to declare
a charge on land, mortgagees of the land whose mort
subsequent to the will creating the charge and subje

s of it, were made defendants by the writ of summons; but
eir own application immediately after delivery of statement
im, their name was struck out with costs.

asten, for the plaintiff.

B. Brown, for the Imperial Loan Company.

[1st April, 1889.

In re ELLIOTT v. NORRIS.

bition—Division Court—Territorial jurisdiction—Transcript to another Division Court after judgment.

plaint was brought in the First Division Court of Middlesex
a contract signed by the defendants dated at London, to pay
e order of the plaintiffs at London, "$16 in wood delivered
e Hamilton and North-Western Railway," which was not
iddlesex. The defendant resided in the county of Simcoe.

eld, that the Court in which the plaint was brought had no
diction.

e defendant filed a notice disputing the claim and the juris-
on, but did not appear at the trial, and judgment was given
st him. Subsequently a transcript of the judgment was
mitted to the Seventh Division Court of Simcoe.

eld, that the judgment did not thereby become a judgment of
Simcoe Court, and prohibition to the Middlesex Court was
ted after such transmission.

B. Clarke, for the plaintiff.

W. Howard, for the defendant.

[Ferguson, J., 4th February, 1889.

St. PHILIP'S CHURCH and GLASGOW AND LONDON INSURANCE Co.

ance—Fire—Policy effected before R. S. O., 1887—Appraisement—Arbitration—Costs—R. S. O., 1877, c. 162—R. S. O., 1887, c. 167, s. 114.

. P. Church was insured with the G. & L. Ins. Co. under
ree years' policy on 14th November, 1885, and was injured
re on 31st May, 1888. The company admitted the loss, but

asked the churchwardens to prove the damage, and an
for submission to appraisers was entered into by the w
the company in which it was provided that "the awar
them (the appraisers) or any two of them shall be bi
both of said parties as to the amount of such dama
insured property, but shall not determine any questio
the legal liability of said company," etc. Two of the
joined in an award giving the wardens the full amount
in the policy, and ordered the company to pay the c
reference and award. The company refused to pa
over and above half the arbitrators' fees.

Held, affirming the Master in Chambers, that R. S
c. 167, s. 114, was applicable to the policy in questio
the Legislature intended by the words "or otherwise i
Ontario with respect to any property therein" that se
applicable to all policies existing at the time the Act
force, and that costs were properly awarded under s-s.
section.

Lockhart Gordon, for the churchwardens.
Rae, for the insurance company.

[1ST A

CAMERON v. CAMERON.

Costs—Taxation—Opening up.

Motion by the plaintiffs to open up the taxation of
dant's costs of this action for the purpose of enabling
tiffs to object to certain items which were allowed by
officer without objection. No objections had been p
the taxation had been closed and a certificate of taxa

FERGUSON, J., referred to the words of Con. Rule
certificate of the taxing master shall be final and co
to all matters which shall not have been objected to in t
aforesaid," and held that he had no power to open up
tion.

W. B. Raymond, for the motion.
D. Armour, contra.

[3RD APRIL, 1889.

CAMERON v. PHILLIPS.

Administrator ad litem—Rule 311—Security.

In a mortgage action in which foreclosure only was sought, it s stated that the lands were not equal in value to the mort-ge debt. The mortgagor being dead, and having left no estate atever except the equity of redemption sought to be foreclosed, executor named in the will of the mortgagor, which had not n offered for probate, was appointed administrator *ad litem* hout security, under Rule 311.

. B. O'Brian, for the plaintiff.

[THE MASTER IN CHAMBERS, 10TH APRIL, 1889.

X v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Discontinuance—Several defendants.

A plaintiff cannot serve a notice of discontinuance against one several defendants; his proper course is to obtain an order for ve to discontinue against such defendant.

Carlisle v. *Belfast Board of Guardians*, 10 L. R. Ir. 36, lowed.

Hilton, for the plaintiff.

Aylesworth, for the defendant company.

C. J. Holman, for the other defendants.

NOVA SCOTIA.

In the Supreme Court.

PETTIPAS v. CROSBY.

aritime law—Master of vessel—Power to bind owner for supplies—Obligation to consult agent.

The plaintiff sued the defendant for the price of a barrel of ef supplied by him to the master of the defendant's vessel. The ef was shown to be necessary for the vessel, but it appeared that e defendant had an agent at the place where it was procured who ight have been requested by the master to supply or procure e beef for him.

Held, that, in the absence of evidence to show that the r had made such a request to the agent, or that he had s authority to bind the owner, the plaintiff could not recover

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KIDD v. HENDERSON.

Venue—Change of before issues settled.

The defendant applied for and obtained an order at Cha changing the venue in the case on the ground of balance c venience, etc.

It appearing that at the time the order was granted the had not been settled;

Held, that the order must be set aside.

In re RICE.

Costs—Certiorari—Criminal case—Application to rescind the portion order as to costs.

The defendants having been convicted of an offence und Dominion statute in relation to cruelty to animals, an appli was made to a Judge of the Supreme Court for an order writ of *certiorari* to remove the conviction into the Supreme

An order having been made refusing the motion with co

Held, that the offence being clearly of a criminal nature, absence of any authority authorizing the Judge to impose or of any bail or recognizance to pay them, the defendants not be made to pay the costs of opposing the order for th *tiorari*.

An application was made to the Court to rescind that p of the order relating to costs, a similar application having previously made to the Judge and refused.

Held, that there being clearly no appeal in such a case, the Judicature Act and Rules, the course adopted by the dants' counsel of applying to the Court to rescind was the one.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

PETTIT v. KERR.

ord and tenant—Excessive distress—Trespass and trover—Not guilty by statute—Married woman—Joinder of husband in tort.

espass or trover will not lie upon a distress where there is rent due. The action should be upon the case for excessive ss, or for not accounting for the surplus moneys realized, or ot returning the balance of goods unsold.

er distress, surplus moneys should be paid to the sheriff, nsold goods returned or placed in some convenient place notice to the tenant.

Not guilty by statute" puts in issue the tenancy as alleged. ere be a variance as to the landlord alleged, an amendment be allowed if the verdict be otherwise satisfactory.

here the principle upon which the jury should proceed in ating damages was not made clear to them, a new trial was red without costs.

r BAIN, J.—It may still be permissible to join a husband his wife as plaintiff in an action of tort for damage to her s, but not to join the wife with the husband for damage to goods.

ONTARIO BANK v. McARTHUR.

f exchange—Acceptance when debentures sold—Evidence—Identity of debentures—Amendment.

he decision of TAYLOR, C.J., *ante* p. 72, affirmed upon appeal ne full Court.

RAJOTTE v. CANADIAN PACIFIC R. W.

Railways—Master and servant—Precautions against accider bandi—Contributory negligence.

The plaintiff was employed by the defendants as a in their station yards. In discharging his duties his in a "frog," and while held fast he was run over The frog had been "blocked" but the blocking had to some extent. At the trial of an action by the children the presiding Judge at the close of the pla held that there was no evidence to go to the jury. dants' counsel declined to take a non-suit, or to permi reserved to enter a non-suit in term. The Judge th jury to bring in a verdict for the defendants, and addresses by counsel. The jury found a verdict fo tiffs. Upon a motion in term to set aside the verdict

Held, (1.) That neither the trial Judge nor the enter a non-suit against the defendants' desire.

(2.) That the verdict would not necessarily be se should stand unless the trial Judge was plainly ar wrong in point of law.

(3.) That in the absence of evidence that the syste ing was defective or that the blocking in this particul imperfect, and there being evidence that the defendan proper and competent workmen to keep the frogs in r was no case for the jury.

(4.) The *onus* of proving the incompetency of th was on the plaintiffs.

(5.) It was for the plaintiffs to prove that the d ignorant of the dangerous character of the frog ar defendants were aware of it.

CANADIAN PACIFIC R. W. CO. v. BURNE

Sale of land for taxes—"Sold or occupied"– Constitutio

By reason of the legislation extending the limits c vince, the Provincial Legislative Assembly is bound Dominion legislation with reference to the Canad Railway Company.

statute the lands of the company were to be free from tax- for a certain period unless "sold or occupied." The com- made an agreement for sale of certain of the lands upon n conditions. The conditions not having been performed, ompany cancelled the agreement, as by its terms they were ed to do. There never was any actual occupation of the

Held, that the land had never been "sold or occupied," and t was therefore not subject to municipal taxation.

BALFOUR v. DRUMMOND.

ation of deeds—Mistake—Parties—Mortgagee enforcing mortgagor's medies over—Evidence of agency—Escrow—Trustee for sale—Power to ortgage—Ratification—Indemnity of trustee—Appeal—Points open ithout cross-appeal—Foreign executors—Partnership or co-ownership—vidence as against answer.

e defendant D. executed a mortgage in favour of the iff, in which was the usual covenant for payment. He ded the word "trustee" to his signature, thinking that by he pledged himself not personally but in his representa- apacity only. When sued upon his covenant;

ld, per DUBUC, J., that there was no mutual mistake, and fore no case for rectification, but a unilateral mistake, and f law only.

nistake is positively denied by any party to an instrument, evidence is inadmissible to prove it.

a suit upon a mortgage against a trustee who gave it, the e in his answer set up his trust, gave the names of his ., and submitted they were necessary parties to the suit, but no relief over against them. The *c. q. t.* having been , the plaintiff asked that their liability to indemnify the e should be enforced in the plaintiff's favour.

ld, that the plaintiff was so entitled.

ond was executed by D. for V. as his attorney. D. on nation by the plaintiff as to his authority said that he had er of attorney (not produced) from V. and had acted for n relation to the matter in respect of which the bond was for several months.

Held, that D. was properly authorized to execute

A number of persons interested in certain land bond as collateral to a mortgage of the land giv trustee. B., one of these persons, obtained the variou and some of them upon the agreement that the bon be delivered until all the persons interested had B. delivered the bond without obtaining all the sig the mortgagee upon the faith of it advanced the mo

Held, that all the persons signing it were liable o

A trustee for sale of land upon which there was executed a new mortgage paying off the old one.

Held, that he had power to do so, and that his bound to indemnify him. M., one of the *c. q. t.*, interest to C. previous to the giving of the second m thereafter attended meetings of the association a calls made by the trustee, being thus known and acc assignee of his share.

Held, that the trustee was entitled to no relief as

Upon rehearing DUBUC, J., remained of the above

Per TAYLOR, C.J.—When some of the defendants whole case is open as between them and the plain plaintiff can ask for no variation of the decree as other defendants unless he also rehears.

2. The *cestuis que trustent* of a mortgagor are n parties to a bill for sale, but they are not improper p

3. Foreign executors who have not proved the Province do not sufficiently represent the estate.

4. A trustee for the sale of an estate has no po gage. Acts of ratification by the *c. q. t.* discusse sufficient.

5. Whether a voluntary association of persons fo purpose of buying a piece of land with a view to res nership, discussed.

6. Parol evidence of a single interested witness n to set aside a deed. The rule as to two witnesses the answer, doubted.

7. There is an implied agreement on the part o indemnify the trustee against all loss which may a proper execution of the trust. But where there is agreement upon the subject none can be implied.

ersons against whom the plaintiff's debtor is entitled to
ver, should not on that account be made parties to the
d the plaintiff cannot enforce such relief in his own favour.
t all persons who have an interest in the *subject* matter of
t, but in general those only who have an interest in the
f the suit, who are ordinarily required to be made parties.

[KILLAM, J.

WEST v. LYNCH.

performance—Mortgagees of purchaser—Costs—Release by mortgagee without mortgagor's assent.

rule in *Hudson's Bay Company* v. *Ruttan*, 1 Man. L. R.
at the mortgagee of a purchaser's interest under a con-
r the sale of real estate, who has registered his assign-
should be ordered to pay the costs of a suit for specific
nance, does not apply where the party made defendant is
e first assignee, and where the assignments are absolute.

was the assignee of a purchaser's interest by a chain of
conveyances, absolute in form but intended to operate as
ges and assignments of mortgage only. H. executed and
red a deed by way of grant, release, and quit claim to the
l purchaser without the knowledge or assent of the pur-
.

d, that a mortgagee is always entitled to release to his
l mortgagor and debtor without his consent, even an
s estate or interest.

erence was made to the rule that the assent of a party to a
r of property to him is presumed; for which the following
were cited:—*Butler's and Baker's Case*, 3 Rep. 25; *Thomp-
Leach*, 2 Vent. 198; Shaw P. C. 151; *Siggers* v. *Evans*, 5
B. 367; *Standing* v. *Browning*, 31 Ch. D. 282; *London
unty B. Co.* v. *London and R. P. Bank*, 21 Q.B.D. 543.

Supreme Court of Canada.

ONTARIO] [18TH M

ROBERTSON v. WIGLE.

THE ST. MAGNUS.

Maritime law—Collision—Damages—Party in fault—Answer

The owners of the tug B. H. sued the owners o propellor St. M. for damages occasioned by the tu down by the propellor in the River Detroit.

Held, reversing the judgment of the Maritim Ontario, that as the evidence showed the master of have misunderstood the signals of the propellor, a directed his vessel on a wrong course when the t proximity, the owners of the propellor were not liab petition in the Maritime Court should be dismissed.

MacKelcan, Q.C., and *Lash*, Q.C., for the appellan *Robinson*, Q.C., and *S. White*, for the respondents.

McMILLAN v. GRAND TRUNK R. W.

Railway company—Carriage of goods—Bill of lading—Carriag lines—Negligence—Exemption from liability for—R. S. C —Construction of—Joint tort feasors—Action against— charge by one.

M. shipped certain goods by the G. T. Railway fr to Portage La Prairie, and the bill of lading contained ing condition :

"10. All goods addressed to the consignees at po the places at which the company has stations, and which no directions to the contrary shall have been those stations, will be forwarded to their destinatio

s or otherwise as opportunity may offer without any claim
ay against the company for want of opportunity to forward
or they may, at the discretion of the company, be suffered
ain on the company's premises or to be placed in shed or
ouse (if there be such convenience for receiving the same)
g communications with the consignees, at the risk of the
s as to damage thereto from any cause whatsoever. But
livery of the goods by the company will be considered com-
and all responsibilty of said company shall cease, when
ther carriers shall have received notice that said company
ared to deliver to them the said goods for further convey-
and it is expressly declared and agreed that the said G. T.
shall not be responsible for any loss, mis-delivery, damage,
ention that may happen to goods so sent by them, if such
is-delivery, damage, or detention occur after the said goods
at said stations or places on their line nearest to the points
ces which they are consigned to, or beyond their said
"

d, on the authority of *Bristol & Exeter R. W. Co.* v. *Collins*,
. C. 194, that this clause could not operate to restrict the
y of the G. T. R. Co. to loss or damage occurring on their
ne, but that the contract by the G. T. R. Co. must be held
or the carriage of the goods over the whole route so far as
d be performed by railway, and the other companies over
lines the goods were to be carried to be the mere agents of
T. R. Co., for the purpose of such carriage.

ion 104 of the Railway Act, R. S. C. c. 109, gives a right
on against a railway company for breach of certain regula-
and for failure to convey and deliver goods, etc., and
es that from such action "the company shall not be
d by any notice, condition, or declaration, if the damage
from any negligence or omission of the company or of its
ts."

d, that the plain construction of the whole section is that
rohibition only affects railway companies in respect to their
and obligations as common carriers, and the G. T. R.
uld, therefore, limit their liability, either as carriers or
vise, in respect of goods to be carried after leaving their
ine, the contract for such carriage being one they might
declined altogether.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. guished.

The evidence showed that the loss and damage to this case occurred not in transit but after their ar station named as the place of delivery and while i of another company.

Held, reversing the judgment of the Court below, Fournier and Gwynne, JJ., dissenting, that the abov an end to the liability of the G. T. R. Co., after and the company having possession of them held t forth as warehousemen and bailees for the consignee

Held, also, with the like dissent, that the G. T. relieved from liability by reason of the consignees fa notice of their claim for loss within thirty-six hou arrival of the goods, as provided in another conditio of lading.

Quære.—Under the present law is a release to, o of satisfaction from, one of several joint tort feasc an action against the others?

McCarthy, Q.C., and *Wallace Nesbitt*, for the appel

Robinson, Q.C., and *A. C. Galt*, for the respondent

[7th

MURRAY v. WARNER.

Insolvent debtor—Claim on estate by wife of insolvent—Mone band—Loan or gift—Questions of fact—Finding of Cour

M. having assigned his property to trustees for th his creditors, his wife preferred a claim against th money lent to M. and used in his business. The assi to acknowledge the claim, contending that it was not gift to M. It was not disputed that the wife had m own and that M. had received it. The trial Judge ment against the assignee, holding that M. did not money as a gift. This judgment was affirmed on ap

Held, affirming the judgment of the Court of App the whole case was one of fact, namely, whether the given to M. as a loan by or gift from his wife, who in

of the law was in the same position, considered as a creditor
husband, as a stranger, and as this fact was found on the
ng in favour of the wife and confirmed by the Court of
l, this, the second appellate Court, would not interfere
such finding.

s, Q.C.. for the appellant.
bons, for the respondent.

[9TH APRIL, 1889.

VIRTUE v. HAYES.

In re CLARKE.

l to Supreme Court of Canada—Final judgment—Jurisdiction—Discretion of Court or Judge.

dgment was recovered in the suit of *Virtue* v. *Hayes* brought
lize mechanics' liens, and C., the owner of the land on
the mechanics' work was done, applied by petition in the
cery Division to have such judgment set aside as a cloud
his title. On this petition an order was made allowing C.
ne in and defend the action upon terms, which not being
ied with, the petition was dismissed, and the judgment dis-
ng it was affirmed by the Divisional Court and the Court
peal. On appeal to the Supreme Court of Canada,

ld, that the judgment appealed from was not a final judg-
within the meaning of s. 24 (a) of the Supreme and Ex-
ier Courts Act, or if it was, it was a matter in the judicial
tion of the Court, from which by s. 27 no appeal lies to
Court.

peal quashed without costs.

R. Clarke, appellant in person.
Cassels, Q.C., for the respondent.

EC] [18TH MARCH, 1889.

MONETTE v. LEFEBVRE.

l to Supreme Court of Canada—Right to appeal—Amount in controversy—Supreme and Exchequer Courts Act, s. 29, construction of—Jurisdiction.

an action for damages for slander contained in certain
tions adopted by the defendants (respondents) as school

commissioners of the parish of St. Constant, the (appellant) claimed by his declaration $5,000 dama prayed that the defendants be ordered to enter in th book of the school commissioners the judgment in the c that the same be read at the church door of St. Philipp consecutive Sundays. The case was tried before a Ju out a jury and the plaintiff was awarded $200 damag defendants thereupon appealed to the Court of Queen (appeal side), and the plaintiff did not file any cross-a contended that the judgment for $200 should be affirm Court of Queen's Bench, setting aside the judgmer Superior Court, held that a retractation made by the d and a tender of $40 for damages and the costs of an $40 were sufficient, and dismissed the plaintiff's actio surplus.

The plaintiff thereupon appealed to the Supreme Canada.

Held, that the case was not appealable, as the matte troversy did not amount to the sum or value of $2,000.

Where the plaintiff has acquiesced in the judgme Court of first instance by not appealing from the measure of value for determining his right of appeal, u of the Supreme and Exchequer Courts Act, is the awarded by the judgment of the Court of first inst not the amount claimed by the declaration.

Allan v. *Pratt*, 13 App. Cas. 780, followed. *Joyce* 1 S. C. R. 321 ; and *Levi* v. *Reed*, 6 S. C. R. 482, over

Appeal quashed without costs.

Lacoste, Q.C., and *Pagnuelo*, Q.C., for the appellant.
Geoffrion, Q.C., and *Robidoux*, for the respondents.

LABELLE v. BARBEAU.

Appeal to Supreme Court of Canada—Judicial deposit by insuran —Rival claims as to same—Value of matter in controversy— —Supreme and Exchequer Courts Act, s. 29.

The Ætna Life Insurance Company deposited Prothonotary of the Superior Court, under the Judicia Act of Quebec, the sum of $3,000, being the amount

y issued by the company to one E. L., which by its terms become payable to those entitled to the same, but to one of which sum rival claims were put in. The appellants, as eral heirs of the deceased, by a petition claimed the whole e $3,000, and the respondent (*mise-en-cause* petitioner) the v of the deceased, by a counter petition claimed as *commune ns* one half, and in her answer to the appellants' petition d that, in so far as it claimed any greater sum than one it should be dismissed. After issue joined the Superior awarded one half to the appellants and the other half to spondent. From this judgment the appellants appealed to ourt of Queen's Bench (appeal side) and that Court con- l the judgment of the Superior Court.

ereupon the appellants appealed to the Supreme Court of la.

ld, that, as the sum or value of the matter in controversy en the parties in this case was the sum of $1,500, and fell of the appealable amount, the case was not appealable R. S. C. c. 135, s. 29.

URNIER, J., *dubitante*.

peal quashed with costs.

nholme, for the motion to quash.

lamme, Q.C., contra.

SCOTIA]

CONNOR v. MERCHANTS' MARINE INSURANCE COMPANY.

nce—Marine—Policy—Perils of the seas—Barratry—Loss by—Construction of policy.

a marine policy insuring against loss by "perils of the there was no mention of barratry. The vessel being lost, s found in an action on the policy that such loss was d by the barratrous act of the master in causing holes to be by which the vessel was sunk.

ld, STRONG, J., dissenting, that this loss was not occasioned perils of the seas," and the fact of barratry not being

expressly excepted in the policy would not entitle th
recover.

MacMaster, Q.C., and *W. B. Ross*, for the appella
MacCoy, Q.C., for the respondents.

TUPPER v. ANNAND.

*Contract—Mining land—Speculation in—Agreement with
Renewal of—Effect.*

T., being in Newfoundland, discovered a mine of
on returning to Nova Scotia he proposed to A. that
buy it on speculation. A. agreed, and advanced m
paying T.'s expenses in going to Newfoundland t
title. T. made the second journey and obtained a
of purchase from the owner of the mine for a limi
failing to effect a sale within that time the agreemer
was renewed, however, some two or three times, A
to advance money for expenses. Finally T. effected
mine at a profit, and had the necessary transfers
purpose, keeping the matter of the sale secret fro
action by A. for his share of the profit under the or
ment,

Held, affirming the judgment of the Court below,
related back, as between T. and A., to the date of th
ment, and A. could recover.

W. B. Ross, for the appellant.
G. H. Fielding, for the respondent.

WALLACE v. SOUTHER.

*Promissory note — Mistake in name of payees—"Currency,"
Stamps—Principal and surety.*

A promissory note made payable to John South
sued on by John Souther & Co.

Held, that, it being clear by the evidence that
were the persons designated as payees, they could r

t is no objection to the validity of a promissory note that it is payment of a certain sum in currency. Currency must be l to mean "United States Currency," particularly when the e is payable in the United States.

f a note was insufficiently stamped, the double duty may be ked as soon as the defect comes to the actual knowledge of holder. The statute does not intend that implied knowledge uld govern it.

he appellant claimed that he was only a surety for his co-ndant, and that he was discharged by time being given to principal to pay the note.

leld, that, the fact of time being so given being negatived by evidence, it was immaterial whether the appellant was prin-l or surety.

'. J. Wallace, appellant in person.
rthur Drysdale, for the respondent.

ONNELL v. CONFEDERATION LIFE ASSOCIATION.

surance—Life—Policy — Memorandum on margin — Want of counter-signature—Effect of—Admissibility of evidence.

policy of life insurance sued on had in the margin the fol-ng printed memorandum: "This policy is not valid unless ntersigned by agent at . Countersigned day of . Agent." This memorandum not filled up, and the policy was not, in fact, countersigned the agent. Evidence was given of the payment of the nium, and rebutting evidence by the company that it had er been paid. The jury found that the premium was paid the policy delivered to the deceased insured as a completed rument, and a verdict was entered for the plaintiff and med by the Supreme Court of Nova Scotia.

leld, affirming the judgment of the Court below, RITCHIE, C.J., GWYNNE, J., dissenting, that the necessity of countersigning he agent was not a condition precedent to the validity of the cy, and the jury having found that the premium was paid, r verdict should stand.

The judgment on the former appeals in this case v
point, substantially adhered to. See 10 S. C. R.
S. C. R. 218.

S. H. Blake, Q.C., *J. Beaty*, Q.C., and *Borden*, fo
lants.

Weldon, Q.C., and *Lyons*, for the respondent.

REGINA v. CHESLEY.

*Bond—Execution in blank—Bondsman estopped from denyin
Proximate cause of acceptance of bond.*

V., a Government official, requested C. to sign a bo
for the faithful discharge of his duty as such official.
agreed to do so, V. produced a blank form of bond, a
his name to it and to an affidavit of justification, a
ledged to a third party that he had executed such
third party made an affidavit of the execution before a
who gave a certificate of its due execution before
bond, which had been filled out for the sum of $2,00
sent to Ottawa to be registered as the statute require

In an action on the bond against C., on defaul
claimed that the amount of the bond was represente
be $500 or $1,000, that there was no seal on it whe
it, that he had not sworn to the affidavit of justifi
that the magistrate should not have given the certific
The Court below held, affirming the judgment of the
that C. was estopped from denying the execution o
but as his action was not the proximate cause of the
of the bond by the Government, but the false certifica
the magistrate was, the Crown could not recover. C
the Supreme Court of Canada,

Held, reversing the judgment of the Court below
Rep. 313, that the making of the bond was the real
acceptance, and the defendant being estopped, the
entitled to judgment.

R. L. Borden, for the appellant.

Harrington, Q.C., for the respondent.

WHITMAN v. UNION BANK OF HALIFAX.

ruptcy and insolvency—Assignment in trust for creditors—Preference —Liability of assignee—Limitation of—Release of debtor—Resulting rust—13 Eliz. c. 5.

deed by C. assigning all his property to W. in trust for the fit of creditors provided that six creditors should first be paid ll; that if sufficient assets remained for the purpose, twenty- other creditors should next be paid in full; that the balance, y, should be distributed ratably among all the creditors not referred, and the surplus returned to the debtor. The deed ided for a release and discharge by the executing creditors of eir respective claims against the debtor, and also contained provision, "that the party of the second part (the trustee his executors or administrators, shall not be liable or ntable for more money or effects than he shall receive, nor ny loss or damages which may happen in reference to the trusts, unless it shall arise by or through his own wilful ct." In a suit by an unpreferred creditor for a large amount ve the deed set aside;

eld, affirming the judgment of the Court below, GWYNNE and ERSON, JJ., dissenting, that the deed was one which it was asonable to expect creditors to become parties to, and was under the statute 13 Eliz. c. 5, as tending to defeat and creditors in the recovery of their claims, and as containing ulting trust in favour of the debtor.

arrington, Q.C., for the appellant.

L. Borden and *W. B. Ritchie*, for the respondents.

EBSTER v. MUTUAL RELIEF SOCIETY OF NOVA SCOTIA.

urance—Life—Mutual company—Bond of membership—Warranty—Concealment of facts—Misstatement.

n an application for insurance in a mutual assessment insur- society, the applicant declared and warranted that if in any of nswers there should be an untruth, evasion, or concealment cts, any bond granted on such application should be null and In an action against the company on a bond so issued, it

was shown that the insured had misstated the date of giving the 19th instead of the 23rd of February, 18 date; that he had given a slight attack of apoplexy disease with which he had been afflicted, and the co tended that it was, in fact, a severe attack; that he that he was in "perfect health" at the date of the which was claimed to be untrue; that he had suppres of his being subject to severe bleeding at the nose; a stated the attack of apoplexy which he had admitted o years before the application, whereas the fact was occurred within four years. The trial Judge found th statement as to date of birth was immaterial, as it cou increased the number of years on which the premium culated; that the attack of apoplexy was a slight, n attack; that the applicant was in "good" if not in health when the application was made; that the blee nose to which the insured was subject was not a dise dangerous to his health; but that the misstatement time of the occurrence of the attack of apoplexy was and on this last issue he found for the society, and others for the plaintiff. The Court in banc reversed t and gave judgment for the plaintiff on all the issues, l as to the issue found by the trial Judge for the society a variance between the plea and the application whic the society from taking advantage of the misstate appeal to the Supreme Court of Canada;

Held, GWYNNE and PATTERSON, JJ., dissenting, that of the Court in banc was right, and should be affirme

Bingay, Q.C., and *Borden*, for the appellant.

Harrington, Q.C., and *Gormully*, for the respondent

NEW BRUNSWICK]

REGINA v. MACFARLANE.

Criminal law—Assault on constable in discharge of duty—Ind
Service of summons under Canada Temperance Act—Wife
Competent as witness on trial.

A constable in attempting to serve a summons violation of the Canada Temperance Act was assau

is wife. On indictment for such assault as an assault on a able in discharge of his duty under 32-33 V. c. 20, s. 39; C. c. 162, s. 34;

ld, affirming the judgment of the Court below, that such n applies to the case of a constable serving a summons for ion of the Canada Temperance Act.

ld, also, that on the trial of such an indictment neither the dant nor his wife is a competent witness under s. 216 of the elating to procedure in criminal cases, R. S. C. c. 174.

A. Vanwart, for the appellant.

J. Ritchie, S.-G., for the respondent.

MARITIME BANK v. TROOP.

ny—Winding-up—R. S. C. c. 129, s. 57—Double liability—Set-off.

ction 57 of the Winding-up Act, R. S. C. c. 129, provides that e law of set-off, as administered by the Courts, whether of or equity, shall apply to all claims upon the estate of the any, and to all proceedings for the recovery of debts due or ing due to the company at the commencement of the ing-up, in the same manner and to the same extent as if business of the company was being wound up under this

eld, reversing the judgment of the Supreme Court of New nswick, that this section does not give a right to a con- tory to set off an independent debt owed to him by a com- against calls made in the course of winding-up proceedings, r for capital or double liability.

arker, Q.C., for the appellants.

A. Vanwart, for the respondent.

SNOWBALL v. NEILSON.

Fraudulent judgment—Motion to set aside—Collusion.

., a judgment creditor of J. N., sr., applied to the Supreme rt of New Brunswick on affidavits, to have a judgment of N., jr., against J. N., sr., his father, set aside as being

obtained by collusion and fraud, and in order to cov
of J. N., sr. The facts alleged in the affidavits su
application were that a cognovit was given and th
of J. N., jr., was signed on the same day; that
was ever rendered of the debt; that no entries wer
by J. N., jr., against his father; that the account fo
cognovit was given was made up from calculation a
books; that the father had offered to have the ju
charged on payment of a much smaller sum; and
examination of the father for disclosure he could no
he owed his son the amount, and that he had had n
of accounts. The affidavits in answer stated how t
accrued, giving the details; that there was no collus
the father and son; that the son had frequently aske
for a settlement but could not get it; and that h
been a party to or authorized any settlement. The
held that the applicant had failed to show fraud an
set aside the judgment.

Held, that the decision of the Court below should

G. F. Gregory, for the appellant.

Hannington, Q.C., and *J. A. Vanwart*, for the resp

VANWART v. NEW BRUNSWICK R. W.

Railway company—Negligence—Duty of company—Contribut

V. was at a siding of the N. B. Railway with a pai
horses. He was told that a train was approaching,
voured to unhitch the horses, but before he could do
came along, the horses took fright and ran away,
dragged on the track where he was killed. There w
of the approach of the train by whistle or ringing o
the company, not coming under the general railw
not bound to give such warning. The train was
daily freight and was proceeding at its usual rate of

Held, reversing the judgment of the Court bel
facts presented did not show such negligence by the
the company as would make the company liable
for V.'s death.

eld, also, that if the company were liable, the father of the ased would have had reasonable expectation of future niary benefit from the life of his son, and would be entitled are in the damages.

W. Weldon, Q.C., for the appellants.
A. Vanwart, for the respondent.

WINCHESTER v. BUSBY.

r—Conversion—Bill of lading—Refusal to deliver cargo—Pre-payment of freight—Expenses of storage.

. was master of a vessel carrying a cargo of coal for B. On al W. refused to deliver the coal unless the freight was pre- which B. refused, offering to pay freight ton by ton as ered. The agent of the owners then caused the coal to be d; on which the whole freight was tendered by B. and the demanded, which the agent refused unless the expenses of torage were paid. In an action of trover against W.,

eld, affirming the judgment of the Court below, GWYNNE, J., nting, that there was a conversion of the coal for which B. l recover in trover.

eld, per PATTERSON, J., that B. had a right of action, but not nst the master of the vessel, and that the appeal should be ved on that ground.

eldon, Q.C., for the appellant.
. *Pugsley* and *C. A. Palmer*, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 7th M

TRUAX v. DIXON.

Mechanics liens—Material men — Extent of lien—Cross-cl against contractor—Set-off—Payment—Registered claim of ments of—R. S. O. c. 126, ss. 9, 10, 16, and schedule—A missioner.

The last of the materials in respect of which the sub-contractors claimed a lien under the Mechanic upon the estate of the land-owner were delivered September, 1887, and the claim of lien was not re was notice in writing given until the 11th Octobe this action to enforce the lien was not brought t October, 1887.

Held, that under ss. 9 and 10 of R. S. O. c. claimed did not attach so as to make the owner liable sum than the sum payable by the owner to the contr

Goddard v. *Coulson*, 10 A. R. 1, followed.

The owner had an old account against the contract supplied, which account with interest he charged sums due to the contractor under the contract.

Held, upon the evidence, that the account and int be treated, not as a matter of set-off, but as a pa much of the contract price.

Section 16 of R. S. O. c. 126, requires that of lien shall state the time or period within materials were furnished. The claim registered i did not state the year, but only the months and months, in which the materials were furnished. however, that the materials were furnished on or bef

ember, 1887; and in this and all respects it followed form he schedule to the Act; and s-s. 2 of s. 16 provides that laim may be in one of the forms given in the schedule to Act.

ld, that the statement that the materials were furnished on fore a named day was a sufficient statement of the time or d within which they were furnished, according to the true t and meaning of s. 16.

berts v. *McDonald*, 15 O. R. 80, overruled.

e question of the authority of schedules to Acts of Parlia- discussed.

e land upon which the lien was claimed was in the county ellington, but the affidavit of the plaintiffs verifying the of lien registered was made in the county of Bruce, and e a commissioner for taking affidavits in that county.

ld, that the affidavit satisfied s. 16, s-s. 2, of the Act.

P. O'Connor, for the plaintiffs.

H. Kingston, for the defendant George Dickson.

LEWIS v. BRADY.

ment and taxes—Distress for taxes—Legal assessment—Delivery of oll to collector—Return of roll by collector—Appointment of collector—Declaration of office—Demand of taxes—R. S. O. c. 193, ss. 12, 120, 132, 133.

he defendant, as collector of taxes of a village for the year , on the 9th January, 1888, seized goods of the plaintiff as tress for taxes assessed against the plaintiff upon the assess- t roll for 1886. The plaintiff brought this action of replevin cover the goods so seized.

) *Held*, upon the evidence, that it was not shewn that the tiff was not duly and legally assessed for the taxes in ect of which the distress was made.

) Section 120 of the Assessment Act, R. S. O. c. 193, provides the clerk shall deliver the roll to the collector on or before 1st day of October, or such other day as may be prescribed by-law of the local municipality; but no by-law was passed, the roll for 1886 was not delivered by the clerk to the defen- until about the 1st January, 1887.

Held, that the provisions of s. 120 were directo imperative; and the omission to deliver the roll prescribed time had not the effect of preventing from proceeding to collect the taxes mentioned in soon as it was delivered to him, or of rendering such invalid.

(3) Section 132 of the Act, provides that every co return his roll to the treasurer on or before 14th D each year, or on such day in the next year not la February, as the council may appoint; and s. 133 p in case the collector fails to collect the taxes by the da the council may by resolution authorize the collec other person in his stead to continue the levy and co

On 11th December, 1886, (before the roll was deli collector) the council passed a resolution that the c ceed at once to collect the taxes for 1886; on 7th M another resolution instructing P. Brady (the defendan the payment of the uncollected taxes at once; on 1 ber, 1887, a resolution that P. Brady, collector, be i have the roll for 1886 returned by the 24th inst.; January, 1888, (after the distress and before the rep lution that the time for the collection of the unpa 1886 be extended until 15th February, 1888, and th be authorized to collect until that date. The ro remained in the hands of the defendant from the delivery of it to him until after the distress and repl

Held, that the defendant was either the collecto meaning of s. 132 when he made the distress, and roll still in his hands unreturned was authorized following *Newberry* v. *Stephens*, 16 U. C. R. 65; person authorized as collector, or in the stead of t by the resolutions of the council to continue the levy tion under s. 133, which provides no limit of time i and in either case the distress by him was valid.

(4) By by-law providing for the assessment an rates for 1885 passed by the council on 11th Dece the defendant was appointed collector to collect t 1885. On the 23rd December, 1886, the defendant a bond with sureties as collector to the corporation of which recited that he had been appointed collector; same day a resolution was passed by the council tha

P. B. as collector be accepted, as presented to the council; no other appointment of the defendant as collector was ved, and the defendant swore that he did not think he made declaration of office for any year.

Held, that the effect of the defendant's not having made and scribed the declaration required by s. 271 of the Municipal , R. S. O. c. 184, was not to make his acts void; and having n duly appointed by by-law collector, he held office until oved by the council, even if what was done by the council the 23rd December, 1886, did not constitute a good appoint-nt.

5) *Held*, that the appointment in December, 1887, of another on to collect the rates for 1887 had not the effect of remov-the defendant from office; for it was an appointment for that only, and by s. 12 of the Assessment Act the council might oint such number of collectors as they might think neces-; but even if it had that effect, the roll for 1886 had not n returned by the defendant, and the resolution of the 17th uary, 1888, authorized him to continue the collection under 38, and legalized the distress then made.

8) It was proved that the defendant on the 11th January, 7, duly demanded the taxes distrained for.

Held, that this demand was sufficient to warrant the distress, the fact that the defendant several times afterwards anded the same taxes did not affect the validity of the first and, which was the only one required.

. *M. Meredith*, for the plaintiff.

H. Blake, Q.C., for the defendant.

LAING v. SLINGERLAND.

—Discharge—Action on recognizance—Surrender of principal— Notice of urrender—Exoneretur—Bail relieved on terms—Amount of recovery gainst bail—Rules 1062, 1064, 89.

he defendants were special bail for one S. upon a recognizance n action by the plaintiff against S. The proceedings in the nal action were begun and carried on in the county of Middle-and the condition of the recognizance was that S. would, if emned, satisfy, etc., or render himself to the custody of the

sheriff of Middlesex, or the cognizors, the present
would do so for him. The defendants on the 7th Febr
rendered S. to the sheriff of Norfolk, S. being fou
county, and obtained from the sheriff a certificate of s
but obtained no order for the entry of an exoneretur.
of summons in this action upon the recognizance was
the defendants on the 10th April, 1888, and on the
1888, the defendants served on the plaintiff a notice of
of S. to the sheriff of Norfolk.

R. S. O., 1877, c. 50, s. 40 (now Rule 1062) provid
render of the defendant to the sheriff of the county in
action against such defendant has been brought;
of the same Act (now Rule 1064) provides that speci
surrender their principal to the sheriff of the count
the principal is resident or found, and that upon p
notice to the plaintiff of the surrender, and produc
sheriff's certificate thereof, a Judge shall order an exo
be entered on the bail-piece, and thereupon the bail s
charged.

Held, that the bail were not entitled to be discharge
the plaintiff was entitled to bring this action upon th
ance, because no exoneretur had been entered upon i
standing the notice of render; but that, the substan
rendering the principal having been performed, the
should be relieved upon terms.

The Court ordered that upon the defendants filing a
an exoneretur within two weeks, and paying the c
action within ten days after taxation, the judgment for
tiff should be set aside and all further proceedings sta
wise judgment to be entered for the plaintiff with cost

Held, also, that under Rule 89 of T. T. 1856,
1085), the liability of bail is limited to the amount of t
nizance; and the plaintiff having recovered in the orig
the whole sum sworn to in the affidavit of the def
recovery against the bail should not in any event be
that sum.

Gibbons, for the plaintiff.
Watson, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 18TH MARCH, 1889.

IORTON v. PROVINCIAL PROVIDENT INSTITUTION.

surance—Life—Certificate of membership—Default—Forfeiture—Waiver.

Judgment of ROBERTSON, J., 16 O. R. 382; 8 Occ. N. 344, ffirmed with costs.

Mowat, Q.C., A.-G., and *J. S. Robertson*, for the defendants.
W. R. Meredith, Q.C., for the plaintiff.

[BOYD, C., 16TH JANUARY, 1889.

In re McMILLAN.

Agreement—Power of those for whose benefit it is made to enforce same—Release.

In consideration of a conveyance to him of a certain farm, I. M. agreed with his mother, M. J. M., that he would during er life provide her with a house on the farm and with neces-aries and support his brothers and sisters thereon until they eached 16 years of age so long as they remained at home on the arm and assisted him so far as they were able in the manage-ient of it.

Held, that M. J. M. had no right or power to release H. M. rom the obligations undertaken by him with reference to his rothers and sisters under the above agreement, and if the children id their part they could hold their brother to his promises, hough the agreement was not in terms made with them as arties.

Hoyles, for the petitioner.

[28TH FEBR

ANGLO-CANADIAN MUSIC PUBLISHERS' ASS
v. SUCKLING.

Copyright—British—Canadian—R. S. C. c. 62.

There is a very clear distinction to be observed in right Act, R. S. C. c. 62, between works which a British copyright and those which are of prior Cana right. If there is a prior British copyright, and Canadian copyright is obtained by the production of then by s. 6 that local copyright is subject to be inv importation of lawful British reprints. But if the copyright is first on the part of the author or his as under s. 4 the monopoly is secured from all outside i

The Imperial Parliament has sanctioned and reitera legislation, whereby the possessor of a prior Canadian is secured completely against all interference to the extent of the Dominion; even as against English re or copies made under a subsequent British copyright.

Bain, Q.C., for the plaintiffs.

W. Cassels, Q.C., for the defendants.

[26TH M

HOBBS HARDWARE CO. v. KITCHEN

Chattel mortgage—Advance of firm moneys—Mortgage taken to

A. and B. were partners as money lending brokers in the habit of lending firm moneys and taking securi for in the name of the individual partners, as each wa accept the security of the person seeking to borrow. of firm moneys was made to C. on a chattel mortga B., who made the affidavit of *bona fides*, and A. wa scribing witness thereto. In an interpleader issu creditors of C., who claimed under executions, and B., w under the mortgage, in which, while it was admitted no fraud or *mala fides* in the transaction, it was conte both members of the firm should be specified as mortg

eld, that there was nothing illegal or misleading to the public ıch an arrangement, and that creditors should not be allowed ake advantage of it to the detriment of an honest lender; that artners are joint owners in law of the assets of the firm, there o legal objection to a loan by one member from the moneys ne firm and the taking of the mortgage to himself; while in ty the security is the property of the partnership, and the vidual mortgagee would have to account for the moneys nced; and judgment was given for the claimant for the tgage.

ibbons, for the execution creditors.
oyles, for the mortgagee.

[1st April, 1889.

In re STURGES.

Will—Attesting witness—Beneficiary.

fter a person named as a beneficiary in a will had signed her ne as an attesting witness, it was discovered that she was the e person as was named as the beneficiary. Two other nesses then signed the will, with the consent of the testator, the name of the first attesting witness was not erased.

eld, that, nevertheless, evidence was admissible to show the ve circumstances, and the right of the beneficiary to take er the will was not defeated.

V. H. Blake, for the defendants.
. T. English, for the plaintiffs.

DOMINION BANK v. OLIVER.

Banks and banking—Mortgage—Renewal notes—Warehouse receipts—Negotiation—Bank Act, R. S. C. c. 120.

f a bank, holding a mortgage as additional security for the ment of certain notes, substitutes for these notes renewals n time to time, without however receiving actual payment, whole series of notes and renewals form links in one and the ne chain of liability, which is secured by the mortgage, ough as a matter of bookkeeping the bank may have treated

the first notes and the subsequent substituted no
the application of the proceeds from time to time of

The simple renewal of notes by a bank is not a
within the meaning of s. 53, s-s. 4, of the Bank A
120, so as to validate a warehouse receipt take
security, no new advance being made, and no val
eration being given or surrendered contemporan
bank, which might represent the inception of a ne
or negotiation of securities.

Moss, Q.C., for the defendants Oliver and Knowl
W. N. Miller, Q.C., for the plaintiffs.

In re ZOOLOGICAL AND ACCLIMATIZATIO
COX'S CASE.

Company—Winding-up—Contrib: tories—Subscription

Where one C. signed the subscription book
incorporated under R. S. O. c. 157, under the fo
ment :—

"We the undersigned do acknowledge ourselv
scribers to the capital stock of the company for t
shares and to the amount set opposite our nam
hereby covenant, promise, and agree each with t
* * to pay the amount of our said subscr
calls thereon when and as the same may be called
provisions of the Joint Stock Act or under any
may by passed ;"

Held, following *In re Queen City Company*, 10 C
this amounted to a complete and absolute engage
company, and with the other signatories, which
the engagement was not conditional on the allotm

If the stock was not given to the signatories
enforce the engagement specifically and needed
more to perfect the agreement.

A. C. Galt, for E. S. Cox.
W. Creelman, for the liquidator.

[ROBERTSON, J., 9TH JANUARY, 1889.

NICHOL v. ALLENBY.

junction—Right to maintain action—Owner of undivided share in land—Purchaser at sale under void partition proceedings—Simple contract creditors—Mortgagee of undivided share—Power of local Master—Lands in two counties.

In an action for an injunction brought by (1) the owner of o undivided third parts of certain lands, (2) the purchaser at sale of the lands under an order made by a local Master for e partition or sale of lands in two different counties, and (3) simple contract creditor of the owner of the other undivided ird part of the lands, against a mortgagee of the latter's un-vided third, to restrain the mortgagee from proceeding with a reclosure action ;

Held, that as the lands sought to be affected by the order for rtition or sale made by the local Master lay in more than one unty, the jurisdiction of the local master did not attach ; and, llowing *Queen* v. *Smith*, 7 P. R. 429, the Master having no risdiction to make the order for partition or sale, all proceed-gs under it were null and void.

Held, also, that the owner of the two undivided third shares the land had no right to redeem the mortgagee of the other divided third share.

Held, also, that a simple contract creditor had no right to deem.

Quære, whether a mortgagee of an undivided share in the nds should not be made a party to partition proceedings.

J. Hoskin, Q.C., and *W. Nesbitt*, for the plaintiffs.
Bain, Q.C., for the defendant.

[14TH FEBRUARY, 1889.

In re SPROULE, SHARP v. SPROULE.

ll—Construction—Devise "if my father does not alter his will"—Legacies —Vesting.

A testator by his will provided that in case his father did not oke his will and so deprive him (the testator) of certain lands erein devised to him, then he (the testator) devised to S.

certain lands; but in the event of his father alter and depriving him (the testator) of the lands therei him, then he devised the said land otherwise.

He then bequeathed pecuniary legacies to cer children, adding in the case of those of them who eighteen, the words "to be paid to them when they c and concluding: "I do hereby authorize and dire executors to invest the moneys devised to my child legal securities until they arrive of age and the inter from such investment to be paid to my wife to assist porting and educating my family."

The father of the testator did not revoke or alter the way referred to, but the testator predeceased him

Held, that the words relating to the alteration of the father of the testator must be construed as mea the testator became the owner of the lands devised in will so that he could have a disposing power over that they should go in the manner mentioned.

Held, also, that the pecuniary legacies were all of t and that the legacy left to each child which did not at one within the year after the testator's death was to until each child came of age, and the interest up to times when they should each attain twenty-one sh plied in assisting the widow or mother to maintain such child or children; and as each child attained tw or she would be entitled to be paid their respective l

F. A. Anglin, for the executors.

J. Hoskin, Q.C., for the infant children of the test

N. F. Patterson, Q.C., for the adult defendants.

[STREET, J., 18TH M

CAMERON v. GIBSON.

Mortgage—Conveyance—Merger—Chattel mortgage of gro

A. C., owner of certain lands, mortgaged them to Permanent Loan and Savings Company, and afterwa two successive mortgages to one H.

erwards, in 1887, A. C. sowed eight acres of fall wheat, n January, 1888, made a chattel mortgage of this fall to G., which chattel mortgage was properly registered. h April, 1888, before the harvest, under pressure from H., conveyed to H. the lands for a consideration equal to what lue on the three mortgages and a small additional un- d debt due from him to H.

5th April, 1888, H. leased the property to A. J. C. for a

en the fall wheat was ripe A. J. C. cut and harvested it; sent and seized it under his chattel mortgage, and A. J. C. rought this action to recover the value of the wheat.

d, that on his taking the conveyance from A. C. the rights as mortgagee were merged, for the evidence pointed ly against an intention on his part that the mortgage should remain, and therefore G's. right as chattel mort- became prior in point of time to the title of A. J. C.; and tion should be dismissed. As mortgagee H. would no doubt ad the right to take possession of the crops as part of his ty.

n, for the plaintiff.

P. O'Connor, for the defendant.

IN CHAMBERS.

[BOYD, C., 15TH APRIL, 1889.

In re DOLSEN.

s—Taking land for—Costs—Railway Act of Canada, 51 V. c. 29, 136, 137—Infants interested in land—Sale and conveyance—Necessity order.

ere land was conveyed to C. D. for life with remainder to ildren, and C. D. during the infancy of her children to sell and convey the land to a railway company for the es of its railway;

l, that C. D., notwithstanding the provisions of s. 136 of ilway Act of Canada, 51 V. c. 29, had no right in law to o get such a right an order of a Judge under s. 137 was ed; and where the proceeding was entirely for the benefit

of the railway company, and no factious oppositio
by anyone, the company should pay the costs of the
of the price of the land.

J. Hoskin, Q.C., for the infants.

Hoyles, for the Ontario & Quebec Railway Compa

[Rose, J., 2nd

MARITIME BANK v. STEWART.

*Bankruptcy and insolvency—English Bankruptcy Act, 1883-
under—Staying action in Ontario.*

This action was begun in March, 1887, to reco
from the defendants. The defendants having beco
proceedings in bankruptcy, the plaintiffs presente
and lodged it with the assignee in bankruptcy in
September, 1887. The Judge in bankruptcy in E
an order enjoining the plaintiffs from proceeding wi
in the High Court of Justice for Ontario, and sub
order was made in this action by the Master in Cha
the proceedings forever.

Quære, whether there was power under the E
ruptcy Act, 1883, to grant the injunction referred t

Held, that there was power in this Court to ma
either under s. 10 of the English Act, or by reason
of the case and the power of the Court to administe
and the order of the Master in Chambers stayin
was affirmed.

Howell v. *Dominion of Canada Oil Refining Co.*
484; *Regina* v. *College of Physicians and Surgeons o*
U. C. R. 564; *Ellis* v. *McHenry*, L. R. 6 C. P.
referred to.

Gormully, for the plaintiffs.

McCarthy, Q.C., for the defendants.

[The Master in Chambers, 8th

WALLBRIDGE v. TRUST AND LOAN

Security for costs—Plaintiff suing for another, but interested

Where a plaintiff in an action is not an actor the
mere passive instrument in the hands of the real

n the action is brought, security for costs will be ordered; where the plaintiff, although he partly brings the action for benefit of another, who has agreed to contribute to the use thereof, is also himself largely interested in the result, to be considered as the real acting plaintiff, and cannot be elled to give security for costs.

laney v. *MacLellan*, *ante* p. 170, distinguished.

lenworth, for the plaintiff.

H. Marsh, for the defendants.

[12TH APRIL, 1889.

HALL v. FORTYE.

Speeding the trial—Sale blocked.

tion by the defendant to compel the plaintiff to speedily r his statement of claim in an action by the sheriff of borough, a subsequent assignee for creditors of Porter Bros., vent debtors, against the prior assignee, to establish the tiff's rights as assignee, and to restrain the defendant from g the stock-in-trade of the debtors. A motion for an interim ction restraining the sale had been refused by BOYD, C., p. 160) but the sale was in fact prevented from going on by ction of the solicitor for the plaintiff, who also represented nsolvent debtors, and, by appearing at the place of sale and ing persons not to purchase, in effect blocked the sale.

E MASTER held that the conduct of the solicitor brought the nder the same rules as if there had been an injunction or *ndens*, and that he was therefore justified in speeding the of the action. He ordered that the plaintiff should deliver tatement of claim on or before Monday, 15th April.

epley, for the defendant.

yles, for the plaintiff.

First Division Court of the County of Norfolk.

[LIVINGSTONE, Co. J., 25TH APRIL, 1889.

WHEELER v. COUNTY OF NORFOLK.

y had and received—Fine in hands of county—Subsisting conviction bad on its face—Notice of action.

e plaintiff was convicted by the Police Magistrate of the ty of Norfolk of a first offence against the second part of the

Canada Temperance Act, and was fined $75. The
and was subsequently passed over to the defendant
the Order-in-Council founded upon the provisions
R. S. C. c. 180. The plaintiff then sued for the a
quashing the conviction or giving any notice of act

Held, that the action for money had and received
the fine from the defendants.

Held, also, following *Regina* v. *Smith*, 16 O. R
fine of $75 could not legally be imposed for a first
the second part of the Canada Temperance Act.

Held, also, that the conviction being bad on
failure to quash it could not be urged as an answer
and that the defendants were not entitled to notice

J. B. MacKenzie, for the plaintiff.

Robb, for the defendants.

(Reported by J. B. MacKenzie, Esquire, Brantf

NOVA SCOTIA.

In the Supreme Court.

WILLIS v. SWEET.

Work and labour—Contract—Trespass.

The defendant contracted with the plaintiff to m
for him a track sulky, for a price agreed upon, t
supplying all the materials.

On the completion of the work, the defendant
amount agreed upon, when the plaintiff refused t
to deliver the carriage unless he was paid a larger a
he claimed. The defendant thereupon broke into t
workshop and removed the carriage.

In an action for the trespass and for the amoun
the plaintiff, judgment was given in the defendant's
contract with costs, and in favour of the plaintiff fo
with nominal damages.

Held, that the judgment could not be disturbed.

LARDER v. FARQUHAR.

Account stated—Mutual understanding.

he plaintiff sued the defendants, F. and L., for wages due for work done as a diver in saving goods from a wrecked ner at the island of Anticosti, and also for two-fourteenths he goods saved, under an agreement to that effect. The dant L. suffered judgment to pass against him by default. defendant F. contested the claim as to the share of the pro- claimed. In the County Court judgment was given in the tiff's favour, based on what purported to be an adjustment he salvage account between F. and L. in a previous suit ght to secure a settlement of their accounts. There was no nce as to who made the paper or that the defendant F. its contents, and it appeared further that it had been ed to the plaintiff 's solicitor, who was acting at the time as tor for the defendant L., in connection with the previous without predjudice, and on the understanding that it was o be made use of in any other suit.

eld, on appeal, that there was no evidence to support the ment appealed from.

support an account stated, it is necessary to show a mutual rstanding between the plaintiff and defendant as to a balance k or sum admitted.

NEW BRUNSWICK.

In the Supreme Court.

orted by J. W. McCready, Esquire, Barrister-at-law, Fredericton.)

[18TH APRIL, 1889.

Ex parte McCLEAVE.

da Temperance Act—Conviction of employer and servant on same day.

cC. was convicted for selling intoxicating liquor on 24th ary by R., his clerk or servant, and R. was also convicted elling on the same day.

