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SPECIFIC PERFORMANCE OF CONTRACTS FOR CONTINUOUS PERSONAL RELATIONS.*

IN the early days of the Court of Chancery it did assert a jurisdiction to order the specific performance of contracts for the maintenance of a continuous personal relation, such, for example, as the relationship between master and servant; but the courts now, as a general rule, no longer attempt, or at any rate are very loth to attempt to enforce the continuance of such a relationship, or of any other relationship which is based upon the existence of mutual confidence and trust. Sir George Jessel, M.R., deals with the matter as follows:—"A dozen people may agree to meet and play whist at each others' houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each others' houses, or at any other place where there is a possibility of their meeting each other; but if the association has no property and takes no subscriptions from its members, I cannot imagine that any Court of Justice could

* The following article consists of extracts from lectures on Specific Performance, delivered before the Students of the Law School, at Osgoode Hall, Toronto.

interfere with such an association if some of the members declined to associate with some of the others. That is to say, the courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of living and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy—in such cases no Court of Justice can interfere so long as there is no property, the right to which is taken away from the person complaining" (*a*).

Lord Justice Cotton says, in a case involving the right of a person to continue to act as a director of a company: —"If the company says that even if the plaintiff has the qualification they do not desire him to act as one of the managing directors, we should not grant any injunction, because it would be contrary to the principles on which this court acts to grant specific performance of this contract by compelling this company to take this gentleman as managing director, although he was qualified so to act, when they do not desire him to act as such" (*b*).

Lord Justice Fry says:—"I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another, to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery, and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner" (*c*).

Although the courts will not enforce specific performance of a contract for personal service, yet they will

(*a*) *Rigby* v. *Connol*, 14 Ch. D. 487.

(*b*) *Bainbridge* v. *Smith*, 41 Ch. D. 474.

(*c*) *De Francesco* v. *Barnum*, 45 Ch. D. 438.

recognize the validity of such a contract, *even though it be for the term of a man's whole life* (*d*).

"The law of England allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents—any elements of servitude as distinguished from service" (*e*).

The limitations of the right of contract in this respect are well set forth by Mr. Hargrave in his argument in *Somersett's Case* (*f*):—"The law of England will not permit any man to enslave himself by contract. The utmost which our law allows is, a contract to serve for life; and some perhaps may even doubt the validity of such a contract, there being no determined cases directly affirming its lawfulness. Certain also it is that service for life in England is not usual, except in the case of a military person, whose service, though in effect for life, is rather so by the operation of the yearly acts for regulating the army and of the perpetual act for governing the navy, than in consequence of any express agreement. However, I do not mean absolutely to deny the lawfulness of agreeing to serve for life. . . . . The law of England may perhaps give effect to a contract of service for life; but that is the *ne plus ultra* of servitude by contract in England. It will not allow the servant to invest the master with an arbitrary power of correcting, imprisoning or alienating him; it will not permit him to renounce the capacity of acquiring and enjoying property, or to transmit a contract of service to his issue. In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery."

All that has thus far been said with regard to the principles upon which the court will act in refusing specific performance of a contract for personal service or

(*d*) *Wallis* v. *Day*, 2 M. & W. 281.

(*e*) *Per* Bowen, L.J., in *Davies* v. *Davies*, 36 Ch. D. 393.

(*f*) 20 St. Tr. 1.

for the continuance of personal relations, is perhaps applicable only to a contract by which the parties affirmatively agree upon the terms of such service or of such relations. If, on the other hand, the contract be one by which the parties agree in the negative form that one or more of them shall not do some specified act, as, for example, that he will not serve any other person during a specified period, specific performance thereof may be enforced by means of an injunction restraining the doing of the prohibited act. No great difficult was formerly felt by the court in enjoining the breach of *an express negative agreement*, but, while that jurisdiction may be open to some question, there has been a great difference of opinion with regard to the power of the court to practically order the specific performance of an affirmative agreement, by restraining the contracting party from committing a breach thereof, upon the theory that the court may restrain the breach of a negative agreement, and that every affirmative agreement has imported into it by implication a negative agreement, to the effect that the contracting party will do nothing inconsistent with the affirmative agreement into which he has entered, and that therefore the court may restrain him from committing a breach of this implied negative agreement.

One of the best known cases upon this breach of the law is the case of *Lumley* v. *Wagner* (*g*). Mademoiselle Wagner, who was an opera singer, had entered into a contract with Lumley, who was an operatic manager, that she would sing twice a week at his theatre for three months, in certain specific roles, for a specified remuneration, *and that she would not use her talents at any other theatre.* Subsequently to the making of this contract she entered into another agreement with one Gye, who was also an operatic manager, whereby, in consideration of a promise of higher remuneration, she agreed to sing in Gye's theatre and to abandon her contract with Lumley. Lumley then filed a bill against Mademoiselle Wagner and Mr. Gye for an injunction to restrain Gye from employing her, and to

(*g*) 1 DeG. M. & G. 604.

restrain her from committing a breach of the negative stipulation in her contract with the plaintiff. It was contended on behalf of the defendants that as the court could not enforce specific performance of the affirmative part of the agreement, it should not restrain a breach of the negative portion thereof. The court, however (Lord St. Leonards, L.C.), granted the injunction as asked. The case has been repeatedly followed, and the principle of law there laid down and acted upon was for a long time deemed to be well settled; but latterly some of the Judges have intimated their dissatisfaction with the case, and that the application of the principle should in practice be restricted rather than extended. In that case there was the express negative covenant, and the chief difficulty in connection with this branch of the law arises in those cases in which there is no express negative contract. We shall consider some of the subsequent cases in their order of date.

In *Catt* v. *Tourle* (*h*), the plaintiff, who was a brewer, had sold a piece of land to a purchaser, who agreed that the plaintiff should have the exclusive right of supplying beer to any public house which might be erected on the land, but the plaintiff did not enter into any agreement to supply the beer. The purchaser subsequently sold the land to the defendant, who had notice of the said agreement, but who, notwithstanding this, erected a public house upon the land and supplied it with beer from his own brewery. The plaintiff then filed his bill to restrain the defendant from acting in contravention of the agreement. It was contended on behalf of the defendant that the court would not interfere, as there was a want of mutuality, and as there was no express negative covenant to the effect that the defendant would not get his supply of beer from some person other than the plaintiff. The court held that though the covenant was in its terms positive, yet it was in substance negative, and that the

(*h*) L. R. 4 Chy. 654.

court would interfere by injunction to restrain the defendant from acting in contravention of it. The court followed *Holmes* v. *Eastern Counties Ry. Co.* (*i*), in holding that a grant of an exclusive right of this description contained in a covenant is equivalent to a negative covenant. This does not go the length of holding that every affirmative covenant has imported into it an implied negative covenant, a breach of which will be enjoined by the court.

Subject to what is hereafter said about its being subsequently disapproved of, *Montague* v. *Flockton* (*j*) broke down the distinction between affirmative contracts and negative contracts, in so far as the authority of a single Judge (V. C. Malins) was capable of so doing. In that case it was held that an actor who enters into a contract to perform for a certain period at a certain theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.

To the same effect, in so far as concerns breaking down the distinction between affirmative and negative agreements, are the remarks of Lord Selborne, L.C., in *Wolverhamton, etc. Ry. Co.* v. *London & N. W. Ry. Co.* (*k*), where he says:—"With regard to the case of *Lumley* v. *Wagner*, to which reference has been made, really when it comes to be examined, it is not a case that tends in any way to limit the ordinary jurisdiction of this court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made that if you find the word 'not' in any agreement—'I will not do a thing'—as well as the words 'I will,'

(*i*) 3 K. & J. 675.

(*j*) L. R. 16 Eq. 189.

(*k*) L. R. 61 Eq. at p. 440.

even though the negative term might have been implied from the positive, yet the court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance, and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

It will be observed that the Lord Chancellor in this judgment agrees with V. C. Malins in the view that the distinction should be broken down between affirmative covenants and negative covenants, but he also intimates the opinion that even where there is an express negative covenant, the court should not, as a general rule, restrain the breach thereof, unless it has also the power to order specific performance of that which is practically and substantially the affirmative thereof. The application of this rule would have produced a different result both in *Lumley* v. *Wagner* and in *Montague* v. *Flockton*. The Lord Chancellor, moreover, intimates that where the court has power to order the specific performance of the thing agreed between the contracting parties, the court should so order or should restrain the breach of the contract, even though there be no express negative covenant.

Quite in accord with the latter part of the opinion of Lord Selborne, as cited, is the judgment of Sir George Jessel, M.R., in *Fothergill* v. *Rowland* (*l*), where he holds (in a case in which there was no negative covenant) that the court will not interfere to restrain the breach of a

(*l*) L. R. 17 Eq. 132.

contract for the sale and delivery of chattels, of which it could not enforce specific performance. He says (at pages 140-1): "Then it is said, assuming this contract to be one which the court cannot specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. . . . . I cannot find any distinct line laid down or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked . . . . . for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions—that the rule is that the court is to find out what it considers convenient, or what will be considered a case of sufficient importance to authorize the interference of the court at all, or something of that kind."

In a House of Lords case, decided subsequently to all of those already mentioned, Lord Cairns, L.C., strongly draws the distinction between cases where there is a negative covenant and cases where the contract is wholly in the affirmative form. He says: "If there had been a negative covenant, I apprehend, according to well settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the

injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance by the court of that negative bargain which the parties have made, with their eyes open, between themselves. But, my Lords, if there be not a negative covenant, but only an affirmative covenant, it appears to me that the case admits of a very different construction. I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from and a violation of the covenant. This is a well settled and well known jurisdiction of the Court of Equity. But in that case, my Lords, there appears to me to come in considerations which do not occur in the case of a negative covenant. It may be that a Court of Equity will see that by interposing in a case of that kind, in place of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good, and there are, as we well know, different matters which the Court of Equity will, under these circumstances, take into its view. It will consider, for example, whether the injury which it is asked to restrain is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will also ask this question—Suppose the act to be done, would the right to damages for it be decided exhaustively, once and for all, by one action, or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of Equity would well look to, and on the other hand a Court of Equity would look to this: If we interfere and say, in aid of this affirmative covenant, that something shall not be done which would be a departure from it, no doubt we shall succour and help the plaintiff who comes for our assistance. But shall we do that? Will the effect of

our doing that, be to cause possible damage to the defendant very much greater than any possible advantage we can give to the plaintiff? Now, in a case of that kind, where there is an amount of discretion which the court must exercise, those are all considerations which the court will carefully entertain before it decides how it will exercise its discretion" (*m*).

A recent deliverance upon the subject is contained in the judgment of Mr Justice Fry in *Donnell* v. *Bennett* (*n*). A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted.

The learned judge says in giving judgment: "The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of *Fothergill* v. *Rowland*, and of the *Wolverhampton and Walsall Railway Company* v. *London and Northwestern Railway Company* is towards this view, that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is a subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contains or does not contain a negative stipulation; but that if on the other hand the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which

(*m*) *Doherty* v. *Allman*, 3 App. Cas. at pp. 719-21.
(*n*) 22 Ch. D. 835.

are binding on me. . . . . In the first place, there is the case of *Dietrichsen* v. *Cabburn* (*o*), in which undoubtedly the court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the court. Still more, in *Lumley* v. *Wagner*, the court enforced by way of injunction a portion of a contract, the whole of which contract could not have been enforced by way of specific performance, and Lord St. Leonards in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations (*p*): 'Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound to a true, and liberal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country, to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.' It is plain therefore that Lord St. Leonards did not adopt the view which has occurred to me as that towards which the more recent cases have been tending. That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description, where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract (*q*)."

(*o*) 2 Ph. 52. (*p*) 1 De G. M. & G. 619.

(*q*) *Donnell* v. *Bennett*, 22 Ch. D. at pp. 837-9. See *De Francesco* v. *Barnum*, 43 Ch. D. 165.