The objections to the conviction in McC.'s case we

(1) That the convictions against him and R. w same act of selling.

(2) That the principal and agent could not be convi same offence.

(3) That the prosecutor must elect against which would proceed, and having proceeded against R. an him, no conviction could afterwards be made again the same act.

The judgment of the Court was delivered by

ALLEN, C.J.—No doubt it is probable that the sale McC. was convicted was the same as that for which was convicted. The same witness proved the sale in Admitting, however, for the purpose of argument th struction of s-s. 2 of s. 100 of the Act R. S. C. c contended for by the defendant's counsel, we do not the evidence brings this case within that constructio to the identity of the sales, or as to R. having bee victed.

Rule for *certiorari* discharged.

Ex parte TOWER.

Landlord and tenant—Summary proceedings under C. S. c. 83, s land—Certiorari.

Held, that C. S. c. 83, s. 22, applies only to a cl landlord and tenant; and where in a proceeding bef County Court Judge is satisfied that the question of *fide* raised he should not proceed any further.

Phillips v. *McLaughlin*, 24 N. B. 532, distinguishe

Held, also, that the removal of the proceedings was proper in this case, where the objection was that t the County Court had no jurisdiction, though possibl might have been taken under section 23. But whethe would lie or not, the remedy by *certiorari* was proper.

SAVOY v. SAVOY.

Ejectment—Statute of Limitations—Misdirection to jury—New trial.

Vhen the defendant was about 15 or 15 years old, his mother taken to the Lazeretto, and he was about to leave his home use the people of the place shunned him on account of the ase. His father, it was alleged, then gave up the property to and he had been in possession ever since.

ne defendant and his father lived together on the highland of the property till about the time of his father's second riage in 1857. In December, 1857, the father died, having e his will the day before his death in favour of the lessor of plaintiff. At the trial the Judge asked the jury to answer question, "Who was in possession of the property at the of the father's death?"

was proved that the defendant and his father were living ther on the highland part of the property till about the time e father's second marriage in 1857, and that the father had occupying the property for many years before that, the ndant assisting in the work of the farm.

eld, TUCK, J., dissenting, that under such circumstances the umption was that the property belonged to the father, unless e was satisfactory evidence to the contrary.

eld, also, that the proper question for the jury would have whether the father had given up the possession and control he property to the defendant with the intention that the ndant should become the absolute owner of it more than nty years before the making of his will; and whether the ndant at that time had been in exclusive possession of the erty claiming it as his own, by consent of his father, for the n of twenty years.

new trial was ordered.

SCAMMEL v. JAMES.

Judgment—Irregularity—Bail-piece—Exoneretur.

eld, that under the practice and rules of Court it is not ssary to have the bail-piece on file in order to enter up

judgment after verdict; and that when the signing was delayed for a period of fifteen months after verd signed without notice to either party, the judgment and the Judge was right in granting the order *exoneretur* on the bail-piece.

JONES v. TOBIN.

Bail—Order to stay equivalent to setting aside proc

An application to set aside an order staying pro suit against the defendant as bail.

Held, that the order should have been to set a ceedings against the defendant as bail; but as a st ings amounted to the same thing, and as the bail to have the proceedings set aside, the application with costs.

MANITOBA.

In the Queen's Bench.

McMICKEN v. ONTARIO BANK.

Security for costs—Payment into Court.

The Referee having made an order that secu should be given "in accordance with the usual p Court;"

Held, that he could not permit the plaintiff in a bond to pay into Court a sum less than $400.

STEVENS v. McARTHUR.

Interpleader issue—Form of—"The goods or any par

It is immaterial whether an interpleader issue goods seized," or "the goods seized or any part th the former words the claimant may prove for a goods seized.

LAVALLE v. DRUMMOND.

Real Property Act—Trial of issue—Costs.

n order directing the trial of an issue under the Real Pro-
y Act should reserve all further questions, including the
tion of costs, until after the trial of the issue.

NOR'-WEST FARMER v. CARMAN.

Garnishee—Costs—Affidavit disputing liability—form of.

garnishee, upon the first return of a summons to pay over,
l an affidavit alleging an assignment of the debt to the judg-
nt debtor previous to attachment; and also denying the
tence of the debt; but this denial was not in sufficient form.
Held, that the plaintiff might elect to abandon the proceedings
hout costs.

[KILLAM, J.

In re McARTHUR AND GLASS.

Real Property Act—Affidavits in support of petition after caveat.

t is not necessary to file affidavits in support of a petition
ed upon a caveat in the Land Titles office. Cause may be
wn by argument upon the allegations of the petition or by
davits, after which the Judge may, if necessary, permit the
itioner to adduce evidence or may direct an issue.

[BAIN, J.

ELLIOT v. ARMSTRONG.

Pleading—Joinder to pleas of release and counter-claim.

The plaintiff joined issue upon pleas of release and counter-
im.
Held, that a joinder was appropriate to such pleas.

FRASER v. DARROCH.

Insolvent debtor—50 V. c. 8, s. 1, s-s. 5 (Man.), construction of—in value of the creditors."

Upon a motion for an injunction it was held by Bain in estimating the "majority in value of the creditors 50 V. c. 8, s. 1, s-s. 5, (Man.), the question of security any creditor should not be taken into account. creditors must be taken to be such for the full amount the debtor owes them."

REGINA v. GALBRAITH.

Justice of the peace—Summary conviction—Distress and impri default of fine—Certiorari—Practice.

A statute permitted punishment by imprisonment or both. It also provided that where a fine is impos not paid a warrant of distress may issue, and after a ret sufficient goods the defendant may be committed to also provided that no conviction should be quashed fo form or should be removed by *certiorari* into any Superi

Under this statute a summary conviction directed the of a fine, and in default of payment a distress, and if then imprisonment.

Held, that as there was jurisdiction to award dist imprisonment, the conviction was not bad, although jurisdiction was prematurely exercised—such award at was surplusage only.

A fiat for a writ of *certiorari* should not issue as of the justice do not appear upon notice of an applicat summons that it should issue.

Notwithstanding the statutory provision a *certiorari* where the justice has no jurisdiction.

BRITISH LINEN CO. v. McEWAN.

Security for costs—No valid defence—Jurisdiction of foreign Co on foreign judgment.

Security for costs is in the discretion of the Court not be ordered where there is no valid defence to the ac

an action on a foreign judgment want of jurisdiction in the gn Court cannot be set up if the defendant appeared in that t.

foreign judgment is not evidence merely of a debt, but itself titutes a cause of action.

In re HEUBERT AND GILSON.

l Property Act—Priority between registered fi. fa. and unregistered transfer.

ter a *fi. fa.* against the registered owner of lands had been tered, a prior transferee of the whole estate registered his fer.

eld, that a transfer gives to the transferee the right to have and registered in his name, but until it is registered it has ffect upon the land; and that the execution creditor was fore entitled to priority.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

. D.] [30TH APRIL, 1889.

ONTARIO LOAN & DEBENTURE CO. v. HOBBS.

rtgage—Re-demise clause—Landlord and tenant—Right to distrain.

the 31st May, 1883, one D. mortgaged to the plaintiffs in lands to secure the sum of $20,000 then advanced by to him. The advances were repayable as follows:—$500 e first day of December, 1883; $500 in each of the months ne and December in each of the four following years; and 00 on the first day of June, 1888; together with interest e rate of seven per cent. per annum from the 1st day of

June, 1883, to be paid half-yearly on the first days
December in each year. The mortgage was made
of the Act respecting Short Forms of Mortgages a
the following clause, described in the margin as
clause."

"And the mortgagees lease to the mortgagor th
from the date hereof until the date herein provide
payment of any of the moneys hereby secured un
the mortgagees or their assigns, he, the mortg
therefor in every year during the said term on each
the days in the above proviso for redemption appoi
ment of the moneys hereby secured such rent or s
in amount the amount payable on such days respect
ing to the said proviso without any deduction. An
that such payments when so made shall respecti
and be in all respects in satisfaction of the moneys
able according to the said proviso."

The mortgage did not contain the statutory distr
the statutory clause providing for possession by th
until default, or any attornment clause, and it was
by the mortgagees. At the time it was given D. w
occupation of certain of the properties comprised
annual rental value of about $1,200, while the oth
comprised in it were in the occupation of tenants of
producing an annual rental of about $2,000. After t
of the mortgage the properties continued to be oc
same manner by D. or his tenants and payment
mortgage were duly made by D. In 1887 the go
one of the properties comprised in the mortgage and
him were seized under executions against him and
plaintiffs claimed as landlords that the proceeds
should be applied first in payment of the amount
for the unpaid instalments of principal and interest
December, 1886.

Held, reversing the decision of the Queen's Ben
15 O. R. 440, that this claim was well founded; th
landlord and tenant having been validly created
parties, and the execution creditors in the absence
being entitled to complain.

Moss, Q.C., and *A. O. Jeffery*, for the appellants.
W. R. Meredith, Q.C., for the respondents.

YD, C.J

MACLENNAN v. GRAY.

Registry laws—Priorities—Unregistered mortgage—Dower.

R. G. and J. G., being the owners, subject to the dower of ir mother R. and an annuity in her favour, of certain lands, rtgaged them to one C. to secure advances made by him to m. R. knew of the mortgage and was asked but refused to cute it. Subsequently R. G. and J. G. mortgaged the lands he plaintiffs to secure advances made by them. R. released her claims for the purpose of this mortgage but received no efit from the advances. This mortgage was taken by the intiffs without any notice of the mortgage to C., and was istered before it and gained priority over it. Under this rtgage the lands were sold and after payment of the claim the plaintiffs a surplus remained which R. claimed in priority C.

Held, reversing the decision of BOYD, C., 16 O. R. 321, that was not entitled to priority. The priority gained by the intiffs by force of the Registry Act did not enure to her efit, as she was not a purchaser or mortgagee; nor did that rity enure to her benefit as surety by virtue of the doctrine subrogation, because that doctrine could not be invoked to eat the honest claims and superior equities of third persons.

H. J. Scott, Q.C., for the appellant.

Kingsford, for the respondent.

In re CENTRAL BANK OF CANADA.

BAINES' CASE.

nks and banking—Winding-up Act—Subscription for shares—Transfer of shares—Shareholders within one month of suspension—R. S. C. c. 120, ss. 20, 70, 77.

One B. subscribed for twenty-five shares of the capital stock the Central Bank of Canada, but did not at the time of sub- ption nor within thirty days thereafter make any payment reon. About eight months later, however, payment was de by B. to the bank, and the bank accepted payment from

him, of twenty per cent. of the amount subscribed, quently dividend cheques were issued by the bank i B., were indorsed by him, and were paid.

Held, MACLENNAN, J.A., dissenting, affirming the BOYD, C., 16 O. R. 293, that, the original signature unobliterated, the subscription was revived and bec plete as soon as payment was made, and no fresh sig necessary.

Per MACLENNAN, J.A.—The payment not having within the prescribed time, the original subscriptio but the subsequent payment accepted by the ban indorsement by B. of the dividend cheques operate subscription.

No special directions as to the transfer of shares formally adopted by the directors, but the transfer been prepared and adapted to the system of margin One C. transferred certain shares in blank, subject b note, initialled by C., to the order of a broker, and su subsequent marginal note, initialled by the broker, t of B. B. signed an acceptance of the shares immedi the transfer in blank signed by C. and was entered in of the bank as the holder of the shares, the interme fers to and from the broker being omitted. The tra and the acceptance by him took place within a mo suspension of the bank.

Held, affirming the decision of BOYD, C., that th and acceptance were a sufficient compliance with or a in any way a violation of the statutable provisions a became the legal holder of the shares and was liabl tributory.

Sections 70 and 77 of the Act must be read to make liable as contributories all those who hold sh time of the suspension of the bank or who have hel any time within one month before.

A. C. Galt, for the appellant.

W. R. Meredith, Q.C., for the respondents.

RMOUR, C.J.]

RYAN v. CLARKSON.

signment for the benefit of creditors—Costs of creditor having execution in sheriff's hands—R. S. O. c. 124, s. 9.

Held, BURTON, J.A., dissenting, affirming the judgment of MOUR, C.J., that under R. S. O. c. 124, s. 9, the costs for ich the execution creditor has a lien are the costs not of the ecution only, but all the usual costs which could be recovered m the debtor under an execution.

Foy, Q.C., for the appellant.

Idington, Q.C., for the respondent.

ERGUSON, J.]

COLE v. HALL.

chanics' liens—Parties—Priorities—Subsequent incumbrancers—Master's office—R. S. O. c. 126, ss. 23, 29.

The appellant's execution against lands was placed in the eriff's hands shortly after the registration of a mechanic's lien the plaintiff, who began his action to enforce such lien and gistered his *lis pendens* within the ninety days prescribed by 23 of the Mechanics' Lien Act, R. S. O. c. 126, but did not use the appellant to be added as a party till the case had got o the Master's office, which was after the expiry of the ninety ys.

The appellant contended that as against him proceedings to alize the plaintiff's lien had not been instituted within the oper time, and therefore his execution had gained priority over e lien, and he was improperly added as a subsequent incumancer in the Master's office.

Section 29 of the Act provides that the lien may be realized in e High Court according to the ordinary procedure of that Court.

Held, that the effect of ss. 23 and 29 is that the lien shall ase after ninety days unless in the meantime proceedings are stituted in the High Court according to its ordinary procedure realize the claim; the practice or procedure of the Court is as uch the law of the land as any other part of the law; and the aking the appellant a party to the proceedings in the Master's

office was a regular step in the action, authorized and prescribed by the practice and procedure of the Court for nearly forty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days.

White v. *Beasley*, 2 Gr. 666; *Moffatt* v. *March*, 3 Gr. 163; and *Jackson* v. *Hammond*, 8 P. R. 157, referred to.

Juson v. *Gardiner*, 11 Gr. 23; *Shaw* v. *Cunningham*, 12 Gr. 101; *McDonald* v. *Wright*, 14 Gr. 284; and *Bank of Montreal* v. *Haffner*, 10 A. R. 597, distinguished.

Decision of FERGUSON, J., 12 P. R. 584, affirmed.

C. Millar, for the appellant.

Hoyles, for the respondent.

STREET, J.]

In re ROBERTSON AND TOWNSHIP OF NORTH EASTHOPE.

Municipal corporations—Drainage by-law—Petitioners for—R. S. O. c. 184, ss. 291, 292, and 569.

A petition of land-owners under 46 V. c. 18, s. 570 (R. S. O. c. 184, s. 569,) for the construction of drainage works must include a majority of all the persons found by the engineer to be benefited by the proposed works, and not merely a majority of the persons mentioned in the petition itself.

Unless the petition is signed by such majority the Council have no jurisdiction, and a by-law founded on a petition not signed by such majority is void and cannot be upheld even though valid on its face.

If the petition is not signed by such majority the opponents of the by-law are not restricted to the mode of objection given by ss. 292 and 293 of the Act of 1883 (R. S. O. c. 184, ss. 291, 292,) but are entitled to attack the validity of the by-law on this ground by application to quash even after an unsuccessful appeal to the Council.

Where a Council know that a majority have not signed, though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate inves-

gation at the instance of persons opposed to it, and they have o right to impose upon the opponents of the by-law as a term or refusing to pass it any condition as to payment of expenses heretofore incurred.

Decision of STREET, J., 15 O. R. 423, reversed.

Lash, Q.C., and *J. E. Harding*, for the appellants.

Idington, Q.C., for the respondents.

IN CHAMBERS.

[MACLENNAN, J.A., 25TH APRIL, 1889.

ROWLANDS v. CANADA SOUTHERN R. W. CO.

ppeal to Supreme Court of Canada—Judgment of Court of Appeal upon appeal from Divisional Court refusing new trial—Notice of appeal—R. S. C. c. 135, ss. 24 (d.), 41—Extension of time—Circumstances of case.

The defendants appealed to the Court of Appeal from an order f a Divisional Court discharging an order *nisi* to enter judgent for the defendants or for a new trial, on the ground, mong others, that the trial Judge should have withdrawn the ase from the jury or should have directed them otherwise than e did. The Court of Appeal dismissed the defendants' appeal, nd the defendants sought to appeal from such dismissal to the upreme Court of Canada.

Held, that the judgment of the Court of Appeal came within . 24 (d.) of the Supreme and Exchequer Courts Act, R. S. . c. 135, as "a judgment upon a motion for a new trial pon the ground that the Judge has not ruled according to law;" nd that the proposed appeal was governed by the necessity for he notice of appeal within twenty days prescribed by section 41 f the Act.

The judgment of the Court of Appeal was delivered on the 5th larch, 1889. On the 16th March the solicitors for the defenants wrote to their clients suggesting an appeal, but they eceived no instructions until the 2nd April, and took no step ill the 3rd April. No explanation was offered of the delay or

neglect except the production of a telegram to the solicitors from an officer of the defendants giving instructions to appeal, and suggesting that the matter had been overlooked by another officer. The Judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants.

Held, that under these circumstances, the time for giving the required notice should not be extended.

Gordon v. *Great Western R. W. Co.*, 6 P. R. 300; *Sievewright* v. *Leys*, 9 P. R. 201; *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P. R. 15; *Langdon* v. *Robertson*, 12 P. R. 189, referred to.

R. M. Meredith, for the plaintiff.

D. W. Saunders, for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 7TH MARCH, 1889.

PEARSON v. MULHOLLAND.

Title to land—Description—Falsa demonstratio—Exception void for uncertainty—Operation of release—"Remise, release, and quit claim"—Operation as grant or bargain and sale—14 & 15 V. c. 7, s. 2—Possessory title.

L. in conveying land to S. described it as being composed of the southerly half of lot 17 in the 4th concession of King, giving it the metes and bounds of the east half. The only part of lot 17 which L. had was that conveyed to him by B. as a part of lot 17, giving it the metes and bounds of the east half, the same as in the deed to S.; and the same quantity was conveyed in both deeds.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of lot 17 in the 4th concession"

Xing; and the deed to S. before mentioned contained an ption "save and excepting out of the same forty-five acres for taxes."

Held, that the exception was void for uncertainty; and a subent release of lands purchased at the tax sale by the sheriff's lee to S. had sufficient to operate upon, and was effectual as lease.

y indenture of bargain and sale made in 1886 between L. K., L. in consideration of $4,000, (the receipt whereof was eby acknowledged) did remise, release, and quit claim unto his heirs and assigns, the south half, etc,, to have and to , etc.

Held, that since 14 & 15 V. c. 7, s. 2, the words "remise, ase, and quit claim" may operate as a grant; and either re or since that enactment they would operate as a bargain sale.

cre v. *Livingstone*, 24 U. C. R. 282, not followed.

Held, also, upon the evidence, that the defendant had no such ession of the land in question as would extinguish the title ne true owner.

. D. Armour, for the plaintiff.

Merritt, for the defendant.

COMMON PLEAS DIVISION.

[FERGUSON, J., 23RD APRIL, 1889.

UNION BANK v. STARRS.

ence — Depositions on examination for discovery before statement of defence—Officer of company—Rule 506.

efore delivery of his statement of defence one of the defend- obtained an order to examine an officer of the plaintiffs for overy, and examined him thereunder.

Held, that such defendant could under Rule 506 read the depoons so taken, as evidence at the trial of the action.

. R. Meredith, Q.C., for the plaintiff.

ylesworth, for the defendant O'Gara.

IN CHAMBERS.

[BOYD, C., 7TH MAY, 1889.

McKAY v. MAGEE.

Costs—Scale of—Action to set aside conveyance as fraudulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

In an action by a judgment creditor seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plaintiff, the proceedings were not alleged to be taken on behalf of other creditors and the plaintiff's judgment was for less than $200. It appeared that there were three other claims, amounting in all to $36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for $75 and costs, and upon the taxation of these costs a question arose as to the scale.

Held, that the case was taken out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the claims of other creditors need not be considered; and the plaintiff's claim being less than $200, the costs should be on the lower scale.

Forrest v. *Laycock*, 18 Gr. at p. 622, followed.

Dominion Bank v. *Heffernan*, 11 P. R. 504, distinguished.

J. B. Clarke, for the plaintiff.

Middleton, for the defendants.

In re SOLICITORS.

Courts—Divisions of High Court—Solicitor and client taxation—Proper officer to tax—R. S. O. c. 147, s. 32.

R. S. O. c. 147, s. 32, provides that a bill of costs may be referred for taxation to "the proper officer of any of the Courts in the county in which any of the business charged for was done."

Held, that "Courts" here does not mean "Divisions of the High Court;" and where the business charged for was done in

office of the local Registrar and Master at Belleville, the erence for taxation was properly made to the Deputy Clerk of Crown at Belleville, both being officers of the same Court.

Hoyles, for the solicitors.

H. Marsh, for the clients.

[9TH MAY, 1889.

In re HARDING.

nts—Sale of land—Consent—Majority of infants—R. S. O. c. 137, s. 4.

Notwithstanding the provision of R. S. O. c. 137, s. 4, that application for the sale of an infant's lands shall not be made hout the consent of the infant if he is of the age of fourteen rs, the consent of a majority of infant land-owners may be icient; for by the Interpretation Act, R. S. O. c. 1, s. 8, s-ss. and 34, words importing the singular number shall include re persons, and females as well as males, and where an act thing is required to be done by more than two persons, a ority of them may do it.

And in this case, where there were three infants all over rteen, and two of them consented to a sale of their lands, the eldest had disappeared and could not be reached, an er was made dispensing with the consent of the one, the sale ng evidently for the benefit of all the family.

H. E. Ridley, for the mother.

. Hoskin, Q.C., for the infants.

[GALT, C.J., 6TH APRIL, 1889.

In re LEWIS v. OLD.

Prohibition—Division Court—Jury trial.

This was an application by the defendant for prohibition to proceedings on a judgment obtained in the first Division rt in the county of Huron. A notice for jury was given by defendant. After the evidence was closed the Judge declined ubmit any question to the jury except the amount of damages.

The jury then assessed the damages. An application was made for a new trial, which was refused. This motion was then made, and was argued on the 27th April, 1889.

Aylesworth, for the defendant.

Campion, for the plaintiff.

GALT, C.J.,—I do not question the correctness of the opinion expressed by the learned Judge as regards the evidence, but, as the case was tried by a jury, the defendant had a right to insist that every question should be submitted to them, and a Judge has not the power in a Division Court suit to withdraw the case from them. The learned Judge has power to instruct the jury as to their verdict, and if they act contrary to his instructions he can grant a new trial, but he cannot withdraw the case from them; the verdict must be theirs. This appears from the form of the oath administered to the jurors. S. 167 of the Division Courts Act, R. S. O. c. 51, enacts:—"Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try according to the best of their skill and ability." This motion must therefore be absolute to stay proceedings on the judgment, and to set the same aside.

There will be no costs on this motion, as I am not aware that this question has been previously before the High Court.

[STREET, J., 1ST MAY, 1889.

REGINA *ex rel.* WHYTE v. McCLAY.

Municipal elections—Quo warranto proceeding—Reference to take evidence—Jurisdiction of County Judge—Jurisdiction of Master in Chambers to refer—R. S. O. c. 184, s. 212—Rule 30.

Section 212 of the Municipal Act, R. S. O. c. 184, has not been affected by the Consolidated Rules, and under it a reference may be directed to a County Court Judge to take evidence, where in a *quo warranto* application a violation of s. 209 or 210 is charged; and, as by Rule 30 the Master in Chambers has in *quo warranto* matters the jurisdiction of a Judge of the High Court, he has power to direct a reference under s. 212 to a County Court Judge.

Aylesworth, for the relator.

W. R. Meredith, Q.C., for the respondent.

[THE MASTER IN CHAMBERS, 2ND MAY, 1889.

BANK OF OTTAWA v. JOHNSTON.

Judgment—Rule 739—Cross-claim of defendant—Defence—Vagueness.

Motion by the plaintiff for judgment under Rule 739.

Middleton, for the plaintiffs.

D. Armour, for the defendant.

THE MASTER IN CHAMBERS.—In this case I must make the order for judgment. The *prima facie* case of the plaintiff is admitted. Whether a malicious prosecution of a civil action without any reasonable or probable cause could ever by English law be a cause of action, I cannot say.

The case attempted to be set up here by the defendant falls far short of this. It is that the plaintiffs, nearly six years ago, by making a false claim of liability of the defendant to the bank for a large amount, prevented the defendant from making an advantageous business arrangement; that the bank at the time knew the effects of their demand, and still insisted on it; but it is not averred that the plaintiffs did not believe that the defendant was guilty or that they acted maliciously.

The case set up by the defendant is quite too vague and misty even for a motion under Rule 739. The defendant gave the notes in question in this action quite lately, without then asserting any right of defence such as he now claims.

ASHLEY v. BRENTON.

Discovery—Examination of plaintiff by defendant after interlocutory judgment—Rule 489.

After the plaintiff had signed interlocutory judgment against the defendant in an action of tort, the defendant sought to examine the plaintiff for discovery, the action being about to come on at the assizes for assessment of damages.

Rule 489 shews that the examination of a plaintiff by a defendant may take place at any time after such defendant has delivered his statement of defence.

Held, that the defendant could not examine the plaintiff.

D. Armour, for the plaintiff.

C. J. Holman, for the defendant.

Ninth Division Court in the County of Simcoe.

[Boys, Jr. Co.J.

DOMINION BANK v. BEACOCK.

Promissory note—Payable to "the estate of W. T. D."—Construction—Set-off —3 & 4 Anne c. 9.

This was an action on a promissory note made by the defendant and payable to "the estate of W. T. D.," and indorsed by the administrator of the estate of W. T. D. to the plaintiffs.

The note had been given for the purchase of a seed drill, and at the time of the purchase a guaranty had been given by the D. estate, of which contract of guaranty the defendant contended there had been a breach causing him damage, which he claimed to set off against the note, contending that the note, not being payable to an individual or body politic or incorporate, did not come within the wording of 3 & 4 Anne c. 9, and was therefore simply evidence of a debt and not a negotiable instrument.

Held, that the proper construction to be placed upon the words "estate of W. T. D.," in the note was "administrator of estate, etc.;" that 3 & 4 Anne c. 9, was a statute which should receive a liberal construction, being passed for the benefit of trade and commerce; and the note came within the statute.

First Division Court in the District of Algoma.

[McCrea, District J.

GRAHAM v. CANADIAN PACIFIC R. W. CO.

Railways—Duty of railway company to fence in territory outside of municipalities—Liability for cattle killed.

On a motion by the defendants for a new trial, after judgment had been given for the plaintiffs,

Held, that railway companies are not bound to fence in territory where no municipality has been organized.

Held, also, that they are not in such territory liable, without some proof of actual negligence, for cattle killed where fences are not erected.

M. McFadden and *W. H. Hearst*, for the plaintiffs.

Kehoe, for the defendants.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. SHEPEARD.

Intoxicating liquors—Liquor License Act of 1886—Conviction under—Appeal from Stipendiary Magistrate, Halifax, to County Court—Evidence of informer—No appeal from County Court to Supreme Court in criminal cases.

The defendant, the holder of a "shop license," was convicted before the Stipendiary Magistrate for the city of Halifax, on the information of J., for having unlawfully allowed liquor sold by him to be consumed on the premises, in violation of the provisions of the Liquor License Act of 1886.

In the County Court for District No. 1, the conviction was quashed with costs, on the ground that the informer, not having renounced his claim to the fine before being sworn as a witness in the Court below, was incompetent as a witness, and there was no further evidence to support the conviction. A further appeal being taken to the Supreme Court;

Held, that the matter being one of a criminal nature, there was no appeal from the County Court to the Supreme Court.

Held, also, that the provisions of R. S. c. 103, excluding the informer in certain cases from giving evidence, are not applicable to suits brought before the Stipendiary Magistrate for the city of Halifax; but, if they can be held to apply, the Judge of the County Court, on trying the case *de novo*, should have received the evidence of the informer, he having renounced all claim to the penalty before being sworn.

Quære, whether there was an appeal from the Stipendiary Magistrate to the County Court.

Quære, also, whether the provisions of R. S. c. 203 are applicable to prosecutions under the Act of 1886.

REGINA v. UPHAM.

Offences against religion—Servile labour—No appeal from County Court to Supreme Court.

The defendant, a driver in the employ of the Halifax Street Railway Co., was convicted by the Stipendiary Magistrate for the city of Halifax of a violation of the chapter of the Revised Statutes, "Of Offences against Religion," by reason of having performed servile labour in driving one of the company's cars on Sunday.

The conviction having been set aside in the County Court for District No. 1.,

Held, following *Regina* v. *Shepeard*, *supra*, that the matter being of a criminal nature, there was no appeal from the County Court to the Supreme Court.

CHURCH v. CHRISTIE.

Husband and wife—Ante-nuptial settlement—Power of the Court to vary, after decree for divorce for adultery—Effect of Act enlarging powers of Court, passed after petition but before decree—Innocent party to settlement.

On the 3rd November, 1884, the plaintiff filed a petition in the Divorce Court praying a dissolution of his marriage with the defendant B. S. M., on the ground of her adultery with W. L. On the 19th May, 1885, the decree prayed for was granted. After the filing of the petition for divorce, but before the making of the final decree, the Act of 1885, c. 15, was passed, giving power to the Court to "alter, vary, or set aside any settlement made by and between parties whose marriage shall have been dissolved," with the same powers in reference to the application of the whole or any portion of the property disposed of by such settlement as the parties thereto had at the time of the execution of such settlement, and providing that "the Court, in exercising such powers, shall have regard to the conduct of the parties to such marriage, and may exclude in whole or in part from any benefit under such settlement any party who shall have been found guilty of adultery by the sentence or decree of the Court."

Under this enactment proceedings were commenced on behalf of the plaintiff to set aside a marriage settlement made by him in favor of B. S. M., and a provision in favor of M. A., a niece of B. S. M., as follows: "To pay the sum of $4,000 to M. A. or to such other person as the said B. S. M. shall by deed or by her last will and testament name and appoint."

Held, that the enactment having come into force before the making of the final decree, though after the commencement of the divorce proceedings, the Court was invested with the enlarged powers therein contained for altering the settlements and directing the disposition of the property.

In pursuance of such power the defendant B. S. M. was excluded from all benefit or power under the settlement, but in regard to M. A., the niece, who was an innocent party, it was directed that the settlement should be carried out as if B. S. M. had died in the lifetime of the plaintiff without making any appointment, provided that if M. A. died in the lifetime of the plaintiff the principal should go to him on her death.

NEW BRUNSWICK.

In the Supreme Court.

[7TH MAY, 1889.

CLARK v. BAIRD.

Solicitor and client—Pleading—Meaning of "Solicitor," "in equity"—Solicitor liable for fraud.

This was an action claiming damages on the ground that the defendant as a solicitor did not properly conduct a proceeding in equity for the plaintiff, by which the suit was lost. The declaration alleged that the "plaintiff at the defendant's request retained and employed him as and being a solicitor to commence and conduct a certain suit in equity." The second count was for the defendant accepting a retainer and not properly proceeding for

the plaintiff, that he "colluded and wrongfully combined with the defendant's counsel in the suit to prevent the plaintiff from recovering," and entered into an agreement by which the plaintiff was defrauded.

The defendant demurred to the declaration on the ground that "it was not stated or alleged, defendant was an attorney or solicitor of what or any Court," and that no cause of action was shewn.

Held, PALMER, J., dissenting, that the word "solicitor" in the declaration must be construed to mean a solicitor of the Supreme Court of New Brunswick, and "a certain suit in equity" a suit in the Supreme Court in Equity of this province.

Per PALMER, J.—The declaration merely stated that the defendant was a solicitor without stating that he was a solicitor of this Court. Consistent with that he might have been a solicitor of any Court in England, the United States, or any other country, and as by the rules of pleading the language must be taken most strongly against the party pleading, in order to support such a count it should with reasonable certainty allege that he was a solicitor of this Court. Also that a proceeding in Equity might mean that the proceeding had been in a Court in any country.

Held, that the second count shewed a good cause of action. If a person as an agent of another accepts employment from his principal, and deliberately commits a fraud upon his principal by which the principal is injured, it is a good cause of action.

SEARS v. LEETCH.

Mortgage—Bar of dower—Dower in equity of redemption—C. S. c. 73.

J. L., one of the defendants in this case, being the owner of certain real estate, mortgaged it to the plaintiff in 1881 to secure $1,600, his wife, the defendant M. A. L., joining in the mortgage for the purpose of releasing her dower. In 1882 J. L. conveyed his equity of redemption in the property to his son and daughter. The land was afterwards sold under the mortgage, and a surplus remained after paying the debt and costs. M. A. L. claimed to

be entitled to dower in the equity of redemption in case she survived her husband, and had her claim allowed in the Equity Court.

The mortgage contained a power of sale in default of payment of the debt, and declared that any surplus remaining after satisfaction of the principal, interest, and costs, should be paid to J. L., his executors, administrators, or assigns.

C. S. c. 73 enacts as follows:—"Where a husband shall die beneficially entitled to any lands for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession (other than an estate in joint tenancy) the widow shall be entitled in equity to dower out of the same land."

Held, varying the decree of the Court below, that M. A. L. was not entitled to dower out of the surplus, her husband being still alive, and having no interest in the land.

ESTABROOKS v. TOWRE.

Attachment for non-payment of costs — Using name of a plaintiff without authority—Negligence—Death of defendant after verdict—Administrator entitled to enforce costs—17 Car. II. c. 8.

This was a motion for an attachment by the administrator of the defendant against the lessors of the plaintiff for non-payment of costs of the action. The case had been tried before a jury and a verdict returned for the defendant. After verdict the defendant died and judgment was signed in the suit. D. H. now alleged that his name was used as one of the plaintiffs without his authority, and claimed that he should not be asked to pay costs.

Upon the argument the case went upon the following questions:

1st. Is D. H., one of the lessors of the plaintiff, liable for costs, his name having been used without his authority?

2nd. Is it open to the plaintiffs now to attack the regularity of the judgment?

3rd. Is the administrator of the defendant entitled to an attachment against the lessors of the plaintiff for non-payment of the costs of the action?

Held, as to the first question, that as D. H. knew early in the action that his name was used as a plaintiff, if this was done without his authority, he should have applied to this Court and had his name struck out, and that he was guilty of negligence if he allowed himself to continue as a party up to judgment and could not now escape the consequences.

Held, as to the second, that it was too late to attack the regularity of the judgment or the order of the Court for leave to appeal from the same.

Held, as to the third question, that the lessors of the plaintiff were liable to pay the costs, and that the administrator of the deceased defendant was the only person who could enforce payment, and that no useful purpose would be attained by compelling him to revive the suit, if payment could be obtained by a simpler and more expeditious proceeding.

ALLEN, C. J., on the authority of *Hayes* v. *Thornton*, Barnes 122, agreed with some doubt that the rule for attachment should be made absolute against all the lessors of the plaintiff.

It was also contended that the suit abated by the death of the defendant before judgment, and therefore no attachment could go.

Held, that it did not abate, for the defendant died after verdict and judgment was signed within two terms thereafter, and therefore by the statute 17 Car. II. c. 8, the suit did not abate.

CENTRAL BANK OF CANADA v. EARLE.

Arrest—Affidavit to hold to bail by one of three liquidators.

Upon a motion to set aside a bail bond and discharge the defendant from custody under an order of arrest, it appeared that the affidavit to hold to bail was made by L., who stated that he was one of the three liquidators of the Central Bank, and that the application for arrest was not made for the purpose of vexing and harassing the debtor.

Held, WETMORE and FRASER, JJ., dissenting, that this statement alone without also shewing that the suit was brought by L.'s direction, so as to enable him to negative the intent to vex and harass, was insufficient; one liquidator alone not having the right to institute a suit.

Halifax Banking Co. v. *Smith*, 25 N. B. 610, referred to.

IN CHAMBERS.

[FRASER, J., 2ND MAY, 1889.

DAVIS v. DAVIS.

Pleading—Cross-interrogatories—Answer—When cause at issue.

The plaintiff's solicitors took out a summons to have the cause set down for *viva voce* hearing. The cause was at issue, and after replication the defendant had served cross-interrogatories, the answers to which had only been on file six days.

Held, that under C. S. c. 49, s. 37, and 45 V. c. 8, the defendant had two months to file exceptions to the answers to the cross-interrogatories, and therefore the cause was not at issue and could not be set down for hearing.

[TUCK, J., 1ST MAY, 1889.

WOONSOCKET RUBBER CO. v. ESTEY.

Pleading—Time—Particulars—Notice of trial.

The time for pleading had expired on Sunday, and the defendants' attorney claimed the whole of the succeeding Monday to plead. The plaintiffs' attorney had demanded a plea on Monday, and the defendants' attorney demanded further particulars on the same day, which were given him at once. Monday was the last day for giving notice of trial for the coming circuit.

The plaintiffs' attorney asked the Judge to impose terms by requiring the defendants' attorney to take short notice of trial.

Held, that the defendants' attorney had all Monday to plead, and that the demand of plea on that day was a nullity. Also that under the rules of practice a Judge had no power to order short notice of trial.

Supreme Court of Canada.

ONTARIO.] [30th April, 1889.

In re SMART, INFANTS.

Appeal to Supreme Court of Canada—Habeas corpus—Commencement of proceedings—Filing case—Jurisdiction.

In the hearing on a writ of habeas corpus the trial Judge ordered that no further proceedings be taken on the writ but allowed a petition to be filed under the Infants' Custody Act. By a judgment of a Divisional Court, affirmed by the Court of Appeal, 12 P. R. 635, that portion of the judgment relating to the habeas corpus was reversed, and the proceedings on the writ and the petition were ordered to be heard together. The judgment of the Court of Appeal was pronounced on 13th November, 1888. Notice of intention to appeal was given a short time after, but the case was not filed in the Supreme Court until 18th February, 1889.

Held, that in habeas corpus proceedings, where no security is required, nor notice necessary, the first step in the appeal is the filing of the case, and that must be done within sixty days from the pronouncing of the judgment under s. 40 of the Supreme Court Act; and the appeal was quashed.

S. H. Blake, Q.C., for the appellant.

J. K. Kerr, Q.C., and *H. J. Scott*, Q.C., for the respondent.

[22nd May, 1889.

O'SULLIVAN v. LAKE.

Appeal to Supreme Court of Canada—From order for new trial—Jurisdiction—Costs.

By s. 24 (d) of the Supreme Court Act, R. S. C. c. 135, an appeal will lie to the Supreme Court of Canada from a judgment upon a motion for a new trial on the ground that the Judge has not ruled according to law.

A motion was made to a Divisional Court supported by affidavits for a new trial on the grounds of misdirection, surprise, and of further evidence being necessary on certain points, and it was granted on the first ground. On appeal the Court of Appeal held that there had been no misdirection but sustained the order on the other grounds.

Held, that no appeal would lie to the Supreme Court from the latter decision.

The respondent in his factum did not raise the question of jurisdiction but objected to the appeal on the ground that the Court should not interfere with the discretion of the Court below, relying on *Eureka Woolen Mills Co. v. Moss*, 11 S. C. R. 91.

Held, that the costs allowed would be costs as of a motion to quash only.

W. Cassels, Q.C., and *Anglin*, for the appellant.

Robinson, Q.C., and *J. J. Maclaren*, for the respondent.

QUEBEC.] [30th APRIL, 1889.

REGINA v. JACOBS.

Criminal law—Indictment—Murder—Name of deceased—Variance—Case reserved.

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.

The prisoner, an Indian, was indicted for the murder of Agnes Jacobs, otherwise called Konwakeri Karonhienawita. At the trial evidence was given identifying the deceased as an Indian woman known by the Indian name laid in the indictment, but there was no evidence that she was known by the name of Agnes Jacobs. The prisoner was convicted of manslaughter.

Held, affirming the judgment of the Court of Crown Cases reserved for the Province of Quebec, that proof of the Indian name was sufficient to justify the conviction.

Regina v. Frost, Dears. C.C. 474, distinguished.

Cornellier, Q.C., for the appellant,

Trenholme, for the Crown.

NEW BRUNSWICK.]

ALEXANDER v. VYE.

Evidence—Admissibility of—Action for libel—Proof of handwriting—Comparison—Recollection.

In an action for libel contained in a letter published in a newspaper and alleged to have been written by the defendant, the publisher of the newspaper was called as a witness to prove that it was so written. He swore that the original MS. was enclosed in an envelope bearing the post-mark of the town where the defendant resided, and that it was accompanied by a letter requesting its publication, which letter was signed by the defendant's name; that the MS. was destroyed after publication, and that he had no knowledge of the defendant or of his handwriting, but on receiving a letter from him some five weeks later he was able to say, from his recollection of the MS., that it was in the same handwriting. This evidence was received subject to objection, and submitted to the jury, who gave a verdict for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, GWYNNE, J., dissenting, that the evidence was properly received.

Held, also, GWYNNE and PATTERSON, JJ., dissenting, that evidence could be given to show that the defendant had changed the character of his signature since the action was commenced.

Weldon, Q.C., and *Gregory*, for the appellant.

Hannington, Q.C., for the respondent.

MILLER v. WHITE.

Evidence—Admissibility of—Entries in defendant's books—New trial.

In an action for goods sold and delivered, against McK. & M., the defence was that the goods were sold to C., McK., & Co., the defendant McK. being a member of both firms. On the trial McK. was called for the plaintiff and on cross-examination he produced, subject to objection, his books, which showed that the plaintiff's goods were credited to C., McK., & Co., though he

swore they had been delivered to McK. & Co. In the plaintiff's books the goods were charged to C., McK., & Co., which plaintiff swore was done at the request of McK. A verdict having been found for the defendant, the Supreme Court of New Brunswick ordered a new trial on the ground that the entries in McK.'s books were improperly admitted in evidence.

Held, reversing the judgment of the Court below, that the evidence was properly admitted, and the rule for a new trial should be discharged.

Weldon, Q.C., and *C. A. Palmer*, for the appellants.

McLeod, Q.C., and *A. S. White*, for the respondent.

GEROW v. ROYAL CANADIAN INS. CO.

GEROW v. BRITISH AMERICA ASS. CO.

Insurance—Marine—Constructive total loss—Cost of repairs—Estimate of—Deduction of new for old.

A policy of insurance on a ship contained the following clause:

"In case of repairs, the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy, if the usual deduction of one-third allowed in adjusting a partial loss under the terms of the policy was not made, but not if it was made.

Held, affirming the judgment of the Court below, PATTERSON, J., dissenting, that the "cost of repairs" in the policy meant the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in

adjusting a partial loss, and not the estimated amount of the gross cost of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value.

Weldon, Q.C., for the appellant.
Barker, Q.C., for the respondents.

RODBURN v. SWINNEY.

Mortgage—Power of sale—Exercise of—Sale under power of attorney—Authority of attorney—Purchase money—Promissory note.

A mortgage authorized the mortgagees to sell in default of payment on giving a certain notice, and contained a clause that the purchaser at such sale should not be required to see that the purchase money was applied as directed. The mortgagee gave R. a power of attorney to sell under the mortgage, which he did, taking part of the purchase money in cash and for the balance a promissory note payable to himself, which he discounted and appropriated the proceeds. The note was paid by the maker at maturity. In a suit to have the sale set aside as fraudulent and made in collusion between R. and the purchaser :

Held, affirming the judgment of the Court below, that R. had no authority to take the said note in payment, and the purchaser was bound to see that his powers were properly exercised. The sale was therefore void and must be set aside.

G. G. Gilbert, Q.C., for the appellants.
Barker, Q.C., for the respondents.

P. E. I.]

HALIFAX BANKING CO. v. MATTHEW.

Chattel mortgage—Action to set aside—Fraudulent as against creditors—13 Eliz. c. 5—Right of creditor of mortgagor to redeem.

The plaintiffs, having recovered judgment against one H., issued execution, under which a sheriff professed to sell certain goods of H. and gave a deed to the plaintiffs conveying all the " share and interest " of H. Six months before the recovery of the plaintiffs' judgment H. had made a mortgage covering all

the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under 13 Eliz. c. 5., and fraudulent in fact. The Court below held the mortgage good and dismissed the bill.

Held, affirming this judgment, that no fraud being shown, and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed.

W. B. Ross, for the appellants.

F. Peters, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [30TH APRIL, 1889.

BLACKLEY v. McCABE.

Banks and banking—Cheque—Presentment—Suspension of bankers—Accord and satisfaction.

On the 26th June, P. and M. exchanged cheques for the sum of $575 for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on F. & L., private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st July, and it was alleged by P. but denied by M. that a similar restriction applied to the latter cheque. F. & L. suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M. His cheque was never presented for payment. M. on the 27th of June issued a writ against F. & L. to recover the balance in

their hands, the amount of the cheque being included. The cheque of P. was presented and paid.

Held, assuming that there was no agreement to postpone presentment, P. had the whole of the 27th June to present M.'s cheque; and that, although the suspension of the bankers would not in itself excuse non-presentment, yet this suspension and the bringing of the action by M., which operated as a countermand of payment, would; and that therefore M. became immediately liable to P. on his cheque.

Some time after the suspension of F. & L., and after some negotiations between P. and M. as to payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form:—"Please take judgment when you think best against F. & L., * * * to include the amount of your cheque for $575 to me * * * upon the understanding that the same is to be paid me out of the first proceeds of such judgment, * * you are to exercise your best discretion in the matter."

M. then went on with his action and entered judgment, but nothing was recovered.

Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque and the acceptance of a new and substituted mode of obtaining payment, and did not operate as an accord and satisfaction.

Decision of the Queen's Bench Division affirmed.

Robinson, Q.C., and *Bigelow*, for the appellant.

Osler, Q.C., for the respondent.

BOYD, C.]

FERGUSON v. KENNEY.

Voluntary conveyance—Right of creditor to attack on ground of continuous indebtedness of grantor to him on current account.

The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about $1,500, exceeded his assets. He continued to deal largely with the plaintiffs down to the time of his failure some years after-

wards, the balance then due them being about $2,300, but much more than $1,500 having been in the meantime paid to them.

Held, that in the case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance.

Decision of BOYD, C., affirmed.

Moss, Q.C., and *A. C. Galt*, for the appellants.

George Kerr and *J. M. Duggan*, for the respondents.

ARMOUR, C.J.] [14TH MAY, 1889.

LEMAY v. McRAE.

Arbitration and award—Motion to set aside award—Admissions of arbitrator as to grounds upon which he proceeded—Draft award setting out grounds.

Held, affirming the judgment of ARMOUR, C.J., 16 O. R. 807, that where the action and all matters of account and counterclaim therein and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person, and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged errors in the principle upon which he proceeded, this principle being disclosed in a draft award not delivered with or forming any part of the formal award, and in conversations after the making of the award between the arbitrator and one of the solicitors for the attacking party; and there being no misconduct or mistake of jurisdiction shown, the Court could not interfere.

East and West India Dock Co. v. *Kirk*, 12 App. Cas. 738, considered.

Robinson, Q.C., and *A. Ferguson*, for the appellant.

Delamere and *F. H. Keefer*, for the respondents.

MacMahon, J.]

MOLSONS' BANK v. HALTER.

Assignment for benefit of creditors—Mortgage to secure moneys used by trustee in breach of trust—Trust estate not a creditor—Intent to prefer—Having the effect of preferring—R. S. O. c. 124, s. 2.

The defendant W., who was executor under the will of one J., made in favour of himself and the defendant H., who was his co- executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given and continued to be in insolvent circumstances, but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage.

Held, that no assignment having been made, an execution creditor might attack the security and take advantage of s. 2 of the Act.

Held, also, that neither H., nor H. and W. as executors, were in the strict sense of the word creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Held, also, Osler, J.A., dissenting, that the words "or which has such effect" relate only to the immediately preceding clause dealing with the preference of one creditor over others, and this mortgage, not being a preference of one creditor over others, and not being made with intent to defeat, delay, or prejudice creditors, could not be set aside.

Per Burton, J.A.—These words apply only to a preference of one creditor over another, and even then only where there is an actual intent to prefer.

Per Osler, J.A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay, or prejudice, as those made with intent to prefer only, and any conveyance or transfer by an insolvent (with the exceptions specially mentioned in s. 3) which has the effect of defeating, delaying, prejudicing, or preferring creditors, whatever may have been the intent with which it is made, is within the statute.

Judgment of MacMahon, J., affirmed on other grounds.

W. H. Bowlby, for the appellants.

W. Nesbitt and *A. W. Aytoun Finlay*, for the respondents.

C. C. WENTWORTH.]

LINTON v. IMPERIAL HOTEL CO.

Landlord and tenant—Lease with proviso for determination in case of assignment for benefit of creditors—Right reserved to distrain after such assignment—Amount for which distress may be made—50 V. c. 23.

B., by lease dated 28th November, 1887, was lessee of certain premises at a yearly rental of $370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act 50 V. c. 23 should not apply to the lease. B. paid $100 on account of rent on the 7th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises. On the 24th July, 1888, the defendants distrained and were paid $270 by the plaintiff as assignee.

Held, that the lease did not become void because of the assignment, but only voidable; that the right to claim the accelerated rent depended not upon the lessors' election to forfeit the term but upon the fact of the lessee having made an assignment for the benefit of his creditors; that the clause was divisible; and that the lessors might distrain for the rent, as they had not elected to forfeit the term, the distress itself not being such an election to forfeit.

Judgment of the Court below varied.

W. Nesbitt and *W. M. Douglas*, for the appellant.

E. Martin, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 20th May, 1889.

BARLOW v. GREEN.

Jury notice—Action of ejectment—Equitable defence.

The action was for ejectment, but the defendant by his statement of defence alleged that he was in possession of the land in question under a contract made with his father, whose executors the plaintiffs were, that if he (the defendant) went on the land and worked it his father would give it to him at his death, and he prayed to have the agreement declared valid, himself declared the owner of the land, and the plaintiffs ordered to execute proper documents to perfect his title.

Held, that the action upon the pleadings came within the words of R. S. O. c. 44, s. 77, "all causes, matters, or issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction;" and a notice for jury was therefore improper.

C. J. Holman, for the plaintiffs.

F. R. Powell, for the defendant.

[MacMahon, J., 18th May, 1889.

HAWKINS v. BICKFORD.

Evidence—Letter written without prejudice.

On the 8th of November, 1884, the defendant wrote the plaintiff a letter marked "without prejudice" as follows: "Yours of 7th received. You must consult your own interest solely whether you go again to Sarnia or not. I can only say that I can pay no more money except actual disbursements of cash *until after* the bonus by-laws are carried. Unless these by-laws

are carried I shall not build another foot of road, and the Government aid will lapse. With it will lapse yours and Cameron's commissions also. All this you may certainly depend upon. You see where your interest is; so now judge for yourself and act accordingly."

Counsel for the defendant objected to this letter being received as evidence at the trial.

The oral evidence shewed that the plaintiff continued at work and secured a bonus towards the defendant's railway (the Erie & Huron) from the town of Sarnia of $16,000, and from the township of Sombra of $14,000; that the defendant had been paid the subsidy granted by the Dominion Government; and that the railway had been built to Sarnia.

MacMahon, J.—The letter so written by the defendant was not in reference to the compromise of any claim nor for the purpose of buying peace in respect of any threatened litigation. It was written with a view of inducing the plaintiff to go on and prosecute the work of securing municipal aid to entitle him, according to the defendant's view, to the commission on the subsidy granted by the Government. * * * As put by Cockburn, C.J., in *Holdsworth* v. *Dimsdale*, 19 W. R. at p. 799, "The plaintiff does what is equivalent to acceptance * * The plaintiff having complied with the condition is in a position to make use of the letter." In the present case the plaintiff had complied with the condition by going on and securing the municipal bonuses, and can therefore make use of the letter.

Powell on Evidence, 5th ed., p. 289, and *Wharton* on Evidence, 3rd ed., sec. 1090, referred to.

Osler, Q.C., and *Wilson*, Q.C., for the plaintiff.

S. H. Blake, Q.C., *Lount*, Q.C., and *W. Creelman*, for the defendant.

CHANCERY DIVISION.

[The Divisional Court, 18th March, 1889.

McNEILL v. HAINES.

Sale of standing timber—Real estate or chattels—Sale of right to cut timber for twenty years—Subsequent sale by vendor of the same timber.

Where one sold and assigned to another all the pine timber he might choose to cut for twenty years, with the right to make

roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from anyone, cut and remove the said timber;

Held, that this timber so sold, together with the rights imparted to the purchaser, was an interest in land.

Where having first granted such timber and rights to the plaintiff's assignor, the defendant five years after sold the timber to W., who forthwith proceeded to cut the same;

Held, that the defendant was responsible to the plaintiff in damages; and

Per FERGUSON, J., that he would have been so even if the timber sold were chattel property; for the act of the defendant in selling to W. would in that case amount to a conversion of the property.

J. A. McCarthy, for the plaintiff.

Lount, Q.C., for the defendant.

[BOYD, C., 13TH MAY, 1889.

In re GRAHAM AND RENFREW.

Trustees—Power to sell—Implied power to take back mortgage.

Under a certain conveyance power was reserved to the trustees named therein to sell upon consent of the majority of the infants who had attained 21. Three were of age and willing to consent. It was argued that they had no right to sell as they did and take back a mortgage for part of the price. The will gave them power to sell at public auction or private sale as to them might seem best, etc. The sale was *bona fide* and a good price was obtained.

Held, that the right to sell existed; and that a subsequent provision as to the children buying from one another on attaining 21 was not inconsistent with or repugnant to the exercise of the power of sale at present. That provision would still be operative if no previous sale were made.

Held, also, that the power of sale given by the will involved a power to secure part of the price by mortgage on the property

sold, the manner of sale being left to the discretion of the trustees; and that therefore the vendors should have judgment in their favour on both points raised by petition under the Vendor and Purchaser Act.

A. W. Morphy, for the vendor.

S. G. Wood, for the purchaser.

McGUGAN v. PUBLIC SCHOOL BOARD OF SOUTHWOLD.

School law—Change of school site—Meeting of ratepayers.

This was an application to have it declared that a certain resolution changing the site of a public school, passed at a public meeting of the ratepayers called for the purpose, was void, and also that certain conveyances made in pursuance of such resolution were void.

It appeared that at the meeting a proposition and also an amendment were submitted, both of which in addition to the main question as to change of site embraced matters collateral thereto.

Held, that the main question had not been so presented to the ratepayers as to give them a fair opportunity of voting upon the material point, and that the vote taken could not be considered as unequivocally indicating the mind of the majority on that particular point.

Resolution declared invalid and conveyances set aside, but without costs.

W. R. Meredith, Q.C., and *Crothers*, for the plaintiff.

Doherty, for the individual defendants.

Glenn, for the defendant corporation.

CORHAM v. KINGSTON.

Mortgage—Insurance moneys—Application upon mortgage—Appropriation of payments.

Motion for injunction to restrain a mortgagee under a mortgage dated 16th December, 1887, from exercising his power of sale, upon the ground that the mortgage was not in default.

The mortgage was to secure $300, with interest to be paid yearly, together with an instalment of principal not less than $50, the first instalment of principal and interest to fall due on 16th December, 1888.

On 29th June, 1888, a fire occurred and the mortgagee received $195 insurance money.

Without communicating with the mortgagor, the mortgagee assumed to apply this in the following way: he reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and no payment of the first instalment being made by the mortgagor on 16th December, 1888, he proceeded to exercise his power of sale.

Held, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation.

Held, also, that though the mortgagee had the right to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment or to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time as payments fell due under the mortgage, unless otherwise arranged between the parties.

Hoyles, for the plaintiff.

A. H. Marsh, for the defendant.

[FERGUSON, J., 2ND APRIL, 1889.

TORONTO GENERAL TRUSTS COMPANY v. SEWELL.

Insurance—Life—Policy effected before marriage—Indorsement in favour of wife after marriage—Who entitled—Administrator of wife—R. S. O. c. 136.

C. B., the husband of the defendant, had before his marriage effected three policies of insurance upon his life. After his marriage he indorsed declarations on each of them that all advantage to arise therefrom should be and accrue for the benefit

of his wife, and handed the policies to his wife, but did not sign the declarations.

After his death the plaintiffs, as administrators of his estate, and his wife both claimed the proceeds of the policies. In an interpleader issue, in which the plaintiffs contended that as the policies were contracts made in the province of Quebec the law of that province governed them and the defendant was not entitled because she could not show that any statute existed in that province similar to the one in Ontario, R. S. O. c. 186, s. 5, respecting such indorsements on policies;

Held, following *Lee* v. *Abdy*, 17 Q. B. D. 309, that the plaintiffs could not succeed on that contention; but

Held, that, as C. B. was not "a married man" at the time that he effected the policies, he could not (except as provided for by 47 V. c. 20, s. 2) withdraw from the claims of his creditors the benefit of the policies effected before marriage, by indorsements or declarations after marriage in favour of or for the benefit of his wife; and that the plaintiffs should succeed in the issue.

A. H. Marsh, for the plaintiffs.

Moss, Q.C., for the defendant.

[4TH APRIL, 1889.

ADAMSON v. ADAMSON.

Settlement—Trustees and beneficiaries as joint tenants and not as tenants in common—Executed trusts—Estate in fee—Tenants in common—Mesne profits.

J. A. by a settlement conveyed certain lands to trustees "upon trust to hold the said lands * * situated * * * being lot No. 2 * * to the said G. A. And also lot No. 1 situated * * to the said A. A., sons of (the settlor) * * to the use of them, their heirs and assigns, as joint tenants and not as tenants in common * * and lastly upon trust that the said trustees * * shall well and sufficiently convey and assure absolutely in fee to the said parties respectively, etc."

Held, that this trust was an executed trust, in which the limitations were expressly declared; and that neither a difficulty in

ascertaining the true construction and legal meaning of the words used nor the final trust directing the trustees to make the conveyances of the legal estate made any difference; and that the words must receive the same construction as if they were found in a common law conveyance.

Held, also, that an estate in fee in lot 2 passed to G. A., and that the words "as joint tenants and not as tenants in common" were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV. c. 1, s. 48; and that they were needlessly used.

Held, also, that, as G. A. died intestate and unmarried after 1st January, 1852, the defendants as the children of a deceased brother took an equal share in the lands as co-tenants in common with the plaintiff A. A.; that they were as much entitled to the possession of the lands as the plaintiff; and that the plaintiff having obtained the legal estate from the trustees should hold the same as a trustee for all the tenants in common, etc.

Held, also, that, there being no proof of ouster of the plaintiff, he could not recover from the defendants any mesne profits in this action.

Mowat, Q.C., A.-G., and *Langton*, for the plaintiffs.
McCarthy, Q.C., and *W. Nesbitt*, for the defendants.

COMMON PLEAS DIVISION.

[BOYD, C., 7TH MAY, 1889.

THOMAS v. BEAMER.

Will—Construction of—Parol evidence—Intention of testator—Costs.

Where a testator devised his property as follows: -"I give and bequeath all my real and personal property which I may die possessed of or interested in, in the manner following, that is to say, to my wife, A. J. B., the north 50 acres of lot 11, concession 5, township of North Grimsby, with all buildings and erections at present thereon, being the lot and buildings we now occupy. * * To my brother O. B. I give, devise, and bequeath the south 50 acres of lot 11, concession 5, township of North Grimsby, subject to the mortgage thereon, which in accepting this my devise he is to assume and pay off;" and it was shewn that the

testator owned and occupied 50 acres, being the west half of lot 11, concession 4, and also owned 50 acres, being the west half of lot 11, concession 5, in said township, which latter half lot was subject to a mortgage made by the testator, and the testator owned no other lands, and had made no other mortgage; and there was no residuary devise contained in the will :—

Held, that parol evidence was admissible to shew the testator's intention.

Held, further, that the evidence clearly shewed that he intended to devise the west half of lot 11, concession 4, to his wife, and the west half of lot 11, concession 5, to his brother; and a declaration was made accordingly.

The action was brought by one of the persons who would have been entitled as one of the heirs-at-law of the testator to a share of any of the testator's land which he had not disposed of, against the devisees named in the will and the other heirs-at-law, one of whom was an infant.

Held, that as the devisees had not brought the action to clear up their title, they should not be ordered to pay costs; but as they benefited by the litigation, should not receive costs; and the plaintiff was ordered to pay the costs of the official guardian.

This was an action brought by E. T., a sister of the testator, against his widow, A. J. B., and brother, O. B., who claimed the land in question under the will, and the remaining heirs-at-law of the testator, one of whom was an infant. The statement of claim set forth the will and alleged that the testator owned the west half of lot 11, concession 4, in the township of Grimsby, which he had not expressly disposed of by his will, and also the west half of lot 11, concession 5, in said township, the south half of which was also not expressly disposed of by the will, and as to these lands the testator alleged there was an intestacy, and claimed a partition of them among the heirs-at-law of the testator.

The action came on for trial before Boyd, C., at the Chancery Sittings at St. Thomas on the 7th of May, 1889.

Ermatinger, Q.C., for the plaintiff.
Colin Macdougall, Q.C., for the infant defendant.
R. Gregory Cox and *W. H. McClive*, for the devisees.

The evidence shewed that the testator was a farmer residing in the township of North Grimsby; that he owned 100 acres of land and no more, consisting of 50 acres the west half of lot 11, concession 4, in said township, on which his house and other buildings were situated, and which was occupied by the

testator and his wife at the date of the will, and at his death, and 50 acres the west half of lot 11, concession 5, in said township, which was woodland, and subject to a mortgage made by the testator, which was shewn to be the only mortgage made by him.

The will was dated 25th March, A.D. 1887, and was expressed as follows:—"I direct all my just debts and testamentary expenses to be paid and satisfied by my executors and executrix hereinafter named as soon as conveniently may be after my decease.

"I give, devise, and 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:

"To my wife, Augusta Jane Beamer, the north 50 acres of lot 11, concession 5, township of North Grimsby, with all buildings and erections at present thereon, being the lot and buildings we now occupy.

"I give, devise, and bequeath further to my said wife all my goods, chattels, horses, and cattle of any nature and kind whatsoever, including my watch, excepting such articles as are hereinafter specified, which I give to my brother Oscar Beamer.

"To my brother Oscar Beamer I give, devise, and bequeath the south 50 acres of lot 11, concession 5, township of North Grimsby, subject to the mortgage thereon, which in accepting this my bequest he is to assume and pay off.

"I further give, devise, and bequeath to my said brother Oscar Beamer my fanning mill and my share of the horse power, as also my share of the carpenter's and blacksmith's tools owned by me, also the two iron pots or agricultural kettles.

"In consideration of these my bequests to my brother Oscar Beamer, I require him to pay my funeral expenses and put up a tombstone at my grave, and to pay my share, being one-third of the expenses of the funeral and tombstone for my late father, John Beamer."

Wright v. *Collings*, 16 O. R. 182, and other cases were referred to.

At the conclusion of the trial judgment was delivered as follows:

Boyd, C.—Mr. Macdougall has claimed, and properly claimed, that the matter must be proved by strict legal evidence to deprive the infant of the share of this estate she would be entitled

to if that evidence were wanting. I think there is strict legal evidence on the important point as to the property of which the testator died possessed. The action is brought by Eliza Thomas, who would be one of the heirs-at-law if the will is not operative. The evidence shews that the testator died without having revoked the will, or made any other will, and at the time of his will he owned and was possessed of the following real estate, namely, those two pieces with which we have been dealing to-day. There is no pretence in the pleadings that there was any other property, and the only evidence given before me is that this is the property of which the testator died seised; so I think there is no doubt at all about this, that we are dealing with the estate of a man who owned neither more nor less than two pieces of land of fifty acres each. Now we have to apply the will to that state of facts, and see what he has done with that property. He begins by saying "I will, bequeath, and devise" etc. (Reads from will.) Now the Courts have always laid hold of a clause of that kind as indicating that the intention of the testator is not to die intestate as to any part of his real or personal property. In this case we are dealing only with the realty. It indicates an intention to dispose of all his real estate, not to leave any part to his heirs-at-law, but to give it to those he indicates. We find he gives his wife "the north half of lot 11 in the 5th concession, with all the buildings and erections thereon, being the lot and buildings we now occupy." Now he made an error in describing the concession and in giving the locality of that piece of land. It is really the west half of lot 11 in concession 4 on which the house and buildings are, and which he occupied. Now the Courts have said that where they find an error in the description of the property, they will see if there is anything else in the will which will guide them to the meaning of the testator; and these words guide very clearly to the meaning of the testator. Suppose there had been nothing else but this "I give and devise all my real estate in the manner following: to my wife Augusta Jane the fifty acres being the lot and buildings we now occupy," there could be no difficulty in ascertaining the property intended, the moment the Court knew what the testator knew as to the buildings which he occupied. The Court has just to put itself in the place of the testator. The evidence is given for the purpose of enabling the Court to say, at the time the testator was making his will, just what the sur-

rounding circumstances were; and being in possession of those facts, as to which there is no manner of doubt, I can see quite plainly that when he says "I give to my wife Augusta Jane the fifty acres and the buildings we now occupy," that he means this particular land which is described as the west half of 11 in the 4th. So there is no doubt in my mind, being all enclosed in one fence, and being occupied as the homestead, that he intended to give that to his wife. That gets rid of one-half of his real estate.

Then we read further in the will that he gives to his brother Oscar the south fifty acres of lot 11, concession 5, subject to a mortgage thereon, which he has to assume and pay off; and he further states that in consideration of his bequests to Oscar he shall pay his funeral expenses. When we read that, at once a strong presumption arises that he is dealing with the other fifty acres of land. It turns out the same blunder occurs in the description as before, not so great a blunder as in the other case, because this is fifty acres of lot 11, concession 5 there is no manner of doubt about that. All you have to reject in that description to make it perfect is the word "south." If you reject "south" you have him bequeathing fifty acres of lot 11, concession 5, subject to a mortgage thereon which he is to pay. You find him bestowing that upon his brother Oscar. Now can anyone doubt—is not the evidence almost irrefutable —that he meant that and nothing else? He was giving 50 acres in lot 11, concession 5; he was giving 50 acres which was subject to a mortgage which Oscar was to pay off; and when you remember that he was giving all the property he died possessed of, that he had already given 50 acres to his wife, and this is all that remained, I think one is shut in to the conclusion beyond all peradventure that it is the west 50 acres of lot 11, concession 5, he refers to. I think the declaration should be that the west half of lot 11, concession 4, goes to the widow under the will, and that the west half of lot 11, concession 5, goes to the brother Oscar under the will.

I do not think the plaintiff ought to be made to pay costs. Difficulty did arise in the construction of the will. I think the defendants should pay their own costs, except the infant, and her costs should be paid by the plaintiff. I do not make the costs payable out of the estate, because it is not the beneficiaries who come to the Court to have their title

cleared up. Eliza Thomas comes to the Court to endeavour to get an adjustment of the estate in her favour, and fails. She comes to the Court to seek the intervention of the Court, and fails. It is not one of the cases in which the estate should be burdened with the plaintiff's costs, and I think the plaintiff should pay the costs of the infant, and the devisees should pay their own costs, for the benefit of getting their title made plain by the Court.

IN CHAMBERS.

[BOYD, C., 25th MARCH, 1889.

In re METCALFE.

Canada Temperance Act—Repeal—Indian Reserve—Indian Electors—Prohibition.

Held, on motion for prohibition against the returning officer, that Indian electors resident in the township of Tuscarora, an Indian Reserve, were not competent to vote in the matter of the repeal of the Canada Temperance Act in that county.

A. H. Marsh, for the applicant.

Masten, for the returning officer.

Irving, Q.C., for the Attorney-General.

[GALT, C. J., 18th MAY, 1889.

CLARKE v. CREIGHTON.

Irregularity—No indulgence to plaintiff where action not sustainable—Action for damages for false testimony.

The plaintiff sued for damages for false testimony, alleging that he had failed in a prior action by reason of such testimony given therein by the present defendant.

Held, that the action would not lie, and the plaintiff being in default by reason of not having given notice of trial, the action was dismissed.

S. R. Clarke, plaintiff in person.

C. Millar, for the defendant.

[FERGUSON, J., 13th and 14th MAY, 1889.

McNEILL v. HAINES.

Costs—Scale of—Action for cutting timber on land—Title to land—R. S. O. c. 47, s. 18.

The plaintiff sued for damages sustained by the defendant cutting timber on his own land, after having sold such timber standing, to the plaintiff's assignor. It was determined by the Court that the timber sold was an interest in land.

Held, that the title to land was brought in question in the action, and therefore, although the plaintiff recovered only $135, a County Court would have no jurisdiction, and the costs should be on the scale of the High Court.

W. M. Douglas, for the plaintiff.

Lount, Q.C., for the defendant.

[ROSE, J., 20th MAY, 1889.

In re BACKHOUSE v. BRIGHT.

Prohibition—Division Court—Ex parte order for new trial.

At the moment when a Division Court action was called for trial the plaintiff and his agent were accidentally absent from the Court, and the action was dismissed without any trial. The plaintiff afterwards obtained from the Judge *ex parte* an order for the restoration of the case to the docket for trial at the next sittings. The defendant made a motion to rescind this order, which was refused, and he then applied for prohibition.

Held, that the Judge had power to dispense with notice of motion for the order; and the motion for prohibition was refused.

Carter v. *Smith*, 4 E. & B. 696; *McLean* v. *McLeod*, 5 P. R. 467; and *Fee* v. *McIlhargey*, 9 P. R. 329, referred to.

Aylesworth, for the motion.

J. A. Paterson, contra,

[29TH MAY, 1889.

HAMILTON PROVIDENT AND LOAN SOCIETY v. McKIM.

Notice of trial—No power to shorten time—Rules 485, 661.

A defendant is entitled to the full ten days' notice of trial prescribed by Rule 661 unless he has consented to take short notice of trial, or unless short notice can be directed as a term for granting an indulgence sought by a defendant; and there is no power under Rule 485 or otherwise to compel the defendant to take short notice.

John Crerar, for the plaintiffs.

Aylesworth, for the defendants.

[1ST JUNE, 1889.

In re McCALLUM AND BOARD OF PUBLIC SCHOOL TRUSTEES OF SECTION 6, TOWNSHIP OF BRANT.

School law—Public school—Suspension of pupil—Mandamus to trustees—Discretion—Delay—Change of position.

A pupil at a public school, having injured the top of a school desk by cutting it, was ordered by the schoolmaster to replace the top, and was suspended till he should do so. The suspension was on the 20th February, 1888, and on the 7th of May, 1889, notice of motion was served by the father of the pupil for a mandamus to compel the trustees to re-admit the son. In the meantime appeals had been made by the father to three of the trustees, to the public school board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school.

Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs.

W. H. Blake, for the applicant.

Aylesworth, for the trustees.

[THE MASTER IN CHAMBERS, 25TH MAY, 1889.

KANE v. MITCHELL.

Payment of money into court—Taking out—Satisfaction—Rule 632.

The plaintiffs sued for work and labour as contractors, claiming a balance of $511. The defendant by his statement of defence denied all the allegations in the statement of claim, and also said that $300 was sufficient to satisfy the plaintiffs' whole claim, and he paid that sum into Court in satisfaction of such claim.

Rule 632 provides that "the payment of money into Court shall not be deemed an admission of the cause of action in respect of which it is so paid."

Held, that the plaintiffs were not entitled to take out the money paid into Court, unless they took it in full satisfaction of their claim.

John Greer, for the plaintiffs.
Montgomery, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

[11TH MAY, 1889.

REGINA v. WATTERS.

Judgment debtor—Disclosure—C. S. c. 38, s. 7—Answers must be signed before order for discharge.

This was an appeal from an order made by a County Court Judge, under C. S. c. 38, s. 7, which enacts that "if the debtor makes a full disclosure of the actual state of his affairs and of all his property, rights, and credits, etc., and signs to the truth of his disclosures and answers, etc., the Judge may by order discharge

the debtor from arrest." The applicant in this case was examined before a County Court Judge, who made an order discharging him from arrest, but the applicant did not sign the disclosure and answers until fourteen days after the order for discharge had been made.

Held, FRASER and TUCK, JJ., dissenting, that the words of the statute are imperative, and the Judge had no authority to make the order until the applicant had signed to the truth of the same.

Per FRASER and TUCK, JJ., that the words of the statute are merely directory and not imperative.

LOEB v. MACAULY.

Bail—Release of debtor—Disclosure—Liability of bail.

The defendant and another were bail for one B., who had been arrested for $800. After arrest B. applied for and made a disclosure under C. S. c. 38, s. 7, and an order was made by the County Court Judge, before whom the disclosure was held discharging B. from arrest. B. did not sign his disclosure answers until after the order was made, and the discharge having been granted no special bail was put in, and the plaintiff now brought an action against the bail for the debt.

Held, FRASER, J., dissenting, that the bail were liable.

GILMORE v. CITY OF ST. JOHN.

Municipal corporations — Defective sidewalk — Negligence — Contributory negligence—Knowledge of plaintiff.

Some property holders in St. John had put down an asphalt sidewalk along their fronts. Where it ended it dropped off suddenly, five or six inches to the old walk. The plaintiff in walking along this street one dark, wet night, stepped off this end suddenly and falling sustained serious injuries. On the trial the plaintiff admitted that she lived directly opposite this sidewalk, knew of its nature, and had frequently avoided it. The trial

Judge directed the jury that this knowledge did not amount to contributory negligence, and a verdict was returned for the plaintiff. The defendants now moved for a new trial.

Held, FRASER, J., dissenting, that the fact admitted by the plaintiff amounted to contributory negligence and that the jury should have been so directed; and a new trial was ordered.

[13TH MAY, 1889.

RICHARDSON v. VAUGHAN.

Maritime law — Charter party — Change in — Giving time — Guaranty — Consideration.

The plaintiffs' attorneys sent the defendant notice of dishonour of two bills of exchange, to which the defendant replied in writing as follows :—" I ask you to delay proceedings on the captain's draft on ship *Eurydice* for £753 5s. 4d. until the vessel's arrival in St. John, or in case of her loss or any delay happening to her I guarantee immediate payment of said draft, and I also guarantee payment of a draft for £173 9s. 1d. drawn by the master of the same vessel." The plaintiffs were the charterers of the above ship at a lump sum, and before the vessel sailed from Savannah there was to be a settlement of the actual freight; if in the vessel's favour the charterers were to pay the owners in cash; if in the charterers' favour payment was to be made on the captain's bill at ten days after the arrival of the ship at the port of discharge. The defendant was part owner and sent his son with a power of attorney to look after the vessel at Savannah. While there the son arranged with the ship's husband at Liverpool, and at request of the charterers agreed to substitute for the ten days' bill, one at sixty days' sight on the agents at Liverpool, who accepted the bill, but before maturity they failed, and the bill was dishonoured and sent back to St. John for collection from the defendant. On receipt of notice the defendant sent the above letter to the plaintiffs' attorneys. Time was given, and on the arrival of the ship at St. John he paid the larger bill but refused payment of the smaller one on the ground that the owners were not liable, as a change had been made in the charter party, and that there was no consideration, as when

the defendant asked for time he was informed that the smaller bill was for disbursements.

Held, that the change in the charter party was made by the parties to it, and therefore the defendant was liable; and that the granting of time at the request of the defendant amounted to a consideration sufficient to render him liable to pay the smaller draft.

REGINA v. GALLAGHER.

Constitutional law—Courts of criminal jurisdiction—Right of Dominion Parliament to organize.

Application for a *certiorari* to remove a conviction under the Canada Temperance Act was made on the ground that in the Provincial Legislature and not in the Dominion Parliament rested the exclusive authority to organize courts of criminal jurisdiction.

The application was dismissed.

REGINA v. WHITE.

Canada Temperance Act—Conviction—Distress—Imprisonment.

This was a motion for a rule *nisi* for a *certiorari* to remove a conviction made under the Canada Temperance Act.

Held, that in a conviction awarding distress and in default thereof imprisonment, both must be made at once, and by the magistrate or justices who tried the case, and by no other.

Regina v. *Porter*, 20 Nova Scotia 352, not followed.

Ex parte MUNCEY.

Absconding Debtors' Act—Non-resident debtor temporarily in the province—Debt of woman before marriage—Warrant against property of husband and wife.

An unmarried woman, residing out of this province, but having property and visiting here occasionally, contracted a debt here. She afterwards married in this province, her husband being a non-resident and coming here for the purpose of the marriage only, and immediately after, with his wife, leaving the province and remaining abroad.

Held, KING, J., *dubitante*, that they were not liable to be proceeded against as absent debtors under C. S. c. 44, s. 3.

Per KING, J.—The warrant should have issued against the property of the wife only.

CRATHERN v. SUTHERLAND

Writ of summons—Re-issue of, after being in sheriff's hands—Issue by attorney's clerk without authority.

An attorney's clerk, contrary to instructions, issued a writ of summons against the defendant, and forwarded it to the sheriff for service. On being informed of the fact, the attorney withdrew the writ, altered the teste, and re-issued it to the sheriff, who executed it.

Held, that, as the issuing of the process by the attorney's clerk was within the scope of his authority, the second issue, without re-sealing the writ, was improper, and should be set aside.

Held, by KING, J., that, as the writ was first issued without authority, the attorney was not bound by the act of his clerk, and the re-issue of the writ was not irregular.

DOHERTY v. THE MAYOR, &c., OF THE CITY OF ST. JOHN.

New trial—Contributory negligence—Damages—Verdict against evidence—Principle on which new trial allowed.

In an action against a municipal corporation for negligence, where the defence relied on was contributory negligence on the part of the plaintiff, who obtained a verdict, a new trial will not be granted if the jury might reasonably have come to the conclusion they did, even though the Court should think that the jury ought to have come to a different conclusion.

It is no ground for reducing the damages found in such an action that the plaintiff was guilty of negligence, but not amounting to contributory negligence.

LYMAN v. SHIRREFF.

Replevin—Goods seized under fi. fa.—Claim of special property by sheriff—Writ de proprietate probanda.

Where goods levied on under execution are replevied by the grantee of the judgment debtor under a bill of sale, the sheriff may put in a claim of special property.

IN CHAMBERS.

[ALLEN, C.J.

Ex parte O'CONNOR.

Bastardy—45 V. c. 18—Request of overseers for warrant necessary—Examination of the woman by justice essential—42 V. c. 21.

45 V. c. 18 enacts:—"It shall be the duty of the justice on the apprehension of the party charged, if he shall deny the charge, to summon the woman making the same before him and

then and there to take her deposition to be signed by her in the presence of the party charged;" and this was an application for the discharge of the defendant from arrest on the grounds: (1) that the warrant under which the defendant was arrested should have stated that it was issued at the request of one of the overseers of the poor for the parish according to the Act, 42 V. c. 21; and (2) that the justice who issued the warrant was bound, on the defendant denying the charges, to summon the woman before him and take her deposition in presence of the defendant.

Held, (1) That the warrant should state that it was issued at the request of one of the overseers of the parish, and without such request the justice had no jurisdiction. (2) That the direction in the statute is positive as to what the justice shall do in such a case, and he has no discretion in the matter; he may, if necessary, commit the defendant to gaol temporarily until such examination can take place. After the examination the justice should send the matter up to the County Court. (3) That the defendant was illegally imprisoned and entitled to his discharge.

Supreme Court of Canada.

QUEBEC.]

ECCLESIASTIQUES DU SEMINAIRE DE ST. SULPICE v. CITY OF MONTREAL.

Municipal taxes—Special assessments—Exemption—41 V. c. 6, s. 26 (Q.)—Educational institution.

By 41 V. c. 6, s. 26, all educational houses or establishments which do not receive any subvention from the corporation or municipality in which they are situated are exempt from municipal and school assessments, "whatever may be the Act in virtue of which such assessments are imposed, and notwithstanding all dispositions to the contrary."

Held, reversing the judgment of the Queen's Bench (Appeal side), that the exemption from municipal taxes enjoyed by educational establishments under that section extends to taxes imposed for special purposes, *e. g.*, the construction of a drain in front of their property; RITCHIE, C.J., dissenting.

Per STRONG, J.—Every contribution to a public purpose imposed by a superior authority is a "tax" and nothing less.

Geoffrion, Q.C., for the appellants.

Ethier, for the respondents.

DUBUC v. KIDSTON.

Hypothecary action—Judgment in—Art. 2075, C.C.—Service of judgment—Art. 476, C. C. P. and Cons. Stats. L. C. c. 49, s. 15.—Waiver.

By a judgment *en declaration d'hypotheque*, certain property in the possession and ownership of the respondents was declared hypothecated in favour of the appellant, in the sum of $5,200 and interest and costs, and they were condemned to surrender the same in order that it might be judicially sold to satisfy the judgment, unless they "chose rather and preferred to pay to the appellant the amount of the judgment." By the judgment it was also decreed that the option should be made within forty days of

the service to be made upon them of the judgment, and in default of their so doing within the said delay, that the respondents be condemned to pay to the appellant the amount of the judgment.

This judgment, (the respondents residing in Scotland, and having no domicil in Canada) was served at the prothonotary's office, and on the respondents' attorneys. After the delay of forty days, no choice or option having been made, the appellant caused a writ of *fi. fa. de terris* to issue against the respondents for the full amount of the judgment. The sheriff first seized the property hypothecated, sold it, and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* was then issued and other realty belonging to the respondents was seized. To this second seizure the respondents filed an *opposition afin d'annuller*, claiming that the judgment had not been served upon them and that they were not personally liable for the debt due to the appellant.

Held, reversing the judgment of the Court below, that it is not necessary to serve a judgment *en declaration d'hypotheque* on a defendant who is absent from the Province, and has no domicil therein: Art. 476, C. P. C., and Cons. Stats. L. C. c. 49, s. 15.

2. That the respondents, by not opposing the first seizure of their property, had waived any irregularity as to the service of the judgment.

3. That in an action *en declaration d'hypotheque*, the defendant, in default of his surrendering within the period fixed by the Court, may be personally condemned to pay the full amount of the plaintiff's claim: Art. 2075, C.C.

Blanchet, Q.C., for the appellant.
Irvine, Q.C., for the respondents.

UNION BANK OF LOWER CANADA v. HOCHELAGA BANK.

Hypothec to the prejudice of creditors—When invalid—Art. 2023, C. C.

Where an hypothec has been acquired upon property within thirty days immediately preceding the declaration and admission of the mortagee's agent, that the mortgagors were notoriously insolvent and *en deconfiture*, such hypothec in a report of distri-

bution of the moneys realized on the property of the insolvents cannot be invoked to the prejudice of a party who was a creditor at the time when the hypothec was given : Art. 2023, C.C.

Irvine, Q.C., for the appellants.

Beique, for the respondent.

DEMERS v. DUHAIME.

Action en restitution de deniers—Sale of personal rights without warranty—Sale en bloc—Arts. 1510, 1517, 1518, C.C.

N. D., the respondent, owner of a cheese factory, made an agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory than that of N. D. N. D. subsequently sold to G. D., the appellant, the factory, and *sous la simple garantie de ses faits et promesses* whatever rights he might have under his agreement with the farmers for the bulk sum of $7,000. Then G. D. assigned to B. the factory and the same rights, but excluding warranty, *sans garantie aucune*, for $7,500. A company was subsequently formed to whom B. assigned the factory and the rights, and one of the farmers who was a party to the original agreement having sold milk to another cheese factory, the company sued him, but the action was dismissed on the ground that N. D. could not validly assign personal rights he had against the farmers. Thereupon G. D. brought an action against N. D. to recover the price paid by him for rights which he had no right to assign. At the trial it was proved that although the price mentioned in the deed and paid was a bulk sum for the factory and the rights, the parties at the time valued their rights under the agreement with the farmers at $5,000. G. D. also admitted that the action was taken for the benefit of the present owners of the factory.

Held, affirming the judgment of the Court below, STRONG and FOURNIER, JJ., dissenting, that, inasmuch as the appellant, by the sale he had made to B., had received full benefit of all that he had bought from the respondent and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid.

Per TASCHEREAU, J.—If any action lay at all, it could only have been to set the sale aside, the parties being restored to the *status quo ante*, if it were maintained.

Irvine, Q.C., for the appellant,

Casgrain, Q.C., for the respondent.

MITCHELL v. MITCHELL.

Removal of executor—Arts. 282, 285, 917, C.C.

Held, affirming the judgment of the Court of Queen's Bench (Appeal side), STRONG, J., dissenting, that Art. 282, C.C., does not apply to executors chosen by the testator, and that in an action for the removal of one executor, when there are several executors, the existence of a law suit between such executor and the estate he represents, and the evidence of irregularities in his administration but not exhibiting any incapacity or dishonesty are not a sufficient cause for his removal: Arts. 917, 285, C.C.

Rielle, for the appellant.

De Lisle, for the respondent.

WEIR v. CLAUDE.

Nuisance—Pollution of running stream—Long-established industry—Injunction.

W. acquired a lot adjoining a small stream at Cote des Neiges, Montreal, and finding the water polluted from certain noxious substances thrown into the stream, brought an action in damages against C., the owner of a tannery situated fifteen arpents higher up the stream, and asked for an injunction. At the trial it was proved that C. and his predecessors from time immemorial carried on the business of tanning leather there, using the waters of the stream, and that it was the principal industry of the village; that the stream was also used as a drain by the other proprietors of the land adjoining the stream, and manure and filthy matter were thrown in; that every precaution was taken by C. to prevent any solid matter from falling into the creek; and that W.'s property had not depreciated in value by the use C. made of the stream.

Held, affirming the judgment of the Court below, that, as between neighbours, there are other obligations than those created by servitudes, which must be determined according to the quality of the locality, the extent of the inconvenience, and also according to existing usages; and under the circumstances proved in this case W. was not entitled to an injunction to restrain C. from using the stream as he did.

Rielle and *Lafleur*, for the appellant.

Laflamme, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.] [14TH MAY, 1889.

CANADIAN LOCOMOTIVE COMPANY v. COPELAND.

Bill of lading—Rate of freight—Demand of freight at too high a rate—Refusal of consignees to accept cargo—Sale of cargo by master of vessel—Expenses of sale—Damages—Demurrage.

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, 14 O. R. 170, and came on to be heard before this Court (HAGARTY, C.J., O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 28th and 29th days of January, 1889.

Britton, Q.C., and *R. V. Rogers*, for the appellants.

W. Cassels, Q.C., and *A. W. Aytoun-Finlay*, for the respondents.

On the 14th May, 1889, THE COURT, HAGARTY, C.J., O., dissenting, allowed the appeal with costs; agreeing with the Court below that freight was payable only at the reduced rate, but holding that it was the duty of the defendants to tender the coal to the plaintiffs with a demand for payment of freight at the reduced rate, and that not having done so the sale was unauthorized and the expenses in connection therewith could not be charged against the plaintiffs.

The Court also held that for the same reason the allowance of damages in the nature of demurrage could not be sustained, but that the defendants were entitled to some compensation (fixed at $100.00) for the delay of the plaintiffs in unloading the vessel, after the duty of unloading was actually undertaken by them.

MACLENNAN, J.A.] [28TH MAY, 1889.

ROWLANDS v. CANADA SOUTHERN R. W. CO.

Appeal to the Supreme Court of Canada—Judgment of Court of Appeal upon appeal from Divisional Court refusing new trial—Notice of appeal—R. S. C. c. 135, ss. 24 (d), 41—Extension of time—Circumstances of case.

The decision of MACLENNAN, J.A., at Chambers, *ante* p. 245, was affirmed by the full Court of Appeal.

R. M. Meredith, for the plaintiff.

H. Symons, for the defendants.

C. C. HALDIMAND.] [14TH MAY, 1889.

FOSTER v. VIEGEL.

Costs—Counter-claim—Scale of costs.

Where the defendant recovers on a counter-claim the costs should be on the scale of the Court in which the action was brought by the plaintiff.

Irwin v. *Brown*, 12 P. R. 689, and *Amon* v. *Bobbett*, 22 Q. B. D. 543, referred to.

Aylesworth, for the appellant.

Lash, Q.C., for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 27TH MAY, 1889.

GILBERT v. STILES.

Arrest—Ca. sa.—Order for—Motion to set aside—New material—Copy of affidavit—Affidavit on information and belief—Rule 609—Exhibits.

Upon an application to set aside an order for a *ca. sa.* upon the ground that it is based upon insufficient material, as distinguished from a motion to discharge the defendant from custody upon the merits, no new material can be used.

Damer v. *Busby*, 5 P. R. at p. 389, followed.

In this case an order for a *ca. sa.* was granted upon two affidavits; one that of the Toronto agent of the plaintiff's solicitors exhibiting a copy of an affidavit made by one of such solicitors, stating that he believed it to be a true copy, and that the original was stated to have been enclosed in a letter received by him that day, but was not so enclosed, but not stating that such an affidavit ever existed.

Held, that this could not be treated as forming any evidence upon which an order for arrest could be founded.

The other affidavit used stated that the deponent was credibly informed and believed certain facts, not stating the name of his informant nor the grounds of his belief.

Held, that this statement did not comply with Rule 609, and was insufficient as proof of the facts stated, upon an application for such an order.

Gibbons v. *Spalding*, 11 M. & W. 173; *McInnes* v. *Macklin*, 6 U. C. L. J. 14, referred to.

The copy of affidavit marked as an exhibit to the affidavit of the Toronto agent was not filed as an exhibit, and was subsequently produced to the Court as an original affidavit, a new jurat having been added.

Held, *per* FALCONBRIDGE, J., that the exhibit, even though it was not actually in the hands of the officer of the Court, was part of the record of the case, and should not have been so dealt with.

Arnoldi, for the plaintiff.

A. Cassels, for the defendant Benjamin Stiles.

[FERGUSON, J., 7TH DECEMBER, 1888, AND 30TH JANUARY, 1889.

O'NEILL v. OWEN.

Will—Execution—Attestation—Revocation—Devise to Infants—Conveyances by heirs-at-law—Registration—Priorities—R. S. O., 1877, c. 111, s. 75—"Inevitable difficulty"—Crops—Possession—Costs.

The plaintiffs were the devisees of the land in question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law of H. O'N.; and the defendant O. was the assignee of all the estate of A.

O'N., and had besides a mortgage from A. O'N. over the land in question.

On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be rewritten and read to him; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of these rewritten, the date 17th was changed to 23rd; the same witnesses were then called in and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H. by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a Surrogate Court.

Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not duly executed and probate of it was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets, out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the later will was a valid one; and it was adjudged that the earlier will should be admitted to probate.

By this will the plaintiffs were to come into possession when they should become of the age of twenty-one years, not being less than twelve years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them, A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the

solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained.

Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to O.; for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and the plaintiffs were prevented from registering the will by "inevitable difficulty" or "impediment" within the meaning of R.S.O. 1877, c. 111, s. 75.

The defendant O. by a counter-claim asked for damages being the value of a crop in the ground and deprivation of possession of the land for a year or more, but a reference to assess these damages were refused.

The plaintiffs and the defendant O. were allowed costs out of the estate, except that the defendant O. was ordered to pay the costs occasioned by charges made by him of fraud and collusion; no costs were allowed to or against the defendant A. O'N.

W. R. Meredith, Q.C., and *T. G. Meredith*, for the plaintiffs.

M. D. Fraser and *R. M. Meredith*, for the defendant Owen.

The defendant Albert O'Neill in person.

[ROSE, J., 17TH MAY, 1889.

WYLIE v. FRAMPTON.

Married woman—Conveyance of real estate—Necessity for joining husband—Tenancy by the curtesy initiate—R. S. O. c. 132, s. 4, s-ss. 2, 3—Order under 51 V. c. 21.

The question in this action was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain lands of the plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance.

The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879 and the remainder in 1882.

Held, that the case was governed by R. S. O. 1877, c. 125, ss. 3 and 4, the same as s-ss. 2 and 3 of s. 4 of R. S. O. 1887, c. 132, and the land could not be conveyed by the plaintiff

alone, unless by virtue of an order under 51 V. c. 21, so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made.

Semble, the wife could convey her own estate in the land.

Re Konkle, 14 O. R. 183, and *Adams* v. *Loomis*, 24 Gr. 24, considered.

Schoff, for the plaintiff.

E. D. Armour, for the defendant.

[7TH JUNE, 1889.

SMITH v. WILLIAMSON.

Costs—Action of ejectment by administrator.

A trustee or executor stands in the same position as any other litigant with respect to costs.

And where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the holder of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with the moneys of the defendant and took the conveyance in his own name, and that the defendant was the true owner of the land:

Held, that the fact that there was no declaration of trust in favour of the defendant, and that the evidence in the hands of the administrator tended to show that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for costs; and costs were given to the defendant against both plaintiffs.

W. N. Miller, Q.C., for the plaintiffs.

Rae, for the defendant.

[8TH JUNE, 1889.

In re CROFT AND TOWN OF PETERBOROUGH.

Municipal corporations—By-law—Submission to electors—Liquor License Act, R. S. O. c. 194, s. 42—"Electors," meaning of.

Section 42 of the Liquor License Act, R. S. O. c. 194, provides for the council of any municipality passing a by-law requiring a larger duty to be paid for tavern or shop licenses than is imposed

by s. 41, "but not in excess of $200 in the whole, unless the by-law has been approved by the electors in the manner provided by the Municipal Act, with respect to by-laws which before their final passing require the assent of the electors of the municipality."

A municipal council having submitted to the electors and passed a by-law providing for a larger duty than $200, a motion was made to quash it on the ground that certain leaseholders had not been allowed to vote upon it, it being assumed by the council that s. 309 of the Municipal Act, R. S. O. c. 184, governed as to the votes of leaseholders.

Held, that s. 309 did not apply; and that the word "electors" in s. 42 must be read as referring to the same class as "electors" in s-s. 14 of s. 11 of R. S. O. c. 194, viz., those entitled to vote at an election for a member of the Legislative Assembly; and the reference to the Municipal Act in s. 42 must be confined to the manner of holding the election.

The by-law, not having been submitted to or approved by the electors according to this interpretation of the statute, was quashed with costs.

Poussette, Q.C., for the applicant.

E. B. Edwards, for the Town of Peterborough.

[STREET, J., 17TH JUNE, 1889.

In re RICHARDSON AND CITY OF TORONTO.

In re HOSPITAL TRUST AND CITY OF TORONTO.

Municipal corporations—Expropriation of lands—Compensation to owners—Method of estimating—Benefit to lands not taken—Special assessment—49 V. c. 66.

Under the authority of 49 V. c. 66, the city of Toronto expropriated the lands of private persons near the river Don for the purposes of the "Don Improvement Scheme." By the Act the city council were to make a survey and plan of the 400 feet on each side of a certain line called "the centre line," showing the lands taken by them, and were to apportion to each lot shown upon the plan a due share of the whole cost of the lands, works, and improvements; and by s. 4, s-s. 3, the lands not taken within the 400 feet were to be specially assessed in respect of

such improvements, but no such special assessment was to exceed the actual value of the benefit derived from the improvement.

R. and the H. T. owned lands extending from the centre line to a distance exceeding 400 feet, and the city took from such lands a strip narrower than the 400 feet.

Held, that in awarding compensation to R. and the H. T. under the Municipal Act for the parts of their lands taken, the arbitrators should allow for any benefit to the parts not taken; but in estimating that benefit they should take into account as best they could the fact that the land-owners were liable to be charged by the city to the extent of the benefit they received, by a rate as for a local improvement under s. 4, s-s. 3.

Bain, Q. C., and *H. D. Gamble*, for the land-owners.

W. A. Reeve, Q.C., and *C. R. W. Biggar*, for the City of Toronto.

CHANCERY DIVISION.

[In Banc, 12th June, 1889.

REGINA v. ROMP.

Criminal law—Confession—Improper inducement—Evidence.

A police officer said to the prisoner, who was arrested on a charge of obstructing a railway train by placing a block on the line: "The truth will go better than a lie. If anyone prompted you to do it you had better tell about it." Whereupon the prisoner said that he did the act charged against him.

Held, that the admission was not receivable in evidence, and a conviction found on it was improper.

Aylesworth, for the prisoner.

No one appeared for the Crown.

[The Divisional Court, 12th June, 1889.

MOSES v. MOSES.

Costs—Scale of—Jurisdiction of Division Court—Ascertainment of amount.

The decision of Robertson, J., 18 P. R. 12, as to the scale upon which the costs of this action should be taxed, was affirmed by a Divisional Court on appeal.

Wallace Nesbitt, for the appeal.

Aylesworth, contra.

[13TH JUNE, 1889.

BARBER v. McKAY.

Ejectment—Probate of will—Evidence—New trial—Pleading—R. S. O. c. 61, ss. 38, 44.

This was a motion by the defendant to reverse the judgment delivered at the trial in an action of ejectment. The defendant claimed to hold the land in question under a deed from the executor of the will of one S.

At the trial the only evidence of the will offered by the plaintiffs was the copy of the probate which was on registry with the affidavit of verification. The plaintiffs, however, endeavoured to support their case by reference to a certain statement in the defendant's pleading in which she claimed to occupy under a deed made by the executor under the will of S.

Held, that the copy of probate put in was not proper evidence of the will, no notice having been given under R. S. O. c. 61, s. 38.

Held, further, that the plaintiffs could not count upon one part of the statement of defence to eke out the insufficiency of their evidence while they rejected the rest of it, but must prove the facts relied on in the proper way.

Shilton, for the plaintiffs.

Bain, Q.C., for the defendant.

[15TH JUNE, 1889.

CLARKSON v. SEVERS.

Assignment for creditors—Execution in sheriff's hands—"Completely executed by payment"—Constitutionality—Bankruptcy—R. S. O. c. 124, ss. 4, 9.

This was an appeal from the judgment of ROBERTSON, J., given at the trial holding that certain moneys realized by the sheriff on a sale under a writ of execution in his hands were the property of the execution creditors as against the assignee under an assignment made by the execution debtor for the benefit of his creditors.

The facts were as follows:—An execution against the lands of one H. had ever since the year 1880 been standing in the sheriff's hands. Eventually in 1887 the sheriff made a seizure and sale and received the purchase money therefor. Before however he

had paid over to the execution creditors the amount due them, H. made an assignment for the benefit of his creditors. The assignee immediately notified the sheriff of the assignment and claimed the moneys realized at the sale, and which were still in his hands, on the grouud that the writ had not been completely executed by payment within the meaning of R. S. O. c. 124, s. 9, and that therefore the assignment took precedence of it.

Held, affirming the decision of ROBERTSON, J., that the assignee was not entitled to the money.

Per BOYD, C.—R. S. O. c. 124, s. 9, applies to cases of execution when the Creditors' Relief Act applies, and did not apply to the writ in this case, which was in the sheriff's hands prior to that Act, and was executed by the sale of the lands and making of the money, which money then became the property of the execution creditors.

Semble, that if R. S. O. c. 124, s. 9, is to receive such a construction as would pass the money in this case to the assignee for creditors, thus giving to him a higher right than the execution debtor had, the Act would be *ultra vires* as a bankruptcy provision.

Per FERGUSON, J.—The authorities are clear to show that after receipt of the moneys by the sheriff the execution was executed.

Semble, therefore, that "completely executed by payment" in R. S. O. c. 124, s. 9, means by "voluntary or involuntary payment to the sheriff."

C. Millar, for the appeal.

T. P. Galt, contra.

[BOYD, C., 22ND MAY, 1889.

In re HEWISH.

Sales of land by the Court—R. S. O. c. 44, s. 53, s-s. 10—Mortgage—Bar of dower—Equitable dower.

In certain partition and sale proceedings lands were sold and a vesting order made, but the wives of certain persons entitled as tenants in common were not made parties.

Held, that the title of those claiming under the vesting order was defective, and R. S. O. c. 44, s. 53, s-s. 10, did not cure the defect.

Where at the time of the vesting order the interests of two of the tenants in common were outstanding on mortgages, in which their wives had joined to bar dower:

Held, that the lands so mortgaged passed by the vesting order free from dower.

E. D. Armour and *W. M. Hall*, for the vendors.

J. H. Macdonald, Q.C., for the purchasers.

[28TH MAY, 1889.

In re CENTRAL BANK OF CANADA.

MORTON'S CASE.

BLOCK'S CASE.

Banks and banking—Deposit receipts—Negotiability—Estoppel—Bank Act, R. S. C. c. 120, ss. 43, 65, 83.

Morton and Block filed claims with the liquidators of the Central Bank as *bona fide* purchasers for value and indorsees of deposit receipts of the Bank, originally issued to Cox & Co. in the following form:

CENTRAL BANK OF CANADA,

$6,000. Toronto, 18th October, 1887.

Received from Cox & Co. the sum of $6,000, which this bank will repay to the said Cox & Co., or order, with interest at 4 per cent. per annum, on receiving 15 days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required.

For the Central Bank of Canada.

Entered. A. B. ORD, Accountant. A. A. ALLEN, Cashier.

Held, that, even if such a receipt did not possess all the incidents of a promissory note, yet it was meant to be transferred by indorsement, being made payable to the order of Cox & Co.; and it was therefore governed by a line of authorities which shewed that it was so far negotiable (whether possessing all the

incidents of commercial paper or not) as to pass a good title to a *bona fide* purchaser for value, who took without notice of any infirmity of title.

Semble, however, that these deposit receipts as drawn were negotiable instruments under which the claimants were entitled to succeed as upon a promissory note made by the bank.

Watson, for the claimants.

W. R. Meredith, Q.C., for the liquidators of the bank.

[6TH JUNE, 1889.

BURKITT v. TOZER.

Will—Construction of—Heirs and representatives.

A testator by his will made a bequest to "the heirs and representatives of Mr. Miles Burkitt." The question for decision was who were entitled to take under this expression, the executors or administrators of the deceased, or his next of kin according to the Statute of Distributions.

Held, on looking at the context, that the next of kin according to the statute were the persons entitled.

The weight of the authority tends to show that the word "representatives" when found standing alone is construed as "executors or administrators," but that very slight expressions in the context have turned the meaning in the other direction to that of "next of kin."

F. E. Hodgins, for the plaintiffs.

A. Cassels, *E. T. English*, and *J. A. Macdonald*, for the other parties.

[STREET, J., 22ND June, 1889.

McMAHON v. COSGRAVE.

Will—Devise of land charged with legacy—Liability of devisees for legacy.

This was an action brought by the plaintiff for payment by the defendants of a legacy given to the plaintiff under a will and charged on land which was devised to the defendants.

The evidence was taken before STREET, J., at the Toronto Assizes, and the argument was adjourned. This case was argued on the 22nd June and judgment was given at the close of the argument.

STREET, J., *held*, following *Carter* v. *Carter*, 26 Gr. 232, that the defendants were personally liable to the plaintiff for the amount of the legacy, they having accepted the land devised to them; and gave judgment for the plaintiff with costs.

Moss, Q.C., for the plaintiff.

Lash, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[FALCONBRIDGE, J., 19TH JUNE, 1889.

GRAND TRUNK R. W. CO. v. BERLIN AND WATERLOO STREET R. W. CO.

Railways—Tramway crossing railway track—Injunction—Danger—Convenience.

Motion by the plaintiffs to continue an injunction granted *ex parte* restraining the defendants from crossing the main line of the Grand Trunk Railway at the town of Berlin.

The motion was argued on the 18th June, 1889.

W. Cassels, Q.C., for the plaintiffs.

Shepley, for the defendants.

Judgment was delivered on the following day.

FALCONBRIDGE, J.—The motion of the plaintiffs was to continue the injunction, granted by my brother STREET, restraining the defendants from crossing the line of the Grand Trunk at Berlin, by driving their cars on tramway rails up to the Grand Trunk rails, and then driving across the rails, no rails being laid between or over the rails of the Grand Trunk. The defendants are incorporated under the Joint Stock Companies' Act and under R. S. O. c. 171. The provisions of the latter statute which require the sanction of the Commissioner of Public Works are not applicable, as the Grand Trunk Railway Company are not within the legislative authority of the Province of Ontario. It was ingeniously argued that the Dominion Railway Act of 1888

applied, and the line of the Grand Trunk could not be crossed without the consent of the Railway Committee of the Privy Council; but I do not feel that I can give effect to that argument. The Grand Trunk Railway crosses the street almost at right angles, and the street railway line runs along the street. It is not a question of crossing a right of way of the Grand Trunk; the Grand Trunk crosses the highway and uses it subject to the public user, as the defendants do; so both parties come before me quite on the same plane. I must decline to continue the injunction till the hearing. I shall not anticipate the merits further than to say that the right of the Grand Trunk is seriously in question. The balance of convenience is against the plaintiffs. By the injunction being continued the defendants would be seriously, perhaps irreparably, injured, and by its being dissolved the inconvenience or chance of loss to the plaintiffs will be comparatively trifling. According to the evidence there will be less danger to the public in the railway track being crossed by cars drawn by horses accustomed to the trains and under the hands of drivers who know the times when trains pass, than by ordinary vehicles, such as omnibuses, farm wagons, or ice wagons. The injunction will be dissolved, and the costs will be reserved to be disposed of by the trial Judge.

IN CHAMBERS.

[FERGUSON, J., 15TH JUNE, 1889.

CAMERON v. PHILLIPS.

Administrator ad litem—Order appointing, form of—Rule 311.

In framing an order under Rule 311 appointing an administrator *ad litem* it is not sufficient to say, "It is ordered that A. be and he is hereby appointed administrator *ad litem* to the estate of B."; the order is really a grant of administration, and should contain the particulars mentioned in Rule 48 of the Surrogate Rules; and, if such is the fact, should also in view of R. S. O. c. 50, s. 58, state that the adminstration is of real and personal estate.

J. B. O'Brian, for the plaintiff.

[24TH JUNE, 1889.

In re DELANTY.

Infants—Sale of land—Dispensing with examination of imbecile infant.

Upon a petition under R. S. O. c. 137, s. 8, for the sale of lands belonging to three infants, the examination of the eldest, a girl of sixteen, was dispensed with, notwithstanding the provisions of s. 4 of the Act and of Rule 999, upon the ground that she was an imbecile.

Re Lane, 9 P. R. 251, and *Re Harding*, 13 P. R. 112, *ante* p. 249, followed.

Hoyles, for the mother of the infants.

F. W. Harcourt, for the infants.

[ROSE, J., 7TH JUNE, 1889.

MARKLE v. ROSS.

Masters and Referees—Appeals from interlocutory rulings—G. O. Chy. 642—Rules 39, 846, 848, 850—Judge in Chambers—Mortgage action—Plea of payment—Onus of proof.

G. O. Chy. 642 provided for an appeal to a Judge in Chambers against any decree, order, report, ruling, or other determination of any Master; but this order has been abrogated, and the provisions for appeals from Masters and Referees are now contained in Rules 848-850, in which there is no provision for an appeal from a ruling or certificate, but from a report only.

Held, nevertheless, that a party to any reference has a right to come to the Court at any stage with any well founded complaint against the conduct of the referee, either personal misconduct or error in receiving or rejecting evidence, or otherwise; and Rule 39 shews the intention to permit interlocutory rulings to be considered; but a Judge in Chambers has no longer any jurisdiction, and the appeal must be to a Judge in Court.

Commee v. *Canadian Pacific R. W. Co.*, 16 O. R. at pp. 641, 642, and cases cited at p. 657, referred to.

Quære, whether upon a reference to a local Master, *qua* Master, an appeal from an interlocutory order would lie under Rule 846.

The action was brought to recover the principal and interest due upon a mortgage, and also upon certain other claims. The interest was alleged to be overdue, and the principal to have become due by virtue of an acceleration clause. The defendant pleaded payment of the interest. A reference was directed to a Master, and upon such reference the plaintiff proved his mortgage, and it appeared therein that certain instalments of interest were overdue.

Held, that the plaintiff had made out a *prima facie* case and could not be called on to prove the non-payment of the interest.

Aylesworth, for the plaintiff.

F. E. Hodgins, for the defendant.

[FALCONBRIDGE, J., 18TH JUNE, 1889.

VERRAL v. HARDY.

Contempt of Court—Motion to commit—Court or Chambers.

This was a motion by the plaintiff to commit the defendant for contempt of Court in disobeying an injunction order pronounced by ROSE, J., in Court.

The motion was made returnable before a Judge in Chambers, and came before FALCONBRIDGE, J., on the 18th June, 1889.

Wm. Macdonald, for the defendant, objected that a Judge in Chambers had no jurisdiction to hear the motion.

J. G. Holmes, for the plaintiff, contra.

FALCONBRIDGE, J., was of opinion that the practice was properly laid down in *Klein* v. *The Union Fire Insurance Co.*, 3 C. L. T. 601, and therefore enlarged the motion into Court.

[20TH JUNE, 1889.

KENDRICK v. KENDRICK.

Motion for distribution—Varying report—Evidence.

Motion by the plaintiff and the defendant Albert Kendrick for an order for the distribution of the moneys in Court, and disallowing to the defendants the executors the amount allowed

them by the local Master at Cornwall in his report as compensation for their services, and the amount allowed them as commission in lieu of costs, and for payment by the executors of the plaintiff's costs of the reference and proceedings in the Master's office, so far as the same related to inquiries upon the account of the surcharge of the plaintiff against the executors.

The reference was under the usual judgment for adminstration.

D. W. Saunders, for the plaintiff and the defendant Albert Kendrick.

Hoyles, for the defendants the executors.

F. W. Harcourt, for the infants.

FALCONBRIDGE, J.—I have conferred with the learned Chancellor about this motion.

The plaintiff's counsel disavows the reference made in the notice of motion to the evidence taken in the Master's office, and says its insertion in the notice was a mistake.

If the matters complained of in the notice of motion can be investigated and disposed of on reading the pleadings and judgment in the action and the Master's report without reference to the evidence, they may be dealt with on the present motion: otherwise there should have been an appeal from the Master's report.

In re GEGG v. ADAMS.

Certiorari—Division Court—Foreign evidence—Amount involved.

This was a motion by the defendant in three plaints in the first Division Court in the County of York for an order transferring the plaints from the Division Court to the High Court of Justice, or for a *certiorari*.

Each of the plaints was upon a note for $200 alleged to have been signed by the defendant. It was said in the affidavit of the defendant that difficult questions of law were likely to arise in the plaints, among others, a defence that the notes were obtained from the defendant by duress and intimidation.

Kilmer, for the defendant.

J. Reeve, for the plaintiff.

FALCONBRIDGE, J.—There are no difficult questions of law suggested as arising in these cases. A commission to take the foreign evidence can issue in a plaint in the Division Court as

well as from the High Court of Justice. The mere fact that a large amount is involved in the three actions, each within the proper competence of the Division Court, furnishes no ground for *certiorari*. The defendant, supposing him to be unsuccessful in the Division Court, is better off than he would be in the High Court of Justice, for he can promptly and with but little expense crave the highest opinion in the Province, by having recourse to the Court of Appeal as provided by the statute. Motion dismissed with costs.

[STREET, J., 11TH JUNE, 1889.

WHITNEY v. STARK.

Notice of trial—Irregularity—Laches in moving against—Waiver—No power to order short notice.