The most recent case is *Whitford Chemical Co.* v. *Hardman* (*r*), where the manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business," and it was held by the Court of Appeal that, whatever other remedies the company might have, they were not entitled, in the absence of any negative stipulation in that behalf, to an injunction to restrain the manager from giving, during the term, part of his time to a rival company. Lord Justice Lindley says:—"The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give 'the whole of his time' to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley* v. *Wagner*, and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon these specific points. In this case, we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds of these parties, beyond this, that the defendant was to give the whole of his time to the plaintiff's business. Now, every agreement to do a particular thing, in one sense, involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum*; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the perform-

(*r*) L. R. (1891), 2 Ch. 416.

ance of a personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in *Lumley* v. *Wagner*—that is say, where a person has engaged not to serve any other master, or not to perform at any other place, the court can lay hold of that, and restrain him from so doing; and there are observations, in which I concur, made by Lord Selborne in *The Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company*, to the effect that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other—some specific thing, upon which you can put your finger. . . . I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. I agree also in what Lord Justice Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction."

In the same case Lord Justice Kay says:—"What strikes me in this case is that if the court could possibly interfere in the way in which the learned Judge has interfered, by injunction, I do not see any contract of hiring

and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet, if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and as I think this case goes very far beyond any case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bona fide*, for that purpose, but it is wanted to prevent him from setting up a rival business which he has not contracted not to do."

Both of the learned Judges expressly disapproved of the judgment in *Montague* v. *Flockton*.

It is safe to say that the last word has not yet been said upon this subject. The equitable doctrine upon the point is in a plastic condition, and has not yet assumed any definite and ultimate shape, nor is it likely to do so until the whole question has been dealt with by some court of final resort.

A. H. MARSH.

EDITORIAL REVIEW.

New Rules of Court.

An instalment of the reform sought for in 1888, when the rules of practice were revised, and since earnestly desired and required, has been granted by the bringing into force of rules designed to effect the purpose of rules 210 and 211. The following are the rules substituted for rules 210, 211 and 212, which are repealed:—

210. A judge shall be at Osgoode Hall every week, except vacation, for the purpose of disposing of all business, except trials, which may be transacted by a single Judge. All applications, during the week, are to be made to the Judge assigned to take the weekly work.

211. The business of the weekly sittings shall be as follows:—

Monday and Friday—Chambers business, motions first, appeals afterwards.

Tuesday, Wednesday and Thursday—Court business.

212. All business, except *ex parte* motions, is to be entered on a list for each court day, and to be disposed of in the order of entry, unless otherwise directed by the Judge.

212 (a)—Lists shall be prepared by the proper officers of all Court business for each day, in which the causes and matters shall be entered in the order in which the præcipes are filed with the officer.

212 (b)—The above rules shall come into operation on and after the 8th January, 1894, and prior publication in the Ontario Gazette is hereby dispensed with.

This arrangement will be welcomed by the whole profession as a move in the right direction. There has for

years been a waste of judicial strength in the division of the work, and, however one may regard the policy of abolishing the system of assigning special work to special Judges, if fusion is to take place it should be complete and not partial. The division of the courts since the abolition of the special jurisdiction of the Chancery Division has been purely artificial, and not based upon any principle. It has been more the name and traditions of the Chancery Division than its powers or jurisdiction, that have made a line of cleavage between it and the other Divisions.

There is something to be said about the mode of doing what has been done, which perhaps has its significance, although it is not apparent on the face of the rules.

The new rule 210 has two verbal alterations apart from the addition to it. The first is, that the word "be" is used instead of the word "sit," which appears in the original rule. Perhaps the interpretation of this amendment is to be found in the addition to the original rule, which in effect prohibits the making of an application to a Judge, unless he is the Judge assigned to take the weekly work. The absolute necessity for his being at Osgoode Hall, if he is the only Judge to hear applications, is so apparent that one can hardly see the necessity for a rule to ensure his attendance. With regard to the addition, an exception might have been made of injunction motions, which are of such, importance that it is justifiable to apply at any time and at any place to any Judge for the relief. After all, it is not a rule of practice, but a domestic regulation which might have been left to be dealt with by an unwritten rule.

The other verbal alteration is grammatical only. The old rule read, "every week, except during the vacations;" the new rule has it, "every week, except vacation." We hope this will not have the effect of reducing vacation to the period of one week.

With regard to the arrangement of the work, it is largely a matter of opinion as to whether that provided by the original rule 211 or that provided by the new rule is the more convenient one. The old rule received very close

consideration from a representative committee of the Bar, and was at the time assented to by the Judges. And it may be said that universal opinion was then in favour of it. The balance of convenience, too, was slightly in favour of the arrangement. Under the old rules, on Mondays and Tuesdays, notice of motion could be given for the Friday Court, and on the other days of the week for the Tuesday Court. By the new rule, Court being fixed for Tuesday, Wednesday and Thursday, Monday is the only day on which notice of motion can be given for the Friday Court. If a notice is to be given on Tuesday, the motion cannot come on for a week without special leave, and all notices of motion given on and after Tuesday in any week without special leave will most probably be given for the following Tuesday, thus clogging the Tuesday Court. However, as long as all business may be taken before one Court, the main object is gained. With regard to Chamber appeals, however, it would have been more convenient if a day had been assigned for them with other appeals. They are usually of more importance than motions, and it is always inconvenient for counsel engaged in appeals to be obliged to wait until all Chamber motions are disposed of in order to get their appeals disposed of.

The necessity for repealing rule 212 is not apparent; and the new rule 212 was altogether unnecessary. It was perhaps passed through inadvertence, attention not being directed to rule 538. That rule already provides for setting down cases for Court. Rule 212 prescribed the order in which business was to be taken. The new rule repeals rule 212, re-enacts the old rule and provides for setting down as well, so that we now have two rules, new rule 212 and rule 538, both regulating the setting down of motions and preparation of lists.

Conditional Leave to Defend.

The judgment of the Queen's Bench Division in *Merchants' Bank* v. *Scott*, on a motion for judgment under rule 739, revives the question of imposing terms upon a defendant

who claims to have a good defence. Elaborate conditions were prescribed which the defendant was to observe as the price of his leave to defend. Judgment was to be entered for the plaintiff's claim and execution issued and placed in the hands of the sheriff as security for the plaintiff's claim, which might ultimately be found to be a debt, and yet might be found to be without foundation. If the defendant elected to defend there was to be no sale under the executions without leave of the Court. The defendant was to elect in ten days whether he would defend. If he did not elect his appeal was to be dismissed. If he did elect and failed in his defence, he was to pay the plaintiff's costs; if he succeeded, the judgment against him was to be set aside.

A defendant who opposes judgment against him either is advised or believes that he has a good defence, or wants time knowing that he owes the debt. In the latter case it is well to expose his conduct, if it can be done with certainty. But as a full investigation of the facts cannot take place on a chamber motion based upon affidavits, it is a rule of doubtful policy to expose a defendant to the consequences of a judgment if there is any doubt of his liability.

The temptation to a plaintiff to harass a defendant on a doubtful claim is great, when he can by a vigorous preliminary skirmish so embarrass the defendant by conditions that he is either unable to defend, or would prefer submitting to a wrong rather than enter upon a course of litigation handicapped from the start. There is a story afloat of an American justice of the peace (which is, of course, a libel on American justice) who found the evidence so evenly balanced between the plaintiff and defendant that he could not say which was right, and finally decided in favour of the plaintiff on the ground that he thought he would not have brought the action if the defendant had not owed him the debt. Perhaps, in truth, though, there is too much leaning in favour of a plaintiff.

However, the rule throws the onus on the defendant of satisfying the Judge that he has a good defence on the merits, or disclosing such facts as may be deemed sufficient to entitle him to defend. The preparation for a defence in such a case must necessarily be made hurriedly, and in many cases might involve states of facts which the defendant could not satisfactorily investigate within the time limited. If he cannot establish that he has a good defence, or if he cannot ascertain all the facts, he is liable to be called upon to pay into Court a sum which he does not owe, or give security which he cannot furnish, or submit to a judgment as security for a debt which the Court cannot say positively is due to the plaintiff, before he will be allowed to defend. If a man is not in the best of credit such a course may complete his ruin. The success of the plaintiff will depend not on the truth and justice of his claim, but upon a hypothetical claim, and the defendant's inability, not to show that it is unfounded, but to furnish the security for it. The conclusion that a defendant shall pay a claim if he cannot furnish security for it is illogical, and holds out an inducement to an unprincipled plaintiff to pursue a vigorous preliminary warfare, and force the defendant into a position where he can practically make his own terms with him under the process of the Court. A defendant in such a case comes to trial with a *prima facie* against him; the merits have been partly determined in his opponent's favour; he has the opinion of a Judge, perhaps two or three, already against him; he is in fact there on sufferance only.

If he is in the unfortunate position of having judgment and execution against him, he may be ruined before the trial. Very few men can survive the effect of judgment and execution. The credit of the very best man will suffer; he cannot buy on credit, for the execution will attach on the goods sold him if he fails in the action; and people do not care to incur such a risk.

If the Court cannot say with certainty that a debt is due, why should security be given, or the plaintiff have judgment? If it can say it positively, then judgment should, of course, go. It is true that this is an objection to the policy of the rule, not to the mode of administering justice under it. Still, the rule might be tempered with a merciful exercise of the discretionary powers which it gives. It might be well to observe the principle laid down by a Divisional Court in *Wing* v. *Thurlow*, 10 Times L. R. 53, in which Mr. Justice Wills said, "Unless one is prepared very nearly to give judgment for the plaintiff, we ought not to impose conditions which may prevent the trial of the action. It is very serious that a condition of this kind should be imposed upon impecunious people."

BOOK REVIEWS.

A practical Treatise on the office and duties of Coroners in Ontario, and the other Provinces and Territories of Canada, and in the Colony of Newfoundland, with schedules of fees, and an Appendix of Forms. Third edition. By WILLIAM FULLER ALVES BOYS, LL.B., Junior County Court Judge, County of Simcoe, Ontario. Toronto: The Carswell Co., Ltd. 1893.

The great usefulness of this book is shown by its having passed into a third edition. The law, duties and practice of coroners are here collected in a most convenient form and compass. In addition to the treatise on the office, duties, jurisdiction, rights, liability, and authority of coroners, there are treated of their duties with regard to offenders, and concerning crimes. Two chapters are devoted to toxicology, and one to wounds and bruises. The remainder of the book is taken up with evidence, the Coroner's Court, the proceedings subsequent to the inquisition, schedule of fees, and an important chapter detailing the whole proceedings at an inquest, with minute instructions as to the mode of procedure, and forms of the various oaths, affirmations, warrants, summonses, inquisitions, etc. We prophecy for this edition even a greater measure of success than the two former met with.

County Constable's Manual; or Handy Book, compiled from The Criminal Code, 1892-3. With schedules of fees, crimes and punishments; the Courts and jurisdiction.

By J. T. JONES, High Constable, County of York. Second edition. Toronto: The Carswell Co. (Ltd.). 1893.

This little book, in form suitable for the pocket, consists of an index of the principal matters necessary for a constable to know. Not only are the various crimes set forth, but many rules and regulations for the conduct of officers in and about an arrest, giving evidence, and the like, are given.

The New Conveyancer. A compendium of conveyancing precedents adapted to meet the present law; comprising forms in common use, with clauses applicable to special cases. By A. H. O'BRIEN, M.A., of Osgoode Hall, Barrister-at-law, Assistant Editor of *The Canada Law Journal, etc.*, Toronto: The Goodwin Law Book and Publishing Co. 1893.

This work provides a very useful collection of various forms in common use. It is easier to find fault than to advise, to criticise than to create. But there are some forms which might have been improved. While this is true, it must necessarily be true of every work of the kind, and so is not said in condemnation of the work. As a rule the forms are well drawn up, and many useful variations are made for changing circumstances. After all, a form is a mere guide to the conveyancer, suggesting the subject matter, rather than dictating the form, and nothing can supply the want of skill in a draughtsman.