The ten days prescribed by Rule 661 for giving notice of trial cannot be shortened except by consent or when short notice of trial is imposed as a term in granting an indulgence.

The plaintiff on the 23rd May, when the pleadings were not closed, gave notice of trial for a sittings beginning on the 10th June. The pleadings were closed on the 27th May, and notice of trial might then and up to the 31st May have been regularly given in good time for the 10th June. The defendant waited until the 5th June and then moved to set aside the notice of trial given on the 23rd May as irregular.

Held, that the defendant had waived the irregularity by his *laches*.

J. F. Gregory, for the plaintiff.

R. U. Macpherson, for the defendant.

[THE MASTER IN CHAMBERS, 11TH JUNE, 1889.

BADGEROW v. GRAND TRUNK R. W. CO.

Discovery—Examination of officer of company—Failure to attend—Motion to strike out company's defence.

There is no power to strike out the statement of defence of an incorporated company for the default of an officer of such company to attend for examination for discovery.

J. W. McCullough, for the plaintiff.

Aylesworth, for the defendants.

[THE MASTER IN CHAMBERS, 12TH JUNE, 1889.

CLARKE v. CREIGHTON.

Costs—Defendant a solicitor—Instructions to another solicitor.

The defendant was himself a solicitor, but retained another solicitor to conduct his defence, and was awarded costs against the plaintiff.

Held, that the defendant was entitled as against the plaintiff to the usual costs of a defendant.

S. R. Clarke, plaintiff in person.

C. Millar, for the defendant.

[18TH JUNE, 1889.

FULTON v. BROWN.

Costs—Third party—Rules 329 et seq.—Discontinuance.

This action was brought by the plaintiff to recover the amount paid by him to the liquidators of the Central Bank for double liability upon ten shares of the bank stock which had been transferred to him by the defendant, who was a stock-broker. The defendant served notice under Rule 329 upon one H. claiming indemnity from him upon the ground that he, H., was the defendant's principal in the transaction with the plaintiff. An order was made under Rule 332 giving directions as to the mode of determining the questions in the action, under which H. was allowed to plead to the claims of the plaintiff and the defendant. After the delivery of pleadings the defendant discontinued the action.

The third party H. now moved for an order disposing of the costs of the action.

R. B. Beaumont, for the motion.

Geo. Lindsey, for the defendant.

John Leys, for the plaintiff.

Beard v. *Credit Valley R. W. Co.*, 9 O. R. 616; *Tomlinson* v. *Northern R. W. Co.*, 11 P. R. 419, 526, were cited.

THE MASTER IN CHAMBERS held that the plaintiff must pay the costs both of the defendant and the third party.

NEW BRUNSWICK.

In the Supreme Court.

[18TH JUNE, 1889.

Ex parte CURRIE.

Certiorari—Church Court—Removal of proceedings—Trial of minister of Methodist Church—Rules of discipline—Procedure.

A Methodist minister charged before the conference with having committed adultery was found guilty by a committee in June, 1885. He appealed, and the conference ordered a new trial, appointing a committee, which met on the 21st and 22nd June, 1885, and adjourned till the 25th. On the 24th a rule *nisi* for a prohibition was granted by this Court, and was made absolute in November, 1886. See 26 N. B. 403; 8 Occ. N. 414.

In September, 1886, the conference made and passed new rules of procedure in matters of discipline, and on the 3rd February, 1887, proceedings were commenced *de novo* against C. for the same offence, under which he was found guilty and suspended.

This was an application for *certiorari* to remove the proceedings of the conference for the purpose of quashing them.

The first ground relied on was that the prohibition granted in November, 1886, covered not only the particular charge then under consideration, but any other charge, in place of that one, for the same alleged offence.

Held, per ALLEN, C.J., WETMORE, PALMER, and FRASER, JJ., that it was not shewn that the conference of 1885 had exclusive jurisdiction over the offence. The committee appointed by them was prohibited by this Court from proceeding with the investigation and consequently the charge was never adjudicated upon.

The second objection was that the charge was tried under the rules of discipline passed in 1886, after the alleged offence had been committed.

Held, that these rules were mere matter of procedure and did not take away any rights the applicant had while the rules of 1884 were in force, and that the principle of *ex post facto* legislation did not apply.

The third objection was that the charge was *res judicata*.

Held, that the charge preferred in May, 1885, never passed *in rem judicatam*, because the committee appointed to try the charge had no jurisdiction according to the rules of discipline, and that therefore there was nothing to prevent a new charge being made and proceedings taken under it to try whether the applicant was guilty or not.

MANITOBA.

In the Queen's Bench.

[DUBUC, J.

ANDERSON v. JOHNSON.

Capias—Cause of action doubtful—Misnomer.

The affidavit upon which a *capias* issued disclosed a good cause of action, but examination upon it rendered success very doubtful. Upon a motion to set aside the writ,

Held, that the Court should not interfere unless it is very clear that the plaintiff must fail.

The affidavit gave the defendant's name as "J. Berkwin Johnson." His proper name was "Berkwin Johnson," but he had been sued and had pleaded as "J. B. Johnson," and admitted that he frequently used the "J." as a distinguishing letter. In the order and writ the name was "J. B. Johnson."

Held, that the order and writ were defective, but might be amended upon payment of costs.

In re SCOTT AND THE RAILWAY COMMISSIONER.

Railways—Expropriation—Lands injuriously affected—Danger to children—Statutes—Retroactive—Appeal from award—Parties.

After an award and before the expiration of the time for appeal a statute came into operation amending the previous provisions respecting appeals.

Held, that the new statute applied to the case.

A statute provided that a notice of appeal from an award should be given to all interested parties.

Held, that the notice was sufficient if signed by the attorney of the party appealing. Such a notice need not be served upon the arbitrators.

Service of such a notice upon the cashier of a foreign corporation is sufficient service.

A railway company had power to expropriate land making compensation "for the value of the land taken, and for all damages to land injuriously affected by the construction of the railway," with a proviso for setting off the increased value of the lands not taken by reason of the passage of the railway through or over the same "against the inconvenience, loss, or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands or grounds as aforesaid."

A portion of certain lands having been taken by the railway;

Held, 1. That the compensation should be the difference between the value of the land as it existed before, and of the remaining portion after, the construction of the railway.

2. That inconveniences arising not only from the construction but from the operation of the railway, such as noise, ringing of bells, smoke and ashes, might be included in the estimate.

3. Danger to children and others should not be included.

STEPHENS v. McARTHUR.

Preferential security—Contemporaneous advance of money—Assignee—Construction of statutes.

The provision of 49 V. c. 45, s. 7 (M.) vesting in the assignee for the benefit of creditors " an exclusive right of suing for the rescission " of fraudulent or preferential transactions, does not affect the right of individual creditors to attack such transactions when no assignment has been made.

The same statute, s. 2, renders void every conveyance *which has the effect* of giving a creditor a preference over other creditors; the intent of the parties, whether fraudulent or *bona fide*, is immaterial.

[BAIN, J.

McARTHUR v. GLASS.

Real Property Act—Affidavit to be filed with caveat.

An affidavit filed in support of a caveat did not state that in the deponent's belief the applicant had a good and valid claim upon the land, as required by the statute.

Held, that the filing of a caveat that complies with the statute is a condition precedent to the jurisdiction of the Court to entertain a petition upon it. The petition was therefore dismissed with costs.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[In Banc, 8th December, 1887.

KESHAN v. COOK.

Summary conviction—Appeal from—Notice.

Question reserved by Wetmore, J., for the opinion of the Court: whether a notice of appeal from a conviction of a Justice of the Peace addressed to the convicting magistrate alone, and not to the respondent, was sufficient.

Held, that it was not sufficient.

T. C. Johnstone, for the appellant.

J. A. Lougheed, for the respondent.

[5th June, 1888.

BLUNT v. MARSH.

Mortgage—Transfer absolute in form—Parol evidence.

The plaintiff executed to the defendants a transfer absolute in form intended to secure them against the endorsement of a promissory note. The defendants having sold and transferred a portion of the land so transferred, the plaintiff brought this action, alleging the transfer to have been made by way of security only, and claiming an account.

Held, that although absolute in form the transaction amounted to a mortgage and the plaintiff was entitled to an account, and the transfer should be delivered up to be cancelled.

J. A. Lougheed, for the appellants.
J. B. Smith, for the respondents.

GALT v. SMITH.

Equitable assignment of debt—Written order to pay.

The plaintiffs sued the defendant for certain moneys had and received by him to their use, under the following circumstances. The plaintiffs were creditors of one Thomas Bull, to whom the Government were indebted for transport services in the sum of $751. In consideration of his indebtedness Bull gave the plaintiffs an order on the Hudson Bay Company, through whom the Government had arranged to pay "rebellion claims" (of which this was one).

The order was in the words following, "To the Hudson Bay Company, Winnipeg. Please pay to Messrs. G. F. and J. Galt or order, amount of my account.".

Bull subsequently made an assignment for the benefit of creditors to the defendant, who obtained the money from the Government.

Held, McGuire, J., dissenting, that the order did not operate as an equitable assignment.

Per McGuire, J.—Though the order in itself does not institute an equitable assignment, yet read in connection with the letters from Bull to the plaintiff, and the surrounding circumstances, the intention is plain that the debt should be paid out of the fund due by the Government to Bull for transport services, and this amounts to an equitable assignment.

J. Secord and *W. J. Tupper*, for the appellants.
D. L. Scott, Q.C., and *W. C. Hamilton*, for the respondents.

[11TH SEPTEMBER, 1888.

REGINA v. MOWAT.

Principal and surety—Material alteration in contract without consent—Liability of Crown for tortious breach of contract by servant.

The defendants were sureties for the performance of a contract for the delivery of hay to the N. W. Mounted Police at Battleford. A large amount of hay was delivered, but not the whole amount contracted for. The police authorities accepted and used a quantity of the hay delivered, without same being inspected by a board of officers as required by the contract, and instead of the hay being weighed, as provided by contract, it was measured in the stacks.

RICHARDSON, J., gave judgment for the defendants. The plaintiff appealed.

Held, that the sureties were entitled to a strict performance of the contract, and that the relationship between the sureties and the principal having been materially altered without consent of the sureties, they were thereby discharged.

Held, also, that the Crown is liable for tortious breach of contract committed by its servants.

D. L. Scott, Q.C., for the appellant.

T. C. Johnstone, for the respondents.

[5TH DECEMBER, 1888.

QUIRK v. THOMPSON.

Chattel mortgage—Sufficiency of description—Date of filing—Revised Ordinances N. W. T. c. 47, s. 11.

This was an interpleader issue. The plaintiff claimed the goods by virtue of a chattel mortgage, by which they were described as "all and singular the goods, chattels, stock-in-trade, and fixtures, etc., now being in the store of the mortgagors, and also all stock purchased by the mortgagors and which may

be in their possession upon the said premises during the continuation (sic) of the mortgage, or any renewal or renewals thereof.

The mortgage was filed 12th August, 1886, at 4 o'clock p.m., and the renewal was filed 12th August, 1887, at 11.49 a.m.

Held, ROULEAU, J., dissenting, that the description was sufficient, and the renewal filed in time.

The time is to be computed either from the termination of the day on which the act is done (*i. e.* the filing of the mortgage) or, at the earliest, from the exact moment of the day when it was done.

Armstrong v. *Ausman*, 11 U. C. R. 498, distinguished.

D. L. Scott, Q.C., for the appellant.

J. A. Lougheed, for the respondent.

(Since carried to the Supreme Court of Canada.)

[9TH DECEMBER, 1888.

REGINA v. FARRELL.

Criminal law—Crown case reserved—Forgery — Corroborative evidence — R. S. C. c. 174, s. 218.

The prisoner was charged with forging the name of Superintendent Gagnon, N.W.M.P., to a requisition for transport; and also for uttering the same knowing it to be forged. Superintendent Gagnon testified that he had not signed the document, or authorized anyone to sign it, and his signature was forged. There was evidence that the prisoner had been a member of the N.W.M.P., but was discharged; that, when arrested, a number of blank forms of requisition, similar to the one in question, had been found on him; that the prisoner claimed to have power to issue passes and was in the employ of the C. P. R. Co.; and that the requisition in question came from his possession.

The prisoner was found guilty, but the following questions were submitted to the full Court:

(1) Was the evidence of Superintendent Gagnon sufficient to establish that the document in question was forged, or did it require corroboration under R. S. C. c. 174, s. 218?

(2) Was the evidence sufficient to warrant the jury in finding that the document in question was forged?

(3) If the last question is found in favour of the prisoner, should the conviction be sustained as to the second count of the charge?

Held, that the conviction was right. The evidence was sufficient on either count. The evidence of Gagnon did not require corroboration.

Supreme Court of Canada.

QUEBEC.]

GALARNEAU v. GUILBAULT.

Bridges—Title to bridge—Appeal to Supreme Court of Canada—R. S. C. c. 135, s. 29 (b.)—38 V. c. 97—Statutory privilege to maintain toll bridge —Interference—Damages.

By 38 V. c. 97, the appellants (plaintiffs) were authorized to build and maintain a toll bridge on the River l'Assomption at a place called "Portage," and "if the said bridge should, by accident or otherwise, be destroyed, become unsafe or impassable, the said (plaintiffs) should be bound to rebuild the said bridge within the fifteen months next following the giving way of the said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable, they should be bound to maintain a ferry across the said river for which they might recover the tolls."

The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although the appellants maintained a ferry across the river, the respondent built a temporary bridge within the limits of the appellants' franchise, and allowed it to be used by persons crossing the river.

In an action brought by the appellants claiming $1,000 damages, and praying that the respondent be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was

Held, 1st. That as the matter in dispute related to the title of an immovable by which rights in future might be bound, the case was appealable: R. S. C. c. 135, s. 29 (b).

2nd. Reversing the judgment of the Court below, that the erection of the respondent's bridge and the use made of it as dis-

closed by the evidence in the case, was an illegal interference with the appellants' statutory privilege, but as the bridge had since been demolished, the Court would merely award nominal damages, viz: $50 and costs; RITCHIE, C.J., and PATTERSON, J., dissenting.

EVANS v. SKELTON.

Lease—Accident by fire—Arts. 1053, 1627, 1629, C.C.

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, etc., as the same were at the commencement thereof, reasonable tear and wear and accidents by fire excepted."

The premises were used as a shirt and collar factory, and were insured, the lessees paying the extra premium, and having been destroyed by fire during the continuance of the lease, the amount of the insurance money was received by the appellant.

Subsequently the appellant, alleging that the fire had been caused by the negligence of the respondents, brought an action against them for $9,084, being the amount of the cost of reconstructing and restoring the premises to good order and condition, less the amount received from the insurance. At the trial it was proved that the respondents allowed the ashes of hard coal used in the premises to be put into a wooden barrel on one of the flats, but that slushy refuse, tea leaves, etc., were always poured into the barrel. The origin of the fire could not be ascertained.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), RITCHIE, C.J., and TASCHEREAU, J., dissenting, that the respondents were not responsible for the loss under Art. 1629, C.C., as the fire in the present case was an accident by fire within the terms of exception contained in the lease.

MacMaster, Q.C., for the appellant.

Lacoste, Q.C., for the respondents.

SHAW v. CADWELL.

Partnership—Liability—Art. 1867, C.C.

Where one member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and afterwards uses the proceeds of the note in the partnership business of his own free will, without being under any obligation to, or contract with the lender so to do, the partnership is not liable for the loan: Art. 1867, C.C.

Maguire v. *Scott*, 7 L. C. Rep. 451, distinguished.

Robertson, Q.C., and *Falconer*, for the appellant.

Geoffrion, Q.C., and *Carter*, for the respondent.

MANITOBA.] [30TH APRIL, 1889.

GREEN v. CLARK.

Appropriation of payments—Evidence—Satisfaction of judgment.

G. and the firm of C. & P. were respectively judgment creditors of one J., and G. accepted in satisfaction of his claim, notes of J. indorsed by C. & P. for 60 per cent., and J.'s unindorsed notes for 20 per cent. more, and G.'s judgment was assigned to C. & P. as security. C. & P. then undertook to supply J. with goods for which, as they claimed, he was to pay cash. After a time C. & P. refused to give J. further goods, and recovered judgment against him on a demand note for a portion of their claim. Other judgment creditors of J. attempted to realize on his stock, and an interpleader order was issued, in which C. & P. claimed to rank on the judgment of G. which had been assigned to them. The other creditors claimed that this judgment was satisfied, if not by the settlement with G. for 80 per cent., at all events by J.'s subsequent payments. C. & P. on the other hand claimed that these payments were all on account of the new supplies of goods for which J. was to pay cash. In his evidence on the trial of the interpleader issue, J. swore that the agreement to pay cash was only for one year, and after that all payments

were to be on the old account. The payments were sufficient if so applied to satisfy G.'s judgment.

Held, affirming the judgment of the Court below, GWYNNE and PATTERSON, JJ., dissenting, that the evidence was not sufficient to rebut the presumption that the payments were on account of the earlier debt.

Lash, Q.C., for the appellants.

G. Davis and *G. Mills*, for the respondents.

EXCHEQUER.]

REGINA v. CHARLAND.

Arbitration and award—Award increased by Exchequer Court—Hearing of additional witness—Appreciation of the evidence—Appeal to Supreme Court of Canada—Weight of evidence.

In a matter of expropriation of land for the Intercolonial Railway, the award of the arbitrators was increased by the Judge of the Exchequer Court from $4,155 to $10,824.25, after additional witnesses had been examined by the Judge. On an appeal to the Supreme Court it was

Held, that as the judgment appealed from was supported by evidence, and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed; GWYNNE, J., dissenting.

Hogg, for the appellant.

Belleau, for the respondent.

REGINA v. VEZINA.

Railways — Expropriation of land—Damages—Injuriously affecting land taken—R. S. C. c. 39, s. 3 (e.)—Farm crossings—R. S. C. c. 38, s. 16.

A certain quantity of land belonging to V. was expropriated for the purposes of the Intercolonial Railway, five arpents for the the track and two arpents for a borrowing pit, whence gravel for ballast is taken. V. made a claim before the Exchequer

Court for the land taken, for injury by the severance of his farm, and for damages. The Judge in the Exchequer allowed $100 per arpent for all the land taken.

On appeal to the Supreme Court,

Held, affirming the judgment of the Exchequer, that the land taken for the gravel, as ballast, there being no other market for the gravel, had been properly estimated at $100 per arpent as farm land.

In addition to the value of the land taken the Judge of the Exchequer Court allowed for depreciation of the remainder one-third of its value, excluding the damages resulting to a portion of the land from the operation of the railway. On appeal it was

Held, reversing the judgment of the Exchequer Court, GWYNNE, J., dissenting; 1st. That the words of R. S. C. c. 39, s. 3 (*e*.) "compensation to be paid for any damages sustained by them by reason of anything done under and by authority of this Act, or of any other Act respecting public works or Government railways" include damages resulting to the land from the operation as well as from the building of the railway.

2nd. That the right to have a farm crossing over Government railways is not a statutory right, and that in awarding the damages the Judge should have granted full compensation for the future as well as for the past for the want of a farm crossing: R. S. C. c. 38, s. 16; GWYNNE, J., dissenting.

Belleau, for the appellant.

Angers, for the respondent.

GUAY v. REGINAM.

Railways—Expropriation of land for Government railway purposes—Severance of land—Farm crossings—Compensation.

Where the land expropriated for Government railway purposes severs a farm, although the owner is not entitled to a farm crossing apart from contract, he is entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing; and as it did not

appear by the judgment appealed from, that full compensation had been awarded, the damages assessed by the Judge of the Exchequer Court were increased by $100.

GWYNNE, J., dissented.

Belleau, for the appellant.

Angers, for the respondent.

KEARNEY v. REGINAM.

Railways—Expropriation of land—Severance—Damages.

On the hearing of a claim referred to the Exchequer Court by the Minister of Railways for compensation to the claimant for land taken by the Crown for railway purposes, the Judge awarded a certain sum for the value of the land so taken and a further amount as damages for the severance from land not taken, in lieu of a crossing. There was evidence that the claimant made money by selling ballast and seaweed for manure and collecting driftwood for fuel on the remaining land.

Held, GWYNNE, J., dissenting, that as the sum allowed for the severance did not include future damage, and the evidence showed that the consequences of the severance would remain even if a crossing was made, the amount of compensation should be increased.

J. T. Wallace, for the appellant.

Hogg, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.]

CONNOR v. MIDDAGH.

HILL v. MIDDAGH.

Municipal corporations—By-law to open road—Trespass—Necessity of quashing by-law before bringing action—R. S. O. c. 104, s. 338.

A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M. a commissioner to remove all obstructions from the highway so defined. M. cut down some trees of the plaintiffs and removed them and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed.

Held, that the road defined in the by-law was the true road, and could properly be opened as therein defined.

Held, also, BURTON, J.A., doubting, but not desiring to express a judicial opinion, that, whether the road defined in the by-law was the true road or not, and whether therefore a trespass was committed or not, the by-laws, being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions.

Judgments of the Queen's Bench Division reversed.

Osler, Q.C., and *J. P. Whitney*, for the appellants the united counties of Stormont, Dundas, and Glengarry.

W. M. Douglas, for the appellant Middagh.

Robinson, Q.C., and *Aylesworth*, for the respondents, the plaintiffs.

CRAWFORD v. UPPER.

Negligence—Injury caused by runaway horse—Liability of owner—Onus of proof.

The plaintiff while walking on the sidewalk was knocked down and injured by the runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away, that the sleigh upset, the occupants being thrown out, and that the horse then ran on the sidewalk and the accident occurred.

Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving the case and explaining the cause of the runaway lay upon the defendant.

Manzoni v. *Douglas*, 6 Q. B. D. 145, discussed.

Judgment of the Queen's Bench Division affirmed.

Whiting, for the appellants.

Aylesworth, for the respondent.

CARROLL v. PENBERTHY INJECTOR CO.

Libel—Action against incorporated company— Publication— Admission of manager—Liability of company for libel published by manager.

The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular signed "Penberthy Injector Company" contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff.

Held, that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority; and that there was therefore no proof of publication.

If J. had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation.

Tench v. *Great Western R. W. Co.*, 33 U. C. R. 8, distinguished.

Decision of the Queen's Bench Division reversed.

Lynch-Staunton and *James Chisholm*, for the appellants.

Moss, Q.C., and *Carscallen*, for the respondent.

CH. D.]

HUTCHINSON v. CANADIAN PACIFIC R. W. CO.

Railways—Negligence—Passenger.

This was an appeal by the plaintiff from the judgment of the Chancery Division, *ante* p. 41.

The plaintiff was travelling in charge of cattle, and while the train was being made up got into a caboose which was standing on the track, thinking, as the fact was, that this caboose was to be attached to the train. While he was standing in this caboose, washing his hands, the train backed down upon it, and he was thrown down and injured. It was not shown that any of the railway employees knew that he was in the caboose or that the coupling had been effected with more violence than usually occurs in the coupling of freight cars. The jury disagreed, and subsequently on motion judgment was given for the defendants.

THE COURT dismissed the appeal with costs, holding that the plaintiff had not put himself in the position of a passenger in charge of the defendants, and in the absence of proof of any specific neglect of duty could not recover.

Osler, Q.C., *M. Walsh*, and *A. W. Aytoun-Finlay*, for the appellant.

Aylesworth and *A. MacMurchy*, for the respondents.

C.P.D.]

BOND v. CONMEE.

Malicious arrest—Justices of the peace—Conviction for having liquors for sale near public works—Destruction of liquors—Necessity for quashing conviction before bringing action—Unsealed conviction returned on certiorari—Power to put in sealed conviction after such return—Notice of action—Statement of cause of action—Service of notice—Necessity for order for destruction of liquors—Necessity for quashing such order before bringing action—Venue.

The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway on the north shore of Lake Superior, 50 miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the village of Michipicoten River. At this place the defendant C. and his co-contractors had their headquarters, and had constructed a supply road to the line of the railway, where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them at this place. The defendant C. and his co-defendant B., who were justices of the peace having jurisdiction in the district of Algoma, caused the liquors to be seized and destroyed and the plaintiff to be arrested, fined, and imprisoned.

Held, that this was a village within the meaning of R. S. O. c. 32, s. 1, and therefore that the prohibition contained in the Act did not apply, and that the justices had no jurisdiction.

The plaintiff, after remaining in gaol for some six weeks, was discharged upon a writ of *habeas corpus*, the conviction having been ordered up on *certiorari* and one signed by the justices but not sealed having been returned by them. The conviction was not quashed.

Held, that after the return to the writ of *certiorari* a new conviction could not be prepared, and that, as the conviction as returned was not sealed, it was a nullity; and that it was not necessary to quash it before bringing an action.

The notice of action stated that one month after the service of the notice an action would be brought for malicious arrest, etc., and for malicious etc. destruction of goods, and for damages for loss of time and injury to business, and for the recovery of costs

and expenses, etc., "same having been committed by you against me in the month of May last at said village of Michipicoten River and at the town of Port Arthur."

The notice was served on the defendant B. personally, and was served on the agent of the defendant C. at the head office of the defendant C. at Michipicoten River, and a copy was also left for the defendant C. at his place of residence at Port Arthur, and another copy was served on his solicitors. The defendant C. admitted that he had seen a copy of the notice, but it was not shown at what time or place he had seen it.

Held, that the notice and service were sufficient.

The venue in the action was laid at the city of Toronto, and subsequently by consent an order was made striking out the jury notice and directing that the trial should take place at Port Arthur.

Held, that in view of this order, the objection that the venue was improperly laid could not be sustained.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors stated, without objection, that he had received a written order to destroy the liquors, signed by both justices, and that he had returned the order to them. This order had not been quashed.

Held, that the defendants were entitled to say that the existence of the order was proved; but that the order for the destruction and the adjudication of destruction were two different things; and that in order to obtain protection the formal adjudication of destruction should have been proved; and that it was not necessary to quash a mere order for destruction.

The order spoken of in R. S. O. 1877, c. 73, s. 4, is an order in the nature of an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction, or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

Judgment of the Common Pleas Division, 16 O. R. 716, affirmed.

Osler, Q.C., and *A. W. Aytoun-Finlay*, for the appellants.

G. T. Blackstock, for the respondent.

BETTS v. SMITH.

Contract—Tender—Incorporation of previous advertisement—Evidence.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, 15 O. R. 413.

THE COURT allowed the appeal with costs, holding that the advertisement and requirements formed part of the contract, and that the plaintiff was not limited to his rights under the tender and acceptance; and a new trial was ordered.

Lount, Q.C., and *F. R. Powell*, for the appellant.

Bigelow and *S. G. McGill*, for the respondents.

BOYD, C.]

In re BOLT AND IRON COMPANY.

LIVINGSTONE'S CASE.

Company—Managing director—Remuneration of officer of company—Breach of trust—Set-off—Winding-up proceedings — Jurisdiction of Master—Assignment of claim after winding-up order—R. S. C. c. 129, s. 77, s-s. 2, ss. 83, 86, 87, 93.

This was an appeal by Livingstone from the judgment of BOYD, C., 14 O. R. 211.

THE COURT dismissed the appeal with costs, unanimously agreeing with and fully adopting the judgment of BOYD, C.

Moss, Q.C., for the appellant.

Bain, Q.C., for the respondents.

MOORE v. JACKSON.

Married woman—Contract—Proof of separate estate—R. S. O. c. 132.

To entitle a plaintiff to recover judgment on a contract entered into by a married woman, it is necessary for him to show that at the time the contract was entered into by her she owned

separate estate, in respect of which she is entitled by statute to contract.

The defendant, a married woman, indorsed certain notes held by the plaintiff, and wrote him the following letter.

"I hold 400 acres of land near W., which is worth $33,000, and is all in my own name and right. By your renewing the note for $1,500 and the other for $600, I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage unless said notes are paid to you in full."

The notes and the letter were proved at the trial, and the examination of the defendant before the trial, in which she stated that at the time she signed the notes she owned property on her own account, was also put in. There was no evidence as to the date of the marriage of the defendant, or as to the mode in which the property was held by her.

Held, reversing the decision of BOYD, C., that there was not sufficient evidence to entitle the plaintiff to recover.

E. D. Armour, for the appellant.

Moss, Q.C., and *J. R. Roaf*, for the respondent.

ARMOUR, C.J.]

LONDON MUTUAL FIRE INSURANCE CO. v. JACOB.

Solicitors—Lien—Fund recovered in action.

Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, but one was dismissed with costs, and in the other the plaintiff recovered judgment. The defendants acted as G.'s solicitors in each action.

Held, reversing the judgment of ARMOUR, C.J., that the solicitors had no lien for the costs of the unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded as one.

MacMillan, for the appellants.

Jacob, one of the respondents, in person.

ROBERTSON, J.]

In re GODSON AND THE CITY OF TORONTO.

Prohibition—County Court Judge—Investigation by, under R. S. O. c. 184, s. 477—Persona designata.

Where a County Court Judge is making an investigation pursuant to the resolution of a council under R. S. O. c. 184, s. 477, he is acting as *persona designata* and not in a judicial capacity, and is not subject to control by a writ of prohibition.

That writ is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual.

In re Squier, 46 U. C. R. 474, considered.

The decision of ROBERTSON, J., 16 O. R. 275, reversed.

Aylesworth and *Fullerton*, for the County Court Judge.

C. R. W. Biggar, for the city of Toronto.

Osler, Q.C., and *T. P. Galt*, for the respondent, Godson.

C. C. BRANT.]

WEAVER v. SAWYER.

Appeal—County Court—Action tried with jury—R. S. O. c. 47, ss. 41, 42.

When an action in a County Court has been tried by a jury, the only appeal given by R. S. O. c. 47, s. 41, direct to the Court of Appeal from the judgment at the trial, is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial, as to a motion for a non-suit or the reception or rejection of evidence or the charge to the jury, must be brought from the decision of the Judge upon a subsequent motion for a new trial.

The general language of s. 42 does not apply when the case is one coming within s. 41.

Aylesworth, for the appellants.

C. J. Holman, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 22nd June, 1889.

In re CITY OF TORONTO LEADER LANE ARBITRATION.

Arbitration and award—Municipal by-law and appointment of arbitrators—R. S. O. c. 53, s. 13—Submission—Necessity for making rule of Court—R. S. O. c. 184, s. 404—Ex parte order—Rule 526—Disclosure of matters in dispute.

In the case of an arbitration under the Municipal Act, R. S. O. c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of Court under s. 18.

R. S. O. c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the High Court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such Court.

Held, upon the language of this section, that the submission should be made a rule of Court before the award is moved upon.

Held, also, that any party to the submission has *prima facie* a right to have it made a rule of Court; and according to the practice existing when the Consolidated Rules came into force no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by Rule 526 there is no necessity for serving notice of motion, and an order can be made *ex parte*.

Such an order is merely a necessary form in order to give the Court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the Court upon the production of the proper affidavits; and the Court can inquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an *ex parte* application for such an

order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award.

D. E. Thomson, for the city of Toronto.

Bain, Q.C., for the land-owners.

In re SOLICITORS.

Solicitor and client—Taxation of costs—Offer by solicitor.

The solicitors rendered to a client ten bills of costs, amounting in all to $428.88. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at $329.76, more than one-sixth being taxed off; but the solicitors contended that they were not liable for the costs of the taxation under R. S. O. c. 147, s. 35, because of an offer made by them before the order but after service of the notice of motion therefor to take $250 in full of all the bills, and a subsequent offer to take $200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded, with the above result. When the question of the liability upon the bills was still undetermined, the client applied for costs of the order and taxation.

Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed; and therefore such offers could not avail them; and they must pay the costs of the order and taxation.

Re Allison, 12 P. R. 6, approved and followed.

Shepley, for the solicitors.

W. H. Blake, for the client.

In re LEWIS v. OLD.

Prohibition—Division Court—Jury trial—Judge withdrawing case from jury.

In a Division Court suit a jury was demanded and called, but the presiding Judge withdrew from their consideration everything

but the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The jury assessed the damages, and judgment was entered for the plaintiff.

Held, affirming the decision of GALT, C.J., *ante* p. 249, that where the plaintiff furnishes evidence which the Judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The Judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition.

Shepley, for the plaintiff.

Aylesworth, for the defendant.

BANK OF LONDON v. WALLACE.

Parties—Action to set aside fraudulent conveyance—Assignee for benefit of creditors—Adding a new plaintiff—Consent—Rule 324 (b.)—R. S. O. c. 124, s. 7, s-s. 2.

The action was brought to set aside a conveyance as fraudulent against creditors. The plaintiffs sued on behalf of themselves and all other creditors of the defendant R. W., and began their action in July, 1888. The statement of defence filed in December, 1888, alleged that in August, 1888, R. W. executed an assignment for the benefit of his creditors under 48 V. c. 26, whereby the exclusive right of action became vested in the assignee. In February, 1889, the plaintiffs obtained an order under R. S. O. c. 124, s. 7, s-s. 2, giving them leave to take proceedings in the name of the assignee, but for their own exclusive benefit, to set aside the conveyance in question; and then applied for an order adding or substituting the assignee as plaintiff in this action. The consent of the assignee was not filed.

Held, that the assignee could not be added as a plaintiff without his consent in writing being filed, under Rule 324 (b.); but that

the plaintiffs had the right to proceed under the order they had obtained by bringing a new action in the name of the assignee, to which his consent would not be necessary.

Aylesworth, for the plaintiffs.

C. J. Holman, for the defendants.

NIAGARA GRAPE Co. v. NELLIS.

Consolidation of actions—Rule 652—Staying actions—Identity of issues.

The plaintiffs brought four actions each against a different person, alleging that the defendant in each case entered into a separate agreement with the plaintiffs to purchase and pay for certain grape vines, and to allow the plaintiffs certain future benefits to be derived from the possession and cultivation of the vines, and claiming payment, an account, and damages. The statements of defence were practically the same in all the actions, the defendants setting up among their defences that by the fraud of the plaintiffs certain promises and warranties on their part were omitted from the written agreement, and that the defendants were induced to enter into the agreement by fraud and misrepresentation on the part of the plaintiffs, and claiming rectification and damages. The sales to the several defendants were entirely separate and distinct transactions made at different times and under different circumstances, but the form of agreement made use of with each defendant was the same.

An order was made in Chambers under Rule 652 on the application of the defendants in all the actions staying proceedings in all but one, which was to be treated as a test action, the defendants agreeing to be bound by the result of it, but the plaintiffs being allowed to proceed to trial in the other actions after the trial of the test action, if they deemed proper.

Held, that actions will only be stayed where the questions in dispute are substantially the same; and in this instance they were not the same, because the questions raised by the defendants upon their defences of fraud and misrepresentation would necessarily be different in each case, the negotiations for each agreement being distinct; and the order made in Chambers was set aside.

C. J. Holman, for the plaintiffs.

W. M. Douglas, for the defendants.

[ROSE, J., 3RD MAY, 1889.

FARQUHAR v. ROBERTSON.

Costs—Action of libel—Recommendation of jury as to costs—Affidavits of jurors—Depriving successful defendant of costs—"Good cause"—Costs of special jury.

When the special jury before which an action of libel was tried returned to the Court room after considering their verdict, the foreman announced a verdict for the defendant. He then asked if the jury had anything to do with the question of costs. The trial Judge replied that he thought not, but if any recommendation was made it would be considered. The foreman then announced that in the opinion of the jury each party ought to pay his own costs.

Upon a motion by the plaintiffs to the trial Judge for an order disposing of the costs in the way recommended by the jury:

Held, that the recommendation of the jury as to costs was not a part of their verdict, but was an announcement of a result at which they had no right in law to arrive; the verdict was complete before anything was said as to costs. If the verdict for the defendant would not have been given except with the recommendation as to costs, that would be matter for consideration upon a motion for a new trial, and not upon the present motion.

Upon the motion the plaintiffs filed affidavits of some of the jurors stating that they would not have agreed in a verdict for the defendant if they had thought the result would be to throw upon the plaintiffs the whole costs of the action.

Held, that these affidavits were not receivable in evidence.

Regina v. *Fellowes*, 19 U. C. R. 48, followed.

Jamieson v. *Harker*, 18 U. C. R. 590, distinguished.

It was also contended by the plaintiffs that the trial Judge should make an order depriving the successful defendant of costs upon the recommendation of the jury and the facts appearing in evidence.

Held, that the question of costs was within the power of the trial Judge, and he could only interfere with the event for "good cause" (Rule 1170). By acting on the recommendation

of the jury he would in effect be abdicating his functions and allowing the jury to determine what was "good cause."

"Good cause" means some misconduct leading to the litigation or in the course of the litigation which requires the Court in justice to interfere; and there is a marked distinction between interfering with costs going to the plaintiff and costs going to the defendant; and upon the facts of this case there was no "good cause" for interfering.

The trial Judge certified for the defendant's costs of a special jury summoned at his instance.

Robinson, Q.C., and *Lefroy*, for the plaintiffs.

S. H. Blake, Q.C., and *J. B. Clarke*, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 28TH JUNE, 1889.

McKAY v. McGEE.

Costs—Scale of—Action to set aside conveyance as fraudulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

The decision of BOYD, C., 13 P. R. 106; *ante* p. 248, was affirmed on appeal by a Divisional Court.

J. B. Clarke, for the appeal.

Middleton, contra.

[FERGUSON, J., 14TH MAY, 1889.

BANK OF MONTREAL v. BOWER.

Will, construction of—"Wish and desire"—Precatory trust—Estate in fee.

A testator by his will made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows;—"And it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal

estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable."

Held, that this did not create a precatory trust and that the wife took the property absolutely.

In re Adams and The Kensington Vestry, 27 Ch. D. 394, and *In re Diggles*, 39 Ch. D. at p. 257, referred to and followed.

McCarthy, Q.C., and *R. G. Code*, for the plaintiffs.

Kidd, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 29TH JUNE, 1889.

TROUTMAN v. FISKEN.

Judgment debtor—Examination of—Judgment for costs only—Rules 926, 934.

A person against whom a judgment has been recovered for costs only cannot be examined as a judgment debtor.

Rules 926 and 934 considered.

Meyers v. *Kendrick*, 9 P. R. 363, has not been affected by the introduction of Rule 934, and is still the law.

J. F. Gregory, for the judgment creditor.

H. E. Irwin, for the judgment debtor.

IN CHAMBERS.

[FERGUSON, J., 29TH JUNE, 1889.

BENNETT v. WHITE.

Costs—Scale of—Jurisdiction of County Court—Counter-claim—Set-off.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over $1,000, and claimed a balance of $169.72 and interest from the 1st January, 1888. The defendant by his statement

of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of $1,825.74, for which he counter-claimed.

Held, that the matter of the counter-claim was really a set-off, and even if it were not improper to call it a counter-claim, having regard to Rule 373, this could not change its real character.

Cutler v. *Morse*, 12 P. R. 594, referred to.

The action was tried without a jury, and the plaintiff recovered judgment for $120.75, "together with his costs of action, to be taxed according to the proper scale applicable."

Held, that a County Court has jurisdiction to entertain and investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; and in this case a County Court would have had jurisdiction.

The case, not having been tried by a jury, did not fall under Rule 1172; and the determination of the scale of costs was a matter in the discretion of the Court. In the exercise of such discretion the principles of Rule 1172 were applied to the case, and the plaintiff was allowed costs on the County Court scale, and the defendant the excess of his costs incurred in the High Court, as between solicitor and client, over the amount which he would have incurred in the County Court, to be set off.

Chapple, for the plaintiff.

D. Armour, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

[30TH JUNE, 1889.

WHITHEAD v. SUTHERLAND.

Court evenly divided—Withdrawing judgment of one Judge.

In giving judgment on a demurrer the Court was evenly divided, and the plaintiff asked that the Junior Judge should withdraw his judgment so as to permit judgment to be entered for the plaintiff.

THE COURT refused the application, intimating that if the parties were desirous of taking an appeal from this Court such an arrangement might be possible, but not otherwise.

Ex parte DAVIDSON.

Judgment debtor—Examination of—Witness—Contempt of Court.

This was an application for a *certiorari* to remove an order granted by the Judge of the County Court for the County of Northumberland for an attachment against the applicant for contempt for not attending and giving evidence as a witness at a time and place appointed by the Judge for the examination of a judgment debtor. An order had been taken out for the examination of the debtor but had not been served, nor was it the intention to serve the debtor, as he was then in the North-west Territories. Counsel attended at the examination before the County Court Judge and protested against the applicant being called as a witness on the ground that as the order had not been served on the debtor the Judge had no jurisdiction.

Held, WETMORE and TUCK, JJ., dissenting, that the County Court Judge had no jurisdiction, the order not having been served on the debtor.

LOEB v. MACAULY.

Bail—Relief of after judgment—Costs.

In this case the defendant and another were bail for B., and judgment had been signed against them on an irregularity. (See *ante* p. 285.)

Ordered, that the bail he relieved on rendering the defendant within thirty days, and on payment of all costs of the suit and of their application for relief.

REGINA v. McKAY.

Recognisance—Demurrer—Notice to prisoner—32 & 33 V. c. 30, s. 44—Declaration, when sufficient.

This was an action on a recognizance given on the remand of the prisoner R. on a hearing before the Stipendiary Magistrate of Saint Stephen. The defendants demurred to the declaration, the principal grounds being :

(1) That the declaration did not disclose any notice of the recognizance having been served on the prisoner R. or the sureties, as required by 32 & 33 V. c. 30, s. 44.

(2) That the declaration did not show that the recognizance had been enrolled.

Held, that if no notice had been delivered it would form the subject matter of a plea, or of an application for relief by the sureties.

Held, as to the second ground, that the words "as by the records and proceeding thereof still remaining in our Supreme Court at Fredericton more fully appear" in the declaration were sufficient.

BANK OF NOVA SCOTIA v. HARRISON.

Promissory note—Action by indorsee against maker—Payment by indorser after verdict—Motion for new trial—Admissibility of affidavit to show payment.

The defendant had purchased certain shares of Maritime Bank stock from S., who had been a director of the bank, and

gave S. his promissory note for the same. Shortly afterwards the defendant discovered the bank to be insolvent, and published a notice forbidding S. to transfer the note, as he had received no value for the same. S. discounted the note with the plaintiffs, and at maturity it was dishonoured, and an action was brought upon it against the defendant. The defendant obtained a verdict, subject to leave reserved to move the Court for a new trial or to enter a verdict for the plaintiffs. Upon the plaintiffs moving the Court pursuant to the above leave, the defendant's counsel offered to read an affidavit showing that S., the payee of the note upon which action had been brought, had paid the amount of the note to the plaintiffs since the verdict.

Held, by a majority of the Court, that the affidavit was admissible, and unless contradicted the most the plaintiffs could recover was nominal damages.

Judgment for plaintiffs for nominal damages and costs.

[15TH JULY, 1889.

WOOD v. VAUGHAN.

Vicious dog—Liability of parent of infant owner.

The plaintiff sustained severe injuries from the bite of a vicious dog, and brought an action against the defendant for damages therefor. It was proved that the defendant's son, who was about 20 years of age and lived with his father, was the owner of the dog, and there was also some evidence of scienter on the part of the defendant, who permitted the dog to remain about the premises. At the trial the plaintiff was nonsuited, and upon an application to set the nonsuit aside,

Held, that the defendant was liable; and a new trial was granted.

Ex parte CLARK.

Promissory note made in one province and payable in another—Where action may be brought.

A person doing business in St. John, while in Prince Edward Island, sold goods to C. & R. there, and took their note for the

amount sold, payable at a bank in St. John. After maturity of the note one of the makers was found in St. John and arrested on a capias issued out of the city of St. John City Court. At the trial there the Police Magistrate granted a nonsuit on the ground that the cause of action not arising within that city he had no jurisdiction. On a review before the County Court Judge of St. John, the nonsuit was set aside and a verdict ordered to be entered for the plaintiff for the full amount of the note, the County Court Judge holding that as the note was made payable in St. John the City Court had jurisdiction. A rule *nisi* for *certiorari* was now taken out to remove the order of the County Court Judge.

Held, that the cause of action did not arise in St. John, and therefore the City Court had no jurisdiction.

In re ST. JOHN BUILDING SOCIETY.

Company—Winding-up—Liability of mortgagors—Double liability of shareholders—Matured shares—Transfers of shares not entered in company's books—Liability of estate of deceased shareholder—Husband not liable for shares held by wife—Infant shareholders—Membership—Priorities.

The above society becoming insolvent went into liquidation, and under the Winding-up Act liquidators were appointed. A great deal of litigation followed and there was a difference of opinion as to the liability of various classes of persons interested in the society. Finally it was agreed to submit a special case to this Court. The questions submitted and the answers given by the Court were as follows:

(1) Are mortgagors whose mortgages were paid and cancelled prior to the commencement of winding-up proceedings herein, liable to be placed on the list of contributories, and if so for what amount? No.

(2) Are mortgagors whose mortgages were paid up at the time of the commencement of winding-up proceedings herein, but not cancelled or discharged, liable to be placed upon the list as contributories, and if so for what amount? No.

(3) Are mortgagors whose mortgages were at the time of the commencement of winding-up proceedings in part unpaid and unsatisfied liable to be placed upon the list as contributories, and if so for what amount? No.

(4) Are holders of shares of paid up or monthly investing stock not yet matured liable to be placed upon the list as contributories, and if so for what amount? Yes, for double liability; PALMER, J., dissenting.

(6) Are holders of shares of such stock matured prior to the proceedings for winding-up, who made a demand for payment of such stock after maturity, but after making such demand received or accepted payment of dividends, and never in any other manner did anything to determine their connection with the society, liable to be placed upon the list as contributories? Yes, for double liability; PALMER and TUCK, JJ., dissenting.

(7) Are holders of shares of such stock matured prior to the commencement of winding up proceedings herein, who have since the maturity of such stock demanded and insisted upon its payment and have never received or accepted but have refused to receive and accept any new certificates or dividends, but who have done nothing further to determine their connection with the society, liable to be placed upon the list as contributories? No; TUCK, J., dissenting.

(8) Does a deed executed for the purpose of transferring stock have the effect of transferring the liability as a shareholder to grantee and releasing the grantor when the officers of the society after demand made, refused to allow such transfer to be entered in their books or to recognize it any way? No; PALMER, J., expressing no opinion.

(9) In case of the death of a shareholder liable to contribute, does the liability survive against his estate or personal representatives? Yes.

(10) In case of the death of two joint shareholders, is the estate of the deceased shareholder liable? No.

(11) Is a husband liable to contribute on account of shares held by his wife, (*a*) when the purchase money is her separate property; (*b*) when the purchase money is not her separate property? No.

(12) Is a father liable to contribute on account of shares standing in the name of an infant child? No.

(13) Is signing the rules a condition precedent to membership or is it absolutely necessary to constitute any person a member? No.

(14) In case all or any of the above classes of shareholders are held liable, in what order of priority, if any, must the liability to contribute be enforced? No priority.

IN CHAMBERS.

[FRASER, J., 30TH JUNE, 1889.

HARRRISON v. NORTHERN AND WESTERN R. W. CO.

Equity—Notice of motion to dismiss bill—Demurrer.

Three of five defendants had filed a demurrer to the plaintiff's bill, and thirty days had elapsed without the plaintiff applying to have the demurrer set down for hearing. A notice that the Court would be moved to dismiss the bill had been served six clear days before the sittings on the plaintiff's solicitor.

Held, that the defendants who had demurred were entitled to have the injunction granted in the suit dissolved and the plaintiff's bill as against them dismissed with costs.

Held, also, that where the plaintiff submits to a demurrer, notice of motion to dismiss the bill need only be served six clear days, and not fourteen before the next regular sittings of the Court.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

SIMPSON v. McDONALD.

Verdict of single Judge—Motion to set aside—Entry of cause—Notice, sufficiency of.

A verdict having been rendered at law for the plaintiff, the defendant properly filed a præcipe requiring the cause to be set down for hearing before the Court in *banc*, and gave the following notice to the other side: "Take notice that the defendants will apply by way of appeal to the full Court from the decision of Mr. Justice Dubuc in this case," setting out the grounds of appeal.

Upon the case coming on for argument it was objected that the notice was insufficient, inasmuch as it was not a "notice of the *entry* of the application," and Rule 50 of Easter Term, 1885, was quoted as follows:—"The party intending so to apply shall also, within said period of two weeks, serve upon the other parties to the cause, matter, or proceeding notice of the entry of the application and the grounds thereof, to the extent and in the manner that under the hitherto existing practice would be required in rules *nisi*."

Held, that the notice was insufficient; and the application was dismissed with costs.

DUNDEE MORTGAGE Co. v. PETERSON.

Insolvent debtor—Fraudulent conveyance—Onus as to proof of solvency—Amendment—Rehearing—Equity decree—Entry of cause—Notice, sufficiency of.

A decree having been made in equity in favour of the plaintiffs, the defendants properly entered the cause for re-hearing before the

Court in *banc*, and gave the following notice :— " Take notice that I have this day entered this cause for re-hearing before the full Court in order that the decree herein dated, etc., may be wholly discharged, etc." Upon the cause coming on for argument it was objected that the notice was insufficient, inasmuch as it did not say that the application had been entered " *with the prothonotary*"; and Rule 55 of Easter Term, 1885 was quoted as follows:— " Applications by way of appeal from or for the reversal or variation of the order or decision of a single Judge shall be entered with the prothonotary, and notice of such entry given, within two weeks after, etc."

Held, that the notice was good.

C. F. was indebted to the plaintiffs in respect of a mortgage upon certain lands in Emerson. After default he conveyed certain other lands to his son, who immediately conveyed them to his (C. F.'s) wife. The conveyances were voluntary and intended as a " provision for the wife so that she would have a home."

Previous to the date of the conveyances land had become unsaleable in Emerson, and the plaintiffs' security was altogether inadequate. There was no direct evidence that C. F. had no other property sufficient to pay the debt, but there was sufficient to lead the Court to suspect it. The deeds were not registered, but were handed to the wife, who was not careful to keep them separate from her husband's papers. The husband continued to collect the rents and to put them into the common purse for household purposes. At the hearing the wife, without withdrawing her answer, offered to consent to a sale and a ratable division of the proceeds among all the creditiors.

Held, that the conveyance was fraudulent as against creditors.

Per TAYLOR, C.J.—The onus of showing the existence of other property available for creditors is upon those supporting a voluntary conveyance.

The bill was originally filed upon a certificate of judgment against C. F. alone. He having disclosed the conveyances to his wife, she was made a party ; the existence of a *fi. fa.* against C. F. alleged ; and the conveyances attacked as fraudulent against creditors. At the hearing it appeared that the *fi. fa.* was placed in the sheriff's hands after the bill was filed. An amendment was allowed in order to make the bill one on behalf of all the creditors of C. F.

REGINA v. DEEGAN.

Criminal law—Forgery of one of several signatures—Interested witness.

A joint and several bond was executed by the prisoner under an assumed name for a fraudulent purpose. There was no proof whether the other signatures had been forged or not.

Held, that an indictment that the prisoner had forged the bond was sustainable.

The bond was executed in order to obtain a marriage license. It having been obtained, a form of marriage before a person without authority to celebrate marriage was gone through.

Held, that the issuer of the license was not an incompetent witness as a person interested or supposed to be interested.

Per DUBUC, J.—Neither was the woman incompetent as a witness.

SCHULTZ v. CITY OF WINNIPEG.

Taxes—Interest—Constitutional law—Powers of provincial legislature—Retrospective statutes.

By the Act of 1886: "In cities a rate of ¾ per cent. at the end of each month shall be added upon overdue taxes, the same to commence on the 1st day of January, from and after the year in which the rate shall have been levied," etc.

By the Act of 1888 (May) the provision of 1886 was repealed, and the following substituted: "Upon all taxes remaining due and unpaid on 31st December, there shall be added a rate of ¾ per cent. per month at the beginning of each month thereafter."

Certain taxes having been due for the years 1885, 1886, and 1887:

Held, that the statutes were not retrospective; that no percentage could be added to the 1885 taxes; that none could be added under the 1886 statute after its repeal in May, 1888; and none under the 1888 statute until after the following 31st of December.

2. That viewing the whole statute the percentage was in reality interest and so *ultra vires* of the Provincial Legislature.

Judgment of TAYLOR, C.J., affirmed; KILLAM, J., dissenting.

BAIN, J., founded his opinion on the fact that the interest exceeded six per cent. per annum.

In re J. B., AN ATTORNEY.

Barrister and attorney—Striking off the rolls—Non-payment of money—Misconduct.

An attorney will not be struck off the rolls for non-payment of money merely.

Whether the Court has jurisdiction to remove attorneys apart from the Provincial Statute, *Quære.*

A client left with an attorney a mortgage for collection, and also a discharge to be delivered over upon payment. The attorney received the money and paid to the client a portion of it, telling him from time to time that that sum was all that he had received. Discovery of the truth was not made until after the attorney had left the country during the following year.

Held, that this was misconduct "in the discharge of his duties as an attorney."

The attorney had also received payment on behalf of mortgagees for whom he was not entitled to act, the mortgagor believing that he was so entitled. The attorney paid over a portion of the money only.

Held, that he should be struck off the roll of attorneys, but not off the barristers' roll, as he had done nothing discreditable in the discharge of that office.

WATSON MANUFACTURING CO. v. STOCK.

Misrepresentations—Rescission of contract—Parol evidence—Written warranty—Laches—County Courts—Rules of equity.

In an action upon a promissory note given for the purchase of a machine, the defendant pleaded that he purchased upon the plaintiffs' false representation of the age of the machine. He

learned the true age on the 28th September. On the 9th October the plaintiffs wrote him for payment of another note. The defendant answered on the 10th November, remitting $11.40 on the other note. On the 18th November the plaintiffs wrote for payment of the machine note. On the 20th November the defendant first complained of the misrepresentation. He returned the machine in the following month. The jury found a verdict for the plaintiffs. The County Judge ordered a new trial, and the plaintiffs appealed.

Held, 1. That evidence of parol misrepresentations was admissible, although a written warranty had been given.

2. Where a County Court Judge is dissatisfied with a verdict and orders a new trial, his decision will not be reversed unless it can be shown that he was clearly wrong.

3. It is no answer to a charge of misrepresentation that the deceived party had the means of verification at hand.

4. If the representation was untrue, the contract might be rescinded, although the statement was not intended to be false.

5. Generally speaking, the circumstances that will support an action for deceit will justify a party in rescinding the contract.

6. In the County Courts the rules of equity as to the rescission of contracts prevail, rather than the rules of law.

7. The delay in complaining of the misrepresentation was evidence only of an intention to confirm the contract, and did not necessarily estop the defendant.

Per KILLAM, J.—As the jury may have proceeded upon the ground that by the delay the defendant had elected to affirm the contract, the verdict should not be disturbed.

In re BRENNAN.

Committal for non-payment of money ordered to be paid—32 & 33 V. c. 62 (Imp.)—Costs—Evidence of non-payment.

R. as agent of S. obtained out of Court a sum larger than that to which S. was entitled. An order was made for the repayment of the excess with costs. Upon an application to commit R. for default in payment,

Held, 1. That the Debtors' Act, 32 & 33 V. c. 62 (Imp.), was in force in Manitoba.

2. That it sufficiently appearing that R. had means to pay, an order should be made for his committal.

3. That the order might be made for non-payment of costs.

4. That the default in payment might be proved as well by R.'s admission as by affidavit of the party to whom payment should have been made.

WRIGHT v. ARNOLD.

Prohibition—County Court—"Cause of action."