There is a standard objection to all the agreements for sale and exchange of land, and that is that they are not binding except at the option of the vendor. They contain the usual provision against being obliged to produce evidence of title not in the vendor's possession, and this always enables the vendor to rescind without being liable for damages, if the purchaser insists on proof of title not in the vendor's possession. On the other hand, the clause

does not compel the purchaser to complete if the proof is not produced. It should be followed by a clause compelling the purchaser to complete on the evidence produced, if a good registered title is shown by the register. Again, they contain provisions, such as for adjustment of taxes, rents, etc., in the way in which the law provides for them without agreement, and as such are surplusage. The agreement for possession pending negotiations as to title is well drawn, as far as it goes, but it does not provide for the contingency of the contract not being completed, as to payment for improvements, adjustment of rents, giving up possession, etc. It is conceived on the hypothesis only that the contract will be completed. The notices of sale under the power in a mortgage contain that common but inadvisable demand for payment, and notice of proceeding if the demand is not complied with, which is unnecessary, as the money must be in arrear when the notice is given. Indeed, the second form of notice appears to be drawn in anticipation of the maturity of the mortgage. A fatal error appears in the suggestion that the mortgagee's solicitor may, as solicitor, sign the notice. The notice must invariably be signed by the party to the contract or some person authorized by him. The solicitor is usually authorized to sign the mortgagee's name, but he can acquire no right, unless the power gives it, to sign his own name.

The Principles of the Law of Evidence. With elementary rules for conducting the examination and cross-examination of witnesses. By W. M. Best, A.M., LL.B. Eighth Edition. With a collection of leading propositions. By J. M. Lely, Esq., Barrister-at-Law, Editor of "Woodfall's Law of Landlord and Tenant," etc. With notes to American and Canadian cases. By Charles F. Chamberlayne, Esq., of the Boston Bar. London: Sweet & Maxwell (Ltd.). Boston: The Boston Book Co. 1893.

This excellent work is a dignified rival of the leading work on evidence so often referred to. Perhaps a little more scientific or academic than Taylor on Evidence, in some parts, it yet contains all that is practical as well. The leading propositions form a concise index to the body of law contained in the text, and enable one (by the references) to find ready access to more discursive treatment. The book is so well known and established, that but little need be said of it. The additions to the text by the American editor are in the mode adopted in Bennett's Benjamin on Sale. Instead of being inserted in the text, or in footnotes on each page, they form a short treatise at the end of each chapter. The Canadian cases are included in the American notes. The English editor is also somewhat confused as to the geography of this country, making a distinction between Canadian and New Brunswick and Nova Scotia cases. Thus Canada is annexed to the U. S. A. by the American editor, and torn to pieces by the English editor.

This is the first book published under the international Copyright Act, the printing having been done in the United States. Notwithstanding that, the English spelling has been retained, for which the parties interested will accept our thanks.

THE
CANADIAN LAW TIMES.

FEBRUARY, 1894.

CAN A LIMITED COMPANY ISSUE SHARES AT A DISCOUNT?

THE English Companies Act, 1867, enacted by section 25 that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Chitty, J., in two cases (*a*), held that under a contract duly registered under this section, a limited company could issue shares at a discount if authorised so to do by its articles of association. This view of the law prevailed until 1888. In that year the Court of Appeal had occasion twice to review the law, and in both cases (*b*) declined to follow the judgment of Chitty, J., but held that it was *ultra vires* of a company, notwithstanding section 25, to issue shares at a discount. Neither of these two cases was appealed to the House of Lords, but recently that Court has had to pass upon this point in company law, and has completed the work of the Court of Appeal. *The Ooregum's case* (*c*)

(*a*) *Re Ince Hall Rolling Mills Co.*, 28 Ch. D. 45 n. (1883); *Re Plasky-naston Tube Co.*, 28 Ch. D. 542. (1883).

(*b*) *Re Addlestone Linoleum Co.*, 37 Ch. D. 191 (1888); *Re Almada & Tirito Co.*, 38 Ch. D. 415 (1888).

(*c*) *The Ooregum's Gold Mining Gold Co. of India Limited* v. *Roper*, L. R. (1892), App. Cas. 125.

may now be considered to be the leading case, that a limited company founded under the English Companies Acts may not issue shares at a discount.

"The whole structure of a limited company," said Lord Chancellor Halsbury, in pronouncing judgment (*d*), "owes its existence to the Act of Parliament, and it is to the Act of Parliament one must refer to see what are its powers, and within what limits it is free to act." . . . "[The Act] makes one of the conditions of the limitation of liability that the memorandum of association shall contain the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. It seems to me that the system thus created, by which the shareholder's liability is to be *limited by the amount unpaid upon his shares*, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been, in accordance with the Act of Parliament, fixed at a certain sum of money. It is manifest that if the company could do so the provision would operate nothing." The *rationale* of the provision is thus laid down by the Lord Chancellor:— "I recognize the wisdom of enforcing on a company the disclosure of what its real capital is, and not permitting a statement of its affairs to be such as may mislead and deceive those who are either about to become its shareholders or about to give it credit." And, he continues, "I think, with Fry, L.J., in the Almada and Tirito Company's case, that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: what is the nature of an agreement to take a share in a limited company? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created." It was further laid down by his Lordship, that section 25, above quoted, simply provides

(*d*) *Ooregum's case*, p. 133.

that payment otherwise than in cash, under certain prescribed conditions, may be payment. The whole amount, however, is to be paid. There is nothing in the section "which justifies the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all."

The result of the decisions in the United States Courts is the same, according to Mr. Beach (*e*): "The stockholders of a corporation, being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors may look for the satisfaction of their demands. It is the basis of the credit which is extended to the corporation by the public and a substitute for the individual liability which exists in other cases. So far as creditors are concerned, it is regarded in the law as a trust fund pledged for the payment of the debts of the corporation. . . . This is true of the unpaid shares subscribed, or balance due thereon, as of the amount which has been actually paid in. Such unpaid shares and the balances are as much a part of the capital stock as the sums which have already been realized thereon, and aside from the funds on hand, they often constitute the sole resource of the company. . . . Accordingly a corporate creditor may impeach the validity of an issue of stock below par made prior to his having extended credit to the company, and may compel payment in full, or so much as is required to satisfy his claim against the company. Even the fact that the stockholder was induced to take the stock by the false representation of the president or directors of the company that it was full paid capital stock, is no defence to an action by a corporate creditor to recover the difference between the amount paid and the par value of the shares."

Our own Letters Patent Acts (*f*) contain each a phrase that seems to contemplate the issue of shares at a discount:—"No by-law for the allotment or sale of stock *at*

(*e*) Beach on Private Corporations, § 116, § 118.
(*f*) R. S. O. cap. 157, sec. 43; R. S. C. cap. 119, sec. 35 (2).

any greater discount or at any less premium than what has been previously authorized at a general meeting . . . shall be valid or acted upon until the same has been confirmed at a general meeting." This phrase, if it is to be construed as conferring such a power upon the company, is in conflict with various sections of the same Acts. Thus, section 61 of the Ontario Act provides that "each shareholder, *until the whole amount of his stock* has been paid up, shall be individually liable to the creditors of the company *to an amount equal to that not paid up thereon*." This fixes the member's liability to creditors, not at what he has agreed to pay to the company, but at the whole amount of his stock less what he may have already paid. Again, section 45 enacts that not less than *10 per cent. upon the allotted* stock of the company shall, by means of one or more calls, be called in or made payable within one year from the incorporation of the company; *the residue*, where and as the by-laws of the company direct." The 10 per cent. is to be calculated on the amount of stock, not on the amount of money the member has agreed to pay thereon; and certainly "the residue" can only mean the remaining 90 per centum of the stock. Compare, also, section 66 of the same Act, which provides that "the directors shall not declare or pay any dividend the payment of which renders the company insolvent, or diminishes *the capital stock* of the company." The letters patent issue on petition; the Act requires the petition to state the amount of the capital stock and the number of shares and the amount of each share. It is beyond question that the phrase "the capital stock of the company," means the amount of the stock as defined in the letters patent which has been allotted. The balance sheet of a company issuing shares at a discount must, therefore, show the capital stock to be diminished by the amount of the discount. The company is practically insolvent from the start. For, as Lord Chancellor Halsbury remarked (*g*), "I observe in the argument it has been sought to draw a distinction

(*g*) In the *Ooregum's case*, at page 189.

between the nominal capital and the capital which is assumed to be the real capital. I can find no authority for such a distinction." Section 43, when read in conjunction with the rest of the Act, may be held to mean that while the company may issue shares at a discount, yet the liability of the subscriber therefor to creditors remains unaltered at the unpaid balance on the full amount of the shares. But read in the light of the decisions on the English Companies Acts, these words in section 43 are a stumblingblock and ought to be expunged (*h*).

The Dominion Companies Act contains a clause not in the Ontario Act, viz., sec. 27, which reads, "Every share in the company shall, subject to the provisions of sub-section five of section five of this Act, be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise agreed upon or determined by a contract duly made in writing and filed with the Secretary of State at or before the issue of such shares." We have already noted that the parallel English section was held to "deal only with the mode in which payment on shares is to be made, and does not touch the question whether that payment is to be anything less than payment in full, and a contract to issue shares at a discount is not rendered valid by registration under it" (*i*).

If, as seems to be the case, it is *ultra vires* of a company to issue its shares at a discount, the position of the allottee of such shares turns, in the first instance, on whether the contract is voidable or void. Upon this point there has been some conflict of opinion, but in practice the Courts have so dealt with the allottee as to make the result now almost certain. Lord Thring's view is (*j*): "If the con-

(*h*) Two cases in our own Courts, *McIntyre* v. *McCracken*, 1 S. C. R. 479, and *Scales* v. *Irwin*, 34 U. C. R. 545, do not throw light upon this point.

(*i*) *Lord Thring, Law and Practice of Joint Stock Companies*, 5th ed. p. 369.

(*j*) *Law and Practice of Joint Stock Companies*, 5th ed. at p. 370; citing *Re Almada & Tirito Co.*, 38 Ch. D. 415; *Re Midland Electric Co.*, 37 W. R. 471; *Re Zoedone Co.*, 60 L. T. 383.

tract is *ultra vires*, as in the case of shares issued at a discount, it is wholly void, there is no contract to take shares at all, and the allottee is entitled to have his name removed from the register and to recover what he has paid on the shares, unless by his subsequent conduct an agreement to hold the shares can be presumed." On the other hand, Mr. Palmer lays it down (*k*), "the contract is voidable, not void, and the allottee must be deemed to know the law, and by allowing his name to be placed on the register he has in effect represented himself to persons dealing with the company as a member who has paid, or will pay, up his shares. A partner in a firm could not escape from liability to creditors on the ground that it was arranged that his liability should be limited, and that by a mistake of law he conceived that agreement to be valid. How then can a shareholder in a limited company plead such an excuse? A voidable agreement cannot be voided after the rights of these parties have supervened."

The law governing the allottee of such shares may be briefly stated under three heads, suggested by Lord Chancellor Cairns (*l*): "The provisions under which that system of limiting liability was inaugurated were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments also to provide for the interests of two other very important bodies; in the first place, those who were shareholders in succession to the persons who were shareholders for the time being, and secondly the outside public, and more particularly those who might be creditors of companies of this kind."

As to the first head, the allottee is clearly liable to the creditors of the company for the amount unpaid on the nominal value of the shares, for our Letters Patent Act (*m*) provides that "each shareholder, until the whole amount of his stock has been paid up, shall be individually liable

(*k*) *Company Precedents*, 4th ed. p. 140 n., citing *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Trevor* v. *Whitworth*, 12 App. Cas. 409.

(*l*) In *Ashbury Railway, etc., Co.* v. *Riche*, L. R. 7 H. L. at p. 667.