If the want of jurisdiction is apparent on the face of the proceedings the defendant may move at any time for probibition; but if it does not so appear he should first raise the objection in the inferior Court.

"Cause of action" in the County Courts Act means the whole cause of action.

An action may proceed in a Court other than the one of the district in which the action arose, (1) by leave of the Judge previous to commencing the proceedings, or (2) by transfer from that district after action commenced.

BRITISH LINEN CO. v. McEWAN.

Security for costs—Action on foreign judgment—No defence—Proof of.

Upon an application for security for costs the plaintiff cannot file material (other than in proof of defendant's admissions) in proof of his cause of action and oblige the defendant to show that he has some defence.

An action was brought upon a foreign judgment. Upon an application for security the plaintiff filed a certified copy or exemplification of the judgment. The existence of the judg-

ment was admitted by the defendant and he did not allege payment of it.

Held, that, as there might be some doubt upon the construction of the judgment as to whether it was of such a nature as to raise an implied promise to pay it, the defendant was not to be deprived of his right to security.

[TAYLOR, C. J.

CONFEDERATION LIFE ASSOCIATION v. MOORE.

Will, construction of—Estate—Application of rents upon mortgages—Improvements under mistake of title.

A testator appointed executors "directing my said executors to pay all my just debts and funeral expenses and the legacies hereinafter given out of my estate." In a subsequent part of the will it was provided that "after paying off my said debts and funeral expenses I give and bequeath to my daughter M. the sum of $5,000, to be paid to her at the age of twenty-one years by my executors, and I give to my wife all my real estate, whatsoever and wheresoever, and all my chattels and household furniture, with the exception of paying the above named legacy. * * * * And also my executors to educate and provide all necessaries for said child (M.) from my estate until she is twenty-one years of age, over and above the $5,000 above mentioned."

The plaintiffs had a mortgage upon part of the real estate of the testator. After his death they advanced to the widow a further sum for the purpose of erecting buildings upon it. After default they took possession under the first mortgage and appropriated the rents to its payment.

Upon a bill to foreclose the second mortgage:

Held, 1. That the legacy and provision for maintenance and education were a charge upon the real estate.

2. That the plaintiffs were not entitled to priority over these charges either upon the ground of mistake in title or because the Court would have sanctioned the loan on behalf of the infant if applied to at the time.

3. The plaintiffs could not be permitted to change the application of the rents to the reduction of the second mortgage.

HANNA v. McKENZIE.

Execution—Sale of goods for third party, under—Satisfaction of judgment—Amending sheriff's return.

Under the plaintiff's judgment and execution the sheriff seized and sold certain horses of the defendants. S. and M., claiming to be mortgagees of the horses, attended the sale and notified intending purchasers. The horses having been sold, the mortgagees brought trespass and trover against the sheriff, and recovered against him the amount for which he had sold the horses.

The plaintiff had indemnified the sheriff against damage by reason of the seizure and sale, and also by reason of payment to him of the purchase money, and the sheriff having paid over the money to the plaintiff, the plaintiff paid the mortgagees the amount of their verdict against the sheriff. The plaintiff then issued an *alias fi. fa.*, taking no notice of the return of the sheriff to the previous writ of "money made and paid to the plaintiff's attorney."

Held, that the new *fi. fa.* should be set aside, satisfaction entered up on the judgment roll, and a summons to amend the sheriff's return discharged.

[KILLAM, J.

LEWIS v. GEORGESON.

Foreign evidence taken by Master.

By consent the Master attended in Montreal for the purpose of taking certain evidence. The evidence "was to be used on the reference (saving all just exceptions) in the same manner as if said evidence had been taken under a commission."

The depositions were styled in the cause (short form) and then proceeded: A. B. sworn, with questions and answers following. The answers were not stated to have been made by any one, and their were no signatures either of witnesses or examiner. Upon appeal from the Master's report, he certified at the request of the Judge that the evidence had been taken and afterwards trans-

cribed by a shorthand reporter, but that it had not been read over to the witnesses.

KILLAM, J.—Without considering whether there is any justification for departing from the old practice in the Master's office, it would certainly be improper to receive any evidence such as that taken in Montreal upon less proof of its being correctly taken than would be required if there had been an order appointing the Master a special examiner for the purpose.

[BAIN, J.

STEPHENS v. McARTHUR.

Preference—Transaction which has the effect of giving preference—Locus standi—Statutes.

A creditor in good faith and without knowledge that the debtor was embarrassed took from him a chattel mortgage. The transaction was straightforward and honest, but the "effect" of it was to give the mortgagee a preference over other creditors.

The debtor afterwards made an assignment, but not under the provisions of the statute.

Upon an interpleader issue between the mortgagee and an execution creditor,

Held, 1. That the mortgage was not invalid because the consideration was stated to be the sum of $870.34, which was the whole amount of the debt, while in fact a large part of it was represented by notes given by the debtor and by the mortgagee indorsed to a bank as collateral security for his own indebtedness.

Bathgate v. *Merchants' Bank*, 5 Man. L. R. 210, considered.

2. That the mortgage was void because of its "effect" with regard to other creditors. The question of intent is immaterial.

3. That it might be so held at the instance of a creditor and not merely at the instance of an assignee.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[In Banc, 7th June, 1888.

PRATT v. MATHEWSON.

Summary conviction—N. W. T. Act, s. 99—Distress—Imprisonment in default.

The defendant was summarily convicted under s. 95 of the N. W. T. Act. The convicting justice ordered that the penalty and costs be enforced by distress, and in default of sufficient distress, that the defendant be imprisoned for one month.

On a case submitted to the full Court by Wetmore, J.,

Held, that the conviction was good, and imprisonment in default of distress was regular under R. S. C. c. 178, s. 67.

T. C. Johnstone, for the motion.

D. L. Scott, Q.C., contra.

[7th June, 1889.

REGINA v. CLIVE

REGINA v. HOLDSWORTH.

Prairie Fire Ordinance—Liability of railway employees for fire caused by sparks from engine.

The defendants, who were respectively engineer and fireman of a C. P. R. locomotive, sparks or ashes from which had set fire to the prairie, were convicted under ordinance No. 17 of 1887.

Proceedings having been removed by *certiorari*, on motion to quash the convictions:

Held, that as there was no evidence of any kindling or placing fire by the defendants elsewhere than in the engine, there was no kindling or placing fire in "the open air" within the terms of the ordinance, and the convictions were quashed.

Aikins, Q.C., and *Secord*, for the motion.

Scott, Q.C., and *Strong*, contra.

REGINA v. HAMILTON.

Summary conviction—N. W. T. Act, s. 99—Distress for penalty—Summary Convictions Act—Form of conviction—Certiorari—New conviction.

The defendant was convicted for having in his possession intoxicating liquor without the special permission in writing of the Lieutenant-Governor.

Proceedings having been removed by *certiorari*, upon motion to quash the conviction;

Held, that the first conviction, which directed the penalty to be levied by distress, and in default imprisonment, was bad in ordering imprisonment for six months in default of sufficient distress.

Pratt v. *Mathewson*, *ante*, distinguished.

2. That a new conviction, returned with the writ of *certiorari*, which directed that in default of payment forthwith, defendant be imprisoned for six months, unless the penalty and costs "together with the costs of conveying the defendant to the guard-room" be sooner paid, was bad.

The form of conviction J. 2 (R. S. C. c. 172) is misleading on account of the words "and charges of conveying the said A. B. to the said common gaol," as there is nothing in the Summary Convictions Act giving the justice a discretionary power to award these costs. These words and the similar words in brackets in form of commitment O. 1 can only be inserted when the substantive Act which creates the offence and the punishment authorizes it.

The N. W. T. Act, s. 99, does not authorize imprisonment for these charges.

Regina v. *Wright*, 14 O. R. 668, approved.

Semble, RICHARDSON, J., *dubitante*, that although the magistrate had filed a conviction with the clerk of the Court, Eastern Assiniboia District, he could with his return to the *certiorari* file a new conviction.

T. C. Johnstone, for the motion.

D. L. Scott, Q.C., contra.

REGINA v. LAIRD.

Summary Convictions Act—Order of dismissal—Awarding costs—Tariff—51 V. c. 45, s. 6—Ordinance No. 6 of 1878—Amendment—Order good in part and bad in part.

Two informations laid by different parties against the defendant for having intoxicating liquor in his possession,

etc., were dismissed with costs. The following items, viz.: (*a*) Rent of hall, $1.00; (*b*) counsel fee, $37.00; (*c*) compensation for wages, $14.80; and (*d*) railway fare, $10.50, were apportioned, and each of the prosecutors ordered to pay half of the same as costs to the defendant by the orders of dismissal.

Proceedings having been removed by *certiorari*, upon motion to set aside the orders:

Held, that items *a*, *c*, and *d* were unauthorized, both by the tariff of fees in summary trials, and by the civil tariff. The counsel fee was not authorized. The local legislature of the territories had prescribed fees to be taken in cases of summary conviction, but these fees were limited to fees to be taken by certain officers and persons. But it is only when no fees are prescribed that resort is to be had to the tariff prescribed for civil cases. The orders were therefore bad in awarding these costs.

Held, also, that there was no authority to amend the orders by striking out the sums mentioned in the orders and inserting the correct sums. But

Held, that orders of dismissal so far differ from convictions that the Court can strike out or quash an objectionable part without interfering with the rest of the order.

Order made to strike out the clause in regard to costs; remaining part of order affirmed. No costs.

W. White, for the motion.

T. C. Johnstone, contra.

TURRIFF v. McHUGH.

Sale of chattel—Implied warranty—Knowledge of defect in title.

The plaintiff, knowing of a defect in the vendor's title, purchased a horse from the defendant. The plaintiff having been obliged to surrender the horse to the true owner, brought an action against the vendor to recover the price paid.

Held, that there was no implied warranty, and the plaintiff could not recover.

T. C. Johnstone, for the plaintiff.

W. White, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

] [29TH JUNE, 1889.

RTRAM v. MASSEY MANUFACTURING CO.

ry trial—Findings in favour of both parties—Substantial recovery laintiff—Depriving defendants of costs of issue found in their —"Event"—"Good cause"—Orders of trial Judge and Divisional

aintiffs claimed more than $13,000 upon a special con- iron sold to the defendants and damages for refusal to portion of the goods sold. The defendants denied their to pay for any part of the iron, setting up that it was t they had contracted for, and counter-claimed for for breach of contract. The case was tried by a jury, answer to questions left to them, found that the iron was not up to contract, but that the defendants had and used a portion of it, and judgment was entered for tiffs by the trial Judge for over $5,000, for the portion on used by the defendants at the contract price less er cent. for inferiority, as found by the jury, and also lefendants for $200 damages upon their counter-claim, by the jury. The trial Judge gave the plaintiffs the he action and the defendants the costs of the counter- nd the Divisional Court (15 O. R. 516) affirmed the t and this disposition of the costs.

efendants appealed upon the question of costs only, con- that they had succeeded upon the issue as to the quality on and were entitled to the costs of that issue.

efendants had not asked at the trial to have judgment for them upon such issue, nor was it so entered.

Held, by the majority of the Court, that there was upon the evidence good cause within the meaning of Rule 1170 for depriving the defendants of the costs of the issue found by the jury in their favour, and the order of the trial Judge and the Divisional Court should not be interfered with.

Per HAGARTY, C.J.O.—If the trial Judge did not intend by his order to deprive the defendants of such costs, then the costs were properly left to follow the event, which was in favour of the plaintiffs to the extent of over $5,000.

Per BURTON, J.A.—The defendants not having applied for judgment thereon, were not entitled to costs of the issue found by the jury in their favour.

Per OSLER and MACLENNAN, JJ. A.— Although there was no formal order specifically depriving the defendants of costs, the trial Judge and the Court below intended to deprive them of costs, for good cause.

Huxley v. *West London Extension R. W. Co.*, 14 App. Cas. 26, specially referred to.

Osler, Q.C., and *Watson*, for the appellants.

Robinson, Q.C., and *Lash*, Q.C., for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[IN BANC, 22ND JUNE, 1889.

REGINA v. BARNETT.

Criminal law—Larceny Act, R. S. C. c. 164, s. 65—Fraudulent conversion of negotiable securities by trustee—Letter shewing trust—Identity of instruments produced with those mentioned in letter—Conversion of proceeds of securities—"Property," definition of—Sanction of Attorney-General—Proof of.

The defendant was indicted and convicted under the Larceny Act, R. S. C. c. 164, s. 65, for that he, being a trustee of two negotiable securities for the payment of $5,250 each, the property of the C. Bank, for the use and benefit of the C. Bank, unlawfully and with intent to defraud, did convert and appropriate the said two negotiable securities to the use and benefit of him, the defendant, etc.

trial the following letter written and signed by the , dated 6th November, 1885, was produced: "I have een entrusted by A. (the cashier of the C. Bank) with of $5,250 each, for the specific purpose of paying two $5,000 that are due in Montreal on 8th November, my failing this shall consider myself committing ffence and amenable to the criminal law."

ırities produced at the trial as those converted by the were two drafts, not promissory notes, for $5,250 each, November, 1885; and two drafts for $5,000 each produced answering the description of the notes for ıt mentioned in the letter except that they were not tes and were due at Toronto on the 9th November, ıt Montreal on the 8th. It was shewn, however, that ıeld by a person in Montreal.

ppeared in evidence that the defendant procured one ınt the two drafts for $5,250 each, B. retaining $1,000 lebt, and paying part of the balance of the proceeds ıdant in diamonds.

ndant did not take up the two $5,000 drafts and e proceeds of the two $5,250 drafts. The drafts ied by witnesses as to dates, amounts, etc., and entries dant's memorandum book, also produced, shewed the e transactions with the cashier and B.

Judge stated a case for the opinion of the Court.

n the evidence, that the drafts were the property of d not of the cashier in his private capacity; and upon evidence, that the defendant was a trustee of the ıithin the meaning of the statute; and that notwith- discrepancies as to the nature of the instruments, e, and place of payment, there was sufficient ;o to the jury of the identity of the drafts produced ıith the notes mentioned in the letter above set out.

:ended that the defendant should have been indicted g the *proceeds* of the securities, inasmuch as it was mplation of the cashier that the defendant should ecurities themselves.

the nature of the transaction with B. shewed an by the defendant of the securities themselves to his d

Per FALCONBRIDGE, J.—Even if it had been otherwise, the definition of property in s-s. (e) of s. 2 of R. S. C. c. 164 shewed the sufficiency of the indictment.

It was objected that no proof was given at the trial that the sanction of the Attorney-General required by R. S. C. c. 164, s. 65, s-s. 2, had been given.

Held, that this objection was not open to the Court upon a case reserved, not being a question that could arise at the trial.

Knowlden v. *The Queen*, 5 B. & S. 532, followed.

Irving, Q.C., and *Osler*, Q.C., for the Crown.

G. T. Blackstock and *J. J. Maclaren*, for the defendant.

[THE DIVISIONAL COURT.

LUPTON v. RANKIN.

Way—Access to road—Rights of way over adjoining lots—Rights of mortgagees—Way of necessity—Extinguishment by unity of possession—Revival on termination of possession.

C. conveyed to R. fifty acres of land and also a strip twenty feet wide to the south of it, to give access from the fifty acres to the town line. R. mortgaged to C. the fifty acres but not the twenty feet strip, and then conveyed the strip to N. Afterwards R. conveyed the fifty acres to his son, subject to the mortgage to C., and on the same day gave him the occupation under an agreement for sale of the adjoining fifty acres to the west. The son mortgaged to the plaintiff the fifty acres conveyed to him. During the possession of R. and his son they got access from the east fifty acres to the side line through the west fifty acres. The agreement for sale of the west fifty acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east fifty acres access to the side line through the west fifty acres, the plaintiff brought this action against R., C., and N., for a declaration as to the existence of a right of way through the strip conveyed to N. or of a way of necessity through the west fifty acres, and for other relief.

f a right of way did pass to C. under the mort-
t was a right of way only to C., his heirs and
he existence of a right in the plaintiff to redeem
e her the rights of C. until after redemption.

ver, that the plaintiff was entitled to a declaration
ce of a way of necessity through the west fifty
vas given by way of implied grant when R. con-
on.

e of the implied grant was suspended during the
son had possession of the west fifty acres, but
ination of that possession the implied grant and
ay under it were revived.

.C., for the plaintiff.
for the defendant Thomas Rankin.
, for the defendant Nafziger.

GINA v. COUNTY OF WELLINGTON.

law—Insolvency legislation—Powers of Dominion Parliament
40, (D.)—Intra vires—B. N. A. Act, s. 91, s-s. 21—Assess-
axes—Exemption from taxation—R. S. O. c. 193, s. 7, s-s. 1.

; the statute 33 V. c. 40, which recites the insol-
Bank of Upper Canada, vests the property of the
ate in the Crown as trustee for the creditors, and
its realization in order that the debts may be paid,
powers of the Dominion Parliament, under s-s. 21
ie B. N. A. Act; and that the interest of the Crown,
ler such Act, as mortgagee of certain lands, could not
rrears of taxes, being exempt from taxation under
193, s. 7, s-s. 1.

., and *H. L. Dunn*, for the plaintiff.
., for certain of the defendants.

In re MOORE v. WALLACE.

Prohibition—Division Court—Attachment of debts—R. S. O. c. 51, s. 189—Absconding debtor—R. S. O. c. 66, s. 16—Payment to sheriff of moneys attached—Payment to Division Court clerk.

Where money comes into the hands of a Division Court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, he must pay the money to the sheriff and not to the primary creditor, under the provisions of s. 16 of the Absconding Debtors' Act, R. S. O. c. 66.

And where after the service upon the garnishees of a Division Court garnishee summons a County Court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor, to the sheriff, but the Judge in the Division Court ordered the sheriff to pay the money to the Division Court clerk, and the clerk to pay it out to the primary creditors in the Division Court:

Held, that the Judge was right in ruling that the money should have been paid by the garnishees to the Division Court clerk, under s. 189 of the Division Courts Act, R. S. O. c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to s. 16 of the Absconding Debtors' Act; and prohibition to restrain the clerk from so paying out the money was awarded.

Aylesworth, for the sheriff and attaching creditors.

John Farley, for the Division Court creditors.

SMITH v. JAMIESON.

Husband and wife—Breach of promise of marriage—Infancy of defendant—Ratification at majority—R. S. O. c. 123, s. 6—Evidence—Corroboration—R. S. O. c. 61, s. 6—Contract not to be performed within a year—Statute of Frauds.

In an action for breach of promise of marriage the defendant admitted a promise but said that he was an infant when he made it, and that there was no ratification in writing after majority, as required by R. S. O. c. 123, s. 6. The plaintiff insisted that

is no engagement between her and the defendant until he of age on the 20th August, 1887. The jury found that the to marry was first made on that day, there being evidence n that finding, and also evidence upon which the jury ave found a previous promise,

ourt refused to interfere with the finding.

was evidence to corroborate the statement of the that an engagement to marry existed, such evidence t inconsistent with the precise engagement sworn to by tiff as having been entered into on the 20th August,

hat this evidence satisfied the requirements of R. S. O.), and it was not necessary that it should go so far as consistent with the promise which the defendant he made before majority.

aintiff swore that "it was to be a year's engagement, ere to be married in the following August."

hat this was not an agreement not to be performed ear, and was therefore not void under the Statute of though not in writing.

, for the plaintiff.
for the defendant.

PIZER v. FRAZER.

liquors—Liquor License Act, R. S. O. c. 194, s. 11, s-ss. (8), (14)—against issue of license in polling sub-division—Form of petition ularity.

ior License Act, R. S. O. c. 194, s. 11, s-s. (14), pro- "No license shall be granted to any applicant for ot then under license or shall be transferred to such a majority of the persons duly qualified to vote as the sub-division at an election for a member of the Assembly, petition against it, on the grounds herein- orth, or any of such grounds."

n one-half of the electors in a certain polling sub- itioned the license commissioners of the district ne issue of any license within the bounds of said

polling sub-division * * * for reasons specified in s. 11, s-s. (8), of the Liquor License Act, R. S. O. c. 194, or for one or more of such reasons "—not otherwise specifying any grounds or referring to any applicant or premises.

The plaintiff was an applicant for a license for premises, not under license, situate in the sub-division, and the question stated for the opinion of the Court was whether under s. 11, s-s. (14), the presentation of the petition precluded the defendants the licence commissioners from certifying for a license to the plaintiff.

Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in s-s. (8) shall be set forth, or all of them specifically alleged; and therefore the defendants were not precluded from certifying for a license.

Aylesworth, for the plaintiff.

J. J. Maclaren, for the defendants.

MAGEE v. GILMOUR.

Landlord and tenant—Verbal lease of land—Expiry of term upon day certain—Notice to quit—Sub-lease—Overholding tenants—Warrant of distress—Creation of new tenancy—Payment of rent.

The result of a verbal lease of real property to continue until and expire upon a day certain is that the tenant is bound to give up possession at the end of the stipulated period without any notice to quit.

And where McC., the tenant for such a term, sub-let to the defendants, but not for any definite period;

Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term, and the defendants, without the concurrence of McC., who had tried to dislodge them, and refused to receive rent from them since the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC.

ıtiff. The warrant recognized McC. as being tenant of its date, some months after the expiry of the term, recognize the defendants' rights in any way. In an ejectment the defendants disclaimed being tenants laintiff, and insisted that they were still in under McC.

ıt the payment of the rent did not, under the circum- ıablish a new tenancy between McC. and the defen- if McC. ever became the tenant of the plaintiff after of his original term, which was not shewn.

ntiff, after the expiry of the term, served on the a written notice to quit, in which they were recognized ıts.

t, having disclaimed being tenants to the plaintiff, nts were not entitled to notice to quit; and if they ıe they received was sufficient.

donald, Q.C., for the plaintiff.
rry, for the defendant.

CHANCERY DIVISION.

[OSLER, J.A., 9TH JULY, 1889.

DARBY v. CITY OF TORONTO.

porations—Representation previous to submission of money 2 V. c. 73, s. 14—Appointment of commissioners—Costs with- successful defendants.

ɔal council, previous to the submission of a money e vote of the electors, issued a pamphlet to them, ined under the heading "Some of the Reasons Why s Should be Erected," this clause: "In order that s may be erected in accordance with . . legisla- en obtained authorizing the appointment of three rs to whom will be entrusted the supervision of the ," and after the by-law was approved of and passed not to appoint commissioners.

on by a ratepayer to enjoin the corporation from pro- the work,

Held, that that representation formed no part of the by-law, and was not a representation of an existing fact, but a mere statement of intention, and formed no part of the bargain, in the sense of a binding bargain between the corporation and the ratepayers; there was nothing to bind the corporation to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course. The action was dismissed; but as the conduct of the corporation was discreditable, costs were refused them.

Held, also, that there was no person or class of persons for whose benefit the power of appointing commissioners under 52 V. c. 78, s. 14, was conferred, or upon whom a right was conferred to have the power exercised, and that such power was not obligatory but permissive only.

A by-law is not a contract between the ratepayers and the corporation.

Remarks upon the practice of taking a plebiscite upon a subject wholly within the discretion of a corporation.

W. M. Hall, for the plaintiff.

C. R. W. Biggar, for the defendants.

[15TH JULY, 1889.

HUNTER v. HUNTER.

Assignment for benefit of creditors—Costs of creditor having execution in sheriff's hands—Costs of defending unsuccessful action brought by insolvent—R. S. O. c. 124, s. 9.

Case stated for the opinion of the Court.

The plaintiff had obtained judgment against one William Reed for his costs of defence in an action of trespass brought against him as a magistrate: *Reed* v. *Hunter*, 8 Occ. N. 428; and immediately after taxation of his costs of that action, placed a writ of *fi. fa.* goods in the hands of the sheriff. A day or two afterwards Reed assigned all his assets to the defendant for the general benefit of creditors, and the defendant was in possession when the sheriff attempted to seize the chattel property which

ned. The assets were insufficient to satisfy the
› plaintiff and the other creditors represented by

l questions submitted were whether an execution
a judgment for costs of defence only acquired a
3. O. c. 124, s. 9; and if so, whether such lien
› of all costs, expenses, and disbursements of the
nection with the taking of the assignment and the
rsuant thereto.

for the plaintiff.

the defendant.

—I see no ground on which the case can be
ıguished from *Ryan* v. *Clarkson*, 16 A. R. 311;
'he execution creditor had judgment and execu-
ıly for his costs of defence, in the sheriff's hands
ɜignment, and his lien for these costs is expressly
he statute. The assignee took the property by
ɜssignment subject to that lien, and in saying that
ıs submitted are answered.

IN CHAMBERS.

[STREET, J., 3RD SEPTEMBER, 1889.

EK v. TOWNSHIP OF YARMOUTH.

:amination of officers of municipal corporation—Surveyors.

ı action of trespass, in which the plaintiff com-
certain road allowance as laid out by the defen-
l upon his land.

ff obtained from the local Judge at St. Thomas an
ɜxamination for discovery before the trial as officers
ants of two surveyors who had made surveys on
lefendants upon which they acted in laying out the
e in question.

ɜe persons was the surveyor and engineer usually
the defendants, but was not formally appointed as
ineer, and the other had not been employed by the

defendants, so far as appeared, except for the purpose of the survey in question.

The defendants appealed from the order of the local Judge.

C. J. Holman, for the appeal.

D. Armour, contra, referred to *Odell* v. *City of Ottawa*, 12 P. R. 446.

STREET, J.—I think surveyors employed in this way cannot be regarded as officers of the corporation. The fact that one of them is the person usually employed by the corporation when they have work in the way of his profession to be done can make no difference. The corporation does not perform its business by means of these persons; they are employed for a specific purpose, and for that only; and are no more examinable than if they had been employed by an individual instead of a corporation. The appeal will be allowed, with costs to the defendants in any event.

County Court of the County of Simcoe.

[ARDAGH, Co. J.

In re PORREL AND THE COURT OF REVISION OF THE TOWN OF MIDLAND.

Assessment and taxes—Assessment Act, R. S. O. c. 193, s. 65, s-s. 18, s. 68—Appeal—Time—Court of Revision as appellant.

The roll of the town of Midland was returned on the 4th May, 1889, and before the 18th May certain appeals were made against it, which were heard by the Court of Revision on the 28th May, and were then finally disposed of. The appeals were by tax-payers appealing against their own assessments as being too high. The hearing of these appeals by the Court of Revision on the 28th May was all the business done on that day, and after the conclusion of it the Court adjourned till the 17th June.

ıet on the 17th June, when it was moved and
ɜmbers of the Court and carried, "That the fol-
be notified that their assessments will be raised:
l, from $1,000 to $2,000"—and so on, through a
ıty names. The assessor was not present at the

ɜ given by the clerk to the eighty taxpayers to
ljourned meeting of the Court of Revision to be
th, the matter mentioned in the notices being,
f your property from $1,000 to $2,000"—or as
be. In the notices the Court of Revision itself
the appellant.

ıt on the 28th June, and on the first case being called
l that the Court was acting without jurisdiction,
f *Toby* v. *Wilson*, 46 U. C. R. 230, was cited. The
d the objection and directed that the respondents
o the merits, which they declined to do. The
oceeded to make such changes in the roll as they
ious, making some change in almost all of the

the other taxpayers appealed to the Judge of the
under s. 68 of the Assessment Act, R. S. O. c. 198.

the Court acted without jurisdiction in hearing the
ɜ being in fact no appellant except the Court itself.

ɜ Court acted without jurisdiction in extending the
ng complaints, as it was not a case of correcting
ɜs under s. 65, s-s. 18, of the Act.

e Court could only extend the time for making such
en days from the first sitting of the Court, while
ɜals were not lodged till the 17th June, nine days
e of the period for which the Court had power to
ne.

ɜ, for the appellants.
ınett, for the Court of Revision.

NEW BRUNSWICK.

In the Supreme Court.

RAYMOND v. SAUNDERS.

Statute of Frauds—Sale of goods—Acceptance—Question for jury—Misdirection.

The defendant examined three coats in the plaintiff's store, and directed the price-tickets to be taken off them, that one of them which was defective should be repaired, and the other two be sent to his hotel, saying that he would call at the store and get the third coat, and pay for all of them. The coats were sent to the hotel as directed on the Saturday evening. On the following Monday the defendant requested the plaintiff to take back the coats, which he declined to do, and the defendant left them at the store in his absence.

In an action for the price of the coats,

Held, that it should have been left to the jury to find whether the acts of the defendant amounted to an acceptance of the goods within the Statute of Frauds, and that the jury should not have been directed that they did.

REGINA v. GILLIS.

Criminal law—Receiving stolen goods—Identity of property—Proof of—Presumption.

On an indictment for receiving stolen goods it is not necessary to prove by positive evidence that the property found in the possession of the prisoner belongs to the prosecutor: it is sufficient if the evidence is such that a jury may reasonably presume the identity of the property.

CROSSMAN v. HANINGTON.

eal—Printing proceedings—Judge's order for—Whether sufficient to print with type-writer.

a Judge's order to settle the part of the proceedings to l on an equity appeal had not been obtained, accord- e Rule of Easter Term, 1883, and the whole of the etc., had not been printed, the appeal was dismissed. that printing known as type-writing is not a compliance Rule.

Ex parte BALSER.

Convictions Act—Information—Arrest by informer—Conviction.

objection to a conviction under the Summary Convic- iat the complainant was not sworn till after the infor- btain a warrant was written by the magistrate.

round for quashing a conviction that the information the constable who afterwards arrested the defendant.

STEPHENSON v. MILLER.

-To whom credit given—Taking note of third party—Whether ional payment—Evidence—Relevancy of—New trial.

on against A. and B. for goods sold and delivered, y pleaded "never indebted" and "payment," the that the goods were sold and the credit given to C. note for the amount had been taken by the plaintiff. nber of the firm of C. & Co., and was also a partner business for cutting and manufacturing lumber, ds, for the price of which the action was brought te having been dishonoured) were used by the defen- lumbering business. The goods were purchased by the plaintiff that he wanted them for himself and ntiff charged the goods in his books, "C. & Co. for

A. & B." The lumbering business of A. & B. having been wound up and their joint property sold, the proceeds, held by the Maritime Bank, were sufficient to pay the notes of C. & Co. held by the bank, and also the liabilities of A. and B., including the plaintiff's claim, against which the bank had indemnified the defendants. A verdict having been given for the plaintiff, a new trial—on the ground that the verdict was against evidence—was refused, there being evidence on which the jury might reasonably find that the credit was given to the defendants. *Per* KING, FRASER, and TUCK, JJ., ALLEN, C.J., dissenting.

Held, also, 1. That the evidence did not establish that C. & Co.'s note was taken by the plaintiff as payment for the goods.

2. That the evidence that the bank held of the proceeds of A. and B.'s joint property sufficient to pay their liabilities (including the plaintiff's claim), and had indemnified them against such claim, was relevant to the issue in the case; ALLEN, C.J., dissenting.

(Affirmed on appeal to the Supreme Court of Canada.)

WINSLOW v. GALLAGHER.

By-law to punish persons intoxicated on the public streets—Whether inoperative by reason of the Vagrant Act, 32 & 33 V. c. 28—Summary conviction—Costs—Distress warrant—Power of Justice to imprison in the first instance.

A municipal by-law for the punishment of persons intoxicated on the public street is not rendered inoperative by the Vagrant Act, 32 & 33 V. c. 28—subsequently passed.

Where an Act directs that penalties for the breach of by-laws may be recovered with costs, the costs may be adjudged to be paid to the informer.

Where an Act directs a penalty to be recovered by distress, and in default of distress, by imprisonment, a warrant of commitment cannot be issued in the first instance under Consol. Statutes c. 62, s. 25, unless it appears to the Justice by admission of the defendant, or by evidence, that the defendant has not sufficient goods whereon to levy a distress.

[14TH AUGUST, 1889.

REGINA v. ELLIS.

ıurt—Newspaper articles—Scandalizing a Judge—Judge sit-ımbers acts as delegate of the Court—Jurisdiction in prohi-ıster's Report—Procedure—Interrogatories.

lant, who was one of the proprietors and the chief ewspaper, wrote and published in his paper certain e Queen's County election case of 1887, referring ılly to an order *nisi* for prohibition granted by ıe of the Judges of this Court, restraining the t Judge from holding a recount on the election. The this election were Baird and King, the former of ıen declared elected by the Returning Officer. The lained of contained the following references:—"But ce that is wanted and therefore Tuck intervenes." ın Judges give it vitality by degrading the ermine t?" "But the assumption of power by officials itution of judicial authority for the purposes of party to weaken the foundations of the strongest faith;" f Tuck had the power to send such an order, as a e may not have been acting in the capacity of a he sent it."

candidate declared elected, then applied for an or contempt of Court against the defendant.

he full Court, (TUCK, J., taking no part) that the s guilty of contempt of Court; but sentence was s to afford an opportunity to the defendant to take he might be advised.

bjection made to the proceedings was that if the shed were to be regarded as an offence against the plication should have been made by the Attorney-t the instance of the Court.

when facts are brought before the Court by affi-ıg *prima facie* that a contempt of Court has been ıe Court has power to act upon them, even though the not made by a Crown officer; that is a question to consider and is not an objection which can be party against whom the rule *nisi* is granted, who ly be prejudiced in his defence by the particular ch the facts are brought to the notice of the Court.

Another objection was that there was no contempt of the Court, and if the publication amounted to a contempt at all, it was a contempt as against TUCK, J., sitting in Chambers and did not relate to any proceeding in this Court; that TUCK, J., had no jurisdiction to make the order which he did; and that the defendant as a proprietor of a newspaper had a right to criticise, comment upon, and censure the conduct of Judges and public men in matters relating to the public welfare.

Held, that TUCK, J., when he made the order, was acting in his judicial character as a Judge and delegate of this Court, and charges made against him alleging that he was actuated by dishonest and corrupt motives in granting the order which he did were calculated to interfere with the proper administration of justice, and to bring the proceedings of this Court into contempt.

Johnson's Case, 20 Q. B. D. 681, followed.

Held, also, that TUCK, J., acting as he did, had general jurisdiction over the subject of prohibition, and when facts were shown to him which satisfied him that the Judge of the County Court was attempting to exercise a jurisdiction which, in his opinion, the County Court Judge had no right to exercise, he then acquired a jurisdiction over the case; and therefore in granting the order he was acting judicially for this Court in the administration of justice and entitled to the same protection as if the order had been granted by the Court while he was sitting as a member of it.

Held, also, that the report of the Master could be referred back to him and the defendant required to amend or make his answers to the interrogatories more full and complete, and that it was proper to interrogate the defendant as to his belief and opinion.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

McMICKEN v. ONTARIO BANK.

ying new suit until payment of costs of former suit.

suit is instituted seeking relief substantially the same ht in a previous suit, the proceedings will be stayed sts of the former suit have been paid.

that the first suit was not determined upon its merits sarily an answer to the application.

that the Judge who heard the application exercised a nd dismissed the application is no bar to an appeal.

AM, J.—It was not a case for the exercise of discretion.

; that in the first suit a married woman was suing in the second she sued by a next friend, is no ground ; the application.

Whitmore, 2 K. & J. 458, considered.

LOR, C.J.—The test of the identity of the suits is, ıe bill in the second suit could have been produced by ndment of the first? But the proceedings will some- stayed, although the relief sought in the second suit have been obtained in the first.

ıere is new matter in the second suit; that the relief not exactly the same; or that the parties are not n both suits, is no ground for refusing to stay proceed-

[TAYLOR, C.J.

McRAE v. CORBETT.

Tax sale—Statutory validity of deed.

Lands were sold 2nd November, 1885, for the taxes of 1883 and 1884. A list of lots liable to be sold for taxes was sent to the clerk of the municipality in 1885, but not in the previous years. A deed was afterwards issued. Upon a bill to impeach the deed:

Held, 1. That the clause requiring the sending of the list was directory only.

2. Under the statute 49 V. c. 52, s. 673, a tax deed cannot be questioned, no matter how informal or irregular the proceedings leading up to the sale, if some taxes were due and the sale itself was conducted in a fair, open, and proper manner. The statute applies to a deed in which the municipality is styled "The Municipality of Kildonan," instead of "The Rural Municipality of Kildonan."

3. The fact that a property worth $700 was in 1885 sold for $17 is not of itself sufficient to show that the sale was conducted improperly.

4. Although by the advertisement it was announced that the treasurer would sell "so much of the said land as may be sufficient to discharge the taxes," etc., yet he might sell the whole lot if he found it necessary so to do; and there being no evidence that offering any part of the land would have produced the requisite amount, but on the contrary there being some evidence the other way, the sale was upheld.

5. An objection that a whole lot was advertised as one parcel, and as a whole, whereas a railway right of way crossed it, is not open after deed given.

WATEROUS v. ORRIS.

s—Parol trust—Renewal of fi. fa.—Certificate of judgment—Informalities.

nd subject to mortgages. For the purpose of gainst some accommodation indorsements, she land to him, but in form the mortgage was to of $3,500. The first mortgagee took foreclosure nd (as the plaintiff alleged) a verbal agreement that O. should prove upon his mortgage ; should or mortgages, borrow upon a new mortgage suffi- him, and hold the equity of redemption in trust

f purchased a judgment against C., upon which nd a certificate of judgment had been issued ; upon them claiming that O. was a trustee for C., a sale. The evidence showed that the plaintiff nominee of C.

at the Statute of Frauds was a valid defence.

fi. fa. had ceased to be in force, it having been ugust, 1885, and renewed more than thirty days ration.

certificate of judgment was invalid. The judg- vered by Thomas Houston and William S. Foster, uston, Foster, & Co., for $1,278.60, whereas the of a judgment recovered by Thomas Hustin and oster, trading as Hustin, Foster & Co., for

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GRAHAM v. HARRISON.

ory judgment—Action on—Evidence of, by exemplification and office copy.

ill not lie upon a foreign judgment unless it be

an English judgment be proved by an office copy n exemplification under the seal of the Divorce

In re JOYCE AND SCARRY.

Executor—Judgment against—Form—Pleading—Reference under R. P. Act.

A certificate of a County Court judgment against "A. B., administrator of the estate of X." charges A. B. personally and not the estate.

The note or memorandum of a County Court Judge is not, but the entry of the clerk in the procedure book is, the judgment.

Upon a reference by the Registrar-General under the Real Property Act no material other than the case submitted together with any documents transmitted can be considered.

Semble, that when an executor or administrator is made a party to an action as such, he must be charged clearly in that character.

[KILLAM, J.

SCHULTZ v. CITY OF WINNIPEG.

Statutes, construction of—Tax deed—Interest upon taxes.

This was an application for an interlocutory injunction to restrain the execution by the defendants of a deed in pursuance of a sale of the plaintiff's land for taxes. The principal ground taken was that interest had been added to the taxes.

J. S. Ewart, Q.C., and *W. H. Phippen*, for the plaintiff. The case is clear under *Schultz* v. *Winnipeg*, *ante* p. 73, if the statute 52 V. c. 45, s. 22, does not validate the proceedings. That section is as follows:—"No sale of any lands for arrears of taxes heretofore or hereafter made under the provisions of any statute of this Province shall be impeached or set aside or held to be invalid on the ground that a rate of percentage, whether by way of increase or interest or otherwise was added to the original amount of taxes, and form part of the claim for arrears for which the lands were sold. The Court of Queen's Bench of Manitoba shall not have jurisdiction to impeach any sale for alleged arrears of taxes on the ground set forth in this section. This section shall not apply to cases in which prior to the fifth day of March, A.D. 1889, suits in equity were instituted affecting any such sale on the said grounds or any of them."

le " means sale completed by a conveyance, and not apply before conveyance. *C. P. R. Co.* v. R. 395. It is so used in various parts of the We do not impeach the "sale," which at most down by the auctioneer, but we attack the hich under 49 V. c. 52, s. 646, is a notification nd the only notification that they receive. All at the sale may be perfectly regular, but if s not been given a deed should not issue. This ecause it claims interest, and the statute does *te* v. *Blanchard*, 4 Man. R. 460.

and *Isaac Campbell*, for the defendants. If "be impeached or set aside or held to be ground that interest has been added, it is imma- ie advertisement claimed the interest or not.

ismissed the application with costs.

NORTH-WEST TERRITORIES.

In the Supreme Court.

IN CHAMBERS.

[ROULEAU, J., 15TH AUGUST, 1889.

SALOIS v. WALKER.

Costs—Taxation of—Witness fees—Affidavit of increase.

Application by way of appeal from the decision of the acting Taxing Master at Calgary allowing upon the taxation the fees of the plaintiff's witnesses, although they had not actually been paid.

The affidavit of increase stated that plaintiff "was indebted to and must pay each of said witnesses for his loss of time," etc.

Held, that the Taxing Master was right, and that the affidavit was sufficient.

T. C. West, for the appellant.

J. R. Costigan, for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 22nd June, 1889.

MOONEY v. SMITH.

Assessment and taxes—Sale of land for taxes—Purchase by wife of treasurer who conducted sale—Sale and conveyance void—Fraud—R. S. O. c. 193, s. 189.

A purchase of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale.

Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R. S. O. c. 193, s. 189, although it took place in 1883 and the action was not brought till 1889.

G. T. Blackstock, for the plaintiff.
Masten and *H. B. Dean*, for the defendant.

RUDD v. FRANK.

Evidence—Admissibility—Communications by deceased person to solicitors—Privilege—Judgment for possession of land—Practice on entering—Order of trial Judge—Writ of possession—Rules 373, 374, 375, 341, 379, O. J. A.—R. S. O. 1877, c. 51, s. 34.

In an action by the devisee of R. to recover possession from F. of land conveyed by him to R., of which F. remained in possession, F. set up that the conveyance to R., though in form

absolute, was really intended to operate only as a mortgage, and offered to redeem.

The evidence of E. and P., two solicitors, as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection.

The evidence of E. shewed that R.'s statement to him was made in E.'s office in the presence of P. and of another person who was a friend of R.'s but not a professional man. E. thought R. made the statement as a preliminary to instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, there was nothing to shew that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time, but at any rate he made no charge for professional services.

P.'s evidence was that he had spoken to R. about the affairs of F. as a solicitor and a friend of the F. family and had advised R. to try to save the property in question for the F. family.

It also appeared that R. was an occasional client of E. and P. but that in the transactions in question he had employed other solicitors.

Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged and were properly receivable in evidence; FALCONBRIDGE, J., doubting as to the evidence of E.

The action was tried without a jury and the trial Judge on the 23rd June, 1888, directed that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly, and the plaintiff put in possession by the sheriff under a writ of possession. This was before the Consolidated Rules came into force.

Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379 of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule and the entry of judgment and subsequent proceedings were regular.

Section 34 of R. S. O. 1877, c. 51, was repealed by Rule 273 of the Ontario Judicature Act, 1881.

E. R. Cameron, for the plaintiff.

W. R. Meredith, Q.C., and *R. M. Meredith*, for the defendant.

) v. LANDED BANKING & LOAN CO.

Administrator ad litem—Rule 311.

ff claimed from the defendants a sum of money, had been deposited by E. P. and part by herself, name of E. B., who was a non-existent person. estate before this action was brought, and no letters tion to his estate having issued, the plaintiff applied 311 for the appointment of an administrator *ad*

refused to make an appointment.

ilson, 13 P. R. 33, approved and followed.

, for the plaintiff.

, Q.C., for the defendants.

[GALT, C.J., 27TH SEPTEMBER, 1889.

IT v. PEOPLE'S LOAN AND DEPOSIT CO.

Mortgage—Interest post diem—Rate of.

an action for redemption and to have it declared that nts' mortgage was satisfied by payment and for the ertain life policies assigned to the defendants as col- rity.

on was referred to the Registrar of the Queen's Bench who made his report finding, par. 4, that the mortgage the 1st June, 1884, and that the defendants were not any interest after that date under the terms of the ontained in the mortgage, or any contract, and assess- lamages at the rate of six per cent. per annum on the ncipal from 1st June, 1884, until they received pay-

rtgage proviso was "Provided this mortgage to be void nt at the office of the company of the principal money ore the 1st June, 1884, with interest thereon at the rate cent. per annum until such principal money and inter- e fully paid and satisfied."

The defendants appealed from the report, and their appeal was argued on the 20th September, 1889.

Delamere, for the appeal.

H. T. Beck, for the plaintiffs.

Judgment was delivered on the 27th September, 1889.

GALT, C.J.—In my opinion this case is concluded by the judgment of the Court of Appeal in *Powell* v. *Peck*, 15 A. R. 138. * * *

In the present case the agreement was to pay the mortgage money on or before the 1st June, 1884. It is therefore manifest that although the mortgagor might have paid the money before the 1st June, 1884, the covenant was to pay it on that day if it had not been previously paid. Mr. Delamere urged that this case differs from *Powell* v. *Peck* in this, that there the money was payable by instalments, whereas here it was payable in one sum, which was to bear interest at ten per cent. until it was fully paid and satisfied. This argument cannot prevail, for there is no provision whatever as to payment except that the mortgagor might pay the mortgage money on or before the 1st June, 1884; but there is no arrangement for extension of time after that day.

As to the life policies, it is plain the defendants have no claim whatever to them after the debt is paid for which they held them as collateral security.

Appeal dismissed with costs.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 9TH SEPTEMBER, 1889.

BANK OF MONTREAL v. BOWER.

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

Held, affirming the decision of FERGUSON, J., 17 O. R. 548; *ante* p. 342, that the words of the will in question did not create a precatory trust and that the wife took the property absolutely.

Per BOYD, C.—If the entire interest in the subject of the gift is given with super-added words expressing the motive of the gift, or the confident expectation that the subject will be applied

it of particular persons, but without in terms cutting terest before given, it will not now be held without trust has been thereby created.

Q.C., and *R. G. Code*, for the plaintiffs.
., and *Kidd*, for the defendants.

[11TH SEPTEMBER, 1889.

REID v. TRIMMER.

o vary order of Judge—Divisional Court—Leave to appeal.

ndants moved before a Divisional Court composed of and ROBERTSON, JJ., to vary an order made upon the application by STREET, J., in Chambers, upon the t the order had been made under a mistake of fact. was not, in fact, made *ex parte*, but the counsel who or the defendants had not full instructions and was osition to show what the facts were, and therefore enlargement, which was refused. The defendant moved before STREET, J., to rescind his own order, refused to do, it having been issued.

Howard, for the defendants, now contended that it ecessary for him to appeal, but under the circum- e Court could correct the order upon a motion, citing *Field*, 9 P. R. 127.

appeared for the plaintiffs.

URT held that *Hughes* v. *Field* was not in point, the n there being to a Judge in Chambers to set aside an rder of the Master in Chambers, and did not think fit to any new practice as to varying orders. The motion was ut the defendants were given leave to move to have an t down for the pending sittings.

—The case of *Hughes* v. *Field* does not seem to have d in *Ryan* v. *Canada Southern R. W. Co.*, 10 P. R. 535, different practice was laid down and has since been fol- See *Jamieson* v. *Prince Albert Colonization Co.*, 11 P. R. *Nabb* v. *Oppenheimer*, 11 P. R. 214; *Taylor* v. *Sisters of of Ottawa*, 11 P. R. 496; *Ball* v. *Cathcart*, 16 O. R. 525. also Con. Rule 536.

[12TH SEPTEMBER, 1889.

CUMBERLAND v. KEARNS.

Covenant against incumbrances and for quiet enjoyment—Local improvement rates.

Action on covenants in a deed of land whereby the defendants covenanted that they had done no act * * whereby or by means whereof the lands * * were or should or might be in any wise impeached, charged, or affected or incumbered in title, estate, or otherwise however, and that the grantee should enjoy them free from all incumbrances.

It appeared that a scheme of local improvement, which resulted in the imposition of a fixed rate for ten years to defray the expense of the improvement, was undertaken at the instance and upon the petition of the defendant and other property owners interested under R. S. O. c. 184, s. 612, s-s. 9.

The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance.

Held, affirming the decision of ROBERTSON, J., that the plaintiff was entitled to recover for breach of the covenants, and to be indemnified in full.

Per BOYD, C.—Different would be the conclusion if the taxes had been imposed by municipal authority without the intervention of the defendants.

J. H. Ferguson, for the plaintiffs.

Haverson, for the defendant.

[ROSE, J., 17TH SEPTEMBER, 1889.

BLAIN v. PEAKER.

Assignment for creditors—Personal estate only—48 V. c. 26.

An assignment for the benefit of creditors, though confined in terms to the assignor's personal estate, professed to be drawn under 48 V. c. 26.

l, that it was nevertheless not within the Act; and this being brought by the assignee to set aside a chattel mort- must be dismissed with costs.

clear that it was intended under the Act to bring all the into the hands of the assignee for general distribution.

n Meyers, for the plaintiff.
H. McFadden, for the defendant.

[ROBERTSON, J., 4TH SEPTEMBER, 1889.

WILLIAMSON v. WILLIAMSON.

bsence of subscribing witnesses—Want of proof of their existence or handwriting—Action to establish will.

n action to establish a will, which was produced, in the iting of the testator, purporting to be executed in the e of two subscribing witnesses, who could not be found, ose handwriting could not be proved, a motion for judg- sking to have the will established and probate thereof , notwithstanding that all parties interested consented, missed on the ground that sufficient evidence had not oduced to show that such will was the will of the testa- ler R. S. O. c. 109, s. 12.

can, for the plaintiffs.
, for the defendants.

[5TH SEPTEMBER, 1889.

O'SULLIVAN v. PHELAN.

vise—Condition in restraint of sale—Restricted to name and family of testator.

tator by his will devised certain real estate to two of his s, subject to the following condition: "But neither of nephews is to be at liberty to sell his half of the said to any one except to persons of the name of O'S. in family; this condition is to attach to every purchaser aid property."

Held, that as all power of alienation was not taken away, the condition was good in respect to a sale, but that there was nothing in it to prevent disposing of the property in any other way, as by gift, devise, or otherwise, and that there was power to mortgage.

Re Macleay, L. R. 20 Eq. at p. 118, followed.
Re Watson and Woods, 14 O. R. 48, referred to.

Anglin, for the plaintiff.
Moss, Q.C., for the infant defendants.
No one appeared for the adult defendants.

COMMON PLEAS DIVISION.

[In Banc, 29th June, 1889.

REGINA v. RICHARDSON.

Recognizance—Absence of affidavit of justification—Sufficiency—R. S. C. c. 178, s. 90.

By s. 90 of R. S. O. c. 178, and the Rule of Court thereunder, no motion to quash any conviction brought before any Court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance with two or more sufficient sureties.

Held, upon a motion for an order *nisi* to quash a conviction, that the sufficiency of the sureties is not shown by the mere production of the recognizance, but there must be evidence on which the Court can say there are sufficient sureties.

Where, therefore, there was no affidavit of justification to the recognizance, it was held not to comply with the statute.

Mackenzie, Q.C., for the motion.

REGINA v. FLOREY.

rations—Closing shops—By-law for—Discrimination—Illemary conviction—Distress—51 V. c. 33 (O.)—37 V. c. 33, —R. S. O. c. 184, s. 421.

assed by the town of A. under s. 2, s-s. 2, of the Regulation Act, 51 V. c. 33, provided, s. 1, that ., where goods were exposed or offered for sale by town should be closed at 7 p.m. on each day of the ing Saturday, from 15th January to 15th Septem- 3 provided that it should not be deemed an infrac- y-law for any shop-keeper or dealer to supply any 7 p.m. to mariners, owners, or others, of steam- ssels calling or staying at the port of A.

t the by-law was bad, for that s. 3 was illegal in ing between different classes of buyers and different tradesmen, and was in contravention of s-s. 9 of

tion of the defendant under the by-law was therefore

so, that a provision in the conviction for distress in payment of the fine and costs imposed did not consti- of the penalty or punishment imposed by the by-law, a means of collecting the penalty as authorized by 4, of 37 V. c. 33, and s. 421 of the Municipal Act, . 184.

rth, for the defendant.

, contra.

REGINA v. COPP.

corporations—Internal walls of buildings—Right to prescribe thickness of—Party walls—What constitutes.

0th s-s. of s. 496 of the Municipal Act, R. S. O. c. 184, ls walls of existing buildings, only applies to external ereof and not to internal walls, and therefore municipal have no power to prescribe of what materials or of what s such internal walls should be. S-s. 18, relating to

party walls, does not apply to internal walls separating buildings belonging to the same owner; for to constitute party walls they should separate the adjoining properties of different owners.

Where, therefore, a by-law was passed by the corporation of the city of Hamilton prescribing the materials and thickness of the internal walls of every building, which therefore included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building owned by him into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law, it was held bad, and a conviction made thereunder quashed.

Aylesworth and *J. A. Culham*, for the defendant.
MacKelcan, Q.C., contra.

REGINA v. GOOD.

Indian lands—Removing hay from—What constitutes "hay"—Right to include costs of commitment and conveying to gaol in conviction—Indian Act, R. S. C. c. 43, s. 26.

The defendant was convicted for removing hay from Indian lands contrary to s. 26 of the Indian Act, R. S. C. c. 43.

Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass or grass sown and cultivated.

Held, also, that under this Act and the legislation incorporated therewith, there is no power to include in a summary conviction the costs of commitment and conveying to gaol.

Mackenzie, Q.C., for the defendant.
Aylesworth, contra.

REGINA v. DOWLING.

Justice of the Peace—Summary conviction—Fraud on cheese factory—51 V. c. 32 (O.)—Offence outside of county—Jurisdiction of County Police Magistrate—Certiorari—Ultra vires.

The defendant was tried at Belleville before the Police Magistrate for the county of Hastings and convicted under 51 V. c. 32

(O.) for, amongst other things, supplying to a cheese factory milk from which the cream or strippings had been taken or kept back. The factory was in the county of Hastings, but the defendant resided and the milk was supplied in another county.

Held, that the magistrate had no jurisdiction, and the conviction was quashed.

Held, also, that the right to *certiorari* has not been taken away in such cases; but even if it had, the Court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction.

Shepley, for the defendant.

Burdett and *C. J. Holman*, contra.

REGINA v. FIFE.

Justice of the Peace—Malicious Injuries to Property Act, R. S. C. c. 168—Warrant of commitment—Omission of word "unlawfully," effect of—Omission of statement of amount of damage.

Under s. 58 of the Malicious Injuries to Property Act, R. S. C. c. 168, the offence must be unlawfully and maliciously committed, and the damage must exceed $20.

In this case the warrant committing the defendant for trial charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully."

Held, that this was fatal to the commitment; and it was quashed.

Held, also, that the commitment should have alleged that the damage exceeded $20.

W. M. Douglas, for the defendant.

No one contra.

REGINA v. AUSTIN.

Intoxicating liquors—R. S. O. c. 194, s. 53—Club incorporated under Benevolent Societies Act—Sale of liquors by—Summary conviction—Evidence—Refusal of Court to interfere.

Held, that the meaning of s. 53, s-s. 3, of the Liquor License Act, R. S. O. c. 194, is that where in a club or society incorpor-

ated under the Benevolent, etc., Societies Act, intoxicating liquors are sold or supplied to members, but such sale or supplying is not the special or main object of the club, etc., but is merely an incident resulting from its principal object, as here the preservation of game, there is no violation of the Act, but it is otherwise if the sale or supplying the liquors is the main object of the incorporation.

The question, however, is for the decision of the magistrate on the evidence before him; and there being evidence here to support the finding of the magistrate that the sale of liquor was the special or main object of the club, with the intent to evade the Act, the Court refused to interfere with the finding, and dismissed a motion to quash a conviction made by him against the defendant, who was the secretary of the "Owl Gun Club."