(*m*) R. S. O. cap. 157, secs. 5, 61 (1).

to the creditors of the company to an amount equal to that not paid up thereon." In the *Ooregum's case* (*n*), Lord Watson comments thus upon the words of the English Companies Act:—"The 'amount if any unpaid' obviously refers to the 'fixed amount' of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders; and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum [memorandum and registration answering to our petition and letters patent] and the sum which has actually been paid upon his shares. Consequently, if shares are issued against money, it appears to me that any payment to the company, less than the nominal amount of the share must by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance when duly called on." In the same case, Lord MacNaghten (*o*), adopting the words of a text writer, says: "The dominant and cardinal principle of these Acts is that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit." It is too late when winding up proceedings are begun for the allottee to ask that the contract be rescinded and his name removed from the register, on the ground that the contract was *ultra vires* of the company, or on the ground that he has not got what he had bargained for, *i.e.*, fully paid shares (*p*); nor can the allottee successfully claim in the winding up proceedings on the assets of the company for the difference now payable by him, by way of damages for breach of the company's contract to issue to him fully paid shares. On such a claim, Lindley, J., (*q*) remarked, "This contract either was a contract to issue shares at a discount or to issue fully paid up shares. If

(*n*) L. R. (1892), App. Cas. 125, at p. 136.

(*o*) At p. 145; see also, Beach on Private Corporations, § 118.

(*p*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325.

(*q*) *In re Addlestone Linoleum Co.*, 37 Ch. D. at p. 205 (1888).

the first be the true view, I think that the appellants were saddled with a liability to pay in full, a liability they could not escape even by a registered contract." If, however, the name of the allottee is on the register without his assent or knowledge, and he has done nothing to show any intention on his part to hold the shares or deal with them as his own, he is not liable in the winding-up. For the matter rests still in contract, and the allottee will not be compelled to take unpaid shares when he bargained for shares fully paid up (*r*).

Under the next head falls to be considered the rights of other shareholders with reference to shares so issued in excess of the corporate powers. The leading case (*s*), so often referred to in this article, definitely decides this. In that case the company had issued its entire capital, had expended the same, the undertaking was not successful and winding-up proceedings were begun. The winding up was stayed pending arrangements to procure fresh capital. Proper steps were taken creating new preference shares. At this time the value of ordinary £1 shares in the market was only 2s. 6d. per share. Preference shares of £1 par value each were then issued, credited with 15s. per share as paid thereon, leaving a liability of only 5s. per share. The capital thus obtained saved the company, which became very prosperous, the value of the ordinary share rising from 2s. 6d. to 40s. Four years after the issue of these preferred shares at a discount, R. purchased in the open market fully paid up ordinary shares of the company. R. then, on behalf of himself and the other ordinary shareholders brought this action against the company and one of the original allottees of the preference shares to have it declared that the issue of the preferred shares at a discount was *ultra vires* and to have the register rectified. It was decided that the preference shares, so far as the same were held by original allottees, were subject to the liability of

(*r*) *Arnot's case*, 36 Ch. D. 701.

(*s*) *Ooregum Gold Mining Co., of India* v. *Roper*, L. R. (1892) App. Cas. 125.

the holder to pay to the company in cash the full amount unpaid on the shares and that the register must be so rectified.

This brings us to the third head, that is, what are the rights of the company and the allottee respectively as to such shares and the amount now found to be a liability thereon? This question yet lacks express judicial answer. In the *Ooregum's case* Lord Herschell (*t*) would have directed, had it been insisted on at the bar, that the company were not entitled to call upon the preference shareholders for any further payment beyond that agreed upon, except in the case of a winding-up and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding-up. Lord Watson (*u*), however, saw this difficulty in the way, the resolution of the original shareholders had for its purpose but a single object, *i.e.*, to declare that the preference shares, after 5s. had been paid on each, were not subject to any payment. This resolution must now, to meet Lord Herschell's view, be severable into two resolutions; the first, to the effect that there shall be no payment in any event, and the second, to the effect that there shall be payment on the occurrence of a certain event. The root of the difficulty is the doctrine that the creditors, through the liquidator, have no wider claim against a shareholder than the company itself had. The weight of Mr. Beach's *dictum* is with Lord Herschell (*uu*). In his view the capital stock forms a trust fund pledged for the payment of the debts of the corporation. It follows that, "creditors of a company are not affected by private understandings between subscribers and a subscription agent, exonerating the former from the performance of that which the subscription requires. It is upon the same principle," he continues, "that shareholders may be held liable to the full face value of their shares, notwithstanding a contract by which the company has agreed to accept a less amount as payment in

(*t*) At p. 143. (*u*) At p. 138.

(*uu*) Beach on private Corporations 118.

full, while a contract of this nature, unless forbidden by statute, is binding as between the company and the subscribers (*v*), and will hold so long as the company remains solvent and able to meet all its obligations, it will not stand as against the claims of corporate creditors, when the company has become insolvent." Lord Justice Lindley, in his Law of Companies (*w*), is dealing with the question of contributories in winding-up, when he says, "Even a registered contract will not bind the company to treat a share issued at a discount as a fully paid up share." This dictum does not seem to be intended to apply to other than winding-up proceedings. For *Sandys'* case (*x*) is merely the converse of *Arnot's* case, (*supra*). The application of Mrs. S. to have her name removed from the register, (no winding up proceedings being on foot) as holding certain shares which had been allotted to her at a discount, and for the return of the money paid thereon, was refused. The reason for this refusal was that Mrs. S. by her conduct had made herself a member of the company. *Per* Bowen, L. J. (*y*), "after her name was placed on the register and after she knew her name was placed on the register, she did certain acts which were only consistent with an intention on her part to be treated as a member of the company, and to treat herself as a member of the company in respect of these particular shares which had been so appropriated to her. If that is not evidence of an agreement to be a member, I really do not know what is." The question, of whether the company could make calls on Mrs. S. to the amount of the discount was not in issue, and, therefore, was not decided. It is probable that when the question does arise that the courts will hold that the com-

(*v*) Citing an American case. The ground for this dictum is not apparent, unless it be the ground of the decision in *Flinn* v. *Bagley* (1881) 7 Fed. Rep 785, in which the Court held that the subscribers "must be held liable upon an implied agreement to pay more for the benefit of creditors than they had expressly agreed to pay for the benefit of the corporation."

(*w*) 5th Ed. 787.

(*x*) *In Re Railway Time Tables Pub. Co., Sandys* case, L. R. 42 Ch. D. 98 (1889).

(*y*) S. C. at p. 117.

pany, in the absence of winding-up proceedings, is estopped from demanding from the subscriber more than is required by the agreement entered into at the time of subscription.

Liability for the amount unpaid upon a share nominally paid up does not pursue the share into the hands of a purchaser for value without notice. "It would paralyse," said Lord Chancellor Cairns (*z*), "the whole of the dealings with shares in public companies, if, a share being dealt with in the ordinary course of business, dealt with in the market with the representation upon it, by the company, that the whole amount of the share was paid, the person who so took it was to be obliged to disregard the assertion of the company, and, before he could obtain a title, must go and satisfy himself that the assertion was true, and that the money had been actually paid. In the first place, as a matter of business, we know that the affairs of mankind could not be conducted if that were necessary, but in the next place, even if such a person were minded to make the investigation, he would be absolutely without the means of making it—it would be impossible for him to obtain accurate information as to whether this state of things were true or not."

It may be useful, perhaps, to note here the way in which the courts have on several occasions commented upon expedients which companies have adopted to avoid the difficulty, while attaining the same result, of issuing shares at a discount. Indeed, it may be laid down in general terms that any unusual liberality on the part of a company in dealing with intending shareholders is indicative of some breach of the organic law of its existence. Thus, the Letters Patent Act in Ontario, like the English Companies Acts, hedges round with safeguards the power that a company has of reducing its capital stock. Lord Watson (*a*) finds the following as the principle of this stat-

(*z*) In *Burkinshaw* v. *Nicolls*, 3 App. Cas. at p. 1017; see also *Waterhouse* v. *Jamieson*, L. R. 2 H. L. Sc. 29; *McIntyre* v. *McCraken*, 1 S. C. R. 479.

(*a*) In *Trevor* v. *Whitworth* (1887) 12 App. Cas. at p. 423; see also, Lord McNaghten's judgment in the same case at p. 436; followed in *Raine's* case, 4 Times L. R. 302. The situation is not helped by an express power to return capital in the Memo. of association itself.

utory restriction: "One of the main objects contemptated by the legislature in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between the company and a shareholder, by means of which the money already paid in to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction. Paid up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of business."

Lopes, L.J. (*b*), remarks: "I can see no particular distinction between issuing shares at a discount and returning to the member a portion of the capital to which the creditors have a right to look as that out of which they are to be paid." And *per* Kay, J. (*c*), "In *in re Almada and Tirito Co.* (*d*), the Court of Appeal held that issuing shares at a discount was *ultra vires*, because it would in effect be altering the amount of the capital of the company in a manner not authorized by the Joint Stock Companies Act, and was equivalent to returning part of the capital to the allottee." Nor will it do for the company to pay the allottee or some one on his behalf a commission on the stock subscribed. Also *per* Kay, J., (*S. C. at page 153*), "A commission to M. would in effect be issuing shares at a discount. Giving a commission to brokers

(*b*) In *In re Almada and Tirito Co.*, (1888) 38 Ch. D. p. 426.

(*c*) *In re Faure Electric Accumulator Co.*, (1888) L. R. 40 Ch. D. at p. 153; see also, *McIntyre* v. *McCraken*, 1 S. C. R. at p. 506.

(*d*) 38 Ch. D. 415.

may in this way be a roundabout mode of returning part of the capital to the allottee." If a company may not present part of a share to the member, it follows, a *fortiori* that bonus shares cannot be validly issued (*e*). The position, however, of the donee of a bonus share is, perhaps safer than that of the allottee of a share issued at a discount. For "a shareholder's liability on his stock arises not out of his relation to the corporation, but out of a contract either express or implied or out of some statute; and accordingly, where no contract can be shown and no statute imposes liability upon a gratuitous allottee of shares, he commits no wrong upon the creditors and is not to be required to pay the full nominal face value of his stock" (*f*). Nor will a company be permitted to write off the discount on shares issued at a discount under the general power that a company has of reducing its capital (*g*). For the capital represented by the discount has not been lost; it never was in existence. The common method of escaping liability on stock is for the member to transfer property to the company at a bloated valuation in exchange for fully paid shares. It is a general rule that the Court will not, in the absence of fraud, go behind the valuation; in other words, the Court will not do the bargaining for the company. But judges have repeatedly intimated that such transactions will be looked into narrowly when the rights of creditors are involved. And Lord Watson, in the *Ooregum's* case (*h*), gravely questioned the proposition that goods worth five shillings could be bought by intending shareholders and resold at twenty shillings to the company for shares.

It may be useful, also, to indicate one way in which the company may get over the difficulty and to all intents and purposes attain the same end. The Letters Patent Act

(*e*) *Palmer on Company Precedents*, 4th Ed. p. 141.

(*f*) *Christensen* v. *Eno*, 106 N.Y. 97 (1887); *Beach on Private Corporations* 121 (*d*).

(*g*) *Re New Chile Gold Co.*, 38 Ch. D. 475.

(*h*) L. R. (1892) App. Cas. at p. 138.

permits the creation of preferential stock (*i*). Such preference may consist in the amount of the dividend, just as well as in priority of dividend. Take the case of a company incorporated with nominal capital stock of $300,000, and that of this capital $100,000 has been absorbed in the acquisition of property and running expenses, and that the discerning public will not take any of the remaining shares at par, but might be tempted by shares at 50 per centum discount, and that $50,000 in money is absolutely necessary to the life of the concern. If shares could be issued at a discount, the company would invite subscriptions to $100,000 of stock at 50 per centum discount. This course, however, not being open to the company, it may issue $50,000 of the capital stock as preferential stock, giving to the same as compared with the common stock the right to participate in the dividends of the company in the ratio of $2 per share of preferred to $1 per share of common stock. Under this method the subscriber, instead of subscribing for $200 of stock at 50 per centum discount, subscribes for $100 of stock at par. The same money accrues to the company and the subscriber is in the same position as regards dividends; to be on terms of equality in other respects provision should also be made whereby the preferred stockholder has a proportionate voting power on his shares. This method seems to be free from objection and a similar proposition was so regarded by Lord Watson (*j*). For in this way creditors are not prejudiced, for unless there are profits the new shareholders have no advantage, and in any event no advantage at the expense of creditors who are looking to the nominal issued capital of the company as their security.