Bigelow, for the defendant.

J. J. Maclaren, contra.

[THE DIVISIONAL COURT.

ANDERSON v. CANADIAN PACIFIC R. W. CO.

Railways—Condition limiting liability for baggage—Letters written between the company's officers—Admissibility of—Limitation of actions—R. S. C. c. 109, s. 27, construction of.

In an action by a passenger on the defendants' railway for the loss of her luggage, in which the defence was that the defendants' liability was limited by a condition on the ticket to $100, certain letters were admitted in evidence, one written by the defendants' general baggage agent to the passenger agent asking whether the plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her, and the other the reply thereto, stating that the rules of the defendants did not require unlimited first class tickets to be signed, and that the ticket had been sold at full tariff rate.

Held, that the letters were properly admitted; but they were of no consequence, as the ticket on its face shewed that it was not purchased subject to the condition.

Held, also, that the six months' limitation clause, R. S. C. c. 109, s. 27, does not apply to an action of this character.

arising out of contract, but to actions for damage occasioned by a railway company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway.

Wallace Nesbitt, for the plaintiff.
G. T. Blackstock, for the defendants.

JONES v. GRACE.

Justice of the Peace—Backing warrant of commitment in adjoining county—Illegality—Joint trespass—Damages—Liability of constable executing warrant—24 Geo. II. c. 24—Notice of action—Interpretation Act.

The plaintiff, who resided in the county of H., was convicted before the defendant G., police magistrate for the county of B., for giving intoxicating liquor to an Indian, and sentenced to pay a fine, and in default of payment to imprisonment in the county gaol of B. The fine not having been paid, G. issued a warrant of commitment directed to all the peace officers of the county of B. to arrest the plaintiff, and prepared a form of indorsement to be signed by a Justice of the Peace for the county of H., authorizing the defendant N., a constable, to arrest the plaintiff in the county of H. G. handed the warrant to N., telling him that the plaintiff lived in H. and he would have to get the warrant indorsed. N. took it to the defendant R., a Justice of the Peace for the county of H., who signed the indorsement, and the plaintiff was arrested by N., and taken first before G. in the county of B., to see if he would accept a promissory note in payment of the fine, and then to the county gaol of B. The plaintiff was afterwards discharged on *habeas corpus*, but the conviction was not quashed.

Held, GALT, C.J., dissenting, that an action for trespass was maintainable against G. and R.; that R. had no power to back the warrant, and was guilty of trespass in so doing; and that G. was liable as a joint trespasser, for by his interference he was responsible not only for the arrest, but for the subsequent detention in the gaol of B.

At the trial the jury found that the plaintiff had sustained no damage as against R., and they assessed the damages against

G. only. Judgment was thereupon entered against G., and the action dismissed as to R.

Held, that the finding of the jury as to the damages was in law permissible; but, if R. should have been held liable, as the plaintiff at most could only have a new trial or elect to retain his judgment as against G. alone, the Court would not interfere with the finding.

Quære, whether the constable N. was protected under 24 Geo. II. c. 24.

The indorsement on the notice of action was that it was given by V. M., of Queen street, in the city of B., in the county of B., solicitor for the within named James Jones. Within was the notice—"I do hereby as solicitor for and on behalf of James Jones of the village of J., in the county of H., farmer," etc.

Held, that the notice taken in connection with the Interpretation Act, 31 V. c. 1, s. 9, was sufficient.

Morgan v. *Palmer*, 13 C. P. 528, not followed, as decided prior to the Act.

Quære, whether any notice of action was necessary.

McCarthy, Q.C., for the plaintiff.

Delamere and *Brewster*, for the defendant Grace.

Aylesworth, for the defendant Rogers.

S. A. Jones, for the defendant Norrie.

BROWN v. McRAE.

Damages—Fire caused by defendant's negligence—Right to deduct amount received by plaintiff from insurance.

In an action for damages for the destruction of the plaintiff's dwelling-house and a quantity of chattel property, caused by sparks emitted from the defendant's steam-tug through neglience.

Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff an amount paid to the plaintiff by an insurance company under an insurance on the property.

W. R. Meredith, Q.C., for the plaintiff.

Osler, Q.C., and *M. Wilson*, for the defendant.

SINDEN v. BROWN.

ıe Peace—Action against—Summary Convictions Act—Imprison-ment for non-payment of fine after payment of costs.

ction under the Summary Convictions Act required ant to pay a fine and costs, and awarded distress in payment, and imprisonment in default of sufficient The plaintiff paid the costs, but was subsequently nd imprisoned for non-payment of the fine. The con-d commitment remained in force unquashed.

ction for false imprisonment,

hat the conviction could be enforced by imprisonment ıyment of the fine, nothwithstanding the payment of ; and therefore with the conviction remaining in force ı was not maintainable.

ɔn v. *Board of Police of Cobourg*, 6 O. S. 405, not ın this respect.

zie, Q.C., for the plaintiff.

rtin, Q.C., for the defendant.

BALTZER v. TOWNSHIP OF GOSFIELD.

corporations—Assumption of township road by county—Liability inty—Remedy over against township—Municipal Act, R. S. O. , s. 531, s-ss. 1, 4; s. 533; s. 566, s-s. 5.

ı for damages for the loss of a horse of the plaintiff as killed by a fall into a ditch dug by the defendant ɔ in a road therein, under a drainage by-law. The town-ncil had passed a by-law for opening and establishing d, and shortly afterwards the council of the defendant ıad passed a by-law assuming it as a county road for the only of expending upon it the county appropriation. ney of the county was expended on the road from year the county by-law was proposed by the Reeve of the p; and its validity, although never assented to by a was never disputed by the township.

, that by their by-law the county had assumed the road as y road, and there was no power in the statute authoriz-

ing them to limit the assumption in the manner proposed; and that under the circumstances the county could not set up the absence of a township by-law assenting to the assumption.

Sections 583 and 566, s-s. 5, of the Municipal Act, R. S. O. c. 184, relied on by the county, were held not applicable to this case.

Held, also that the county, under s. 531, s-s. 1, were bound to keep the road in repair, and were liable to the plaintiff; but under s-s. 4 they were entitled to judgment over against the township.

Lash, Q.C., for the plaintiff.

W. R. Meredith, Q.C., for the defendants the township of Gosfield.

Aylesworth, for the defendants the county of Essex.

OWEN SOUND S. S. CO. v. CANADIAN PACIFIC R. W. Co.

Railway company—Agreement to pay minimum sum out of joint traffic rates—Ultra vires—Legislation legalizing.

By an agreement entered into between the plaintiffs and the T. G. & B. R. Co. it was provided that there should be certain joint rates chargeable for passengers and freight by the steamship company and the railway company, to be divided in certain proportions; and if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, that if the steamship company received more than the sums mentioned in the agreement the railway company were to be entitled to a share of the surplus.

Subsequently an agreement was entered into whereby the T. G. & B. R. Co. leased their lines to the O. & Q. R. Co., the latter agreeing to assume the contract with the plaintiffs. This agreement was ratified by Act of Parliament.

The O. & Q. R. Co. made a lease of their lines to the C. P. R. Co., which was confirmed by Act of Parliament, such Act providing that the C. P. R. Co. were to assume all contracts of the T. G. & B. R. Co., including that with the plaintiffs.

t even if the agreement between the plaintiffs and the R. Co. were *ultra vires* the latter company, it was by the subsequent legislation; but apart therefrom it nse objectionable.

omson and *G. Bell*, for the plaintiff.
, Q.C., and *G. T. Blackstock*, for the defendants.

[ADDEN v. HAMILTON FORGING Co.

ervant—Workmen's Compensation for Injuries Act—Injury by workman through improper instructions by superintendent—of master.

dants, an iron works company, used in their business ears for cutting up boiler plate and scrap iron, prior placed in the furnace to be melted. It was the duty iff and another workman to put the iron into the nile a large iron gate was, by the superintendent's put into the sheais to be cut up, by reason of the tructions given by the superintendent, the plaintiff se of his duty was injured. The plaintiff, though of danger, was not aware of the nature and extent nd obeyed through fear of dismissal.

ion against the defendants under the Workmen's n for Injuries Act for the damage sustained by the

the defendants were liable.
for the plaintiff.
., and *F. R. Waddell*, for the defendants.

OSE v. GRAND TRUNK RAILWAY CO.

trial—Omission to swear juror—Affidavit of juror.

will not grant a new trial because one of the jurors sworn, where no injustice is done thereby.

vit of a juror as to what took place in the jury be received.

.C., for the plaintiff.
, for the defendants.

MARKS v. TOWN OF WINDSOR.

Jury—Dispensing with after evidence taken.

The Judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised.

A. W. Aytoun Finlay, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

KEARNS v. TENNANT.

Partnership—Continuing deceased partner's share in business—Evidence of—Debt due deceased partner's estate.

K., a partner in a firm, by his will made in 1884 appointed the plaintiff executor and trustee, and, after a general bequest to the plaintiff to hold all his real and personal estate in trust, directed him within six months after his death to ascertain the proper amount due his estate for his share in the firm's business, and when ascertained to allow the same to remain in the business with interest at six per cent., and to pay such interest to his wife during her life, but if he deemed it advisable to do so, to withdraw the share from the business in the proportion of twenty per cent. annually from the time the amount was ascertained, and to invest the sums so withdrawn, and to pay the interest thereon to his wife for life. The evidence shewed that after the share was ascertained it was not continued in the business for the purpose mentioned in the will, but was treated and made a debt to K.'s estate.

Held, that under the circumstances, the plaintiff, as executor of K.'s estate, was not as to K.'s share in the position of a partner in the firm.

The firm in question was from 1860 to 1862 composed of K. and R., when T. was taken into the firm, the firm thus constituted to continue so long as deemed advisable for the mutual benefit. In 1871 K. and R. insured their joint lives for $10,000, to be paid to the survivor. In 1876 R. assigned his interest to K., and in 1884 K. assigned the same as collateral security to a person who had indorsed notes for the

K.'s death the insurance company paid the insurance
the holder of the policy, who handed the amount to
etired the notes therewith.
iat the plaintiff was entitled to recover the amount as
to K.'s estate.
).C., and *McCracken*, for the plaintiffs.
els and *Snow*, for the defendants.

[7TH SEPTEMBER, 1889.

In re McGREGOR v. NORTON.

*—Division Court—Money paid into Court by defendant—Plaintiff's
on to proceed—Failure to notify in writing—R. S. O. c. 51, ss. 125,
7—Motion to inferior Court to set aside judgment.*

endant in a Division Court suit paid a sum of money
as a full satisfaction of the plaintiff's demand under
. 51, s. 125, and the plaintiff was notified thereof.
aintiff notified the Clerk of the Court, but not in
hat he intended to proceed for the remainder of his

126 of R. S. O. c. 51 provides that when payment is
Court under section 125 the plaintiff is to be notified,
sum so paid shall be paid to the plaintiff, and all pro-
n the action stayed, unless within three days after the
the notice the plaintiff signifies in writing to the clerk
ion to proceed * * in which case the action shall
if brought originally for such remainder only."
iat the words of the statute are imperative; and in the
the written notice all proceedings were stayed. A
h took place afterwards was therefore a nullity; and
n was granted restraining proceedings upon the judg-
vered by the plaintiff at such trial.
so, that an application by the defendant to the inferior
set aside the judgment so recovered was not a bar to
n for prohibition.
it was a convenient practice to move in the inferior

n of FALCONBRIDGE, J., 13 P. R. 28; *ante* p. 115,

, for the plaintiff.
', for the defendant.

[GALT, C.J., 16TH APRIL, 1889.

In re ST. CATHARINES AND NIAGARA CENTRAL R. W. CO. AND NORRIS.

Railways—Loss of local custom by use of railway—Compensation—Speculative damages.

The owner of a mill, who also owned an adjoining lot which was used as the principal means of communication between the mill and a public highway, across which lot a railway company had erected a trestle bridge, sought compensation under the Dominion Railway Act, 51 V. c. 29, for the loss of local custom to the mill, not arising from the construction of the railway, but from a subsequent use of it.

Held, that the damages were too remote and speculative to be allowed.

Aylesworth and *Ingersoll*, for the company.

H. H. Collier, for the land-owner.

[10TH MAY, 1889.

HENDERSON v. TOWNSHIP OF STISTED.

Assessment and taxes—Exemptions—51 V. c. 29, s. 3.

By s. 3 of the Assessment Amendment Act, 51 V. c. 29, which came into force on the 1st August, 1888, s. 7 of the Assessment Act, R. S. O. c. 198, was amended by adding to the exemptions, "All horses, cattle, sheep, and swine which are owned and held by any owner or tenant of any farm, and when such owner or tenant is carrying on the general business of farming or grazing."

The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., R. S. O. c. 185; s. 20 of which provides for the making of an assessment roll, which by s. 28, when finally revised, is to be the roll of the municipality until a new one is made. By s. 29 the council are to fix the time for making the subsequent assessments at periods of not less than one nor more than five years; and the year for the purposes of the Act is to commence on the 1st of January. By s. 364 of the Municipal Act, R. S. O. c. 184, the taxes or

imposed for any year are to be considered imposed on and the 1st January of that year and end with the 31st Decem- unless otherwise provided. By s. 30 of c. 185 the council each year after the final revision of the roll pass a by-law ng a rate on all the real and personal property on the roll.

this case the assessment for the year 1888 was made in the hs of March and April, the roll was returned to the clerk e municipality on or about 1st of May, and was finally d by the council sitting as a Court of Revision on 16th . On 14th August a by-law was passed directing a rate to ied to meet the current expenses for the year.

ld, under these circumstances, that the personal property ioned in 51 V. c. 29, s. 3, was not exempt for the year

Urquhart, for the plaintiff.
rge Bell, for the defendants.

[PROUDFOOT, J., 21ST JUNE, 1889.

IIA AGRICULTURAL IMPLEMENT CO. v. HUTCHINSON.

ny--Winding-up—R. S. C. c. 129, s. 31—Action brought in name of npany in liquidation—Order of Court—Objection made too late—Mortge received as collateral security—Production before judgment entered.

ion to recover the price of an implement manufactured by aintiffs. A winding-up order having previous to this action obtained against the plaintiffs and a liquidator appointed, ection was taken by the defendant at the trial that the should have been brought in the name of the liquidator ith the approval of the Court under R. S. C. c. 129, s. 31. ler of Court authorizing the liquidator to sue either in his ame or that of the company was put in after the trial.

d, that the objection was too late and must be overruled.

ble, the proper course is to move in Chambers to dismiss tion for want of authority to sue.

ble, also, as the company under the statute had power to ney could do so without the authority of the Court if they to run the risk of costs.

The plaintiffs had obtained a mortgage from one of the defendants as collateral security for the debt sued for, which mortgage they had assigned to a bank.

The Court directed that judgment was not to be entered for the debt until the plaintiffs produced the mortgage and a re-conveyance or discharge thereof to the mortgagor.

Moss, Q.C., and *J. E. Harding*, for the plaintiffs.

Maybee, for the defendants.

[ROSE, J., 22ND APRIL, 1889.

HAMILTON v. BROATCH.

Malicious prosecution—Leave granted to put in original information and judgment of acquittal.

In an action for false arrest and malicious prosecution arising out of a false information laid by the defendant, a certified copy of the information having been put in and objected to, leave was given to put in the original as also an exemplification of the judgment of acquittal; for, it appearing that the merits were not with the defendant, technicalities should not be allowed to defeat justice.

Burdett and *S. O'Brien*, for the plaintiff.

W. Kerr, Q.C., for the defendant.

[FALCONBRIDGE, J., 27TH FEBRUARY, 1889.

GRIFFIN v. KINGSTON & PEMBROKE R. W. CO.

Copyright—Neglect of author to deposit copy in library of Parliament—Right to proceed for infringement—Railway ticket—Subject of copyright.

The 5th section of the Copyright Act, C. S. C. c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for infringement of his copyright.

A railway ticket is not a subject of copyright under the Act.

Bain, Q.C., for the plaintiff.

Cattanach and *R. Vashon Rogers*, for the defendants.

[ROBERTSON, J., 1ST APRIL, 1889.

WADDELL v. ONTARIO CANNING CO.

ıy—Illegal acts done by majority af shareholders—Right of minority to ·estigation—By-law ratifying illegal acts—Invalidity of—Injunction.

› defendants were an incorporated company composed of shareholders. The plaintiffs, four of the shareholders, ıg twenty-five per cent. of the stock, claimed that there had nismanagement of the company's funds in the payment of sums to the president and secretary for salaries or services ut any legal authority therefor; and in the failure to e any dividends, though the company had made large ; and that no satisfactory investigation or statement of ompany's affairs could be obtained, though frequently d for; and that it was impossible to ascertain the com- s true financial standing.

der these circumstances the Court directed an investigation company's affairs.

a meeting of four of the directors, constituting the majority, after proceedings taken by the minority to disallow the l payments made to the president and secretary, and without r notice to the minority of such meeting or its object, a ıtion was passed ratifying the payments made to the secre- and at an adjourned meeting, of which also the minority ·ed no notice, by-laws were passed ratifying the payments both to the president and secretary.

ld, that the resolution and by-laws were invalid and could ›e ratified by the shareholders; and an injunction was ed restraining the company from acting thereunder or from ng a meeting of shareholders to ratify and confirm the .

in, Q.C., and *F. R. Waddell*, for the plaintiffs.
Martin, Q.C., and *Duff*, for the defendants.

[10TH MAY, 1889.

McCONNELL v. McCONNELL.

:il—Change of—Evidence—Foreign domicil of testator—Devolution of real and personal estate.

:ld, upon the evidence, that although a testator's original cil was in Ontario, he had changed it to the State of Min-

nesota, where his domicil was at the time of his death; and that his will must therefore be construed according to the laws of the State of Minnesota as regarded his real estate there and all of his personal estate, wheresoever situate; but as regarded his real estate in Manitoba according to the laws of Manitoba; and as regarded his real estate in Ontario, that it should devolve upon his executors in the will named.

Douglas, Q.C., for the plaintiff.

W. Cassels, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 16TH SEPTEMBER, 1889.

In re BIGGAR.

Lunacy—Application for declaration of—Notice of motion.

An order was pronounced by BOYD, C., in Chambers, declaring one Herbert Biggar a lunatic. The Clerk in Chambers on settling the order took exception to the absence of the petition usual in such cases. The applicant did not file or serve a petition, but simply served notice of motion.

BOYD, C., on being referred to by the Clerk, held that a notice of motion was sufficient.

W. H. Blake, for the applicant.

[24TH SEPTEMBER, 1889.

BANK OF HAMILTON v. STARK.

Postponing trial—Terms of order—Securing debt—Rule 681.

In ordering the postponement of a trial the Master in Chambers has a discretion under Rule 681 to impose terms.

And where upon the defendants' application to postpone the trial, the Master so ordered upon their giving security for part of the amount sued for;

Held, that the term was properly imposed.

W. M. Douglas, for the plaintiffs.

D. Henderson, for the defendants.

LATOUR v. SMITH.

Taxation—Costs of unnecessary proceedings or witnesses—Discretion of taxing officer—Rules 1195, 1215—Costs of præcipe order.

the judgment on further directions the plaintiffs were d the costs of the action and reference. Upon appeal he taxation of such costs, the defendant contended that intiffs should not be allowed the costs of attendances and es in the Master's office relating to items in the account tion as to which the plaintiffs failed.

, that the plaintiffs were entitled to all the costs properly, nd reasonably incurred upon the reference but not to unnecessary proceedings or witnesses; and the costs of es called to establish something on which the party them failed were in the discretion of the taxing officer.

1195 and 1215 considered.

also, that upon taxation only one attendance should be on obtaining a *præcipe* order.

on, for the plaintiffs.

eton, for the defendant.

GIRVIN v. BURKE.

tion of actions—Conduct of consolidated cause—Priority in time—Burden of proof—Scope of actions.

termining which party is to have the conduct of a con- n of two cross-actions the main *indicia* to be regarded hich action was first begun? Upon whom does the rden of proof lie? Which action is the more compre- in its scope?

where G. first sued B. for cancellation and delivery up promissory notes made by G. and S. jointly to B., and cancellation of an agreement in relation to which the re given; and B. afterwards sued G. and S. upon three ur notes in question; and substantially the same issues sed in both actions, the making of the notes being by G. and S. in the pleadings; the actions were con- , and G. was allowed to proceed with his action, S. led as a party to it.

Holman, for Burke.

nour, for Girvin and Spence.

[THE MASTER IN CHAMBERS, 7TH SEPTEMBER, 1889.

SHAW v. CRAWFORD.

Notice of trial—Action in Chancery Division—Assizes—Chancery Sittings—Right of defendant to give notice of trial—Rule 654.

In an action in the Chancery Division in which no jury notice had been given, the defendant gave notice of trial for the Assizes beginning on the 10th September, 1889, and the plaintiff for the Chancery Sittings beginning on 4th November, 1889.

Held, that under Rule 654, either party has the right to give notice of trial for the next sittings, whether an assize or a Chancery Sittings; and the plaintiff cannot take away that right from the defendant by giving notice of trial for a later sittings.

The plaintiff's motion to set aside the defendant's notice of trial was therefore refused.

Palmateer v. *Webb*, 7 Occ. N. 244, distinguished.

C. A. Durand, for the plaintiff.

R. S. Neville, for the defendant.

[9TH SEPTEMBER, 1889.

LAINCHBERRY v. DUNN.

Pleading—Statement of claim asking more than writ of summons.

By the indorsement on the writ of summons the plaintiff claimed $2,000 for the seduction of his daughter and no further relief. The statement of claim in addition to the damages for seduction claimed a sum for maintenance of an infant under an agreement entered into by the defendant.

A. W. Morphy, for the defendant, moved to strike out the part of the statement of claim asking maintenance on the ground, among others, that it went beyond the claim made by the writ.

W. H. Blake, for the plaintiff, contra, referred to *Sowden* v. *Sowden*, 4 P. R. 276; *Huggins* v. *Guelph Barrel Co.*, 8 P. R. 170; *Johnson* v. *Palmer*, 4 C. P. D. 258.

MASTER IN CHAMBERS refused to strike out the part of the ; complained of, holding that it was not improper to so rom the indorsement.

[21ST SEPTEMBER, 1889.

ESSERY v. GRAND TRUNK R. W. CO.

tors—Agents in county towns—Posting up papers where no agent booked—Rules 203, 204, and 461.

e a solicitor has not entered the name of an agent for ı county town, service of papers in an action where the ngs are being carried on in such county town cannot be upon him by posting up copies in the office of the local : there, if he has the name of a Toronto agent duly

203, 204, and 461 considered.

ish, for the plaintiff.

vorth, for the defendants.

Division Court in the County of Pembroke.

[DEACON, Co. J., 3RD JULY, 1889.

.THWELL v. CANADIAN PACIFIC R. W. CO.

—Fencing—51 V. c. 29, s. 194—Killing of cattle on railway—spassers on lot adjoining railway—Free commoners—By-law.

aintiff was the occupant of lot 18 in the third concession of township organized and surveyed for settlement. The defen- .ilway ran through lot 19, of which the plaintiff was neither r occupant, and not through lot 18. The plaintiff 's cattle were the railway, having got thereon from lot 19. The cattle were ıe by by-law free commoners in Rolph. The defendants had ed fences to guard the track.

Held, that the by-law did not justify the cattle being on lot 19; and the plaintiff not having shewn any right for the cattle to be on lot 19, they were "wrongfully on the railway," within the meaning of s. 194, s-s 3, of the Railway Act of Canada, 51 V. c. 29, and the plaintiff could not recover.

This was an action to recover $60.00, the value of two cows of the plaintiff killed by an engine and train of the defendants on that part of their line which crosses lot No. 19 in the 3rd concession of Rolph, and came up for trial at the last May sitting of this Court. when the counsel for the parties agreed upon the following statement of facts, and arranged for a subsequent appointment to argue the questions of law arising thereon:—

1. The plaintiff is the occupant of lot 18 in the 3rd concession of Rolph.

2. The said lot does not touch the railway track within 310 feet, the railway crossing lot 19, and not lot 18.

3. The plaintiff is neither owner nor occupant of lot 19. Reference to plan or sketch annexed to statement.

4. The Township of Rolph is organized and surveyed for settlement.

5. There are no fences.

6. The plaintiff's cattle were killed on the railway, having got thereon from lot 19, having first come from 18 on to 19. The accident occurred on 22nd October, 1888.

7. The value of the cattle, $50.00.

8. The cattle were at the date of the accident free commoners in Rolph. Provided counsel for the plaintiff files certified copy of by-law to that effect—not otherwise admitted.

9. No negligence either way.

Pursuant to the arrangement made the questions of law were argued by *J. H. Burritt*, for the plaintiff, and *W. R. White*, for the defendants.

DEACON, Co. J.—Mr. Burritt at once conceded that if the law had stood as it was declared to be in the cases of *Conway* v. *Canadian Pacific R. W. Co.*, 12 A. R. 708, and *Davis* v. *Canadian Pacific R. W. Co.*, ib. 724, the plaintiff would not be entitled to recover, as the cattle had gone upon the track from lot No. 19, of which he was not occupant and to which he had no shadow of a claim; his own lot No. 18 not being in any part touched by the line of railway, and he being in no sense an adjoining pro-

prietor. But he argued that the effect of the 194th section of the Railway Act, 51 V. c. 29, which reads as follows: "When a municipal corporation for any township has been organized and the whole of any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township of the height and strength of an ordinary division fence with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway. (3) Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses, and other animals not wrongfully on the railway, and having got there in consequence of the omission to make complete and maintain such fences and cattle guards as aforesaid;" the right of the plaintiff and in fact of each private proprietor in the whole township was enlarged beyond the limits of his own or the land occupied by him to the full extent of the limits of the township, and that he had a right to allow his cattle to roam at their free will and pleasure over the highways and un-enclosed lands in the township, and of course go upon the railway line or track if in their rambles they should meet with it; and further in support of this contention he put in a copy of a by-law of the municipality of Rolph, Buchanan, and Wylie providing for the allowing cattle to be free commoners within the townships at certain seasons of the year and with certain exceptions not applying to the cattle now sued for.

This by-law was passed as long ago as the 5th of June, 1875, and before the defendants' railway was built through these townships or even contemplated. Its provisions are somewhat peculiar. Sec. 1. provides—"That on and after the maturing and passing of this by-law it shall not be lawful for horses, bulls, stags, breachy or unruly cattle, oxen, cows, young cattle, pigs, sheep, geese, and turkeys to run at large or to be free commoners within the limits of the said townships of Rolph, Buchanan, and Wylie at any seasons of the year. Proviso, that oxen, cows, and young cattle, (not being breachy or unruly) shall be at

liberty to run at large and be free commoners within the said townships between the 1st day of April and the 1st day of January in each year." But then sec. 2. provides, that "any animal or animals mentioned in the first section of this by-law found running at large contrary to the provisions of the by-law shall be liable to be impounded in one of the public pounds of the said township, and being so impounded, the owner or owners of such animals shall be liable to pay the fines and penalties following, that is to say,—for each and every cow, ox, or young cattle running at large between the 1st day of April and the 1st day of January, in any one year, one dollar." This part of sec. 2 directly contradicts the proviso in sec. 1, and renders it at least doubtful what the council really meant to do in regard to cows, oxen, and young cattle.

I have carefully compared sec. 194 of the Act of 1888 with sec. 16 of the Act of 1883, for which it is substituted, and excepting only the provision in that sec. 16 as to the case of the company taking possession of a section or a lot of land for the purpose of constructing a railway thereon, and being required in writing by the occupant thereof to fence, etc., the obligation to fence, etc., in the other cases is as clear and imperative in one section as the other. The phraseology of sec. 194 is certainly different in some respects from that in sec. 16, of which I have spoken, but unless it was to give the municipality, as such, some right to compel a general fencing of the line through the whole of the townships, I cannot satisfactorily determine what more, if anything, the parliament did intend. If it was intended to enlarge the right and privilege of each private proprietor to the extent contended for by Mr. Burritt, why were the words of limitation "not wrongfully on the railway" inserted in sub.-sec. 3, and thereby in every case raising and presenting the issue as to whether the cattle were or were not wrongfully on the railway at the time of their being struck and killed? In the present case that issue is fairly and squarely presented. The cattle were either rightfully or wrongfully on the line on 22nd of October, 1888. Now if rightfully, where was the right, and how was it acquired? There is nothing in sec. 194 which speaks of private proprietors or occupants or gives them any new rights or defines any old ones, in fact nothing touching them except this sub-sec. 3, which contains the limitation just now mentioned.

ght is given by the by-law, upon which Mr. Burritt enough to say he did not place very much reliance, an say is that I cannot make out from secs. 1 and 2 contradict each other) what this council really in- with respect to oxen, cows, and young cattle being run at large as free commoners; but even if their ever so clear in its provisions, it must be borne in unicipal councils could give no such right or autho- vate lands or properties, and certainly not over any railway track itself; their by-law could only affect ighways, and public squares of their municipality; egard to the highways the 271st section of the Rail- ld limit their right (so far as allowing cattle to run concerned) to such parts of them as were not within of the intersection of the highway with any rail- vel.

t consideration I have been able to give the matter, ow the plaintiff's cattle can be said to have been he track at the time, as they were undoubtedly tres- 19, from which they got upon the railway—and f has not shown any right for the cattle to be put I am forced to hold they were wrongfully on the railway when they were struck and killed, and language of Mr. Justice Patterson in the *Conway* when speaking of the change effected by sec. 16 sideration, it appears to me "there is no evidence reat and so uncalled for as to extend their right to r occupant of lands that did not adjoin the rail- think the language of Mr. Justice Osler in the . 721 is still, notwithstanding the change in the licable to such a case as this. "In the absence y provision to the contrary, a railway company is tion to fence its track as a general rule, however ntain enactments more or less stringent requir- so; but unless the duty created by the Act is obligations imposed unlimited and unqualified, owners of adjoining lands and those in privity can take advantage of it, and the company are ake good damages to cattle which were trespas- which when they escaped upon the track ought, land-owner and the company, to have been

I have been favoured with a perusal of the judgment recently delivered by Mr. Justice Brooks of the Quebec Superior Court in *Morin* v. *Atlantic & North-West R. W. Co.*, and find that he takes the same view as I do of the recent sec. 194 of the Railway Act.

If the Parliament intended making such an extensive change in the law as contended for, they should have said so in plain terms and could have refrained from putting in any limitations of the right to recover.

A good deal of the language of the Judges in *Douglas* v. *Grand Trunk R. W. Co.*, 5 A. R. 585, is, I think, still applicable to the position of the plaintiff even under this new enactment.

As to the question of negligence or contributory negligence, I do not touch upon it in view of the admission made in the statement, further than to say that I gathered from Mr. Burritt's argument that the absence of negligence as conceded did not include what might be deemed negligence in not having constructed the fences, and from Mr. White's that the want of negligence on the part of the plaintiff did not include what might be deemed negligence in allowing his cattle to roam at large over the lands not belonging to him and unattended and unrestrained.

I think my proper course is to direct a non-suit under the 114th section of the Act—and a non-suit is ordered accordingly.

Supreme Court of Canada.

QUEBEC.]

HOLMES v. CARTER.

Seizure of bank shares held in trust—Onus probandi—Res judicata.

The respondent, having obtained a judgment against A.M., served a writ of *saisie arret* upon the Molsons' Bank. The bank through its manager declared they had 115 shares of their capital stock and the dividends accrued thereon since 1879 standing in the name of A. M. in trust for E. A. M. *et al.* E. A. M. intervened and claimed that the shares were her property, and that the seizure should be set aside. The respondent contested the intervention, contending that the shares had been purchased with the moneys of A.M., and so placed in trust to prevent his creditors having any remedy against these shares; and, moreover, pleaded *res judicata*, the Privy Council having already decided that the dividends on a certain number of the shares seized and standing in the same account *in trust* were not the property of E. A. M. *et al.*

The evidence at the trial established that E. A. M. was the wife, duly separated as to property, of A.M., and that she had means of her own, and that the shares in question had been originally purchased by A.M. as her duly authorized agent. There was no evidence to prove that the shares had been purchased with A. M.'s moneys. The decision of the Privy Council was that E. A. M. had no right to claim the dividends on 33 shares under the will of the late Hon. W. Molson, nor to rank on her husband's estate as a creditor on the ground of insolvency.

Held, reversing the judgment of the Court of Queen's Bench, that the shares seized being held by the bank in trust for E. A. M. *et al.*, the onus of proof was on the respondent to

show that the shares had been purchased with A. M.'s moneys when insolvent.

Sweeny v. *Bank of Montreal*, 12 App. Cas. 617, followed.

2. That as the appellant in the case which was decided by the Privy Council had only claimed the dividends of other shares as forming part of an estate in which she was interested as substitute, and as she now claimed the corpus and dividends of these 115 shares as her own property, the plea of *res judicata* was not available to the respondent: Art. 1241, C.C.

Laflamme, Q.C., and *Robertson*, Q.C., for the appellants.

H. Abbott, Q.C., for the respondent.

CANADIAN PACIFIC R. W. Co. v. COLLEGE OF STE. THERESE.

Expropriation of land—Order by Judge in Chambers as to moneys deposited—Not appealable—R. S. C. c. 135, s. 28.—42 V. c. 9, s. 9, s-s. 31.—Persona designata.

The College of Ste. Therese having petitioned for an order for payment to them of a sum of $4,000 deposited by the appellants as security for land taken for railway purposes, a Judge of the Superior Court in Chambers after formal answer and hearing of the parties granted the order under 42 V. c. 9, s. 9, s-s. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal side) and that Court affirmed the decision of the Judge of the Superior Court. On appeal to the Supreme Court of Canada it was

Held, that, as the proceedings had not originated in the Supreme Court of the Province of Quebec, the case was not appealable. R. S. C. c. 135, s. 28.

2. That the Judge of the Superior Court when he made the order in question acted as *persona designata*.

Appeal quashed with costs.

H. Abbott, Q.C., and *A. Ferguson*, for the appellants.

Pagnuelo, Q.C., for the respondents.

THOMPSON v. MOLSONS' BANK.

id banking—The Banking Act, R. S. C. c. 120, ss. 52 et seq.—house receipts—Parol agreement as to surplus—Effect of—Locus i—Art. 1031, C.C.

Molsons' Bank took from one H. several warehouse as collateral security for commercial paper discounted ordinary course of business, and, having a surplus from of the goods represented by the receipts after paying the which they were immediately pledged, claimed under a reement to hold that surplus in payment of other debts [., who had become insolvent. T., the appellant, brought n, under Art. 1031, C.C., against the bank claiming surplus must be distributed ratably among the creditors . He was a member of the firm of H. & H., who were es to the suit.

affirming the judgment of the Courts below, that the eement was not contrary to the provisions of the Bank- R. S. C. c. 120, ss. 52 *et seq.*, and that after the goods fully sold, the money that remained after applying the of each sale to its proper note, was simply money held se of H. subject to the terms of the parol agreement; C.J., doubting, and FOURNIER, J., dissenting.

SCHEREAU, J.—That H. & H. ought to have been made the suit.

n, Q.C., and *Falconer*, for the appellant.
ott, Q.C., for the respondents.

CHANGE BANK OF CANADA v. GILMAN.

C.P.—Retraxit—Subsequent action—Document not proved at admissible on appeal—Lis pendens and res judicata, pleas of.

change Bank of Canada in an action they instituted . filed a withdrawal of a part of their demand in open erving their right to institute a subsequent action for at so withdrawn. The Court acted on this retraxit, judgment for the balance. This judgment was not against. In a subsequent action for the amount so

Held, reversing the judgment of the Court below, that the Provisions of Art. 451, C.C.P., are applicable to a withdrawal made outside and without the interference of the Court, and cannot affect the validity of a withdrawal made in open Court, and with its permission.

2. That it was too late in the second action to question the validity of the retraxit upon which the Court had in the first action acted and rendered a final judgment.

3. That a document relied on in the Court of Queen's Bench, not proved at the trial, as setting aside the final judgment rendered in the first action, could not be relied on or made part of the case in appeal.

Montreal L. & H. Co. v. *Fauteux*, 3 S. C. R. 433, and *Lyonnais* v. *Molsons' Bank*, 10 S. C. R. 527, followed.

4. That under the circumstances the defendant's pleas of *lis pendens* and of *res judicata* could not be maintained.

MacMaster, Q.C., for the appellant.
Gilman, for the respondents.

MITCHELL v. HOLLAND.

Art. 19, C.C.P.—Right of suit by trustees.—Promissory notes given as collateral—Prescription of notes will not prescribe the debt.

The appellant, who, as trustee for certain creditors of a certain commercial firm of Robert Mitchell & Sons, sued the respondent alleging a transfer to him by notarial deed dated the 1st December, 1877, by John Ross Mitchell of a sum of $4,720.20 due by the respondent as and for the price of certain immovable property in the city of Montreal, sold to him by John Ross Mitchell, by notarial deed of 5th January, 1877, and registered, and also a transfer of certain promissory notes signed by the respondent for the same amount, and representing the price of sale, and which were to be in payment thereof only if paid at maturity.

The respondent was a party and intervened to the deed, and declared himself subject to the conditions therein contained.

To this action the respondent pleaded that the appellant had no action as trustee under Art. 19, C.C.P., and that the price had been paid by the two promissory notes, which were now prescribed.

Held, affirming the judgment of the Court below, that Art. 19, C.C.P., was not applicable to trustees in whom property has been vested by a registered deed and to which deed the defendant was a party.

Burland v. *Moffat*, 11 S.C.R. 76, and *Browne* v. *Pinsonneault*, 3 S.C.R. 102, distinguished.

2. That the notes in question were given merely as collateral for the price of sale of the property, and therefore the plea of prescription could not be maintained.

McCord, for the appellant.

H. Abbott, Q.C., and *Lonergan*, for the respondent.

DUFRESNE v. DIXON.

Action en nullite de decret—Registration of deed—Art. 2089, C. C.—Preference between purchasers who derive their respective titles from the same person.

D. *et. al.*, judgment creditors of one W. A. C., seized and sold a lot of land situate in the city of Montreal as belonging to his estate. This lot had originally belonged to Dame M. D., who sold it to W. A. C. *et al.*, and subsequently W. A. C., who became the registered owner of the lot, re-assigned it to Dame M. D. The property was occupied by Dame M. D. through her tenant at the time of the seizure.

The sheriff's sale took place on the 3rd October, 1884. Dame M. D. registered her deed of re-assignment on the 28th November, 1884, and on the 4th May, 1885, the purchasers registered their deed of purchase.

The respondent by petition to the Superior Court prayed for the setting aside of the sheriff's decree.

Held, affirming the judgment of the Courts below, that the respondent having been for a long time in open, peaceable, and public possession of her property, and notably so at the time of

the seizure, the sheriff's seizure and sale thereof at the instance of the appellant was null as having been made *super non domino*.

2. That, notwithstanding the adjudication by the sheriff on the 3rd of October, 1884, the respondent, having registered her deed of retrocession prior to the 4th May, 1885, was entitled to the conclusions of her petition.

Pagnuelo, Q.C., and *Geoffrion*, Q.C., for the appellant.
Lacoste, Q.C., and *Grenier*, for the respondent.

NEW BRUNSWICK.] [14TH JUNE, 1889.

MILLER v. STEPHENSON.

Goods sold and delivered—Evidence—To whom credit given—Direction to jury—Withdrawal of evidence from jury—New trial.

In an action against McK. and M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants and on their credit, and his evidence was corroborated by the defendant McK. The defence showed that the goods were charged in the plaintiff's books to C. McK. & Co. (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, and that the notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co.

The trial Judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say as to whom credit was given for the goods.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the case was properly left to the jury, and a new trial was refused.

Weldon, Q.C., and *C. A. Palmer*, for the appellant.
McLeod, Q.C., and *A. S. White*, for the respondent.

CANADIAN PACIFIC R. W. CO. v. WESTERN UNION TELEGRAPH CO.

Foreign company—Telegraph company incorporated in the United States—Power to operate line in Canada—Sole right of operating over line of Canadian railway—Agreement therefor—Violation of railway charter—Restraint of trade.

In 1869 the European and North American Railway Co. entered into an agreement with the Western Union Telegraph Co., a company incorporated in the State of New York, with the right of constructing lines of telegraph and operating the same in the state, by which agreement the telegraph company was granted the exclusive right of constructing and operating for 99 years a line of telegraph over the road of the railway company from Boston, Mass., to St. John, N.B. In 1888 the latter road was operated by the New Brunswick Railway Co. under lease from the St. John and Maine Railway Co., and the Canadian Pacific Railway Co. in that year undertook to establish a telegraph line from Montreal to St. John, and run the same over that portion of the road controlled by the Western Union lying between Vanceboro', Maine, and St. John. The Supreme Court of New Brunswick sitting in Equity granted a perpetual injunction restraining the Canadian Pacific Railway Co. and New Brunswick Railway Co. from interfering with their exclusive right in building the line. On appeal to the Supreme Court of Canada from the decree ordering the issue of such injunction;

Held, GWYNNE, J., dissenting, that the fact of the company being a foreign corporation empowered by its charter to construct and operate telegraph lines in a foreign country did not prevent it from enforcing the agreement for an exclusive right of operating such lines in Canada, and the injunction should be maintained.

Per GWYNNE, J.—That such a power vested in a foreign corporation might be very prejudicial to the interest of the inhabitants of Canada, and should not be recognized nor given effect to in the Courts of this country.

Held, also, that the agreement with the telegraph company did not create a monopoly in favour of that company and was not an agreement in restraint of trade and commerce.

Weldon, Q.C., and *A. Ferguson*, for the appellants.

Hector Cameron, Q.C., and *Barker*, Q.C., for the respondents.

BRITISH COLUMBIA.]

WALKEM v. HIGGINS.

Libel—Innuendo—Damages—Unnecessary appeal—New trial.

W., a Judge of the Supreme Court of British Columbia, and formerly a premier of the Province, brought an action against H., editor of a newspaper published in Victoria, B.C., for publishing in such paper the following article, alleged by W. to be libellous, copied from an Ottawa paper:

"THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee, defendant in the suit of McKenna v. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership (in the dry-dock contract) out in British Columbia, one of them was the premier of the Province.' The premier of the Province at the time referred to was the Hon. Mr. Walkem, now a Judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue: but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded."

The innuendoes alleged to be contained in this article were, shortly, that W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money; that he did so under cloak of his public position, and by fraudulently pretending that he acted in the interest of the Government; that he committed criminal offences punishable by law; and that he continued to hold his interest in the contract after his elevation to the bench.

On the trial a verdict was found for the plaintiff with $2,500 damages, and the defendant obtained from the full Court two rules *nisi*, one for leave to enter a nonsuit or judgment for him, and the other to have the judgment entered on the verdict set aside and a new trial ordered. Both rules were discharged, and the defendant by order of a Judge of the Court below brought two appeals to the Supreme Court of Canada.

iat, though the article was libellous, it was incapable
innuendoes attributed to it, and the consideration of
endoes should have been distinctly withdrawn from the
h was not done.

ıONG, FOURNIER, TASCHEREAU, and GWYNNE, JJ., that
e case was improperly left to the jury, yet the defen-
red no prejudice thereby, other than that of excessive
and the verdict should stand on the plaintiff's filing
to have the damages reduced to $500.

:CHIE, C.J., that there had been a mis-trial, and in
,void a new trial, the consent of both parties to the
of damages was necessary.

YNNE, J., that two appeals were not necessary, and in
the appeal on the rule for leave to enter a nonsuit
dismissed with costs, and only one bill of costs should

her Robinson, Q.C., and *Bodwell*, for the appellant.
lake, Q.C., and *Gormully*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[12TH OCTOBER, 1889.

FINCH v. GILRAY.

l tenant—Payment of taxes by tenant—Rent—Tenant acquiring possession—Real Property Limitation Act—R. S. O. c. 3, s. 5, cknowledgment of barred debt.

t agreed to pay for certain premises six dollars a
l taxes, and for some eighteen years remained in
paying the taxes to the municipality and paying noth-

The tenant after the expiration of this period gave to his landlord an acknowledgment of indebtedness for rent for the whole period.

Held, that the payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable for rent accruing after the expiration of the statutory period by giving to the landlord an acknowledgmemt of indebtedness in respect of it.

Judgment of the Queen's Bench Division reversed, and that of STREET, J., at the trial restored. See 16 O. R. 393.

J. B. Clarke, for the appellant.

W. M. Douglas, for the respondent.

BOYD, C.]

In re HARVEY AND PARKDALE.

Municipal corporations—Expropriation of one foot strip of land across street —Quantum of damages—Local improvements.

H. & M., the owners of a block of land in Parkdale, laid it out in building lots, dedicating as a street, called D. street, a portion of it running through it from a street on the east to within one foot of its west limit, the one foot being reserved, because at that time W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. street through to the next street to the west. Subsequently W. laid out his land in building lots dedicating as a street, also called D. street, a portion of it running, (in the same line as the portion dedicated by H. and M.), through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the strip reserved by H. and M. Subsequently H. and M. sold all their land except the one foot strip and afterwards the municipal corporation expropriated the two strips to make D. street a thoroughfare, and H. and M. were allowed merely nominal damages for their strip.

Held, BURTON, J. A., dissenting, that this was right, there being no evidence that the property had any market value in the

hands of the owners, or was worth anything except for the purpose of opening the street, or that it was capable of being put to any other use whatever. The higher price that H. and M. might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be willing to give to have the obstruction removed, could not be considered as an element in fixing the damages.

Per OSLER, J. A.—Where works are done under the Local Improvement clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the application of the same principles, as in cases where the corporation are not acting under those clauses, and this whether the corporation initiate the proceedings or are put in motion by the petition of the parties who desire the improvement to be made. There is nothing to justify the notion that in the latter case more is to be paid for the work than if the cost had to be borne by the corporation.

Judgment of BOYD, C., 16 O. R. 372, affirmed.

Mowat, Q.C., A.-G., for the appellants.

J. H. Macdonald, Q.C., and *C. R. W. Biggar*, for the respondents.

STREET, J.] [29TH JUNE, 1889.

McDONALD v. JOHNSTON.

New trial—Trial without a jury—Rejection of evidence.

THIS was an appeal by the plaintiff from the judgment of STREET, J.

The action was brought to set aside a conveyance made by the plaintiff in favour of the defendant, and in the statement of claim it was charged that the conveyance in question was never executed or delivered by the plaintiff, but that the alleged execution thereof was obtained by the defendant's fraud, and that the plaintiff signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. There was also a general charge that the execution of the conveyance had been obtained by the fraud and undue influence of the defendant, but there were no specific allegations as to the

nature of the fraud or undue influence. The statement of defence was a mere general denial of the allegations set out in the statement of claim. At the trial the plaintiff tendered evidence as to the defendant having induced him to drink to excess about the time of the transaction in question, as to the plaintiff's want of education or business capacity, and other evidence of that nature, and also evidence as to the position of the wife's estate and as to transactions between the parties in connection with it, but the learned Judge ruled that this evidence could not be introduced under the general allegations contained in the statement of claim, and at the end of the case gave judgment in favour of the defendant.

The plaintiff appealed, and the appeal came on to be heard before this Court on the 23rd and 27th of May, 1889.

Moss, Q.C., and *R. G. Code*, for the appellant.

J. H. Macdonald, Q.C., for the respondent.

THE COURT was of opinion that the exclusion of evidence had been pushed too far, and that for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties which could throw any light on conduct or motive, and they ordered a new trial; costs to abide the final result; each party having leave to amend.

C. C. ELGIN.] [12TH OCTOBER, 1889.

McINTYRE v. HOCKIN.

Master and servant—Wrongful dismissal—Condonation—Province of jury.

In an action for damages for wrongful dismissal, tried with a jury, it is for the Judge to say whether the alleged facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

If good cause for dismissal exists it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient. When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to

justify dismissal, he cannot retain him in his employment and afterwards, at any distance of time, turn him away for that fault without anything new, but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offences may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury if in the opinion of the Judge there is any evidence of it to be laid before them.

Judgment of the Court below affirmed.

Moss, Q.C., for the appellant.

J. M. Glenn, for the respondents.

C. C. MIDDLESEX.]

ROBB v. MURRAY.

County Court—Jurisdiction—Claim over $200—Liquidated or ascertained amount—R. S. O. c. 47, s. 19, s-s. 2.

Pending negotiations for the sale by the plaintiff to the defendant of a certain business as a going concern, the defendant entered into possession, made sales, and received moneys, entering the receipts in a cash book. The negotiations fell through and the plaintiff brought this action in the County Court to recover "$271.03 the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff's shop, as follows:" setting forth the sums received on each day by the defendant.

Held, that this sum was not ascertained by its receipt by the defendant, and the bringing of the action by the plaintiff for the sum so received. The increased jurisdiction applies only in the comparatively plain and simple cases where, by the act of the parties or the signature of the defendant, the amount is liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant, or contract between them; such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them.

Judgment of the Court below affirmed.

Magee, for the appellant.

R. M. Meredith, for the respondent.

In re LONDON SPEAKER PRINTING COMPANY.

PEARCE'S CASE.

C. C. YORK.]

In re SPEIGHT MANUFACTURING COMPANY.

BOULTBEE'S CASE.

Company—Subscription before incorporation—Allotment—Ontario Joint Stock Companies Letters Patent Act—R. S. O. c. 157, s. 2, s.-s. 6—Contributory—Ontario Winding-up Act—R. S. O. c. 183.

P. signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock Companies Letters Patent Act.

B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated.

P. and B. were not corporators named in the letters patent and no shares were in fact ever alloted to them, but they were entered in the books as shareholders, and notices of meetings and demands for payment of calls were sent to them, and in winding-up proceedings they were placed on the list of contributories.

Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as without more to make P. and B. liable as contributories.

In re Queen City Refining Co., 10 O. R. 264, explained. Orders of the Courts below reversed.

A. O. Jeffery, for the appellant Pearce.

H. J. Scott, Q.C., for the appellant Boultbee.

Duncan MacMillan, for the liquidator of the Speaker Printing Company.

W. D. Gregory, for the liquidator of the Speight Manufacturing Company.

SURR. C. PEEL.] [18TH OCTOBER, 1889.

LINFOOT v. LINFOOT.

Infants—Guardian—R. S. O. c. 137, s. 10.

A contest arose as to the guardianship of two children of William France Linfoot, deceased, between the step-mother of

n and their uncle, and the Judge of the Surrogate
eel appointed the uncle guardian, holding that he was
) do under the authority of *In re Irwin*, 16 Gr. 461,
e was personally of opinion that it would be better for
1 that the step-mother should be their guardian.
-mother appealed and the appeal came on to be heard
Court on the 18th October, 1889.

in, for the appellant.
dham, for the respondent.

RT allowed the appeal, holding that the Judge had
exercise a discretion in appointing a guardian, and
into consideration what was most likely to promote
efit of the infants, and was not bound to appoint the
eference to the step-mother. The matter was refer-
the Judge; the costs of the appeal to be disposed of

WENTWORTH.] [MACLENNAN, J.A., 21ST SEPTEMBER, 1889.

HAY v. BURKE.

—Notice of dishonour—To what place to be addressed—Place designated under signature—R. S. C. c. 123, s. 5.

is intended to designate under the provisions of
.23, s. 5, a place to which notice of dishonour may
r than the place at which the bill or note is dated.
it if the name of a place is written under or beneath
e of the party. "Under his signature" does not
ie name of the place must be written by the party's
it may be written by another person if that other
n any manner any kind of authority from the party

place has been so designated the holder of the
may send notice to the party at that place, even if
n to think, or even know, that that place is not the
of residence or place of business.

. *Boyle*, 6 S. C. R. 165, considered and applied.
of the Court below affirmed.

, Q.C., for the appellant.
r the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 22nd June, 1889.

LOUIS ROUTHIER v. McLAURIN.

Malicious prosecution—Reasonable and probable cause — Information for assault—Justification of assault—Misdirection—New trial.

The defendant laid an information against the plaintiff for assault, which the magistrate dismissed on the ground that the title to land came in question. It appeared that the defendant had come upon land, of which the plaintiff's father was in actual possession, for the purpose of removing some wood, so as to give possession to one to whom he had assumed to sell the land. There was a scuffle, and the defendant was put off the premises.

At the trial of this action, brought for malicious prosecution, there was contradictory evidence as to what part the plaintiff took in the scuffle and whether he laid hands on the defendant.

The trial Judge asked the jury to say whether the plaintiff made an assault on the defendant on the occasion, and told them that if they answered "yes," they need not go any further, for that would end the case. They answered "yes," and judgment was entered for the defendant.

Held, that there was misdirection; the answer was not decisive of the question whether there was reasonable and probable cause for laying the information; and the plaintiff was entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong. A new trial was ordered.

Hinton v. *Heather*, 14 M. & W. 131, followed.

Sutton v. *Johnstone*, 1 T. R. 493, distinguished.

Watson, for the plaintiff.

Shepley, for the defendant.

[GALT, C.J., 18TH OCTOBER, 1889.

In re COOKE AND VILLAGE OF NORWICH.

l corporations—By-law for contracting debt—Bonus to manufactory—ntures not payable within 20 years—Municipal act, R. S. O. c. 184 340, 334, 351, 352.—Time for moving to quash—Promulgation of w—Registry of by-law.

on to make absolute an order *nisi*, obtained and served on h September, 1889, to quash a by-law of the village of h, to raise the sum of $1,700 by way of bonus, to aid an y in the village.

by-law was finally passed by the council, after having ted on by the electors, on the 3rd June, 1889, and was gated on the 20th June, 1889. It was registered on the igust, 1889.

by-law stated on its face that it was to come into force on July, 1889, and authorized the issue of three debentures twenty years after the date of issue, and provided that e of issue should be the 1st October, 1889.

, that the period of payment exceeded twenty years, and law was therefore in contravention of s. 340, s.-s. 2, of nicipal Act, R. S. O. c. 184, and should be quashed.

, also, that this by-law was not a by-law by which a rate posed, and was therefore not subject to the provisions of of the Act, requiring an application to quash to be made three months from promulgation; but was a by-law for ting a debt, and was therefore subject to the provisions of and 352, requiring an application to quash to be made three months from the registry of the by-law, and this tion was therefore in time.

. *Holman*, for the applicant.

worth, for the township.

[FALCONBRIDGE, J., 9TH SEPTEMBER, 1889.

RMSTRONG AND THE TOWNSHIP OF TORONTO.

al corporations—By-law in aid of harbour works—Raising money by —Time of repayment uncertain—R. S. O. c. 184, s. 340, s.-s. 2; 93, s.-s. 1—Submitting by-law to electors—Day fixed for taking votes lotion to quash—Applicant voting against by-law not estopped—ts.

ion 340 of the Municipal Act, R. S. O. c. 184, which izes municipal councils to pass by-laws for contracting

debts, etc., provides, s.-s. 2, that the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect.

A by-law of a municipality to raise by way of loan $3,000, to aid in repairing harbour works, provided that the debentures should be made payable annually, the first payment to be made on the 15th day of December in the year next succeeding the year in which the "repairs will have been completed."

Held, that, as the time of repayment was uncertain, the by-law was not in accordance with s. 340, s.-s. 2, and was therefore illegal and should be quashed.

Semble, also, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to s. 298, s.-s. 1, of the Act.

Held, also, that the applicant had not by voting *against* the by-law disentitled himself to apply to the Court to quash it, or to the costs of his motion.

E. G. Graham, for the applicant.

Beynon, Q.C., and *Ritchie*, Q.C., *contra*.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 10TH JUNE, 1889.

MASON v. BERTRAM.

Master and servant—Workmen's Compensation for Injuries Act—Lord Campbell's Act—Damages—Death from accident—Reasonable expectation of benefit from life of deceased—Notice of action.

The plaintiff's son had grown up and was intending to study to be a doctor, in which course the plaintiff intended to aid him by furnishing the necessary moneys. Just before he commenced such course he entered the employment of the defendants in their machine shop, and was injured by the falling of some iron lathes, from the effect of which he died. In an action by his father as administrator,

Held, that, under the circumstances, the plaintiff could have no reasonable expectation of benefit from the son's life, and that

rdict obtained at the trial should be set aside and a non-
ıtered.

ıotice of action under the Workmen's Compensation for
es Act does not require to be signed or to be given on
of any one.

r, Q.C., for the defendants.
Lynch-Staunton, for the plaintiff.

[12TH JUNE, 1889.

In re WALLIS AND VOKES.

*ic's lien—Prior conveyance—Notice of lien to purchaser—Validity of
n—Proceedings to realize—Summary application to discharge.*

as the owner of a lot upon which he was building four
, and W. was his plumbing contractor, doing the work on
specified sum for each house. He commenced his work
tember, 1887, and finished about May, 1888. V. was the
ctor for the brick work, and as such was on the premises
me to time while the work was going on, and was not paid
V. purchased one of the houses, which was conveyed to
S. by deed dated 1st December, 1887, and registered 20th
ry, 1888. On 24th February, 1888, W. registered his
the property. Both V. and W. alleged that each knew
g of the other's transaction.

ERTSON, J., held, affirming the Master in Chambers, that
notice of W.'s claim, and that his summary application
W.'s lien discharged must be dismissed with costs.

ıppeal the two Judges composing a Divisional Court
in opinion.

ROUDFOOT, J.—A lien should be registered against any
ose rights are acquired during the progress of the work,
ıot so registered it becomes absolutely void unless pro-
s are taken to realize within thirty days. No proceedings
ken within that time by W., and the lien, not being
ed against the subsequent owner, ceased to be a lien

s v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 18 A. R. 1,
1.

ERGUSON, J.—The real question is not whether there
alid registration of the lien, but whether the judgment of

Robertson, J., affirming the refusal of the Master to discharge the lien on a summary application, was right. The Master was justified in so refusing.

Wanty v. *Robins*, 15 O. R. 474, referred to.

George Macdonald, for the appeal.

Masten, contra.

McINTYRE v. EAST WILLIAMS MUTUAL FIRE INSURANCE CO.

Insurance—Fire—Further insurance without consent—Notice to first company —Payment of assessments—Estoppel—Damages—Amount of judgment.

The plaintiff on 1st February, 1886, insured with the defendants for $1,000. He changed his mortgage on the insured property from one loan company to another, and the latter refused to accept the defendants' mutual policy, and insured in the L. Assurance Co. for the same amount, and notified the plaintiff by letter, who, in December, 1886, showed the letter to the defendants' secretary-treasurer, and was then told it was all right, and that there was nothing further necessary for him to do. The plaintiff paid the defendants' assessments in December, 1886, and March, 1887. A fire occurred on the 30th June, 1887, and the loss was $2,200. The defendants' by-laws provided that they should not pay more than two-thirds of the actual loss sustained, and that not more than $2,000 would be taken in one risk. The L. Assurance Co. paid their $1,000.

Held, that the showing of the letter to the secretary-treasurer did not fulfil the requirements of the statute R. S. O. 1877, c. 161, s. 40, so as to charge the defendants.

Held, also, that the receipt of assessments by the defendants after the officer was aware of the other insurance operated an estoppel on the company, and must be treated as an exercise of the directors' option to treat the policy as valid.

Held, also, affirming FALCONBRIDGE, J., that the proper way to arrive at the damages was first to deduct the $1,000 paid by the L. Assurance Co. from the $2,200 amount of the loss, and then take two-thirds of the remaining $1,200, making the judgment $800.

R. M. Meredith and *W. Nesbitt*, for the plaintiffs.

W. R. Meredith, Q.C., for the defendants.

JAMTANCE v. TOWNSHIP OF HOWARD.

orporations—Agreement subject to passing of a by-law not executed oration—Work done under it—Mandamus to raise the money— :ate of engineer—New trial.

ıintiff entered into an agreement in writing with the ts to do certain work. The agreement contained this ' Notwithstanding anything hereinbefore contained to rary, this agreement * * is made subject to the sing * of the said by-law * * and in the event ıid by-law not being passed * * then this agreement null and void * *"

ə trial it was proved that the by-law was never finally and the agreement was produced to prevent the plaintiff ng as on a *quantum meruit*.

reversing the judgment of FERGUSON, J., that the defen- vere bound by the contract; the stipulation as to the ent, being subject to the final passing of the by-law, must a reasonable construction; the defendants' right to refuse s the by-law must be confined to the case where the ff has not performed his work properly. The plaintiff, on ıg he had complied with the terms of the contract, was ıd to a *mandamus* to compel the defendants to raise money y him; but as he neglected to furnish a preliminary cate of an engineer, a new trial was granted to enable him do.

ıglas, Q.C., for the plaintiff.

lesworth, for the defendants.

[6TH SEPTEMBER, 1889.

JOHNSTON v. DENMAN.

Will—Devise—Legacies charged on real estate.

he testator, after giving certain pecuniary legacies and a ıe to two of his children until they come of age, proceeded as ows: "And I will and bequeath unto my daughter C. J. all real estate and the remainder of my personal estate after the ve legacies are paid."

Held, affirming ROBERTSON, J., that the legacies were charged on the real estate.

Idington, Q.C., for the plaintiff.

Shepley, for the infant defendant.

[12TH SEPTEMBER, 1889.

ROBLIN v. McMAHON.

Statute of Limitations—Acknowledgment—Depositions in another action—21 Jac. 1 c. 16.—R. S. O. c. 123, s. 1.

In an action for a debt incurred more than six years before the writ issued, two documents were relied on as constituting such acknowledgment as stopped the running of the Statute of Limitations. One was a letter from the defendant, in which he said: "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up, which will not be before the last of March, or the beginning of April."

The other was a part of the examination of the defendant in a certain other action, brought for the administration of the son's estate, the examination being in reference to a claim set up by the defendant against the estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff, who was an executor, for it. There was evidence also that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim.

Held, affirming the decision of FALCONBRIDGE, J., that the letter was a sufficient acknowledgment under the statute; and meant that on the son's estate being wound up the defendant would pay; and the estate having been wound up, anything conditional in the letter had been ascertained.

Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action.

Masten, for the plaintiff.

C. J. Holman, for the defendant.

REYNOLDS v. JAMIESON.

Breach of promise of marriage—Action for—Non-suit—Repudiation—Release by promisee.

In an action for breach of promise of marriage, the plaintiff set up a promise to marry in October, 1885, and a repudiation of it by the defendant in March, 1886. The promise was duly

the evidence of the plaintiff was that in March, efendant visited her and said to her: "I never asked y, or came to marry you. I never was promised to reupon she got vexed at him and ordered him out of that he wanted the engagement renewed, and she consent to it. The trial Judge non-suited the plaintiff und that this amounted to an absolute release, and lationship between the parties was terminated.

owever, that the matter was one which should have o the jury; that there was evidence of the defendant oken the contract before the interview of March, 1886, plaintiff's action was one of the consequences flowing t breach; the jury might have reasoned that the chose to consider the connection between them at an defendant having previously violated his engagement, she was not willing to subject herself to the pain and ation of being again deceived; and there must be a new

. *Edwards*, for the plaintiff.
l. Douglas, for the defendant.

[BOYD, C., 11TH SEPTEMBER, 1889.

AUGUSTINE v. SCHREIER.

Will—Construction—Specific bequests—"Home"—Maintenance.

estator bequeathed to his daughter "a home as long as she remain single" in his dwelling house.

ld, that though in the case of an infant, "home" would ably include maintenance, yet that the legatee in this case g of age, and there being no express words giving her itenance after minority, she was not entitled to maintenance er the above bequest.

he testator also bequeathed to his wife "the full control of my real and personal estate, stock, and implements, during lifetime;" and willed that at his wife's decease "all the ck of whatever kind, with the farming implements on the m, at my wife's decease, shall be equally divided between my ns."

Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies.

Hoyles, for the plaintiff.

Moss, Q.C., *J. M. Clark*, and *W. D. McPherson*, for the adult defendants.

J. Hoskin, Q.C., for the infant defendants.

[25TH SEPTEMBER, 1889.

In re CHANDLER AND CHASE.

Will—Construction—Life estate—Remainder to sons—Rule in Shelley's case.

Vendor and Purchaser application.

A will contained the following clause: "To my son G. W. I give and bequeath during his lifetime the south-east quarter of said lot 4, before mentioned, and at his death to go to, and be vested in, his son W. C., or in case other sons should be born to my son G. W., then to be equally divided between all of the boys."

Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons as a class, which would let in all born before his death.

Atkinson, Q.C., for the vendor.

C. J. Holman, for the purchaser.

REDICK v. SKELTON.

Arbitration and award—Publication, what is—Right of arbitrators to declare lien.

Motion to continue an injunction.

Held, that an award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published.

ors, upon a reference to settle disputes between ound the balance due from the firm to one of the and that this balance was a lien upon the assets, to t of them specifically.

iat they had the power to give this direction, and the ı question had power to sell to satisfy that lien out of ic property applicable, of which he was joint owner.

Iolman, for the applicant.

Marsh, contra.

[26TH SEPTEMBER, 1889.

In re HAMILTON.

nstruction—Devise to one for life, then to issue in fee simple—Rule in Shelley's case.

lor and purchaser petition.

stator devised lands to his daughter, "to her own use for l term of her natural life, and from and after her decease lawful issue of my said daughter to hold in fee simple."

ı daughter contracted to convey in fee simple to a pur- r.

ld, that the Court would refrain from making any order on etition, for that the law on this head seemed to be in a of uncertainty, if not of transition, and any experiment had r be made in a contested case when all parties interested ı represented.

mble, that the direction that the issue should hold the perty in fee simple appeared incompatible with an estate tail he mother.

Shepley, for the vendor.

In re NORTHCOTE.

Will—Construction—Devise—Restraint on alienation.

After a devise of certain land to his son C., his heirs and ssigns for ever, a testator added that his devise to C. was sub- ect to this express condition that he should not sell or mortgage

the land during his life, but with power to devise the same to his children as he might think fit, in such way as he might devise.

Held, that the case was governed by *In re Winstanley*, 6 O. R. 315; and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple, with, however, a valid prohibition against selling or mortgaging it during his life.

J. R. Roaf, for the purchaser.

J. M. Clark, for the vendor.

[2ND OCTOBER, 1889.

SANDERSON v. ASHFIELD.

Costs—Action for price of work—Inferiority of work—Not subject of set-off or counter-claim.

The plaintiff claimed $1,205, the balance of the contract price for work done, and the defendant claimed that by reason of imperfect work the balance should be reduced by $900. The defendant was allowed $266.54 in respect of his claim for reduction, and the plaintiff therefore recovered $938.46.

Held, that what the defendant claimed was neither a set-off nor a counter-claim; and, as the plaintiff had substantially succeeded, he should get the general costs of the action and reference, less the costs incurred by the defendant in establishing the items of improper work on which he succeeded.

Cutler v. *Morse*, 12 P. R. 594, followed.

John Greer, for the plaintiff.

Walter Read, for the defendant.

[10TH OCTOBER, 1889.

In re CLARKE AND CHAMBERLAIN.

Vendor and purchaser—Objections to title—Discharges of mortgages—Numbering in Registry office—Name of mortgagee—Grant to "party of third part"—No party of third part to deed.

Upon a petition under the V. & P. Act the Court was asked to pronounce upon certain objections to title.

ge registered as 5,674, C. W., was discharged in the ce by virtue of an instrument which referred to it ,674, omitting the letters. The mortgage was in of the mortgagor, marked "discharged," and so ap- ıe Registry office.

ıt the statute had been complied with, and that there discharge.

discharge was signed by Eliza Switzer, whereas the she purported to discharge was made to Elizabeth

ıat the maxim "*omnia rite esse acta*" applied, the the person signing being established by affidavit to ıction of the Registrar of Deeds, and the names being ıus or interchangeable.

Peerage, 6 Cl. & Fin. 80; Bacon Abr. V. p. 598, o.

ınveyance the grant was made to "the said party of the t," there being no party of the third part in fact to the e, and it not being executed by the party of the second o was intended as the grantee.

that taking the deed *per se* it was uncertain as regarded ıtee, and an objection raised to it was valid, though it ily removable.

v. *Whitbread*, 11 C. B. 406; *Newton* v. *McKay*, 29 Mich. red to.

. *Clarke*, vendor in person.

M. *Clark*, for the purchaser.

[FERGUSON, J., 29TH AUGUST, 1889.

OF KINGSTON v. CANADA LIFE ASSURANCE CO.

ment and taxes—Insurance company—Head office and branch office—leaning of "branch" or "place of business" in Assessment Act—lssessment of income at branch office.

ıe defendants were a life assurance company, with their head e in H., and transacted business by agents in K., where they ived applications for insurances, which they forwarded to the d office, from which all policies issued ready for delivery. e premiums were collected in K.

In an action by the corporation of the city of K. to recover taxes assessed against the defendants on income, in which the defendants contended that they had no place of business in K., that their only place of business was in H., and that their business was of such a nature that they could not be assessed at K., but might elect, and in fact had elected, under R. S. O. c. 193, s. 35, s.-s. 2, to be assessed at H. on their whole income, and were consequently not liable to the plaintiffs, it was

Held, that the defendants had a branch or place of business at K.; that as the evidence was that the agent at K. could show each year the gross amount of his receipts; and, as the words "gross income" were used in the statute, the amount of premiums received year by year at K. was assessable at that branch or agency; and that the plaintiffs were entitled to succeed.

Walkem, Q.C., and *Agnew*, for the plaintiffs.

Bruce, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[In Banc, 7th September, 1889.

REGINA v. VERRAL.

Municipal corporations—By-law against soliciting baggage—Summary conviction under—Baggage transfer company—Employee going through trains for baggage under agreement with railway company—Evidence—Ultra vires.

A by-law of the city of Toronto prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing or allowing any runner or other person to assist or act in concert with him in soliciting any passenger or baggage at any of the "stands, railway stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. C., an employee of a baggage transfer company, boarded an arriving railway passenger train at one of the city stations on its way to the Union Station, and went through the cars calling out

nsferred to all parts of the city," and having in his ber of the transfer company's checks. No baggage the time. C. was continually doing this, and it e his sole duty. C. acted under instructions from company, who had an agreement therefor with the pany.

there was no breach of the by-law, but merely the t of the transfer company's agreement with the pany; and further, that the railway train did not the description of any of the places mentioned in and a summary conviction under the by-law was

, J.—If the by-law had covered this case, it would *ltra vires.*

h, for the defendant.
or the complainant.

REGINA v. HENDERSON.

e Peace—Summary conviction—Carrying on "petty trade"—al by-law—R. S. O. c. 184, s. 495, s.-s. 3—Evidence.

endant, a wholesale and retail dealer in teas in the W., where he resided, went to the county of H. and y sample to private persons there, taking their orders which were forwarded by him to the county of W., and ges of teas subsequently delivered, all the packages t in one parcel to H. county, and then distributed. dant was summarily convicted under a by-law passed S. O. c. 184, s. 495, s.-s. 3, pars. (a.) and (b.), for n a petty trade without the necessary license therefor. hat the conviction could not be sustained, and must be

Tibbon, for the defendant.
e, for the complainant.

REGINA v. HIGGINS.

Canada Temperance Act—Summary conviction under—Village joined to another county for municipal purposes—Jurisdiction of Justices of the Peace of county within which village situated—Conviction differing from minute of conviction—Validity of.

The defendant was convicted by two Justices of the Peace of the district of Muskoka for a breach of the second part of the Canada Temperance Act, for selling liquor at the village of B., in the district of M. The Act was in force in the village of B., only by reason of its being for municipal purposes within the county of S., in which county the Act was in force, there being no evidence to show that the Act was in force in the district of M., within which B. was situated.

Held, that the Justices of the Peace of the M. district had no jurisdiction to convict the defendant, for he could only be convicted by Justices of the Peace whose commissions were for the county of S.

The adjudication and minute of conviction did not award distress, but provided, in default of payment forthwith of fine and costs, for imprisonment; while the conviction ordered that in default of payment forthwith there should be distress, and, in default of sufficient distress, imprisonment.

Held, following *Regina* v. *Kennedy*, 12 O. R. 358, 360, 361, that the conviction was bad on this ground.

Aylesworth, for the defendant.

Delamere, for the complainant.

[THE DIVISIONAL COURT, 29TH JUNE, 1889.

DABY v. GEHL.

Execution—Division Court judgment—Transcript to District Court—Issuing fi. fa. lands without fi. fa. goods—Sale under expired writ—Sale after return of fi. fa. lands under ordinary fi. fa. instead of alias fi. fa.—Estoppel—Payment.

A transcript of a Division Court judgment was obtained to the District Court of the Thunder Bay District.

Held, that it was not necessary to issue a *fi. fa.* goods from such District Court before a valid sale could take place under a *fi fa.* lands issued therefrom.

e sold under a *fi. fa.* lands after the expiry of the leed was executed by the sheriff. The deed recited had been duly renewed, but neither the sheriff's nor clerk's books showed any such renewal.

no renewal was proved, and the sale was invalid.

ıtly writs of *fi. fa.* goods and lands were issued on t, the former being returned *nulla bona*, and a sale ınder an ordinary writ of *fi. fa.* lands, and a deed the sheriff.

t the fact of an ordinary *fi. fa.* lands being issued n alias *fi. fa.* and the advertisement being as if the were initiatory proceedings towards effecting a sale dant's lands, would not of itself invalidate the sale.

he now defendant commenced an action against the ntiff and others to set aside the first sheriff's deed, lismissed for want of prosecution.

t the defendant was not thereby estopped from setting lidity of the sheriff's sale, for there was no determiıis matter and no final judgment of the Court pro- the matters now in issue.

o, that under the circumstances, the defendant could hat the proceedings under the expired writ constituted of the execution debt.

, for the plaintiff.

h, for the defendants.

CARTY v. CITY OF LONDON.

ırporations—Accident—Want of repair of street—Contract with ailway Company to keep in repair—Liability of corporation—over against Street Railway Company—Limitation of actions.

ndon Street Railway Company was incorporated by 9; by s. 18 of which the city of London were authonter into an agreement for the construction of the such of the streets as might be agreed on, and for the pairing, etc., of the same. By s. 14 the city were wered to pass by-laws to carry such agreement into d containing all necessary provisions, etc., for the

conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the Street Railway Company, who were to be liable for all damage occasioned to any person by reason of the construction, repair, or operation of the railway or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to the plaintiff by reason of such portions of the streets being out of repair, an action was brought by the plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident, on the application of the city of London, the Street Railway Company were made party defendants.

Held, that, notwithstanding the legislation, by-law, and agreement, the city were liable under s. 531 of the Municipal Act, R. S. O. c. 184, to the plaintiff for the damage he had sustained; but that the city were entitled to have a remedy over against the Street Railway Company.

Held, also, following *Anderson* v. *Canadian Pacific R. W. Co.*, *ante* p. 398, that the six months' limitation clause in the Railway Act did not apply, the question being one of contract.

Osler, Q.C., and *G. W. Marsh*, for the plaintiff.

W. R. Meredith, Q.C., for the defendants the city of London.

Robinson, Q.C., and *J. H. Flock*, for the defendants the London Street Railway Co.

SMITH v. SMITH.

Will—Life estate—Annuity—Costs—Tender—Annuity—Dower—Consolidation of mortgages.

The testator by his will made a provision for his wife as follows:—"I give and devise to my beloved wife * * all household goods * * for the term of her natural life; and I give and devise to her one bedroom and one parlour of her own choice in the dwelling-house wherein I now dwell * * also the use of the kitchen yard garden; also I give and devise to my said wife her life in the said lot heretofore mentioned; also an annuity

." He then, subject to the above and to the pay-
)0 to his eldest son D. and other legacies, devised
second son J.

stator's death the plaintiff, the widow, and J. lived
ranging between them as to her maintenance. In
money to pay D.'s legacy, the plaintiff and J.
lot to a building society, and upon default of pay-
ıortgage proceedings were taken under the power of
payment. The plaintiff set about making arrange-
)ff the mortgage, but the company refused to accept
ss the amount of two other mortgages made by J.
so paid. No tender was made by the plaintiff,
ınd made for arrears of annuity or dower. An
ought by the plaintiff to establish the will and
ghts of the building society declared.

the proper construction of the will was that the
have a life estate in the bedroom and parlour she
and also in the kitchen-yard garden, and also the
)0; and that the building society could not claim
ıortgages consolidated; and that, as the plaintiff
any tender to the building society, she could not
s, but it was directed, in lieu of her paying costs,
rs of annuity and dower should be wiped out.

and *Folinsbee*, for the plaintiff.

dith, Q.C., for the defendants the Ontario Loan
e Co.

[7TH SEPTEMBER, 1889.

OMMERCE v. BRITISH AMERICA ASS. CO.

—Statutory condition as to terminating risk—Notice of Sufficiency of—Amount of unearned premium—Tender of.

h statutory condition of fire insurance policies,
ıce may be terminated by the company by giving
effect, and, if on the cash plan, by tendering
ıtable proportion of the premium for the unexpired
ed from the termination of the notice; in the case
ervice of the notice, five days' notice, excluding
be given. Notice may be given by any company

having an agency in Ontario by registered letter addressed to the assured at his last post-office address notified to the company, and where no address notified, then to the post-office of the agency from which application was received, and where such notice is by letter, then seven days from the arrival at any post-office in Ontario shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days, as the case may be."

The defendants' agent called on A., who was insured under a policy of fire insurance in the defendants' company, and handed him a letter written by himself, stating that the company "have instructed me to cancel their policy 2,862,361, held by the Bank of Commerce, and I therefore send you herewith $13.75 for unearned premium on same."

The agent said that on handing A. the letter he took the money out of it, counted it over, and laid it down beside the letter, and when A. refused to receive the money he (the agent) said he had no alternative but to tender it. He also said that he told A. that he had, under the conditions of the policy, a limited time to replace the insurance.

Held, GALT, C. J., dissenting, that the letter was not a sufficient cancellation of the insurance within the meaning of the condition; that the condition required written notice; and such notice must state that the insurance would be cancelled on the expiration of five days, whereas here the notice was of an immediate cancellation: and also that the ratable proportion of the premiums for the unexpired term should have been calculated from the termination of the notice.

Caldwell v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212, commented on.

Quære per ROSE, J., whether the letter was anything more than a notice of the agent's instructions.

Lash, Q.C., for the plaintiffs.

Bain, Q.C., for the defendants.

[MACMAHON, J., 20TH JULY, 1889.

YOUNG v. TOWN OF RIDGETOWN.

Municipal corporations—Invalid by law—Injunction restraining acting under —Passing new valid by-law.

The municipal corporation of R. were restrained by injunction from purchasing a site for a town hall under a by-law passed

use the by-law did not provide for the levying a
and there was no money on hand for the purpose.
nction was obtained the corporation passed a new
ɜ that the validity of the existing by-law had been
ıd directing its repeal, and that their solicitors
;he Court to have proceedings stayed thereunder,
he action. The new by-law provided for the levy
ng the year to raise the money required to pur-

;he corporation, by repealing the old by-law and
›urchase of the same property under the new by-
its face, were not disobeying the injunction which
purchasing of the property under the old by-law;
for a writ of sequestration was therefore refused.
lith, Q.C., for the motion.
contra.

IN CHAMBERS.

[Boyd, C., 1st October, 1889.

In re BAKER.

nt—Taxation of bill of costs after payment, and death of -Delay in applying—Special circumstances—Terms.

sts rendered by a solicitor in October, 1888, was
terwards, but upon the undertaking of the solicitor,
ɜtters written by him, that the payment was to be
taxation of the bill at any time. The solicitor
889, and no application for taxation was made till
mber, 1889, when an *ex parte* order was obtained
ter in Chambers for taxation, the letters of the
being produced, nor any special circumstances
ı the application of the executrix of the solicitor
to set aside his *ex parte* order, the letters were

he Master was not bound to vacate his first order,
as wrong; but, there being no imputation of bad
ıt in giving leave to amend the order so as to do

substantial justice; and, notwithstanding the death of the solicitor after being paid, there was jurisdiction to order a taxation as against his representative, under the circumstances.

The application, being within the year, came under s. 46 of the Solicitors' Act, R. S. O. c. 147, and "special circumstances" to justify a taxation existed in the fact of the letters having been written by the solicitor; but the delay of the applicants and the death of the solicitor were reasons for imposing terms; and it was ordered that upon the taxation the books of the solicitor should be *prima facie* evidence of the correctness of his charges, or if the books were not available that the bill should be so taxed as to throw the onus of impeaching any charges on the applicants.

George Bell, for the executrix.

George Ritchie, for the applicants.

[8TH OCTOBER, 1889.

In re DINGMAN AND HALL.

Leave to appeal—Report of referee—Time—Judgment on further directions, effect of—Jurisdiction of Judge in Chambers and in Court.

Held, that after the report of a referee has became absolute, and a judgment on further directions founded thereon has been pronounced, drawn up, and entered, a Judge in Chambers has no jurisdiction to entertain an application for leave to appeal; nor could any appeal be entertained unless the judgment on further directions were set aside; and that could not be done even by a Judge in Court, but only by the proper appellate tribunal.

Hoyles, for Dingman.

Kilmer, for Hall.

In re RODY, RODY v. RODY.

Infants—Sale of lands—R. S. O. c. 137.

This was an application for sale of an infant's lands under R. S. O. c. 137, s. 3.

W. H. Blake, for the applicant.

J. Hoskin, Q.C., for the infants, cited *Re Caldicott*, 1 Ch. Chamb. R. 182; *Re Smith*, 6 P. R. 282; *Re Wilson*, 7 P. R. 244.

BOYD, C.—To direct a sale now is against the provisions of the will, which directs the sale to be when the son attains twenty-one; and besides, no sale is to be had if he fails to reach twenty-one and has no issue; the land is then divided between testator's brothers. There is no jurisdiction under 12 Vict.

[23RD OCTOBER, 1889.

GRAHAM v. DEVLIN.

Judgment debtor—Examination of— Unsatisfactory answers—Motion to commit—Re-examination—Evidence—Rules 928, 932.

Upon a motion to commit the defendant for unsatisfactory answers upon his examination as a judgment debtor:

Held, that the examination should not be so conducted as to try to entrap the debtor, but it should be full, fair, and searching.

2. That the broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is: Having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that full and true disclosure has been made?

3. That where the particulars wherein dissatisfaction is felt have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions or supplying what may appear to be omissions.

4. That the ordinary rules for dealing with evidence in litigated matters, where money or money's worth only is involved, are not to be applied without more to cases where the liberty of the person is at stake.

And in the present case, where the examination was protracted and ranged over a period of more than two years, during which the defendant had had two lines of business going on, he was allowed an opportunity to protect himself by explanations, upon various parts of his examination, relied upon as showing that a considerable sum of money had not been accounted for.

being brought to his notice; and having been thus further examined, and it not having been shown that he had any means available to satisfy the judgment, and his answers as a whole being reasonably satisfactory, in view of the rules above laid down, a motion to commit was refused.

History of the enactments contained in Rules 928 and 932.

Hoyles, for the plaintiff.

C. J. Holman, for the defendant.

[GALT, C.J., 27TH SEPTEMBER, 1889.

In re NOBLE v. CLINE.

Prohibition—Division Court—Territorial jurisdiction—Where cause of action arose.

The plaintiffs resided in the district of Algoma, and the defendant in the county of Wentworth. The defendant telegraphed from Wentworth an order for a ton of fish to be sent him by the plaintiffs, and the latter shipped the fish from Algoma to Wentworth. The plaintiffs sued for the price of the fish.

Held, on motion for prohibition, that the whole cause of action arose in Algoma, and a Division Court there had jurisdiction.

Cowan v. *O'Connor*, 20 Q. B. D. 640, and *Newcombe* v. *De Roos*, 2 E. & E. 271, followed.

Shepley, for the plaintiffs.

Aylesworth, for the defendant.

[7TH OCTOBER, 1889.

In re WHITAKER AND MASON.

Municipal corporations—Warrants for salary of officer—Refusal of mayor to sign—Application by officer for mandamus—Remedy by action.

An officer of a municipal corporation applied for a *mandamus* to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council.

Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a *mandamus* would not be granted at his instance.

W. H. P. Clement, for the applicant.

Aylesworth, for the mayor.

[17TH OCTOBER, 1889.

PETERS v. STONESS.

Construction—Heading—Rules 5, 1008—Summary order for sale of equitable interest in land—Reference.

he Consolidated Rules provides that "The division es into chapters, titles, and headings is for con- , and is not to affect their construction."

Rule 1008, notwithstanding the heading, "Sum- es into Fraudulent Conveyances," is not limited to able interests arising under fraudulent conveyances, o a case where a judgment creditor is seeking to le the interest of his debtor under an agreement for of land.

e was directed to ascertain what interest the debtor nd in question.

Hurl, 28 Gr. 146, not followed, owing to the change y Rule 5.

or the judgment creditor.

uglas, for the judgment debtor.

[21ST OCTOBER, 1889.

CARTY v. CITY OF LONDON.

on—Evidence taken de bene esse—Attendance of medical man —Service of subpœnas—Rule 1212.

l by the plaintiff from the rulings of one of the tax- upon taxation of the plaintiff's costs of the action.

arsh, for the appellant.

or the defendants the city of London.

r the defendants the London Street Railway Co.

J.—This is an appeal from the decision of the taxing llowing the costs of the examination of the plaintiff At the trial the evidence taken under the commission ıd, nor was the plaintiff examined. In my judgment governed by the decision of the learned Chancellor in *etc., Co.* v. *Stinson*, 9 P. R. 177, in which he states:

"The direction in the order as to costs did not preclude the taxing officer from disallowing the costs to the plaintiff on the ground that the evidence had not been used."

The second item disallowed was as to the attendance of a medical gentleman during such examination. If the costs of the examination are disallowed, these charges must also be disallowed.

The third item is as to charges for service of subpœnas. Rule 1212 is positive, and unless the taxing officer was satisfied that the provisions of the Rule had been complied with, it was his duty to disallow them.

Appeal dismissed with costs.

[25TH OCTOBER, 1889.

LLOYD v. WARD.

Close of pleadings—Default note—Time—Delivery, service, and filing—Rules 7, 371, 393, 398, 480.

The last of the eight days within which the defendants should have delivered their statements of defence, as required by Rule 371, was Saturday the 12th October.

Rule 7 prescribes that the offices of the Court shall be kept open from ten a.m. to three p.m., except on holidays, etc.

Rule 480 prescribes that service of pleadings shall be effected on Saturdays before the hour of two p.m., and that service effected after two shall be deemed to have been effected on the following Monday.

Rule 393 provides that when any party makes default in delivering a statement of defence, the officer with whom the pleadings are filed may enter a note that the pleadings are closed.

Rule 398 says that delivering a pleading includes filing.

On Saturday the 12th October, at twenty-five minutes past two in the afternoon, no statements of defence having then been filed, or served on the plaintiff's solicitor, the officer entered a note that the pleadings were closed.

Held, that the officer had no power to close the pleadings until the end of the day, which would be three o'clock; and therefore the note was irregular, and should be set aside.

Watson, for the plaintiffs.

Hoyles and *C. J. Holman*, for the defendants.

[FERGUSON, J., 16TH OCTOBER, 1889.

BANK OF COMMERCE v. WOODCOCK.

—Judgment against—Rule 739—Necessity for proving separate estate.

ion by the plaintiff for summary judgment against
nan under Rule 739, an officer of the plaintiffs
married woman was made a party to the note
se he, the deponent, was informed by her husband
nd had no doubt, that she had separate estate of
that there was no doubt, so far as she was con-
he contracted with respect to her separate estate
rsed the note.

is made and matured and all the material facts
e the passing of the Married Women's Property

ing *Moore* v. *Jackson*, ante p. 384; 16 A. R. 431;
ntiffs were bound to prove the existence of some
erty at the time of entering into the alleged con-
at this was not shown by the affidavit; and the
lgment was refused.

for the plaintiffs.

, for the defendant.

[17TH OCTOBER, 1889.

MOONEY v. JONES.

nination of parties—Refusal to answer questions as to matters not pleaded.

an action brought against two surgeons for
The plaintiff sustained a compound fracture of a
treated professionally by the defendants. The
t set properly, but overlapped, and the plaintiff
his was caused by the negligence or want of skill
ants. The defendants in their statement of defence
l denial of the allegations of the statement of claim,
ecifically allege that the reason of the bones not
ly was due to disease existing in the plaintiff
e under their treatment.

plaintiff's examination for discovery he was asked
ad ever been afflicted with syphilis, and he answered

that he had not. He was then asked to give the names of all the physicians or surgeons who had treated him or whom he had consulted during the preceding seven years, which he declined to do.

The defendants thereupon moved to commit the plaintiff for contempt of Court in refusing to answer the question, and the motion came on for argument in Chambers on the 17th October, 1889.

J. B. Clarke, for the motion.

Aylesworth, contra.

Judgment was given at the close of the argument.

FERGUSON, J.—I think the application should be refused. The plaintiff seems to have answered very fully and fairly all the questions on the subject suggested, so far as they were addressed to his knowledge respecting it. There does not appear to have been anything in the nature of intended contempt in refusing to answer. The objection really rested in matter of opinion as to the propriety of the question. Looking at this, the fact that the defendants have not by their pleading raised any issue on which what is sought could be evidence to be given by them, and the mere speculating or fishing nature of the question without any issue, I do not think the defendants' contention should succeed.

The refusal will be with costs in the cause to the plaintiff in any event of the action.

[STREET, J., 19TH OCTOBER, 1889.

In re SHIBLEY AND THE NAPANEE, TAMWORTH, & QUEBEC RAILWAY CO.

Costs—Railway company—Application for warrant of possession—51 V. c. 29, s. 165.

Where a railway company, having a right to expropriate land, obtains under s. 168 of the Railway Act, 51 V. c. 29, a warrant for immediate possession, and the amount subsequently awarded to the land-owner is not more than he was previously offered by the company as compensation, the costs of the application for the warrant should, under s. 165, be paid by the land-owner.

Delamere, for the land-owner.

Aylesworth, for the company.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 26TH OCTOBER, 1889.

In re IRON, CLAY, ETC., COMPANY.

TURNER'S CASE.

Company—Property of, purchased by director at public auction—Director declared trustee.

In a winding-up proceeding pending before the Master-in-Ordinary, the liquidator applied to have one Turner declared a trustee for the company in respect of certain lands purchased by him in 1888, while a director and officer of the company.

The company was incorporated in 1884, for the manufacture and sale of paving-stones, blocks, bricks, pipes, tiles, statuary, and all other like articles; and in March, 1886, acquired the property in question for $14,100 for the purposes of its business, assuming in the purchase an existing mortgage for $4,700. The company got into financial difficulties and paid nothing on the mortgage, and in 1888 the mortgagees sold the lands under a power of sale at public auction, when the respondent became the purchaser for $8,400, he having at the same time a judgment and execution against the company for $3,400. In February or March, 1889, he was offered $23,000 for the property. No imputation was made upon the conduct of the respondent, but it was alleged that he wrongfully claimed to hold the property as against the company and its creditors.

Robinson, Q.C., and *C. Millar*, for the liquidator, contended that, on account of his position as director and treasurer of the company, he could not purchase for his own benefit, and that he held the lands as a trustee for the company.

W. Cassels, Q.C., and *D. Macdonald, contra.*

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—The chief ground urged by counsel for the liquidator is that on the ground of public policy a director should not be allowed to acquire the corporate property for his own benefit, for the reasons that he and his co-directors have the possession and control of that property and acquire their knowledge of its situation and advantages by virtue of their position as directors; and that they are bound to use it for the benefit of the shareholders.

There is no statutory law prohibiting directors from purchasing the property of their company; the law controlling such purchases is a rule of equity classed by jurists and text writers as a law of public policy. The law of public policy is not capable of exact definition, but I think it may come within Austin's references to "a rule morally sanctioned, or a rule of positive or actual morality," which may become binding if approved by legislative action, or may become "converted into a law after the judicial fashion." It is sometimes deemed a law emanating from custom or *jus moribus constitutem;* and though establishing a rule of judiciary law, it is not less a positive law than if it were enforced by a statute. One branch of that law relates to the position and duties of persons holding a fiduciary relation towards others, and it affirms that such fiduciary relationship debars the person holding it from gaining a personal benefit at the expense or to the detriment of the persons in respect of whom such fiduciary relationship exists.

The position of directors of a company has been variously defined as that of "trustees," "quasi trustees," or "managing partners or agents." (The learned Master here referred to and quoted from *York* v. *North Midland R. W. Co.* v. *Hudson*, 16 Beav. 491; *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 453; Lindley's Law of Companies, p. 364; *Bradley* v. *Farwell*, 1 Holmes C. C. 433; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, as to the position of directors; and to *Covington, etc., R. W. Co.* v. *Bowler*, 9 Bush 468; *Hoyle* v. *Plattsburgh and Montreal R. W. Co.*, 54 N. Y. 314; *King* v. *Keating*, 12 Gr. 29; *Gabbett* v. *Lawder*, 11 L. R. Ir. 295, as to purchases by directors or trustees.) * * * *

These cases appear to be applicable to the case before me, and I therefore follow them, and adjudge that the respondent is a trustee for the company of the lands in question, but that he is entitled to claim as against the said lands all charges and expenses properly claimable by him in these proceedings. Costs to follow the result, including the costs in *Martens* v. *Turner*. Subsequent costs reserved.

ONTARIO.

ıupreme Court of Judicature.

COURT OF APPEAL.

[12TH NOVEMBER, 1889.

GRANT v. CORNOCK.

e—Breach of promise of marriage—Justification of breach—igation of damages—Statute of Limitations.

dily chastity is the only justification for breach of rry.

the woman of coarse, obscene, and profane lan- indulgence in profane swearing would not justify marry.

ıher evidence of such matters can be admitted in damages.

of the time fixed for the marriage is not necessarily e promise. There must be a refusal or something ı refusal after the time fixed for performance before Limitations begins to run.

of the Queen's Bench Division, 16 O. R. 406,

.C., and *Shepley*, for the appellant.
nd *A. W. Aytoun-Finlay*, for the respondents.

IAGARA GRAPE CO. v. NELLIS.

actions—Staying actions—Identity of issues—Leave to appeal.

consolidate, strictly so called, is a matter of dis- ı made as a favour to and for the benefit of the e object being that a single trial may decide that

which is in fact only a single question, and thus save costs and expense. No such order ought to be made unless the questions in each case are substantially the same, and the evidence would be substantially the same if they were all tried.

Leave to appeal from the order of the Queen's Bench Divisional Court, 13 P. R. 179; ante p. 340, was refused.

McCarthy, Q.C., for the defendants.

C. J. Holman, for the plaintiffs.

BOYD, C.]

BLACKLEY v. KENNY.

Voluntary conveyance—Creditor with whose knowledge and assent it is made cannot complain—Mortgage to secure past and future advances—Mortgagee after notice of voluntary conveyance cannot charge land with further advances.

Where a debtor, at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's lands, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary and void as against him.

Nor can the creditor charge against the land under his mortgage any advances made after notice of the voluntary conveyance.

Order of BOYD, C., reversed.

A. C. Galt, for the appellants.

Walter Macdonald, for the respondent the plaintiff.

George Kerr, for the trustee for creditors.

ROSS v. DUNN.

Assignments and preferences—Chattel mortgage—Present advance—Following proceeds where mortgaged goods sold—Security taken by partner in his own name to secure partnership debt—Debt represented by paper under discount—Affidavit of indebtedness.

J. D., being indebted to W. D. & Co. in the sum of $2,260, for which W. D. & Co. held his unmatured notes under discount in a bank, applied to them for an advance to enable him to carry on business. They in good faith agreed to advance $1,000, and

attel mortgage in favour of W. D., the senior part-
n, purporting to secure an indebtedness of $3,260.
$1,000 was given to J. D. and held by him for some
id then returned to W. D. & Co., he in the mean-
iance of an arrangement made when the cheque
:awing on W. D. & Co. from time to time as he
ey until he had drawn in all more than $1,000.
the affidavit in the usual form that J. D. was
im in the sum of $3,260. The goods covered by
nortgage were sold under it while the plaintiff's
; in the sheriff's hands.

W. D. could properly take the mortgage in his own
ke the affidavit of indebtedness though the debt
e partnership and partly represented by unmatured
the mortgage was one to secure a present actual
l therefore that it could not be impeached under the
gage Act.

that it could not be impeached under the Assign-
eferences Act because the advance was made in the
f that J. D. would thereby be enabled to continue
ind pay his debts in full.

per BURTON and OSLER, JJ.A., that, as the goods
l, an action against the mortgagee to make him
ie proceeds could not be maintained by the execu-
even if the mortgage were invalid; his remedy, if
e to follow the goods.

of BOYD, C., affirmed.

, and *D. L. McLean*, for the appellants.

, for the respondents.

OGICAL AND ACCLIMATIZATION SOCIETY. COX'S CASE.

Subscriber—Shareholder—Contributory—R. S. O. c. 157.

ie incorporation of a company under the Ontario Companies Letters Patent Act, signed a share sub-
k with the following heading:—

indersigned do hereby severally on behalf of our-
each of our several and respective executors and

administrators acknowledge ourselves to be subscribers to the capital stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder, and we do hereby covenant, promise, and agree each with the other of us and with S. to pay the amount of our said several subscriptions and all calls thereon when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act or under any by-laws which may be passed by the said company, and we request the number of shares for which we subscribe hereunder to be allotted to us."

No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C. the company was wound up and he was held liable as a contributory.

Held, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and *ex propria vigore* create the liability contended for.

Order of BOYD, C., 17 O. R. 881, reversed.

A. C. Galt, for the appellant.

W. Creelman, for the respondent.

ROBERTSON, J.]

SANFORD v. PORTER.

Trusts and trustees—Assignee for the benefit of creditors—Duty as to keeping and furnishing accounts—Misconduct disentitling to costs—Solicitor and client—Taxation by cestui que trust of bill of solicitor employed by trustee.

It is the duty of a trustee or other accounting party to at all times have his accounts ready, to afford all reasonable facilities for their inspection and examination, and to give full information whenever required. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the *cestui que trust* or principal lives at a distance from where the trust affairs are being carried on or in a foreign country it would be the duty of a trustee to give all reasonable information and explanations by letter and even, if requested, but at the expense of the *cestui que trust*, to prepare and transmit accounts and statements.

ue trust may, in the discretion of the Court,
nder the third party clauses of the Solicitors'
on of a bill of costs for business connected with
f a solicitor employed by the trustee.

or brought an action for an account against the
enefit of creditors of his debtor, after demand-
assignee's accounts but without expressing any
any attempt to inspect the accounts and with-
asonable time for preparation of copies, the
wed his costs as between solicitor and client out
f the estate in his hands and in case of defici-
f was ordered personally to pay it.

that a trustee in rendering an account to his
laims that he has in his hands a smaller sum
be due by him when his accounts are taken in
disentitle him to the costs of an action against
ount when the *cestui que trust* who brings the
efore action taken objection to the items that are
lowed.

ROBERTSON, J., affirmed.

and *Washington*, for the appellants.
on and *W. M. Douglas*, for the respondent.

.] [19TH OCTOBER, 1889.

LINFOOT v. LINFOOT.

ertificate of judgment in this case, noted ante. p.
ed, the Court further considered the question of
red the respondent to pay the appellant his costs
and of the application in the Court below.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 13th November, 1889.

In re MARTER AND THE COURT OF REVISION OF THE TOWN OF GRAVENHURST.

Mandamus—Compelling Court of Revision to hear Voters' Lists appeals—Specific remedy by appeal to County Judge—51 V. c. 4, s. 13, s-s. (1)—R. S. O. c. 193, ss. 61, 68.

By s. 13, s-s. (1), of "The Manhood Suffrage Act," 51 V. c. 4, it is provided that complaints of persons not having been entered in the roll as qualified to be voters who should have been so entered, may, by any person entitled to be a voter or to be entered on the voters' list, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under the Voters' Lists Act.

By s. 61 of the Assessment Act, R. S. O. c. 193, it is provided that the Court of Revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll; and by s. 68, s-s. (1), that an appeal to the County Judge shall lie not only against a decision of the Court of Revision on an appeal to that Court but also against the omission, neglect, or refusal of said Court to hear or decide an appeal.

The Court of Revision of a municipality refused to hear or adjudicate upon a complaint made by M. under s. 13 of "The Manhood Suffrage Act" that the names of certain persons had been wrongfully omitted from the assessment roll.

Held, that it was the duty of the Court of Revision under s. 61 to try the complaint made by M.; and that if no other complete, appropriate, and convenient remedy had existed, M. would have been entitled to a mandamus to compel the Court to perform its duty; but as the Legislature by s. 68 had given a specific remedy for this very breach of duty, by appeal to the County Judge, M. was not entitled to a mandamus.

The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the Court

; the complaint to the Court of Revision was a forcing his right, not the right itself.

Q.C., and *Pepler*, for Marter.

., for the members of the Court of Revision.

[3RD DECEMBER, 1889.

MARITIME BANK v. STEWART.

TWO ACTIONS.

d insolvency—English Bankrupt Acts, scope of—Canadian proving claim in England—Staying actions in Ontario.

h bankruptcy carries all the real and personal pro- bankrupt in any part of the British dominions; the e English Bankrupt Acts being that when once a en established for the winding-up of an estate, it is at the whole property of the bankrupt should be e in order that it may be ratably divided amongst tors; and the assets of the bankrupt having thus away from him, creditors will not be allowed to with unnecessary litigation.

dants in these actions carried on business in Eng- anada, and had creditors in both countries, the ing Canadian creditors. The defendants became e English bankruptcy laws, and a trustee in bank- appointed, to whom the plaintiffs presented their t the estate of the defendants, which claim included claimed in these actions, which were begun in he English Court made an order on the application e restraining the plaintiffs from further prosecuting s; and upon the application of the defendants an ade in Chambers here staying proceedings in them. ming the decision of ROSE, J., 13 P. R. 86, that it of the Court here to aid the English Court; and ntiffs, by putting in their claim before the trustee, d themselves from objecting to the authority of the rt; and therefore that the order made in Chambers roper order under the circumstances.

as reserved to the plaintiffs to apply for leave to

for the plaintiffs.

m and *W. M. Douglas*, for the defendants.

SMITH v. BAECHLER.

Damages—Measure of—Conversion of logs—Demand.

One H. sold and delivered to the defendant at his saw-mill a quantity of logs, a large number of which had been cut from the plaintiff's land without his permission, and in the face of an express warning not to cut timber upon his land. The plaintiff's agent went to the defendant's mill, where all the logs cut were lying, and demanded those which had been cut upon the plaintiff's land. The defendant, however, insisted that he had bought the logs, and he sawed them into lumber, and in an action brought for conversion of the plaintiff's logs he denied taking the plaintiff's property, and denied the demand.

The trial Judge found upon the evidence that the defendant knew that he was buying logs taken from the plaintiff's land, or, at least, that he suspected that such was the fact, and wilfully abstained from inquiry.

Held, that the plaintiff was entitled to recover from the defendant as damages the value of the logs as they were in the yard at the time of the demand, without any deduction for the cost of cutting and hauling them.

Semble, if the defendant had been an innocent purchaser, a different measure of damages might have been applied.

Mabee, for the plaintiff.

Garrow, Q.C., for the defendant.

[12TH NOVEMBER, 1889.

THATCHER v. BOWMAN.

Landlord and tenant—Ten years lease by owner of life estate to reversioner in fee—Action by executrix for rent—Covenant in lease—"Heirs and assigns"—Estoppel—Shewing title of landlord at an end—Reformation of lease—Evidence—Acquiescence.

N. B., who had a life estate in certain lands, in 1872 made a lease of them for ten years to E. B., who was entitled to the reversion in fee. The lease was not under the Short Forms Act. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the said lessor, her heirs and assigns" for payment to "the said lessor, her heirs and assigns." N. B. died in 1877, before the expiry of the ten years, and this action was brought

ıf her will to recover (*inter alia*) the instal-
ɔh became payable, as it was alleged, upon
death.

ıe interest of N. B. was a freehold interest,
not recover either as being entitled to the
ıel interest or as being the person designated

there was no estoppel to prevent E. B. from
itle of N. B. had come to an end, and that he
e owner upon her death.

agreement between himself and N. B. that
xpire at her death in case she should not live
ten years, and asked that the lease should be
gly. The only evidence in support of this was
his wife, and of a relation of theirs whose
n to be untrustworthy.

evidence was not sufficient, after so many
nce and after the death of the lessor, to justify
f the lease.

laintiff.

nd *A. J. Wilkes*, for the defendants.

[25TH NOVEMBER, 1889.

:MICK AND TOWNSHIP OF HOWARD.

*ons—Drainage by-law—R. S. O. c. 184, ss. 571, 572—
h—Notice of intention to move must be given by actual*

ıunicipal drainage by-law, whether for the con-
ıriginal work or the improvement of an old one,
ɛ proceedings are taken under ss. 583, 585, or
icipal Act, R. S. O. c. 184, is subject to the
571 and 572 requiring notice in writing to be
days by any one intending to apply to have the
or of his intention to so apply.

ch notice was given by a solicitor and signed by
for J. C. and D. McC., stating that the applica-
made on behalf of J. C., D. McC., and others,

and an application to quash was afterwards made to the Court by persons other than J. C. and D. McC.,

Held, that the application was not made to the Court by any person who had given the notice required by ss. 571 and 572; that another ratepayer could not take advantage of the notice by adopting it as his own; and, the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs.

W. R. Meredith, Q.C., and *Charles McDonald*, for the motion.

M. Wilson, contra.

[10TH DECEMBER, 1889.

BRADT v. BRADT.

Examination—Taking depositions in shorthand—Power of examiner to delegate.

A special examiner or officer of the Court taking an examination in a cause or proceeding pending in Court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot be compelled, in the face of his objection, to submit himself for examination where the examiner proposes to have the depositions so taken.

R. S. O. c. 44, ss. 147, 148, and Rules 501-3 considered.

W. H. Blake, for the plaintiff.

Hoyles, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 8TH OCTOBER, 1889.

TOWNSHIP OF BARTON v. CITY OF HAMILTON.

Municipal corporations—Drainage through adjacent municipality—Arbitration—"Territory"—R. S. O. c. 184, s. 492, s-s. 2.

One municipality cannot construct a sewer through an adjacent municipality against the will of the latter without first

settling the terms by arbitration, even although a purchase is made from the private owners of the land through which the sewer is to be constructed.

The word "territory" in s. 492, s-s. 2, R. S. O. c. 184, is not used to signify land belonging to the corporation as owners but land within their territorial ambit over which they have municipal jurisdiction.

S. H. Blake, Q.C., and *Wm. Bell*, for the plaintiffs.

Moss, Q.C., and *J. M. Gibson*, for the defendants.

[19TH OCTOBER, 1889.

SCOTT v. STUART.

Tax sale—Patented lands advertized and sold as unpatented.

Certain lands were sold for taxes and were described by the treasurer of the municipality in the advertisement and in the tax deed as unpatented, although as a matter of fact they were patented. It was shown in evidence that the effect of such a description was that lands would sell for a merely nominal price.

Held, affirming BOYD, C., that the sale was bad and the deed must be set aside.

J. C. Hamilton and *Thos. Dixon*, for the plaintiff.

Ceasor, Q.C., for the defendant.

[BOYD, C., 2ND OCTOBER, 1889.

SPAHR v. BEAN.

Married woman—Action of tort brought by, without her husband—Parties—Married Women's Property Act, 1884.—R. S. O. c. 132, s. 3.

A married woman may bring an action of libel in her own name without joining her husband as plaintiff.

The omission of the words "either in contract or in tort" found in the Married Women's Property Act, 1884, from s. 3 of R. S. O. c. 132 does not limit the legal effect and operation of that section.

King, for the plaintiff.

Hoyles, for the defendant.

[14TH OCTOBER, 1889.

WORTS v. WORTS.

Will—Construction—Investment—Joint Stock Company—Income.

J. G. W. by his will authorized his trustees "to invest in such securities as they should think proper * * with power to retain any investments existing at his death as long as they shall see fit." He also authorized them to continue his firm business, in which he was engaged, for one year after his death if they saw fit.

A few months after the testator's death his firm business was converted into a joint stock company, the assets of the testator being valued and put in as so much stock.

Held, that technically this was a breach of trust, and the user of the money of the estate in the business not a proper investment under the will.

Investment is not a proper term as to money in trade; "securities" meaning such securities as bind land or something to be answerable for it.

The joint stock company business was prosecuted for seven years, when the interest of the testator's estate was bought out at a large advance by the surviving partner.

Held, that, under the circumstances of this case, which did not raise the question between tenants for life and remaindermen, the profits derived from the above user of the capital of the estate were, properly considered, income, and to be applied accordingly by the trustees of the will.

Moss, Q.C., and *T. P. Galt*, for the plaintiffs.

Robinson, Q.C., *McCarthy*, Q.C., *J. Hoskin*, Q.C., *Lash*, Q.C., *William Macdonald*, and *A. R. Creelman*, for the various defendants.

[23RD AND 24TH OCTOBER, 1889.

GARDNER v. BURGESS.

Receiver—Rents and profits of mortgaged premises—Action by mortgagees—Leave to proceed—Petition—Receiver's costs of appearing on—Tender of costs—Rule 1193.

Where actions were brought by mortgagees without the leave of the Court for sale of mortgaged premises after the appoint-

ment of a receiver to receive the rents and profits of such premises, an order was made, upon the petition of the mortgagees, allowing the proceedings in the actions to stand, and allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver.

The receiver was served with notice of the presentation of the petition and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged, or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages and the costs of the actions and the petition.

Held, that if the petitioners wished to protect themselves from paying costs they should have proceeded under Rule 1193 and tendered the receiver $5 with the petition; and this not having been done, and the relief asked in the alternative prayers been such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt.

Gunther, for the petitioners.

Arnoldi, for the receiver.

[27TH NOVEMBER, 1889.

LAWLESS v. CHAMBERLAIN.

Husband and wife—Marriage under intimidation and threats—Conduct of the parties—Action to declare it a nullity—Jurisdiction—Consent of parents to infant's marriage—26 Geo. II. c. 33, s. 11.

To dissolve a marriage once validly solemnized is not of judicial but of legislative competence; whereas if the alleged marriage has been procured by fraud or duress in such wise that it is void *ab initio*, judgment of nullity may be given by the Court.

When a marriage *de facto* is ascertained to be void *de jure* by reason of the absence of some preliminary essential, the action of the Court does not annul, but declares it was from the first null and void. There is jurisdiction to grant this measure and manner of relief now vested in the Superior Courts of Ontario.

In cases of annulling marriages, nothing short of the most

clear and convincing testimony will justify the interposition of the Court.