TORONTO. W. H. HUNTER.

(*i*) R. S. O. cap. 157, sec. 25.

(*j*) *Ooregum's* case, at p. 138.

EDITORIAL REVIEW.

Sittings for Trials.

The new rules respecting sittings of the High Court for trials of actions were published just after our last number went through the press, and are by this time familiar to all the profession.

In Toronto the relief was distinctly and immediately felt. The experiment of assigning a Judge for each week to take the trial of non-jury cases, is one that concerns the Judges themselves more than the profession at large; but one would suppose that the frequent change of work would prevent the jading that must ensue from the steady plodding work of weeks which a long list necessitates. As long as the Judges are able to relieve each other in rotation at weekly courts and weekly sittings for trials, the experiment ought to be successful; but if one Judge should be unable to take his regular week, the risk is run of throwing the whole scheme "out of gear." In 1888 when the rules were revised, and a tentative scheme was discussed, it was found that, taking Divisional Court sittings, weekly sittings and trials into consideration, there was actually no time to spare for any judge. Each individual would have had to work all the year round, vacations excepted, in order to fulfil his engagements. That that is the case now, with the new scheme in operation, is also very evident. The difference between the present state of affairs and that of last year, is simply that the same number of Judges are attempting to do more work under the new arrangement than under the old. While under the old system the arrears were very large in Toronto, under the new system there may be no arrears, but the strength of the Judges

may be taxed to the utmost. No doubt under the old system there was a waste of judicial strength; but whether the waste was proportioned t the arrears, can only be determined by the present experiment. If exactly proportioned, then it is clear that we have not enough Judges. For it is inhuman as well as imprudent to provide exactly the number of Judges to keep down the work without allowing one of them a spare week. The opinion is pretty widely held that there ought to be at least two more Judges. It is not too soon to provide for them when the work is in sight for them to do. It is too late when the work has fallen into arrear.

With regard to the weekly sittings, while there was a large amount of work awaiting the termination of the Christmas vacation, and a consequent glut of work when the sittings began, the new scheme has, on the whole, worked well. So far, there has not been in any week more work than could be done by one Judge, though the hours have on some days been long. It is possible, of course, that the work may increase to such an extent that two Judges may have to sit. But if both exercise universal jurisdiction, there can be no complaint. The difficulty under the old system was, that a Judge of the Chancery Division would not entertain a motion in a case in one of the other divisions, and *vice versa*. As long as all motions are in order before any Judge, no complaint can be made if the work has to be divided.

Registration of Discharges of Mortgages.

In an Act to consolidate the Registry Act and its amendments, many curious amendments were made which are not indicated in the title. It is our purpose here to refer to one only. Section 76, sub-section 2, of the Act, 56 Vict. cap. 21, enacts that where a mortgage is paid off "by any person advancing money by way of a new loan on mortgage on the same property, and the mortgage so paid off or the discharge thereof is held by the mortgagee making the new loan or advance," the discharge of the

mortgage so paid off shall be registered within six months from the date thereof, unless the mortgagor shall in writing have authorized its retention for a longer period. But such registration shall not affect the right (if any) of any mortgagee or purchaser who may have paid off such mortgage to be subrogated to the rights of the mortgagee whose mortgage debt has been so paid.

This enactment is no doubt aimed at the practice, prevalent amongst lenders, of keeping the discharge as a receipt, in order that if any question as to priority should arise, an assignment might be demanded. The practice was a harmless one as regards the mortgagor, and a prudent one as regards the new lender. For the paid off mortgage stood on the register as a warning to persons dealing with the lands, and induced enquiry. The present enactment is a most imprudent one, and will have the effect of depriving lenders of the protection of the Act as it formerly stood, and will consequently re-act upon the unfortunate mortgagor who was not injured at all by the former practice.

Thus, a mortgagee advancing money can no longer rely on a discharge of mortgage as a re-conveyance or discharge of the mortgage. It operates *prima facie* as a discharge of the debt and as a reconveyance, but enquiry must be made as to whether any equity exists, which is not apparent in the register or title deeds, to have the mortgage revived notwithstanding the discharge. The 95th section practically abolished all equities as against the registered title, and enabled a person dealing with the land fearlessly to buy or advance money thereon relying on the registrations. If the new enactment can, in the face of the 95th section, be held to keep alive such equities, the whole benefit hitherto derived from the latter section will be lost where mortgages are concerned.

It is to be hoped, however, that when the two sections are read together, it will be held, as we submit it may be held, that the equity to subrogation will not prevail as

against anyone subsequently dealing with the registered title.

Apart from the effect just noted, there seems to be no penalty attached to a breach of the provision. The registration might, perhaps, be compelled by an action; but it is doubtful if mortgagors will venture upon a warfare with mortgagees who are generally better able to maintain it. The result will probably be that, in future, every discharge will be accompanied by an authority to retain it until the advance has been paid off.

If the principle is to be maintained that mortgagees who pay off prior mortgages are to be enabled to retain the position of the prior mortgagees, the direction to register the discharge is simply a direction to lay a trap for those subsequently dealing with the land, unless indeed the 95th section will avail them. In any event it was unnecessary, because by the Mortgage Act a person making an advance has the right to an assignment of the mortgage, a right which he will no doubt avail himself of in every case now if he is well advised. Considering also the effect of a statutory discharge, which we pointed out in a recent article (12 C. L. T. 1), it is clear that a good deal of confusion may arise from the insistence upon this section.

Warehouse Receipts.

The judgment of the Judicial Committee of the Privy Council, in *Tennant* v. *Union Bank*, 10 T. L. R. 147, is not entirely satisfactory on the constitutional point involved. There had been a general opinion beforehand that the business of a warehouseman being purely local, and dealing with the disposition of personal property, was one wholly within the jurisdiction of the Provincial Legislatures. But the judgment in the case cited seems to go beyond this, and declare that there may be a law respecting property for banks and other bodies within Dominion jurisdiction, and a law for private persons and bodies corporate under Provincial jurisdiction. The Committee affirmed the proposition, already so well known and so

necessary, that the Dominion in the exercise of its jurisdiction must necessarily at times invade the domain of property and civil rights. In bankruptcy and insolvency, the whole scope of every law must necessarily include property and civil rights — the whole property of the insolvent and all his rights and contracts necessarily are dealt with. The Committee 'points out also, that with regard to patents of invention and copyrights, property and civil rights must also be interfered with. That is true, also, but for a different reason. Patents of invention and copyrights are originated and granted by the Dominion alone, and are never at any time subject to Provincial jurisdiction. The property and civil rights of an individual, apart from these, are subject to Provincial control until the *status* of the owner is altered by bankruptcy or insolvency. Then they become subject to Dominion jurisdiction. Patents and copyrights never pass from one jurisdiction to another, but of themselves originate with and are always dealt with by Dominion laws. They form a special kind of property assigned exclusively to Dominion jurisdiction.

In so far as the reasoning of the judgment attributes power to the Dominion Parliament to enable banks to deal in any kind of security available, it is satisfactory. But if the reasoning is to be extended, as in its general terms it may, to enable the Dominion Parliament to make one law of property for banks, leaving the Provincial Legislature to make another for private persons, it is wholly unsatisfactory. Thus there is no objection to a bank's receiving power from the Parliament to take mortgages of land or chattels, provided that the local laws as to land and chattels are observed. But if an attempt were made by the Dominion to interfere with the local laws, in favour of a special law for banks, it would be entirely objectionable.

The case seems to fall rather within the principle of *Parsons* v. *Citizens*, 1 Cart. 265, where the foreign corporation doing business in Ontario was bound to make its contracts according to the local law of Ontario.

Mortmain and Charitable Uses Act.

A useful case on the application of this Act is *Re Bridger*, 10 T. L. R. 158. In that case the testator had made his will before the English Act, from which ours is taken, came into force, by which he devised his property in trust "to pay such part of my said residuary trust estate which may by law be given for charitable purposes to the Brompton Hospital for consumption." The remainder he give to a legatee who contested the validity of the devise in so far as it comprised impure personalty. The testator died after the passing of the Act which (as our Act) was made applicable to the wills of persons dying after the passing of the Act. It was contended that the will should be read as of its date, and that therefore all the property which by law the testator at the time of making his will could bequeath to the charity was the pure personalty. The Court of Appeal, however, held that the devise was valid to pass impure personalty. The combined effect of the Act and that clause of the Wills Act which makes a will speak from the death as to the property comprised therein had that effect. Lord Justice Lindley said, "An extension, whether by a statute or otherwise, of a testator's power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to."

The Court was pressed with the argument that the legatee would by this construction get nothing, whereas it was evidently the intention of the testator that she should get something. But it was answered that he intended to prefer the charity, and to give to the legatee only what he could not give to the charity.

It would be worth while for testators who are charitably inclined, and who may have given bequests to charity in general terms upon the hypothesis that they will include pure personalty only, to look again at their wills in the light of this decision.

Easements and registration.

In *Israel* v. *Leith*, 20 Ont. R. 361, an easement of aqueduct and drainage was created by the severance of a piece of land on which were two houses, the one being served by water-pipes and drained by soil pipes laid under the other. The servient tenement was sold, and the owner cut off the pipes, whence the action. Mr. Justice Rose held that as the purchaser of the servient tenement had no notice by registration of the easement he took free from it. The Divisional Court reversed this on two grounds, first, that an easement created by implied grant is not capable of registration; secondly, that if it passed by express grant the act of registration was effected by the registration of the conveyance of the dominant tenement. As to the latter point, there seems to be an impression abroad that registration "against a lot" is essential. Nowhere in the Registry Act will anything be found to justify the theory that registration, in order to be perfect, is to be made "against," or with respect to, any particular lot. The conveyances of any particular lot are to be indexed on that lot, but the indexing is not registration.

As to the question of notice, there is one phase that seems either to have been overlooked or not to have been deemed worthy of reporting. It is suggested by Mr. Justice Rose's observation that "it surely is more just to require a party who wishes to burden his neighbour's land with an easement which is not visible or apparent, to place in the registry office notice of his claim, than to subject a purchaser, who finds no sign upon the ground and no notice in the registry office, to the continuance of the burden, he being in fact a purchaser for value without notice."

It is as to the question of notice that we direct our remarks. The creation of such an easement, just as the creation of an easement of light, is by severance of the tenement, not by express grant. The rights and liabilities the parties are to be ascertained, not from the contract

itself, or rather not from the construction of the grant itself, but from the position in which the parties have placed themselves by the contract, taking into consideration all the surrounding circumstances: *Birmingham, etc., Co.* v. *Ross*, 38 Ch. D. at pp. 308,315. Now in every case where land has been divided into building lots, the purchaser has express notice of the division, or severance, by the registration of the plan and the various conveyances made in accordance therewith. He must consequently be held to have express notice that the severance may have created easements. And it is his duty not only to inspect the premises for the purpose of ascertaining whether there are any apparent easements, but also to enquire whether there are any which are not apparent which are occasioned by the severance. Inasmuch, then, as it is the severance that creates the easements, and inasmuch as he has express notice of the severance, he must in each case be conclusively deemed to have been put upon enquiry.

We are aware that it is the practice, where the title to an estate is well known, not to search behind the plan; but even in such a case the very existence of the plan puts the purchaser of a lot on enquiry as to what is the effect of the division or severance.

CORRESPONDENCE.

Powers of Sale without Notice.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—It is now nearly a year since I ventured to give some reasons for the opinion that powers of sale without notice, when exercised according to their tenor, were inequitable, and left the purchaser open to be redeemed (13 C. L. T. 36).

That a contract may be good at law and bad in equity, is a proposition which no one will seriously dispute. Nor is it doubtful, in a contest between the parties to such a contract, which of them is entitled to succeed.

But rights, whether legal or equitable, are not enforced by our Courts *mero motu;* they must be claimed, and established by evidence.

The legal validity of the powers in question had been affirmed in several cases, but, so far as I could discover, the equitable aspect of such powers had never been considered.

The reasons I assigned for my opinion were:—

(1) Powers of sale without notice fetter, if indeed they do not absolutely destroy, the equity of redemption.

(2) They fall within the category of "unconscionable bargains."

In the December number of your Journal (13 C. L. T. 279), Mr. Symons undertakes to collect and discuss the cases upon the subject, and to criticize the opinion I had expressed. The cases he refers to are all commented upon in my article.

I need not refer to his argument on the legal validity of these powers, for that I had plainly conceded.

To my first reason, founded upon the principle enforced in *Salt* v. *Marquess of Northampton* (L. R. [1892] A. C. 1), Mr. Symons offers no answer whatever.

As regards the second reason, which is supported by *Miller* v. *Cook* (L. R. 10 Eq. 641), Mr. Symons says that in that case the existence of the power of sale without notice was only one of various grounds upon which the bargain was held to be unconscionable. This is true enough; but the language used by the learned Judge who decided that case, reads as though he viewed this species of power as about the most unconscionable part of the unconscionable bargain, and it is for those who think otherwise to give some reason for their opinion.

The question under discussion is far too important to be decided by my learned critic or by me, and therefore what we have to say about it is useful only in so far as it is supported by authority. A criticism which amounts to a mere denial of the opinion criticised is not likely to answer any useful purpose.

There are, however, one or two statements made by Mr. Symonds which seem to call for a reply. In dealing with the subject originally, I realized that I was perhaps treading on dangerous ground, owing to the numerous instances of such powers being acted upon, and I fully appreciated the fact which Mr. Symons points out when he says, "None of the counsel in the Ontario cases, so far as the reports shew, took this ground—a fatal one in all of them —(except perhaps the *Teeter case*), if it could have been sustained, and it is hardly possible that so important a point could have been overlooked by counsel and an array of judges, keen to discover equitable grounds upon which to relieve mortgagors and their representatives."

This is an argument which will strike different minds with different force. It is plausible, and to any one who

does not choose to look beneath the surface of the matter, it is formidable. But when one considers how frequently counsel do in fact fail to raise points which turn out afterwards to be important, and how seldom judges indulge in academic discussion of rights which the parties do not claim; and when, as in the present instance, it would appear that the point in question—so far from being fatal—could not have been effectively urged in any of the cases in our Courts, by reason of the fact that *the party complaining had in each case received notice*, the argument dissolves into very thin air.

But, says Mr. Symons, "How can this be so when there were no notices in the *Gilchrist* or *Barry* cases, and only imperfect notices in the *Ray* case?" Here again the superficial character of my learned friend's criticism makes itself apparent. If no notice whatever had been given in any of the cases, they might or might not have been decided as they were. If the equitable rights recognized in *Miller* v. *Cook* and in *Salt* v. *The Marquess of Northampton* were not set up or brought to the notice of our Courts, the parties had themselves to blame. The rights of other litigants would remain unimpaired. But it was satisfactory to find, as I thought, a means of reconciling all the cases in our Courts with the principles of equity. Many a case now-a-days depends, for its support, upon principles unnoticed in the judgment.

A whole series of such cases may be seen in *De Colyar* on Guarantees, Bl. Ser. 91 *et seq.*, where the learned author is commenting upon *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374.

The charge of inaccuracy, implied by Mr. Symons, thus relates to an immaterial portion of my argument; and, moreover, it was undeserved.

I had said, "The complaint that a power of sale without notice is unjust has a hollow ring about it when raised by a party who has received notice. Yet this was the position of all the parties, in the above actions, *against whom the power was held to have been properly exercised.*"

(1) In the *Gilchrist* case it was held that, owing to a circumstance foreign to the present enquiry, the power was not properly exercised, and hence that case was not within the class alluded to.

(2) As regards the *Barry* case, the remark I made in reference to judges applies with even greater force to reporters. For while a judge may, if he chooses, discuss and even decide points not argued before him, a reporter would indeed shew rash enthusiasm in detailing facts upon which neither counsel nor court relied.

But it was quite open to Mr. Symons to inform himself on the subject, and by referring to the printed appeal case, pp. 50 and 51 of volume 90, in the library at Osgoode Hall, he might have seen that the proper persons were duly served with notice.

(3) In the *Ray* case, as the report indicates, all persons who could have claimed an equity of redemption, were served with notice either personally or by solicitor; and so far as my limited experience goes, these notices are (rightly or wrongly) served as often one way as the other.

For the purpose of his argument, Mr. Symons assumes the case of a power of sale providing "that the mortgagee, on default of payment for one month, may, without giving any notice, enter on and lease or sell the said lands."

Why give the mortgagor a month when the law says a day will suffice? (*Clark* v. *Harvey*, 16 Ont. R. 159). The legal validity of the power of sale without notice in the case last referred to was upheld; and the question is, does the exercise of such a power according to its tenor, fetter or destroy the equity of redemption, or does it not? The mortgagor is not in default to-day; to-morrow he is; and a day or two afterwards the property is sold without any notice to the mortgagor or his representatives. That is the kind of contract which is pronounced good at law. Where then is the equity of redemption? At law it is gone for ever, and one would expect to find this conclusion

admitted and justified by Mr. Symons. Not so, however; for he makes the following remarkable concession :— "Absence of a provision requiring notice does not take away the right to redeem, or equity of redemption as it is termed, and a mortgagor or his representatives can redeem at any time before foreclosure by legal process, and nothing short of foreclosure or a sale will bar that right." There seems little difference between the absence of a provision requiring notice, and the presence of a provision requiring no notice. In either case the equity of redemption is fettered, and the mortgagor is at the mercy of the mortgagee, with the necessary result that the purchaser remains liable to be redeemed.

In addition to the reasons above given for the opinion that powers of sale without notice are bad in equity, I would ask Mr. Symons to also consider the following view of the question.

Mortgagees with a power of sale are regarded as trustees (Coote's Law of Mortgages, 5th ed. 276); and therefore they are entitled to the protection, and liable for the duties, of their office.

In conveying the property they need only covenant against their own acts.

On the other hand, they must consult the interests of the mortgagor and his representatives, who, at least to the extent of the surplus value of the property over and above the mortgage, occupy the position of *cestuis que trustent*.

The following extract from a leading authority on the subject will indicate the liability alluded to.

"A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestuis que trustent*, and in the case of several successive *cestuis que trustent*, with a fair and impartial attention to the interests of all the parties concerned. If trustees, or those who act by their authority, fail in reasonable diligence in inviting competition, or in the management of the sale (as

if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another), they will be personally responsible for the loss to the suffering party; and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement" (Lewin on Trusts (Bl. Ser.), 561).

A. C. GALT.

January 5th, 1894.

BOOK REVIEWS.

A Treatise on the Medical Jurisprudence of Insanity. By EDWARD C. MANN, M.D., author of "A Manual of Psychological Medicine." Albany: Matthew Bender. 1893.

Dr. Mann, in this work, takes up an advanced opinion as to insanity, and in many cases suggests theories which at present are not adopted in practice, though it is not impossible that the advancement of the science may compel their ultimate adoption. With his suggestion that the state should take charge of the children of criminals, and strive by a healthy environment to combat the desires of heredity, one can hardly at the present time agree, nor yet with the suggestion that criminals should be prevented from marrying. Taking into consideration the theory of reversion to ancestral types, it may be a question whether the environment of a few years would produce the expected results. If it is a principle of nature to "revert," the artificial condition would require cycles of years to produce any effect, that is, if the evolutionists' theory is correct.

The Law of Collateral Attack on Judicial Proceedings. By JOHN M. VANFLEET, Judge of the Thirty-fourth Judicial Circuit of Indiana. Chicago: Callaghan & Co. 1892.

The range of this book is vast. Cases from English, Scotch, Colonial and American Courts are cited. The subject is treated with great detail in every view, and the book will be found a most useful work of reference. It is methodically and systematically arranged.

An Essay on Judicial Powers and Unconstitutional Legislation, being a commentary on parts of the Constitution of the United States. By BRINTON COXE, of the Bar of Philadelphia. Philadelphia: Kay & Brother. 1893.

This work, which was not finished on account of the death of the author, is academic rather than practical. The theory of the judicial power to test the validity of Acts of the Legislatures in the United States, is no longer the subject of discussion, though the history of the relation of the Judiciary to Parliament is interesting. In addition to the matter relating to the States, there are interesting portions of the Essay devoted to English and Colonial law, and the relation of the Judiciary to the Legislative bodies of European countries. Many of the opinions of eminent men are taken from Chalmers' Opinions. The book unfortunately ends with the historical commentary.

Behring Sea Tribunal of Arbitration. Opinions of Mr. Justice Harlan at the Conference in Paris. Washington, D.C.: Government Printing Office. 1893.

This publication contains all the opinions expressed by Mr. Justice Harlan at the conference, or rather the extended reasons for the opinions then expressed in the various rulings.

REVIEW OF EXCHANGES.

Canada Law Journal.—16th January, 1894.

Tobacco and Smoking, by R. V. R. A collection of a number of statutory provisions as to the use and abuse of tobacco, with a reference to some modern cases.

Central Law Journal.—5th January, 1894.

A Legal Definition of Baggage, by JOHN D. LAWSON. The learned writer attempts what, he says, many judges and text-writers have declared to be something too difficult to attempt, namely, a definition of the term "baggage." From numerous cases on the subject he evolves the following definition:—"In the law of common carriers the term 'baggage' means such goods and chattels as the convenience, or comfort, the taste, the pleasure, or the protection, of passengers generally makes it fit and proper for the passenger in question to take with him for his personal use, according to the habits or wants of the class to which he belongs, either with reference to the period of the transit or the ultimate purpose of the journey."

Ibid.—12th January, 1894.

The Doctrine of Election in Equity, by ISIDOR LOEB. The learned writer refers to the origin of the doctrine as of the Roman law, then to its adoption by the Court of Chancery. He deals largely with doctrine as it affects the right to dower. English and American cases are cited.

Ibid.—19th January, 1894.

Delivery in Donationes Mortis Causa. The distinction between gifts *inter vivos* and gifts *mortis causa* is pointed out. The learned writer then deals with the question of delivery. There must be an actual transfer or tradition to the donee or a trustee for him, in expectation of death, with the intention of making a gift. The donor must be deprived of all further control and dominion over the thing given, and the donee must retain possession till the donor's death. If the donor regains possession the gift is defeated. Where there is a writing, less evidence of delivery is necessary than where the gift depends on parol evidence solely.

Irish Law Times.—6th January, 1894.

Contracts by Letter. A short discussion on a case of *Maconchy* v. *Trower*, in the House of Lords, from which the following proposition

is deduced by the learned writer:—"If A., wishing to contract with B., employes C. as his agent in the matter of the contract, any term introduced into the agreement, even though contained in a separate document, if assented to by C., will be binding upon A. But if C. is not an agent of A., but a mere intermediary, his assent to an additional term will not bind A. Nevertheless, if a party chooses to waive a condition introduced by him into a contract—a new and, in his opinion, more favourable term being substituted—he may still enforce the contract."

Ibid.—18th January, 1894.

Service out of the Jurisdiction.—1. This is the first instalment on the subject. The learned writer refers to the rule as to foreigners and cites *Russell* v. *Combefort*, 23 Q. B. D. 526, where the Court of Appeal suggested that they should consider the power of Parliament to legislate so as to bind or affect the subjects of a foreign ruler. *Ex p. Blain*, 12 Ch. D. 322, is also referred to. Referring to the principle contended for, the learned writer proceeds: "To acquiesce in the validity of this objection is to admit that Judges are to administer the law modified by their own views of morality, or by the interpretation they may put on the theories of writers on international law." There is, however, another way of arriving at the same result, viz.: to assume the objection and then hold that Parliament evidently did not intend to violate the principle, and therefore to construe the act in accordance with the principle, if its terms permit it.