The plaintiff having gone to the house of the defendant's father, the latter entered the room with a pistol in his hand, which he pointed at the plaintiff, and threatened that if he did not marry his daughter he should not leave the house alive. Other relatives came in and the father became more quiet. The plaintiff consented to be married, and a clergyman was sent for, but when he came the plaintiff told him he was a minor and had not obtained his father's consent, and had been placed in his then position at the head of a revolver. The clergyman then refused to perform the ceremony, and went for another. When the two returned, the plaintiff expressed his willingness that the ceremony should proceed, but neither would officiate. On a suggestion that the parties should go to a neighboring city, procure a license, and have the marriage performed there, the plaintiff consented, and drove an uncle of the defendant to the city in his conveyance, obtained the licenses, representing his age as twenty-two, and arranged with the city clergyman who performed the ceremony, and who at the trial testified that the plaintiff answered the usual questions in the marriage service, and that he (the clergyman) had no reason to suspect he was not a willing party.

Held, that although evidence of intimidation might be found at one point of time during the transaction, that was not enough. It must be manifest that force preponderated throughout, so as to disable the one influenced from acting as a free agent; that although the plaintiff at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary details, and submitted to the proposed method of procedure, and forwarded its accomplishment; the necessary consent to the union was proved as to both parties, and the religious observance was not a mere idle ceremony, but was the final step in the actual constitution of marriage.

Held, also, that s. 11 of 26 Geo. II. c. 33 (Lord Hardwicke's Act,) was not in force in this Province.

Gemmill and *Chrysler*, for the plaintiff.

McCarthy, Q.C., and *F. W. Harcourt*, for the infant defendant.

[FERGUSON, J., 25TH OCTOBER, 1889.

WOODILL v. THOMAS.

iod of distribution—Annuity—Death of annuitant—Who entitled—Vested interest.

his will provided as follows: "I give and devise ghters (naming them) an annuity of $120 per paid one year after my decease, and to be for eir natural lives; also to my two granddaughters eceased daughter) an annuity of $60 each, to be * * * which annuity will expire at the death ghter. In the event of the death of any of my annuity which she received during life to be amongst her children until the decease of my hare and share alike. In the event of the death iving daughter, the annuities are immediately to mount of real and personal estate in the hands s is to be equally divided amongst my grand- ded they are not lazy spendthrifts, drunkards, cters, or guilty of any act of immorality." One ughters named married and died, leaving an infant husband was appointed administrator of her

ch annuity given was to continue to the death of ng daughter, and that the annuity of the deceased from the time of the last payment to her until he last surviving daughter, was payable to her l representative for the benefit of those who were w entitled to her estate.

that the interest taken by the deceased grand- e property to be divided by the executors was a subject to be divested by the clause as to lazy tc., which clause was not a condition precedent, he nature of a condition subsequent, and that her sentative became entitled to it.

rry, 11 O. R. at p. 519, quoted from.

or the executors.

for the infant great-grandson.

Cullough, for the administrator of a deceased

onald, Q.C., for the children and grandchildren.

[ROSE, J., 21ST SEPTEMBER, 1889.

OLDFIELD v. DICKSON.

Sale of land—Time the essence of a contract—Offer to sell—Acceptance—Net price—Reasonable time to pay money.

Time may be of the essence of a contract even without any express stipulation if it appears that such was the intention.

The defendant wrote his agent on 25th March, "If O. (the plaintiff), still wants that farm * * he can have it for $350 net, provided it can be arranged at once. Kindly advise me * * if he accepts, and when he will pay the money over." Ten days later the agent telegraphed the defendant, "O. will take the farm, will pay the money in two weeks." On 11th April the defendant telegraphed, "Your offer of 6th comes too late."

Held, that an arrangement between the defendant and his agent as to the latter's commission would not affect the *net* price as between the plaintiff and defendant.

Held, also, that the inquiry "When he will pay over the money," showed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But

Held, also, that the acceptance of the defendant's offer was not in time.

Crossfield v. *Gould*, 9 A. R. 218, referred to

Pepler and *J. H. Bowes*, for the plaintiff.

Hewson, for the defendant.

[STREET, J., 19TH OCTOBER, 1889.

ALBRECHT v. BURKHOLDER.

Slander—Words applicable to class of two—Law of Slander Amendment Act, 1889—Right of action.

Action for slander under the Law of Slander Amendment Act, 1889, for saying that he, (the defendant), had heard one Brayley "had got one of the Albrecht girls (meaning the plaintiff) in trouble."

The plaintiff was one of four daughters of Ferdinand Albrecht, two of whom were mere children, and though the evidence showed that there were circumstances which might lead persons to think that the words referred to the plaintiff, yet it also showed that the person to whom they were actually spoken was

not aware of these circumstances, and had no reason, therefore, to understand them as referring to the plaintiff.

Held, however, that either the plaintiff or her eldest sister, being the only two of Albrecht's daughters to whom the words could apply, was entitled to maintain the action; but it was necessary for her to prove that the words were untrue of her sister the other member of the class to which the hearer might have applied them, and she having failed to do this here, the action must be dismissed.

MacKelcan, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

COMMON PLEAS DIVISION.

[In Banc, 7th September, 1889.

REGINA v. GRANT.

Municipal corporations—By-law authorising imprisonment for six months of persons found drunk in streets—R. S. O. c. 184, s. 479, s-s. 19—Validity of by-law—Summary conviction under—Costs of conveying to gaol included—Evidence of defendant.

A by-law of the city of Brantford enacted that any person found drunk in any of the public streets thereof should be subject to the penalty thereby imposed, namely, to a fine of not more than $50 exclusive of costs, and, in default of payment forthwith of the fine and costs, distress, and, in default of sufficient distress, imprisonment in the common gaol for a period not exceeding six months unless the fine and costs should be sooner paid.

Held, that under s-s. 19 of s. 479, R. S. O. c. 184, there was power to authorize imprisonment for the period mentioned.

A conviction under the by-law directed that in default of payment forthwith of the fine and costs and of sufficient distress, imprisonment for ten days in the common goal unless the costs and charges, including the costs of conveying to gaol, were sooner paid.

Held, that the conviction was bad, as there was no power to include the costs of conveying to goal.

Regina v. *Wright*, 14 O. R. 668, followed.

Held, also, that upon the trial of an offence under the by-law the magistrate could not refuse to receive the evidence of the accused.

Mackenzie, Q.C., for the defendant.

Aylesworth, for the complainant.

[THE DIVISIONAL COURT.

PAXTON v SMITH.

Promissory note—Statute of Limitations—Payment of interest by maker, who is also executor of indorsing surety.

The defendant, who was the maker of a promissory note and also the sole executor of one who had indorsed the note as a surety, paid interest on the note out of his own money and on his own account only, within six years before action brought.

Held, that such payment had not the effect of taking the note out of the Statute of Limitations as regarded the estate of the surety.

Scane, for the plaintiff.

Pegley, for the defendant.

[19TH NOVEMBER, 1889.

In re WATSON v. WOOLVERTON.

Prohibition—Division Court—Territorial jurisdiction—R. S. O. c. 12, s. 5—Application to Judge of Inferior Court.

This was an appeal by the defendant from an order of FALCONBRIDGE, J., in Chambers refusing to prohibit the 5th Division Court of the united counties of Stormont, Dundas, and Glengarry from proceeding in this suit, on the ground that such Division Court had no jurisdiction to determine it, because the cause of action arose elsewhere and the defendant did not live within its jurisdiction.

Section 87 of the Division Courts Act, R. S. O. c. 51, as now amended by 52 V. c. 12, s. 5, provides that "If an action shall be entered in the wrong Division Court which might properly have been entered in some other Division Court of the same or any other county, the cause shall not abate as for want of jurisdiction, but on such terms as the Judge shall order, all the papers and proceedings in the cause may be

tansferred to any Division Court having jurisdiction * * * The party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction."

FALCONBRIDGE, J., held that this section, if it did not expressly take away the right to prohibit where a suit was entered in the wrong Division Court, at least contemplated the application being made in the first instance to the County Judge, and as no such application had been made, he refused the motion.

The defendant now appealed from this decision.

Teetzel, for the appeal.

Shepley, for the plaintiff, *contra*.

THE COURT dismissed the appeal with costs, holding that the decision was right and that no application for prohibition for want of territorial jurisdiction would lie where an application had not first been made to the Judge of the Division Court, who had now jurisdiction to entertain such application.

[26TH NOVEMBER, 1889.

SIERICHS v. WOODCOCK.

Notice of motion—Divisional Court—Rule 800, construction of.

Upon the proper construction of Rule 800, a notice of motion to a Divisional Court must be made returnable on the first day of the sittings.

But where, although the notice of motion had been made returnable on the fifth day of the sittings, it appeared that there had been a *bona fide* intention to move ten days before the sittings, when the notes of evidence were ordered, leave was given to set the motion down, costs being given against the party moving.

Aylesworth, for the plaintiff.

C. J. Holman, for the defendant.

[GALT, C.J., 7TH SEPTEMBER, 1889.

TOWN OF COBOURG v. REGENTS OF VICTORIA UNIVERSITY.

Statutes—Construction of 4 & 5 V. c. 37 and 47 V. c. 93—Victoria University—Meetings of senate, where to be held.

By 4 & 5 V. c. 37, Victoria College was incorporated as at Cobourg. Section 3 enacts that the principal and professors

together with the members of the board shall constitute "the College Senate," which may be assembled as occasion may require by the principal, by giving one month's notice in the official *Gazette* of this Province. In 1874 an Act was passed to consolidate and amend the Acts incorporating Victoria College at Cobourg: 38 V. c. 79. In 1884 the Act 47 V. c. 93 was passed, whereby Victoria College and another college were placed under the charge and control of the general conference of the Methodist Church under the name of Victoria University. S. 5, s-s. (10), provides that the president of the University shall be the chancellor thereof, and shall call and preside at all meetings of the senate.

Certain statutes of the University were passed relative to the sessions of the senate, which provided: (1) that the senate should meet on the first Monday after the college opening, and continue in session by adjournment for eight weeks; (2) that a second session should be held commencing on the first Wednesday in March and continuing by adjournment until the close of the academic year; (3) that special sessions of the senate might be called at any other date by the registrar on the authority of the chancellor.

On the 20th May, 1889, the chancellor issued a notice calling a meeting of the senate at Toronto, and the registrar of the University issued a similar notice. Pursuant to these notices, a meeting was held at Toronto. Since the passing of 38 V. c. 79 special meetings of the senate had been held at Toronto, but it did not appear how these meetings had been called, or whether any notice had been given in the official *Gazette*.

Held, that under the existing statutes the meetings of the senate must be held at Cobourg, the site of the University, and therefore the meeting called and held at Toronto was illegal.

Robinson, Q.C., and *C. J. Holman*, for the plaintiffs.

Moss, Q.C., and *Britton*, Q.C., for the defendants.

[ROBERTSON, J., 10TH SEPTEMBER, 1889.

McMILLAN v. BARTON.

Trusts and trustees—Purchase of land by agent—Parol evidence to shew trust—Fraud—Redemption—Locus standi—Statute of Frauds.

Certain lands were purchased by the defendant G. B., who paid the cash required at the time of purchase, taking the deed

in the name of his daughter the defendant F. B., who gave a mortgage for the balance of the purchase money.

In this action parol evidence was admitted to shew that the defendants were trustees for the plaintiff.

The evidence also shewed that the defendants were acting in collusion to defraud the plaintiff.

Held, that the plaintiff was entitled to redeem on repaying the amount advanced and on indemnifying F. B. against the mortgage.

When the purchase by the plaintiff was at first contemplated, the intention was to repay the amount required for the cash payment out of moneys due for work done by the plaintiff's husband, on a contract entered into in his wife's name, the husband being insolvent; but this was not carried out and formed no part of the arrangement subsequently made with G. B., whose sole object was, as he said, to assist the plaintiff.

Held, therefore, that an objection taken that the plaintiff had no *locus standi* to maintain the action could not prevail.

The purchase of the land being made by G. B. as the plaintiff's agent, and in pursuance, as was shewn, of an offer therefor in writing by the plaintiff, which was verbally accepted:

Held, that the Statute of Frauds had no application.

Bain, Q.C., and *H. V. Greene*, for the plaintiff.

Moss, Q.C., for the defendant F. Barton.

C. Millar, for the defendant G. Barton.

[STREET, J., 9TH NOVEMBER, 1889.

BROWN v. McLEAN.

Priorities—Mortgage subsequent to fi. fa. lands—Right of mortgagee to be subrogated to rights of prior mortgagees—Relief on the ground of mistake—Costs.

This was an action tried without a jury at the Berlin Assizes on the 21st October, 1889.

The defendant was a judgment creditor of A., and had a *fi. fa.* lands in the sheriff's hands. A. was the owner of the equity of redemption in certain lands subject to two mortgages outstanding in different hands. The plaintiff agreed to advance money to A. to pay off existing mortgages, and took from A. and registered, after the defendant's *fi. fa.* had been placed in the sheriff's hands,

a mortgage for the amount of his advance. He then advanced the money which was applied in payment of the prior mortgages, and these were then discharged at his request by the respective mortgagees in the statutory form. At the time these two mortgages were paid off and discharged the plaintiff was entirely ignorant of the existence of the defendant's execution, the solicitors employed by him having neglected to search in the sheriff's office. The defendant then directed the sheriff to advertize for sale under his execution the lands in question; and the plaintiff brought this action to have it declared that the defendant's rights against these lands as execution creditor are subject to the right of the plaintiff to be repaid the amounts which he had paid upon the two discharged mortgages.

W. Cassels, Q.C., and *Millican*, for the plaintiff.

Garrow, Q.C., for the defendant.

STREET, J.—The case of *Fisher* v. *Spohn*, 4 C. L. T. 446, decided by Patterson, J.A., in October, 1883, was strongly relied on by the plaintiff. * * * If that decision is correct in holding that when the owner of the equity of redemption has created a new mortgage and then procures a discharge of the original mortgage, the effect of the discharge is to operate a conveyance to him, and not to the new mortgagee, of the estate vested in the original mortgagee, then the effect of the discharge in the present case was to vest the estate of the original mortgagee in the judgment debtor and not in the plaintiff, and so to enlarge the estate of the judgment debtor. So that it appears to me the plaintiff is not helped by that decision. I should prefer in any event to give to the statutory discharge a more innocent effect than that of which it is suggested as being capable by *Fisher* v. *Spohn*, and to treat it merely as replacing the mortgagee's estate in the person best entitled to it, without allowing it to affect the real rights of any person. * * * If an execution debtor assigns an equity of redemption whilst execution against him is in the sheriff's hands, and the assignee reduces or discharges the mortgage, it appears to me that upon the proper construction of the statute, the improvement in the nature or quality of the estate enures to the benefit of the execution creditor under ordinary circumstances.

I think, however, that the plaintiff here is entitled to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he

paid to discharge their mortgages, upon the ground of mistake. * * * *Watson* v. *Dowser*, 28 Gr. 478, was relied on by the defendant. * * * In that case, however, it appeared that, relying on the promise of J. to have the prior mortgages discharged, they had paid off C.'s claim without taking an assignment of it, so that it is difficult to see how a case of mistake can be made out. * * * It is further argued by the defendant that there was gross negligence here on the part of the plaintiff and his solicitors in failing to search in the sheriff's office for executions against the mortgagor; and there is no doubt that this is true; but it is not in every case, even of such negligence as existed here, that the Courts will treat it as disentitling the persons guilty of it to relief on the ground of mistake. * * * See the cases referred to under sec. 856 of *Pomeroy's* Equity Jurisprudence. * * * Negligence has been leniently dealt with, where it has been with regard to matters of fact or of legal rights: *Howes* v. *Lee*, 17 Gr. 459; *Wilmott* v. *Barber*, 15 Ch. D. 96 at p. 106; *Smith* v. *Drew*, 25 Gr. 188; *Barnes* v. *Mott*, 64 N.Y. 397; *Young* v. *Morgan*, 89 Ill. 199; *Sheldon* on Subrogation, sec. 28.

I have not overlooked the broad terms in which the law upon this point is laid down by Lord Campbell in *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. at p. 285; but that was a case in which mistake was set up as an answer to a written contract, and the language used is to be read as applying to the subject matter of the case. * * *

The plaintiff is entitled in my opinion to a declaration that, to the extent of the amount which he has advanced to pay off the prior mortgages, he is entitled to priority over the defendant's execution. The defendant has contended that he is entitled to priority over the plaintiff; and having failed in his contention, I see no reason why he should not pay the costs of the action, and the judgment should go accordingly.

[20TH NOVEMBER, 1889.

In re COLENUTT AND TOWNSHIP OF COLCHESTER NORTH.

By-law—Procedure on motion to quash—Notice of motion—Order nisi—Rule 526.

The authority to proceed by rule or order *nisi* in quashing a by-law conferred by R. S. O. c. 184, s. 332, is inconsistent with

Rule 526, and must therefore be taken to be repealed; for by 51 V. c. 2, s. 4, it is declared that all enactments in the Revised Statutes inconsistent with the Rules are repealed.

It is, therefore, not now proper to proceed by order *nisi*.

In re Peck and Ameliasburgh, 12 P. R. 664, followed.

Hewison v. *Pembroke*, 6 O. R. 170, distinguished.

Langton, for the applicant.

W. H. Blake, for the township.

[10TH DECEMBER, 1889.

In re SWEETMAN AND TOWNSHIP OF GOSFIELD.

Municipal by-law—Motion to quash—Notice of motion—Time—R. S. O. c. 184, s. 332—Rules 485, 526.

There is no power under Rule 485, or otherwise, to shorten the four days' notice required by R. S. O. c. 184, s. 332, as modified by Rule 526, to be given of a motion to quash a municipal by-law.

And where the last day for making the application was a Thursday, and notice was given on the preceding Monday for the intervening Tuesday;

Held, that the application could not succeed, even if the notice were regarded as one for Thursday.

Langton, for the applicant.

W. H. Blake, for the township.

IN CHAMBERS.

[BOYD, C., 23RD OCTOBER, 1889.

DISHER v. CANADA PERMANENT L. & S. CO.

Lien—Hire receipt—Lien on land for engine—Mortgage—Priorities—Bar of dower.

Certain lands were subject to a first mortgage, to a lien registered by the Waterous Engine Company in respect to an engine supplied by them, and to a second mortgage registered subsequently to the lien; and the lands having been sold, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage.

ıne company had sold the engine, and now claimed the
the price under the lien.
at they were entitled to make that claim, but that
d the engine without notice to the second mortgagee,
was entitled to impeach that sale by showing that a
m could have been realized if it had been properly
proper notice. But
hat the second mortgagee was alone entitled to the
ıhe interest of the wife of the owner of the equity of
ɔn in the land as inchoate dowress; in as much as she
ɔd her dower in his favour, whereas she had not signed
ement with the engine company. In the absence of
ıent the value of this interest must be ascertained and
in Court, to be paid out to the second mortgagee if the
dower attached by the wife surviving her husband, and
ıgine company if it did not attach.

Beck, for the plaintiff.
s, for the Waterous Engine Company.
cLean Macdonnell, for the defendants.

[3RD DECEMBER, 1889.

RITISH CANADIAN L. & I. Co. v. BRITNELL.

ry—Rule 928—Examination under—"Transfer" from judgment debtor—"Assignment" for creditors under R. S. O. c. 124.

ansfer" used in Rule 928 is not intended to cover an
ɔnment" for the general benefit of creditors, valid and
ɔnt under R. S. O. c. 124, and an assignee under that Act
one of the persons to be subjected to examination under
Rule.

A. Grant, for the plaintiffs.
noldi, for the defendant's assignee.

[4TH DECEMBER, 1889.

In re NIXON.

ution of Estates Act—Effect of—"Personal estate," meaning of, in R. S. O. c. 50, s. 31, s-s. (2)—Removal of contest from Surrogate Court to High Court.

he personalty of a person who died since the Devolution of
ıtes Act was less than $2,000, but her whole estate, includ-
land, was more than that sum.

Held, that a contest as to the grant of probate of her will could not be removed from a Surrogate Court to the High Court: for the words "personal estate" in s. 31, s-s. (2), of the Surrogate Courts Act, R. S. O. c. 50, mean personal estate proper, notwithstanding that by the Devolution of Estates Act, R. S. O. c. 108, the whole estate is now to be administered as personalty.

Hoyles, for George Nixon.

Shepley, for Joseph Nixon.

MOLSONS BANK v. DILLABAUGH.

Judgment by default—Cutting down from final to interlocutory—Delay in issuing and serving order—Action on guaranty.

An order to set aside proceedings must be served forthwith; otherwise the opposite party may treat it as abandoned.

And where final judgment was cut down to interlocutory judgment by order of a Master, granted on the 9th July, but not issued or served till the 19th November:

Held, that the delay was fatal, and the Master was wrong in allowing the stale order to be used against the judgment as originally signed.

Semble, also, that where in an action on a guaranty the writ of summons is not specially indorsed, but full particulars are set out in the statement of claim, final judgment may be signed upon default of defence.

Hoyles, for the plaintiffs.

Ludwig, for the defendant.

[GALT, C.J., 14TH NOVEMBER, 1889.

REGINA v. LEWIS.

Summary conviction—Jurisdiction of Justice of the Peace—Prayer to proceed summarily.

Douglas Armour, for the defendant, moved for a *certiorari* to remove a summary conviction of the defendant by a magistrate of the county of Elgin for an assault, on the ground that the magistrate acted without jurisdiction in this, that he convicted the defendant summarily of an assault, although in the complaint the prosecutor had not prayed the justice to proceed summarily.

GALT, C.J.—In the copy of the evidence produced before me it appears the case was heard on 22nd October, and adjourned until the 29th October, when "both parties appear; John G. James asked for summary trial." On which the magistrate gave the adjudication now complained of. It appears to me this case is concluded by the case of *Regina* v. *Deny*, 2 L. M. & P. 230, and *Reg.* v. *Smith*, 46 U. C. R. 442.

It is in the option of the complainant, or of the person acting on his behalf, to request the justice of the peace to proceed summarily under sec. 78 of the Summary Convictions Act, and if he gives expression to that wish before the case is disposed of, the justice of the peace has jurisdiction, although such wish had not been contained in the original complaint.

Application refused.

[ROSE, 7TH DECEMBER, 1889.

WRIGHT v. WRIGHT.

Pleading—Reply—Delivery after time expired—Motion to set aside—Rules 381, 392—Costs—Notice of motion—Irregularities—Rule 534.

Rule 381 provides that "A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge;" and Rule 392 provides that upon the expiry of the three weeks the pleadings shall be closed.

Held, that where, upon a motion to set aside a reply delivered after the three weeks, nothing else appears than the fact that the time has expired, the pleading should not be set aside; and even if there is the right to move, the proper order to be made upon such a motion would be one extending the time for delivery of the reply, and the moving party should have no costs.

Held, also, that upon such a motion no grounds of irregularity except those taken in the notice can be considered; referring to Rule 534.

Hoyles, for the plaintiff.

Furlong, for the defendant.

[STREET, J., 29TH NOVEMBER, 1889.

McDOUGALD v. THOMSON.

Dismissing action—Want of prosecution—Failure to enter for trial—Notice of trial—Rules 647, 663.

Where the plaintiff fails to enter the action for trial at a sittings for which he has given notice of trial, the action cannot be dismissed for want of prosecution under Rule 647; the defendant's remedy is to enter the action himself under Rule 663.

Crick v. *Hewlett*, 27 Ch. D. 355, distinguished.

George M. Barton, for the plaintiff.

Gunther, for the defendant.

[11TH DECEMBER, 1889.

THOMSON v. GYE.

Discovery—Evidence—Foreign commission—Examination of defendant before delivery of statement of claim—Special circumstances.

An order for examination before the delivery of pleadings, whether for discovery or evidence, should only be granted under exceptional circumstances, and where absolutely necessary in the interests of justice.

The plaintiff was seeking damages for breach of a contract made with persons whom he alleged to be agents of the defendant. Before delivering a statement of claim, and after many months had elapsed since appearance, the plaintiff obtained an order to examine the defendant under a foreign commission at Chicago, in the United States of America, for the purpose, as he alleged, of obtaining information for the purpose of framing his statement of claim, and also for convenience, as the defendant was continually travelling about in the course of her career as a public singer, and it might not be possible to take her evidence later if it were not taken at Chicago, where she was shortly to be.

Held, that the circumstances were not such as justified the order, and it was set aside.

W. H. Blake, for the plaintiff.

C. Millar, for the defendant.

[MacMahon, J., 13th August, 1889.

PRITCHARD v. PRITCHARD.

ntempt of Court—Disobedience to order upon solicitor to repay ney into Court—Motion to commit solicitor—Rule 867.

intiff's solicitor obtained an order for the payment out certain moneys in Court, and the money was paid out on such order. The money in Court represented the he action, and the plaintiff was entitled to it, but the lleged that the plaintiff was indebted to him for costs. ntly an order was obtained by the plaintiff rescinding rder, and directing the solicitor forthwith to repay the nto Court, and to pay the costs of the application; and n such repayment into Court the solicitor should be at have his bills of costs against the plaintiff taxed, and ey should be retained in Court to answer such costs. er was personally served on the solicitor, and on his non- ice therewith, a motion was made to commit him.

that the order for committal should go; for what was by the motion was the punishment of the solicitor for his ot in disobeying the order of the Court; and that Rule l no application.

. *Moffatt*, for the plaintiff.

Holman, for the solicitor.

rmed by the Common Pleas Divisional Court, 21st ber, 1889.]

In the County Court of York.

[McDougall, Co. J., 28th October, 1889.

THORNLEY v. RILEY.

r License Act—Sale to inebriate—Action for damages—Notice to liquor seller.

R. S. O. c. 194, s. 125, it is declared that certain relatives n habitual drinker may give a notice, or may require the ector to give a notice, to any person licensed to sell intoxi- ng liquors, not to deliver such liquors to the inebriate; and if person notified, within twelve months, delivers any such or to such person, "he shall incur, upon conviction, a penalty

not exceeding $50, and the person requiring the notice to be given may, in an action as for personal wrong (if brought within six months thereafter, but not otherwise) recover from the person notified such sum, not less than $20, nor more than $500, as may be assessed by the Court or jury as damages."

In this action a notice was given by the relative, and it was contended that the action would not lie because the plaintiff had not "required the notice to be given" by the inspector.

Held, that the action for damages would lie upon the notice being given by the plaintiff.

NEW BRUNSWICK.

In the Supreme Court.

[OCTOBER, 1889.

GILCHRIST v. PROVEN.

Evidence—Improper admission of—Jury view—Conversation by jurors with third parties—New trial.

This was a motion for a new trial. There were two principal grounds on which the applicant relied; first, the improper admission of evidence in allowing the declaration of a stranger who pointed out a certain stump and said it was a line tree; and secondly, the conversation of third parties with the jury while on a view. A jury view had been ordered under the charge of the deputy-sheriff of the county, and before leaving the Court room the learned Chief Justice before whom the cause was tried particularly cautioned the jury not to hold any conversation with third parties while absent from the Court. The plaintiff, who was the owner of a herd of Jersey cattle and a fine stallion, had this stock brought out and shown to the jury, who examined them, commented on their good points, etc., and one of the jurors then made an agreement with the plaintiff's hired man for the services of the stallion.

Held, that the acts of the jury were a good cause for a new trial; and also that the evidence of the stranger should not have been admitted.

Pugsley, S.-G., for the plaintiff.

A. S. White, for the defendant.

Ex parte FOLEY.

liquors—Liquor License Act—Municipal council refusing to licenses—Mandamus compelling a hearing of application.

unicipal council of Gloucester had refused to grant r the sale of liquor under the provisions of the Liquor ct, 1887. The defendant, who was an applicant for obtained a rule *nisi* for a *mandamus* to compel the coun- r and determine upon his application for a license, s made absolute after argument.

v. *Justices of Kings*, 15 N. B. Reps. 535, followed.

. *Gregory*, for the applicant.

A.-G., contra.

RICHARD v. BROWN.

—Powers of trial Judge—Whether contributory negligence a question for Judge or jury—Request of plaintiff to stop suit.

was an action for damages for negligence causing an t to the plaintiff, brought against the lessee of the Kent rn Railway, and at the trial the plaintiff was non-suited ground that he was a trespasser on the railway at the the accident, and guilty of contributory negligence. At al the plaintiff stated that he did not wish the suit to go rther.

d, by KING and TUCK, JJ., sustaining the non-suit, that the at the trial had the power to determine whether there was ice of contributory negligence on the part of the plaintiff .

ld, also, by ALLEN, C. J., that inasmuch as the plaintiff had l in Court at the trial that he wished the cause stopped, this t had power to accede to his request.

ld, by WETMORE and FRASER, JJ., that a new trial should ranted on the ground that the question of contributory gence was not a matter for the Judge to determine but ld have been left to the jury.

. *D. Phinney*, for the plaintiff.

. *J. Sayre*, for the defendant.

O'LEARY v. STEWART.

Pleading—Defence — Foreign adjudication of bankruptcy — Amendment — Terms—Contract for sale of goods—Delivery in instalments—Right to recover for each instalment when delivered.

At the trial the defendants applied to amend their pleadings by setting up that they had been declared bankrupt in England, which the trial Judge, being of opinion that the plea would be demurrable, would only allow on payment of costs of the cause and trial. The plaintiff had a contract with the defendants for the delivery of a large quantity of deals. The deals were to be delivered by shipment in instalments, and upon delivery each shipment was to be paid for. All the deals had not been delivered, and it was contended that the plaintiff could not recover until he had delivered or was ready to deliver all the deals contracted for. The plaintiff obtained a verdict for the deals delivered, and the defendants moved for a new trial.

Held, that while the condition imposed by the Judge at the trial was not reasonable and too onerous, the plea was clearly bad, and the refusal to allow the amendment worked no prejudice to the defence.

Held, also, that the plaintiff was entitled to recover upon each shipment as delivered.

J. G. Forbes, for the defendant.

Geo. F. Gregory, for the plaintiff.

Ex parte WALLACE.

Summary conviction—Distress warrant—Commitment—Who entitled to receive penalty and costs—Payment to prosecutor no ground for discharge.

The applicant had been summarily convicted for the illegal sale of intoxicating liquor and adjudged to pay a fine of $50 and costs, and in default of payment to be committed to gaol for a term of two months unless the fine and costs were sooner paid. The fine not having been paid, a distress warrant was issued by the convicting justices and given to a constable for execution, who, finding no goods and chattels whereon to levy, returned the distress warrant unsatisfied. A commitment was then issued, by virtue of which the applicant was confined in gaol.

He applied for his discharge on the ground that he had paid the prosecutor the amount of the penalty and costs before his arrest.

Held, PALMER, J., dissenting, that the applicant was not entitled to a discharge; for the penalty and costs were payable only to the convicting justices or to the constable who held the distress warrant, and no other person could receive payment.

G. W. Allen, for the applicant.

J. A. Vanwart, contra.

CAMPBELL v. McGREGOR.

Railways—Sparks from engine —Negligence— Contributory negligence — Liability of persons using engine.

A. was a contractor for the construction and equipment of one hundred miles of railway, and he sublet a section of ten miles to the defendants, who were to grade, ballast, and lay the track. They were supplied with an engine for this work. The netting over the smokestack of the engine had a hole in it some four inches square, and in the progress of the work sparks escaped from the engine and set fire to a barn, which with its contents was burned. The driver was employed and paid by the defendants. One corner of the barn was a few inches within the bounds of the land taken for the railway and only forty-eight feet from the centre of the track. The sills of the barn were raised six or eight inches from the ground and there was a considerable quantity of hay in the the barn placed on poles laid on the ground, so that the hay was exposed along the side of the barn facing the railway in the space between the sills and the ground and in some places projecting beyond the sills. It was in this space the hay caught fire. The barn had been built before the railway was laid out. At the trial the defendants contended that the plaintiff was guilty of contributory negligence in not protecting the hay where it was exposed between the ground and the sills. It was also contended that the action should have been brought against the company incorporated for the construction of the railway. At the trial the Judge ruled that there was no evidence of contributory negligence on the part of the plaintiff.

Held, by PALMER, KING, FRASER, and TUCK, JJ., (ALLEN, C. J., and WETMORE, J., dissenting), that there was no evidence of con-

tributory negligence on the part of the plaintiff and that the evidence of negligence on the part of the defendants was clear.

Held, also, that the liability was that of the defendant.

J. A. Vanwart, for the plaintiff.

L. A. Currey, for the defendant.

LANDRY v. BANK OF NOVA SCOTIA.

Banks and banking—Bill of exchange—Discount—What it is—Conversion—Accepting payment of a draft less discount—Trover.

The plaintiff gave the agent of the defendants at Moncton, N.B., a draft on a person in Pictou, N.S., and alleged that the agent stated to him that on the draft being accepted, the bank would discount it and hand the proceeds to the plaintiff. At the trial the agent stated that he was to endeavour to get the draft accepted, and then discount it, but made no agreement to hand the proceeds to the plaintiff. On presentation the draft was paid, less the discount, and the proceeds were appropriated by the bank to retire certain dishonoured notes held by the bank, on which the plaintiff was indorser, and which were past due some three or four years. The plaintiff demanded the draft or its proceeds, and on refusal brought action of trover against the bank, and contended that the bank had no right to accept the money from the drawees, less the discount, and if they did so it was a conversion, and also that the refusal to pay the proceeds to the plaintiff or return the draft was conversion. The jury found that the agent had agreed to procure the acceptance of the draft, and then discount it and hand the proceeds to the plaintiff.

The defendants applied for a new trial.

Held, that the discounting of a bill by a bank means, *ex vi termini*, a deduction or drawback made upon its advances of loans of money upon negotiable paper, or other evidences of debt payable at a future day, and transferred to the bank; and that in this case there was no discount, because there could not be a discount without the handing over of the money to the plaintiff; and also that this was a clear case of conversion, and the plaintiff was entitled to recover.

Geo. F. Gregory, for the plaintiff.

Hannington, Q.C., for the defendant.

In re SAINT JOHN BUILDING SOCIETY. *Ex parte* PUGSLEY.

Company—Winding-up—Rules of company—Solicitor—Contributory.

By the rules of a certain society its solicitor must be the holder of five shares of the stock. P., who had been solicitor for some years, had subscribed for five shares of $50 each, and paid on them $15. The society became bankrupt, and P. claimed that he should not be placed on the list of contributories, alleging that there was an agreement that certain fees coming to him as solicitor were to go towards the payment of his stock. The proceedings were before Tuck, J., under the Winding-Up Act, and he found that no such agreement was made out in evidence. The applicant now applied for leave to appeal, and the matter was referred to the Court for opinion.

Held, that the Court would not interfere with the finding of the Judge in matters of fact.

Held, by WETMORE and FRASER, JJ., that the applicant was estopped from disputing his liability as the holder of five shares, after having enjoyed the benefits of the office of solicitor, and from time to time holding himself out as such officer to the public.

Pugsley, S.-G., for the applicant.

SAYRE v. WILLIAMS.

Bail—Affidavit for—Cause of action—Harbour customs—Vessels in port—Obligations of master.

G. hired a scow from the plaintiff, and loaded it with deals, and took it alongside the S.S. *North Erin*, of which the defendant was master. During the night the scow went adrift and was lost. The plaintiff alleged that the loss of the scow was due to the improper manner in which the crew of the steamer secured the scow to the vessel. The defendant, having been held to bail, applied to cancel the bail bond, and for his discharge. A number of objections were taken to the affidavits to hold to bail, and it was also contended that steamers were not liable for scows that broke adrift from them, or under any liability to take charge of them, or responsible for damage done to them.

Held, that after eliminating from the affidavits to hold to bail all the statements that were founded on information and belief,

those statements that were positive did not show a good cause of action.

Held, by KING, J., that the affidavits were deficient in not setting forth the customs of the port of St. John, with respect to the obligations of the masters of vessels when loaded scows were brought alongside.

Held, by PALMER, J., that the affidavits disclosed a good cause of action.

C. A. Palmer, for the plaintiff.

H. H. McLean, for the defendant.

VAUGHAN v. PROVIDENCE & WASHINGTON INS. CO.

Offer to suffer judgment by default—Verdict for less amount—Defendants entitled to trial fee—C. S. c. 37, s. 128.

In this case the defendants had filed an offer to suffer judgment by default under Consol. Statutes c. 37, which the plaintiff refused to accept, and proceeded to trial, and recovered a verdict for a less amount than that offered. The defendants were granted a fiat for a trial fee, to which objection was taken.

Held, WETMORE, J., dissenting, that under Consol. Statutes c. 37, s. 128, the defendant was entitled to costs incurred subsequent to the offer to suffer judgment, and had a right to an allocatur for a trial fee, he being substantially the successful party at the trial.

E. McLeod, Q.C., for the plaintiff.

C. A. Palmer, for the defendants.

RICHARDSON v. VAUGHAN.

Appeal to Supreme Court of Canada—Notice of—Power of Judge to make order—R. S. C. c. 135. s. 41.

A question was submitted for the opinion of the Court as to whether a Judge had the power to make an order for an appeal to the Supreme Court of Canada in a case where the defendant had died, and no notice of appeal had been given within twenty days next after the decision complained of, as required by R. S. C. c. 135, s. 41.

Held, WETMORE and TUCK, JJ., dissenting, that the Judge might make the order for appeal, leaving it to the plaintiff to

take the objection that the appeal was too late before the Supreme Court of Canada.

C. A. Palmer, for the plaintiff.

Geo. B. Seeley, for the defendant.

OVERSEERS OF THE POOR FOR THE PARISH OF MONCTON v. OVERSEER OF THE POOR FOR THE FRENCH INHABITANTS OF THE PARISH OF MONCTON.

Municipal corporations—C. S. c. 101, s. 3—French poor—Action for relief—Does not lie in same parish.

The plaintiffs had furnished relief to one of the French poor of the same parish, and brought an action to recover the amount of the relief under C. S. c. 101, s. 3.

Held, that the right of action as given by the statute does not apply in the same parish.

Geo. F. Gregory, for the plaintiffs

P. A. Landry, for the defendant.

WILLIAMS v. CITY OF PORTLAND.

Municipal corporations—Cutting down streets—Right to repair and grade.

W. and wife brought an action against the city of Portland to recover damages for injuries sustained by the female plaintiff in June, 1887, by falling from a plank which had been placed by the plaintiffs at the door of their house on Bridge Street to allow them to pass to and from the street, in consequence of the street being cut down several feet in front of their house. The case was tried at the Circuit Court in August, 1888, and the jury awarded the plaintiffs $625 damages. The defendants moved for a non-suit, the principal ground relied upon being that there was no breach of duty on the part of the defendants, nor were they under any liability for cutting down the street, as it was done for the convenience of the public.

Held, PALMER, J., dissenting, that the corporation had the right and authority under their charter and it was their duty to repair and grade and level and cut down the streets within the limits of the city.

Pugsley, S.-G., for the plaintiffs.

L. A. Currey, for the defendants.

FANJOY v. CITY OF PORTLAND.

False arrest and imprisonment—Action for—Excessive verdict—Damages reduced.

This was an action brought against a city corporation to recover damages for illegal arrest and imprisonment. The plaintiff alleged that a tax bill was left at his residence in 1885, and that shortly afterward he took the bill to the chamberlain and paid it, receiving the usual discount. In 1886 a constable called on him several times for the payment of the taxes of 1885, amounting to $2.25, and each time the plaintiff told the constable that he had paid the tax and had the receipt but would not show it. In November, 1887, the constable called on the plaintiff again and asked him if he would pay the tax. The plaintiff replied he would not. The constable then arrested him and went with him to his house, where he searched for the receipt but could not find it. He then paid the money under protest but afterwards finding the receipt brought this action. The case was tried and the jury awarded a verdict for $400 to the plaintiff.

The defendants now moved for a new trial.

Held, PALMER, J., dissenting, that the verdict was excessive and that unless the plaintiff consented to reduce it to $100 a new trial would be ordered.

Blair, A.-G., and *A. H. Hannington*, for the plaintiff.

L. A. Curry, for the defendants.

Ex parte MELANSON.

Summary conviction—Liquor License Act, 1887—Minute of adjudication—Variance—Form of conviction—C. S. c. 62—Appeal to Judge of County Court—Certiorari.

This was an application for a certiorari to remove a summary conviction made by two justices under the Liquor License Act of 1887 for selling liquor without a license. The conviction adjudged M. guilty of the offence and ordered him to pay a fine of $50 and to pay the prosecutor $11.50 for his costs; and unless such sums were paid forthwith he was to be imprisoned in the county gaol for two months unless the sums should be sooner paid.

The grounds on which the certiorari were moved for were :—

1. That the justices had no power to make such a conviction, because it varied from the minute of adjudication made at the trial, which did not award imprisonment.

2. That the conviction should have been in form (L) prescribed by C. S. c. 62, s. 17, and not in the form (M) under s. 18.

Held, as to the first objection that the conviction was bad, following *Regina* v. *Perley*, 25 N. B. Reps. 48.

Held, also, that the conviction should have been in the form (L) in the schedule to C. S. c. 62, and not in the form (M), and was consequently entirely unauthorized.

Held, however, that, as the granting of a certiorari is discretionary with the Court, in this case it ought not to be granted, inasmuch as the defendant had taken an appeal to the Judge of the county and neglected afterwards to prosecute it before him ; and the rule for a certiorari was discharged.

Geo. F. Gregory, for the applicant.

Blair, A.-G., contra.

Ex parte PORTER.

Constitutional law—Authority of Dominion Parliament to establish criminal Court—Summary Convictions Act—Police Magistrate may act under—Conviction under R. S. C. c. 148—Costs—Defendant and wife not competent witnesses.

P. was summarily convicted for the improper use of fire arms by the police magistrate of Woodstock, under R. S. C. c. 148, and the proceedings were under the Dominion Summary Convictions Act, R. S. C. c. 178. The first objection was that the information should have been before two justices of the peace, and that a police magistrate had no jurisdiction because the Dominion Parliament had no power to create Courts of criminal jurisdiction in this Province.

Held, by ALLEN, C. J., following *Ex parte Perkins*, 24 N. B. Reps. 26, that parliament has the exclusive right to legislate on the criminal law and the procedure in criminal matters, and necessarily the power, in the absence of any Court constituted by the Provincial Legislature for this purpose, to declare by whom the provisions of the Summary Convictions Act should be enforced.

Another objection was that the minute of adjudication did not state the amount of costs the defendant was adjudged to pay.

Held, by ALLEN, C. J., that it was sufficient for the magistrate to adjudge that the defendant pay costs, the amount of which could be fixed when the conviction, which was the record of the judgment, was drawn up. *Regina* v. *Perley*, 25 N. B. Reps. 43, distinguished.

A third objection was that the defendant was justified in presenting the pistol, and that the magistrate came to a wrong conclusion.

Held, that this was a matter which the Court would not inquire into. The Court will not review the judgment of a magistrate on evidence. *Ex parte Daley*, 27 N. B. Reps. 129, followed.

Held, also, that the defendant and his wife were not competent to give evidence in this case, and that s. 210, R. S. C. c. 174, did not apply.

Geo. F. Gregory, for the applicant.

J. A. Vanwart, contra.

LEVESQUE v. NEW BRUNSWICK R. W. CO.

Railways—Consolidated Railway Act, 42 V. c. 9, s. 27—Liability of railway company for neglect to obey statutory duty—Damages—Limit of time—Construction of 33 V. c. 49 (N. B.)—Verdict reduced.

This was an action against the defendant company for killing a horse in consequence of the alleged negligent construction of the railway, and also for damages for cattle straying on the plaintiff's land by means of the company neglecting to fence their line of railway where it passed through his land. The plaintiff obtained a verdict, and on the motion for a new trial it was urged that if the plaintiff ever had any right to claim damages it was barred by the 27th section of the Consolidated Railway Act, 42 V. c. 9, the action not having been brought till more than six months after the accident.

Held, that the right to recover damages was barred by the 27th section of the Railway Act.

Held, also, that the provisions of the Railway Act, 1879, s. 16, directing the company to erect fences on each side of the line if required to do so by the proprietors of the adjoining lands, are quite inconsistent with the direction in the 14th section of

the defendants' Act of incorporation, which requires them absolutely to erect and maintain such fences when the railway passes through improved lands. In one case the duty is conditional, in the other unconditional and imperative, and the defendants in this case were governed by the 14th section of their Act of incorporation and not by the 16th section of the Consolidated Railway Act.

Held, also, that the defendants were liable in an action against them by a person damaged by their neglect to obey the direction of a statute, and that in this action they were liable for the damages sustained during the six months preceding the bringing of the action.

Verdict reduced to $10 on first count of the declaration and entered for the defendants on the other counts.

Geo. F. Gregory, for the plaintiff.

C. W. Weldon, Q.C., for the defendants.

Ex parte JARDINE.

Canada Temperance Act—Sale to convicting magistrate—Conviction bad.

The applicant was convicted for an offence against the second part of the Canada Temperance Act. At the trial his clerk testified that within the dates mentioned in the information he had sold intoxicating liquor to the magistrate who was trying the case, the constable who served the papers, the counsel for the prosecution, and the counsel for the defence. A rule for a *certiorari* was obtained.

Held, that, as the conviction might have been for the sale made to the magistrate, it was bad; and also that it was improper for the magistrate to hear and determine a case on the evidence of a sale to himself.

Blair, A.-G., for the applicant.

J. A. Vanwart, contra.

CAMERON v. TOWN OF MONCTON.

Municipal corporations—Negligence—Defect in sidewalk made by a third party—Corporation liable.

This was an action for negligence brought by C. and wife against a town corporation to recover damages for an injury

sustained by the female plaintiff by stepping on a loose plank in a sidewalk in the town. This plank had been spiked down by the town authorities and afterwards removed by the proprietor of a building to repair a drain and had been replaced by him without being spiked down, and remained in this loose condition for some time.

Held, by PALMER, WETMORE, and FRASER, JJ., that there was evidence upon which the jury could find that this plank had been out of place sufficiently long for the town authorities to have had notice of the defect and they were therefore guilty of negligence and the plaintiffs were entitled to recover.

Held, by ALLEN, C.J., and KING, J., that there should be a new trial on the ground of improper admission of evidence.

Held, by TUCK, J., that a non-suit should be entered pursuant to leave reserved.

R. B. Smith, for the plaintiffs.

W. W. Wells, for the defendants.

McGREGOR v. HARRIS.

Staying proceedings after judgment—Order of Judge at Chambers—Right to make—When inoperative—Varying by Court—Merits—New trial.

The plaintiffs had obtained a verdict subject to leave reserved to move for a new trial. WETMORE, J., made an order at Chambers directing that upon payment into Court of the amount of the verdict and costs the plaintiffs might have same paid out to them upon their entering into a security to abide the result of a new trial, and also that the return of the *postea* and signing of judgment be stayed till the next term.

Held, that the Judge had a right to grant such an order, but that the defendant by not accepting the terms and acting upon the order had rendered it inoperative to effect the stay. The defendant having however shown on the argument that there were reasonable grounds for a motion for a new trial and that this application was *bona fide*, it was ordered, WETMORE, J., dissenting, that the defendant upon payment into Court of the amount of the verdict, interest, and costs, all further proceedings be stayed until he could have an opportunity in the usual course to move for a new trial.

E. McLeod, Q.C., for the plaintiff.

S. Alward, for the defendant.

CLARK v. COLLIER.

Costs—Taxation—Motion for review—Taxing officer the judge of work done.

This was an application for the review of the taxation of the costs in the suit upon the ground that some of the work charged for had not been performed. The principal objection was to an item of $65 for drawing and preparing the appeal papers.

Held, that the clerk by whom the costs were taxed was the judge in the matter and that the discretion used by him would not be reviewed by the Court, and that the Court will not in general interfere unless they see clearly that the taxing officer has come to a wrong conclusion.

BUSBY v. SCHOFFIELD.

Maritime law—Action against ship owners—Verdict against master—One defendant cannot compel judgment to be signed against another—Locus standi—Collusion—What amounts to a release.

An action was brought against the defendants as owners of a vessel, and this was an application made by F., one of the defendants in the suit, for an order to compel the plaintiff to sign judgment upon a verdict which he had obtained against W., the master of the vessel, so as to enable F. to plead it in this suit, the defendants being joint tort-feasors; and also to show cause why all proceedings should not be stayed on the ground that the plaintiff had entered into a collusive agreement with some of the defendants not to enforce any verdict he might obtain in this suit against their property.

Held, that what took place between the plaintiff and W. as to no further proceedings being taken against him upon the verdict simply amounted to a discontinuance of that suit, and that F. had no *locus standi* to require judgment to be signed on that verdict.

Held, also, that the alleged collusive agreement merely amounted to a covenant or undertaking not to enforce any judgment that might be obtained in this suit against those defendants and did not amount to a release, but if it did, then it was open to F. to plead it.

C. A. Palmer, for the applicant.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[RICHARDSON, J., 16TH SEPTEMBER, 1889.

In re BOYLE.

Territories Real Property Act, R. S. C. c. 51—Lands not under Act—Effect of unregistered deed executed after 1st January, 1887—Executions delivered to registrar under s. 94—Priority—Indorsement on certificate of ownership.

This was a case referred to a Judge of the Supreme Court by the Registrar of the Assiniboia District under the T. R. P. Act for examination of the title of W. H. Boyle, an applicant for a certificate of title, subject to a mortgage of $50,000, to certain lands.

The facts were as follows:—On 21st July, 1886, the Bell Farm Company became grantees of the lands; on 27th August, 1886, the lands became subject to a mortgage made by the said company for $50,000; on 14th January, 1888, the Bell Farm Company executed a deed purporting to convey the lands to W. H. Boyle, subject to the $50,000 mortgage; but this deed was not registered, nor were the lands brought under the Act. Subsequently certain execution creditors of the Bell Farm Company lodged executions with the sheriff, who in pursuance of s. 94 of the Act delivered certified copies of the writs to the Registrar with a description of the lands intended to be charged, viz: the lands in question.

W. H. Boyle now applied for a certificate of ownership, subject only to the $50,000 mortgage; but the execution creditors opposed the application on the ground that the land was bound by their executions.

Secord and *I. Campbell*, for the applicant.

D. L. Scott, Q.C., for the execution creditors.

RICHARDSON, J.—The Registrar of Assiniboia having referred, under s. 48 of the Act, Mr. Boyle's application for a certificate of title to several sections of land described in the application, and from his reference it appearing that several persons other than the applicant claimed to be interested, under my direction the notice directed by s. 52 was published—the result being that seven adverse claims were filed, and the matter came up for hearing and adjudication before me on 19th August, 1889.

The duty devolving on me in this matter is defined by s. 49, to examine this title and hear all persons claiming to be interested, *i.e.*, the claims above referred to, as no other adverse claims have been filed, and by s. 53, if satisfied with the applicant's title, to order registration. The title which the applicant seeks to have certified to him under the Act is that of an owner subject to a mortgage, while the seven adverse claimants urge that in registering and certifying the title they are entitled to have entered on the register and certificate to the applicant memoranda of the executions against lands which they respectively have in the sheriff's hands, and in which they have complied with the requisites of s. 94 as to delivery of copies of writs and memoranda of lands intended to be charged, *i.e.*, these lands. In this manner the title to the lands in question is not a registered title under the Act, and the application of Mr. Boyle is under s. 45, to have his title registered under the provisions of the Act. I may here notice that the facts in the *Massey* case, recently decided in Manitoba, (a copy of the judgment in the case having been sent me by Mr. Campbell) differ materially from the facts in this, inasmuch as there the title had been previously registered.

Looking at the Act it is to be observed that it consists of five distinct parts: one, sections 5 to 17 inclusive, dealing with descent, conveyance, etc., of real property, while the remaining sections deal with registration of titles and providing how registrations as to lands patented after 1st January, 1887, are to be made, and as to lands deeded prior to that date. Now the owners (*i.e.*, owner being defined as any person or body corporate entitled to any freehold or other estate or interest in land at law or in equity in possession, futurity, or expectancy) may obtain registration of their titles. This class of owners are not obliged to avail themselves of the Act; what rights they have independent of the Act are preserved to them; but when they do apply to come under it, and have obtained registration, the lands so registered then become by such operation bound by the provisions governing lands brought under it. In the Act provision is made for incumbrances and charges upon lands created or existing in advance of registration, and s. 94 makes provision for charging lands by execution. The question raised and which I have now to determine is: are the lands in question in this matter bound by the executions referred to?

Because if so when effecting registration of the applicant's title, I should direct the Registrar to enter a memorandum of the executions on the register. In no other respect is there any question, for it is not disputed that on 21st July, 1886, the Bell Farm Company became grantees of the lands; that on 7th August, 1886, they mortgaged them; and on 14th January, 1888, by deed conveyed the same subject to the mortgage to the present applicant.

Giving effect, as I consider I must, to the positive words of s. 6: "Every deed or instrument conveying land shall operate as an absolute conveyance of all such right and title as the grantor has therein at the time of its execution unless a contrary intention is expressed in such conveyance," and as no contrary intention is expressed in the deed of 14th January, 1888, and as it is clearly in words a conveyance of lands, I think the deed operates as an absolute conveyance of all such right and title as the applicant's grantors had, previously to its execution, in the lands. The grantee thus became an owner as defined by the Act and as such entitled to apply for registration. There appears to be no question that, unless created by the Act itself, in this case the executions referred to do not bind the lands, they being subsequent in point of date to the applicant's title, and there is no doubt but that, had the deed of 14th January, 1888, not passed and the Bell Farm Company been the applicants, the lands would be bound, because they would be "owners;" and further if the executions were against the applicant Boyle the lands would be bound. But in this matter, the right and title of the Bell Farm Company in the lands having under s. 6 absolutely passed to the applicant Boyle, he thenceforward became and was, when he made his application, owner; and inasmuch as the executions were not against him, his ownership, I conceive, was not affected by the proceedings taken in the registry, and holding such opinion I intend so directing the Registrar by order under s. 53 of the Act. I do not find in the Act any authority for making entries of executions against lands on the certificate of title, inasmuch as executions against lands are not by s. 54 expressly named as items to be entered upon certificates, and because once on the register under s. 61, s-s. (*e*), by implication and without special mention in the certificate, the lands so bound by entry on the register are subject to executions against lands.

INDEX-DIGEST OF CASES.

NOTED, DIGESTED, AND REPORTED IN THIS VOLUME:

AND ALSO OF THE CASES PUBLISHED DURING 1889 IN THE OFFICIAL REPORTS OF THE SUPREME COURT OF CANADA, AND OF THE PROVINCES OF ONTARIO, NOVA SCOTIA, NEW BRUNSWICK, MANITOBA, BRITISH COLUMBIA, AND THE NORTH-WEST TERRITORIES.

NOTE:—Where a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1889.

C. L. T.—*Canadian Law Times.*
Occ. N.—*Canadian Law Times Occasional Notes.*
S. C. R.—*Supreme Court (of Canada) Reports,*
A. R.—*Ontario Appeal Reports.*
O. R.—*Ontario Reports.*
P. R.—*Ontario Practice Reports.*
N. S. Reps.—*Nova Scotia Supreme Court Reports.*
N. B. Reps.—*New Brunswick Supreme Court Reports.*
Man. L. R.—*Manitoba Law Reports.*
Brit. Col. L. R.—*British Columbia Law Reports.*
N. W. T. Reps.—*North-West Territories Supreme Court Reports.*

A.

B.

C.

D.

E.

F.

G.

H.

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J.

L.

M.

N.

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P.

Q.

R.

S.

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V.

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