Ibid.—27th January, 1894.

Domicile.—A continuation of the article on service out of the jurisdiction. Is confined chiefly to definitions of domicile.

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MORTGAGEE, MORTGAGOR AND ASSIGNEE OF THE EQUITY OF REDEMPTION.

ALTHOUGH it has become an almost invariable custom that every mortgage of real estate should contain a personal covenant for repayment of the mortgage moneys, principal and interest, a mortgagee seldom regards the personal liability of the mortgagor as his chief security. Indeed, in most instances, if the property offered as the pledge or "*vadium*" for the loan be not of the most desirable kind as well as of ample value, the capitalist of the present day will decline to invest upon the strength of the proposed mortgagor's financial rating.

One result, however, of the existing depression in the values of real estate has been to direct attention to the real value of the mortgagor's covenant, and to the importance to the mortgagee of refraining from any act of omission or commission that might result in the loss of his personal remedy against the covenantor. There can be but little danger of such a misfortune befalling the mortgagee as long as his original mortgagor or debtor remains the owner of the equity of redemption. While this state of affairs continues, the mortgagee does not require to exercise more than the most ordinary care to preserve his rights and remedies against both the mortgagor and his property intact. The moment he becomes aware, however, that the mortgagor has parted with his

equity in the land it behoves the mortgagee to give to his position the most serious consideration. For, if we may rely upon some recent expressions of judicial opinion, his path is then indeed beset with pitfalls. Should the property to which he has with such confidence looked for security unexpectedly shrink in value, he may find when too late that the personal remedy upon his mortgagor's covenant, which he formerly treated as of such little moment, but to which in his present distress he would gladly resort, has been lost. He has perhaps inadvertently dealt with the new owner of the land, to use the language of a Judge whose authority is deservedly of great weight, as if "no fact" had happened "which changed the original constitution of the parties" (*a*) to the mortgage. He may thus, without ever having for a moment supposed that any person could hold the position of surety towards him, find himself hopelessly involved in the intricacies of the law of principal and surety. He may discover that he has "fallen between two stools," having lost his personal remedy against his mortgagor without having acquired any like redress against the new owner of the property.

For example, take the following comparatively simple state of facts, at the present time of frequent occurrence. An owner of realty mortgages it (not as collateral security for the debt of another) for say $50,000. Before the maturity of the mortgage, the mortgagor conveys the property in question to a purchaser subject to the incumbrance. Upon the mortgage maturing, the purchaser, finding himself unable to pay it off, requests the mortgagee to defer taking any proceedings for sale or foreclosure for one year. The mortgagee, having no desire to call in his money, by agreement under seal with the new owner of the equity, who however assumes no personal liability to the mortgagee, undertakes for a nominal consideration of one dollar to so defer proceedings. The mortgagor is not made aware of this agreement. Is the result of this transaction the loss by the mortgagee of his personal remedy

(*a*) *Aldous* v. *Hicks*, 21 O. R. 97.

against the mortgagor on his covenant? It has never been contended that the new owner of the equity by purchasing it has acquired the position of a surety to the mortgagee for the mortgagor's debt, though it has been argued, and with some judicial approval, that this would be the case if the mortgagor had covenanted with his vendee to pay off the mortgage (*b*). If the vendee had become such a surety it would of course be absurd to argue that an agreement with him for an extension of the mortgage could operate to discharge the mortgagor, who on this assumption would certainly remain principal debtor. But it has been gravely said that the mortgagor himself would thereby acquire the position of a surety *quoad* the mortgagee, with its accompanying rights and privileges. The mortgagee, of course, knew when dealing with the vendee of the equity of redemption, that the latter held that position, and therefore he must have known or should have known that it was his duty to indemnify his vendor against the mortgage indebtedness(*c*). Did such knowledge or notice impose upon the mortgagee an obligation to treat his mortgagor as a mere surety, and subject him to the loss of all remedies on the mortgagor's covenant if he should fail to accord to him all the consideration and regard which a creditor is held bound to exercise towards the surety of his principal debtor? (*d*). If so, we have these remarkable results, viz., that by the mere transfer of the equity of redemption by the mortgagor to an entire stranger, without the consent or even the knowledge of the mortgagee, the relationship which formerly subsisted between the parties to the mortgage contract is entirely changed; that *upon notice of such transfer being given to the mortgagee*, he will no longer be permitted to treat his mortgagor as a principal debtor; but must concede to him the rights of a surety for the purchaser of the equity, who "becomes the principal for the payment of the mortgage debt" (*e*); that the mort-

(*b*) *Blackley* v. *Kenney*, 19 O. R. 169; 18 A. R. 185.
(*c*) *Boyd* v. *Johnston*, 19 O. R. 598; *Beatty* v. *Fitzsimmons*, 23 O. R. 245.
(*d*) *Owen* v. *Homan*, 3 Mac. & G. at pp. 396, 397.
(*e*) *Muttlebury* v. *Taylor*, 22 O. R. at p. 315.

gagee no longer has any principal debtor, for the mortgagor has ceased to be such, and the new owner has never become a debtor to the mortgagee at all, and cannot be sued by him (*f*) unless indeed there has been an assignment by the mortgagor to the mortgagee of the implied covenant for indemnity by the purchaser of the equity (*g*). It may prove interesting at the present time to examine the cases dealing with this subject, with a view to ascertaining what the true relationship really is between the mortgagee and the mortgagor, after a sale of the latter's interest in the lands subject to the mortgage.

Though the authorities exemplifying the principles of the law of principal and surety involved in the solution of this problem are numerous, there is, as far as I am aware, no reported English case, and there are but two decisions and two *dicta* to be found in the reports of this Province dealing directly with the effect of a transfer of the equity of redemption upon the relationship of the mortgagor to the mortgagee. We have in Ontario, in order of date, the decision in *Mathers* v. *Helliwell* (*h*), a *dictum* in *Blackley* v. *Kenney* (No. 2) (*i*), the decision in *Aldous* v. *Hicks* (*j*), and another *dictum* in *Muttlebury* v. *Taylor* (*k*). Of these four cases but one reached the Court of Appeal, and although in that case the appeal was allowed, the decision is very meagrely reported in the Official Reports.

In *Mathers* v. *Helliwell* (*h*), the mortgagor Townsley had sold the lands subject to the mortgage, and the mortgagee, Mathers, subsequently agreed with the purchaser of the equity, Helliwell, to extend the time for payment of the principal moneys for five years in consideration of *Helliwell agreeing to pay him interest during the five years at eight per cent.* The mortgage had only borne six per

(*f*) *Frontenac* v. *Hysop*, 21 O. R. 577.

(*g*) *British Can. L. Co.* v. *Tear*, 23 O. R. 664.

(*h*) 10 Gr. 172.

(*i*) 29 C. L. J. 108, at p. 110.

(*j*) 21 O. R. 95.

(*k*) 22 O. R. 312, at p. 315.

cent. theretofore. Vankoughnet, C., in holding the mortgagor to be thereby discharged, said, "Then, as against Mrs. Townsley, I think I should give no relief. Helliwell undertook to pay off the mortgage money she had contracted to pay. Her equity was to compel him to do this and relieve her. Behind her back, the mortgagee agrees with him that this money shall not be exacted for five years on certain terms. Her equity is to compel Helliwell to pay off the mortgage. The mortgagee, without her assent, binds himself that Helliwell shall not be compelled to do this, and that he will not receive it for five years beyond the time the money is payable, and agrees with him that it shall be expressly charged on the land. I think, in face of this agreement, he can no longer insist on any personal liability of Mrs. Townsley."

In *Blackley* v. *Kenney* (*l*), the grantor of the equity had covenanted to indemnify his grantee, a volunteer, against the incumbrance. Neither in the Court of first instance (*m*), nor in the Court of Appeal (*n*), is the actual decision in point. But, in the judgment of Mr. Justice Osler, delivered in January, 1891, as reported in 29 Can. L. J., we find the following *dictum*, at page 110:—"It is well settled that the relation of a mortgagor who has covenanted with the mortgagee for payment of the mortgage debt, and who sells the equity of redemption subject to the mortgage, is that of surety to the purchaser for the payment of the debt. He has entered into a personal contract for payment of the debt, which debt, as between himself and the purchaser, the latter has assumed; and if the mortgagee deals with the purchaser in such a way as to affect the rights of the mortgagor to compel payment in the terms of the original contract, he discharges the mortgagor from his liability: *Mathers* v. *Helliwell*, 10 Gr. 172; *Campbell* v. *Robinson*, 27 Gr. 634; *Calvo* v. *Davies*, 8 Hun (N. Y.) 222; *George* v. *Andrews*, 60 Md. 26; *Paine* v. *Jones*, 14

(*l*) 19 O. R. 169; 18 A. R. 135.

(*m*) 19 O. R. 169.

(*n*) 18 A. R. 135.

Hun 577; *Barnes* v. *Mott*, 64 N. Y. 397; Jones on Mortgages, secs. 740, 741."

Maclennan, J.A., does not commit himself positively to this proposition; Hagarty, C.J.O., and Burton, J.A., do not appear to have delivered judgments.

In *Aldous* v. *Hicks* (*o*), Hicks, the mortgagor, had sold the mortgaged premises to one Ralston, who subsequently conveyed to one Riches, subject to the mortgage. Aldous, the mortgagee, accepted payments of interest from Ralston and Riches, and Hicks alleged that he had, from time to time, by agreement with Ralston and Riches, but without the knowledge or assent of Hicks, extended the time for payment of the mortgage. Hicks claimed that, on conveying to Ralston, he ceased to be primarily liable to Aldous, and *had become a surety*, and *as such* was discharged by the dealings of Aldous with Ralston and Riches. Boyd, C., on 25th March, 1891, gave this judgment:— "Though the defendant Riches purchased the equity of redemption, and covenanted to pay the mortgage, and so has become primarily liable for the mortgage debt *as between her and the mortgagor*, that does not create any privity of contract between her and the plaintiff, the mortgagee. No right of action arose to the plaintiff whereby he could recover the mortgage debt directly from the purchaser: *Clarkson* v. *Scott*, 25 Gr. 373; *Norris* v. *Meadows*, 7 A. R. 23.

There is, therefore, at the outset, an absence of the threefold relation of creditor, principal debtor and subsidiary debtor or surety, upon which the equitable doctrines invoked operate. No fact is proved which changes this original constitution of the parties. This one material point (absence of right of action against the so-called principal, Riches) distinguishes this from the authorities relied upon. In the nearest case, *Mathers* v. *Helliwell*, 10 Gr. 172, there was a direct dealing between the mortgagee and the purchaser of the equity, as to the interest, which constituted a new contract upon which the purchaser became person-

(*o*) 21 O. R. 95.

ally liable. That element is wanting here." It may be remarked that the judgment of Vankoughnet, C., in *Mathers* v. *Helliwell*, does not rest on any such narrow ground.

The facts in *Muttlebury* v. *Taylor* (*p*) are somewhat complicated, and the decision is irrelevant to the question now under discussion. Boyd, C., however, in his judgment, delivered on 27th April, 1892, re-affirms (*q*) the liability of the purchaser of the equity to indemnify the mortgagor, and denies to the mortgagee any direct remedy against such purchaser. The learned Judge concludes with this statement or *dictum*, hardly pertinent to the point before him for decision:—"I proceed upon the law as enunciated in *Blackley* v. *Kenney*, 19 O. R. 169; 18 A. R. 135, which in no wise conflicts with what is decided in *Aldous* v. *Hicks*, 21 O. R. 95. Both cases recognize the law to be that *the purchaser of an equity of redemption becomes the principal for the payment of the mortgage debt, and that any dealing between the mortgagee and the purchaser which prejudicially affects the terms of the original contract for payment contained in the mortgage will discharge the mortgagor, as being in the circumstances merely a surety for the debt.*"

Now, what conclusion is the reader to deduce as to the suretyship of the mortgagor, upon the suppositious case presented above? To quote the language of *Aldous* v. *Hicks*, has "no fact occurred to change the original constitution of the parties," so as to create a situation of "creditor, principal debtor, and subsidiary debtor or surety upon which the equitable doctrines invoked operate," or, in the language of *Muttlebury* v. *Taylor*, has "the purchaser of the equity of redemption become the principal for payment of the mortgage debt, (so) that any dealing between the mortgagee and the purchaser which prejudicially affects the terms of the original contract for payment contained in the mortgage, will discharge the mortgagor as

(*p*) 22 O. R. 312.

(*q*) 22 O. R. at p. 314.

being in the circumstances merely a surety for the debt?" It must be borne in mind that the giving of time to the principal is always theoretically considered to "affect the terms of the original contract for payment prejudicially" to the surety (*r*).

In other words, does a mortgagor cease to be principal debtor and become surety *quoad* the mortgagee by merely transferring his equity of redemption without the mortgagee's knowledge or assent?

It is proposed, first, to consider the general proposition involved in an affirmative answer to this question, viz., that A., being debtor, and B., creditor, A. can, by subsequent agreement with C., a stranger, without B.'s consent, constitute C. principal debtor, and convert himself into a mere surety; and that upon notice of such agreement being given to B., the latter is bound, at his peril, to accord to A. the privileges of a surety; and then to enquire whether the facts, that A., the original debtor, is a mortgagor of land, B., the creditor, his mortgagee, and C., the stranger, the purchaser of A.'s equity of redemption, materially affect the result when the general principles of the law of principal and surety come to be applied to their position.

There are a few salient and well established points in connection with the law of principal and surety which it may not be amiss to recall, as upon the correct apprehension of them and of their meaning and legitimate consequences a satisfactory solution of this problem depends.

Though so often characterised as a subtle "refinement of equity" (*s*), "carried to the verge of sense" (*t*), and "consistent neither with justice nor common sense" (*u*), the doctrine is now firmly established that the giving of

(*r*) *Samuell* v. *Howarth*, 3 Mer. 272, at p. 279; *Rees* v. *Berrington*, 2 Wh. & Tud. L. C. Bl. Ed. 1106; *Darling* v. *McLean*, 20 U. C. R. 372; *Bolton* v. *Brakenham*, L. R. (1891) 1 Q. B. 278; *Munster & Leinster Bank* v. *France*, L. R. 24 Ir. 82.

(*s*) *Hulme* v. *Coles*, 2 Sim. 14.

(*t*) *Holme* v. *Bronskill*, 3 Q. B. D. at p. 509.

(*u*) *Swire* v. *Redman*, 1 Q. B. D. at p. 542.

time by a creditor to his principal debtor, without reservation of remedies against the surety, discharges the surety. DeColyar (*v*) states three requisites to such discharge of the surety: (1) The agreement must be in reality to give time; (2) It must be binding upon the creditor; (3) It must be made *with the principal debtor* (*w*). To the application of this equitable doctrine it would seem a truism to say, that a proper subject, in the person of a surety to a creditor for a principal debtor, is essential. Yet to say, whether or not upon a given state of facts, such a relationship of parties is constituted, may, in the present state of decisions, be a very nice and difficult question. Who is a principal debtor? It seems almost waste of time to answer that he is the person *whose debt* is guaranteed or assured; that he is the person *liable to the creditor*, who, as between himself and another person, his surety, is *primarily* liable, or perhaps more accurately, *ultimately* liable. But who is the surety. And how is suretyship established? This question cannot be so shortly, or so readily, answered. To say that he is one who is liable for the debt of another is an incomplete and unsatisfactory answer. A better definition, under the authorities, would seem to be that he is a person liable to the creditor, but (by virtue of an agreement entered into with the creditor, or made by the debtors *inter se* prior to credit being given, and of which the creditor has notice), as between himself and the principal debtor, secondarily liable and entitled to indemnity from the principal. Both definitions involve the idea of *liability to the creditor of both principal and surety.*

In the well-known case of *Duncan* v. *N. & S. W. Bank* (*x*), Lord Selborne distinguishes three kinds of cases in which by different modes the relation of suretyship or *quasi* suretyship may be established:—"(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the

(*v*) Guarantees, Bl. Ed. p. 378.

(*w*) *Clarke* v. *Birley*, 41 Ch. D. 422, at p. 434; *Frazer* v. *Jordan*, 8 El. & Bl. 303; 3 Mer. 272.

(*x*) 6 App. Cas. at p. 11.

creditor thereby secured is a party; (2) Those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) Those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being as *between the two*, that of one of those persons only and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid."

And he adds this significant language: "It is, I conceive, to the first of these classes of cases, and to that class only, that the doctrines laid down in such authorities as *Owen* v. *Homan* (*y*), *Newton* v. *Chorlton* (*z*), and *Pearl* v. *Deacon* (*a*), apply in their full extent. If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has (in fact) made himself answerable for another man's debt is, *towards the creditor, no surety, but a principal*, then I think the creditor would not be subject to those special obligations which were described by Lord Truro in *Owen* v. *Homan* (*b*), and would not, generally, have his powers of dealing with securities circumscribed and restricted in the manner described by Vice-Chancellor Wood in *Newton* v. *Chorlton* (*c*), and by Lord Romilly in *Pearl* v. *Deacon* (*d*). The difficulties, therefore, which, in the present case, appear to have weighed most upon the minds of the Judges in the Court of Appeal, would not ordinarily arise, *unless there was a contract of suretyship, properly so called, not between the two debtors only, but between them and the creditor also.*" Full effect is given by his Lordship to the doctrine established by *Oriental Financial Corp.* v. *Overend, Gurney & Co.* (*e*).

(*y*) 3 Mac. & G. 378.
(*z*) 10 Ha. 646.
(*a*) 24 Beav. 186; 1 DeG. & J. 461.
(*b*) 3 Mac. & G. 378.
(*c*) 10 Ha. 646.
(*d*) 24 Beav. 186; 1 DeG. & J. 461.
(*e*) L. R. 7 H. L. 348.

But this case is not authority for the proposition which, in *Maingay* v. *Lewis* (*f*), *Oakeley* v. *Pasheller* (*g*) was said to establish.

At Common Law, before the day of equitable pleas (*h*), as also in the Civil Law (*i*), the liabilities as well as the privileges of the surety were the result of contract by him *with the creditor*, and, according to Lord Selborne, this is "suretyship properly so-called." In equity, it would now seem well established, however, that the privileges of suretyship can be claimed as against the creditor by one of his joint debtors by virtue of an agreement between such debtors made prior to, or perhaps contemporaneously with, their assuming the position of debtors, to which agreement the creditor is no party, but of which he has notice, though his knowledge be acquired after he has become creditor. Such was the decision of the House of Lords in *Oriental Corp.* v. *Overend, Gurney & Co.* (*j*). This leading case settled at least partially the problem that was mooted but not determined in *Pooley* v. *Harradine* (*k*), and which had been otherwise decided in Upper Canada (*l*). The surety's rights in Equity are said to be based not upon any contractual obligation of the creditor towards him; but upon "the existence of the relation of principal and surety between the debtors, and the creditor's actual or constructive knowledge thereof" (*m*). "It depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor" (*n*). It was upon this ground that the House of Lords held, in

(*f*) Ir. R. 5 C. L. 229.

(*g*) 4 Cl. & F. 207; 10 Bli. N. S. 548.

(*h*) *Pooley* v. *Harradine*, 7 E. & B. at pp. 433, 434; 17 & 18 Vict. cap. 125.

(*i*) Evans' Pothier, p. 228.

(*j*) L. R. 7 H. L. 348.

(*k*) 7 E. & B. at pp. 436, 440, 441.

(*l*) *Bank of U. C.* v. *Thomas*, 11 C. P. 515.

(*m*) De Colyar on Guarantees, Bl. Ed. p. 377.

(*n*) *Swire* v. *Redman*, 1 Q. B. D. at p. 542; *Hollier* v. *Eyre*, 9 Cl. & F. at p. 45.

the case above cited, where the relation of principal and surety existed between the joint debtors *at the time the creditor became such*, that it was immaterial that the creditor was not aware until after the surety had become liable to him, that the latter had, as between himself and his co-debtor, been from the beginning secondarily liable. It would seem to be the opinion of some members of the English Bench that the House of Lords has in this case carried the effect of notice to an extreme limit even in Equity (*o*); and that to carry the doctrine thereby unquestionably established one step further would be an undue interference with the principles which underlie the law of contracts. One is almost tempted to enquire whether, even if strictly confined to what was absolutely necessary for the decision of that case, the law as enunciated by Lord Cairns does not appear to lessen, if indeed it does not nullify at least some of the contractual rights of the creditor against his debtor (*p*). Such being the case, the doctrine of *Oriental Financial Corp.* v. *Overend & Co.* should not be extended one jot beyond what the facts there before the Court justify and require. Two of these facts should always be borne in mind when that case is being considered, viz., that the person allowed to claim the rights of a surety *was one of two co-debtors;* and that his right to indemnity as against his co-debtor existed when he became liable to the creditor. These two facts are to be found in every English case where, *without the creditor's assent*, a debtor has been allowed to claim the privileges of a surety. *Oakeley* v. *Pasheller* (*q*) has been said to be authority for the proposition that joint debtors by agreement between themselves *made subsequently to their becoming such*, can on notice thereof to their creditor require him to accord to one of them the rights of a surety, and thus deprive him, without his consent, of his right to treat both as principals; but as is clearly pointed out in *Swire*

(*o*) *Swire* v. *Redman*, 1 Q. B. D. 542.

(*p*) *Maingay* v. *Lewis*, L. R. 5 Ir. C. L. at p. 231.

(*q*) 4 Cl. & F. 207: 10 Bli. N. S. 548.

v. *Redman* (*r*), the reports of this case, meagre and imperfect as they are, show that the decision proceeded on the ground that the creditor was actually a party to the arrangement whereby one of the joint debtors became a surety, and that the arrangement was in substance and reality a novation. In no subsequent English case has this view of *Oakeley* v. *Pasheller* been controverted (*s*). The erroneous conception of the real ground of decision in *Oakeley* v. *Pasheller*, taken by Bacon, V.C., in *Wilson* v. *Lloyd* (*t*), and by the Irish Court of Appeal in *Maingay* v. *Lewis* (*u*), is also pointed out in *Swire* v. *Redman*.

In this latter case, decided in 1876, the judgment of the Queen's Bench Division, prepared by Mr. Justice Blackburn, one of the ablest Judges who ever adorned the English Bench, and delivered with full concurrence by Chief Justice Cockburn, is an express authority for the proposition that by agreement, *made subsequently to the creation of the debt*, and to which the creditor is not a party, joint debtors cannot constitute one of themselves surety for the other so as to entitle the former to the privileges of suretyship at the hands of their creditor, and deprive him of his contractual right to treat both as principal debtors. Mr. Justice Blackburn, citing *Oriental Financial Corp.* v. *Overend & Co.*, says the rule it lays down "whether it was originally right or wrong, is no doubt well established," viz., that notice to the creditor (though received after credit has been given) of the anterior existence of the suretyship of one of his joint debtors for the other is binding on the creditor. "But when, as in the present case, the two debtors are both principals, there is no such right." The reasoning seems conclusive. "The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice,

(*r*) 1 Q. B. D. at pp. 543, 545.

(*s*) See, however, *Oakford* v. *Eur. & Am. S. S. Co.*, 1 H. & M. 190 and *Rouse* v. *Bradford Banking Co.*, W. N. (1893), 194.

(*t*) 16 Eq. 60. Disapproved of in *Re Jacobs*, 10 Chy. App. 211.

(*u*) L. R. 5 Ir. C. L. 229.

to prevent the plaintiffs from doing what they lawfully might before, to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that (it) is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants derogating from the plaintiffs' right without their consent" (*v*).

The doctrine thus enunciated stood unquestioned by any reported decision in the English Courts down to the month of December, 1893, when we find Mr. Justice Kekewich, in *Rouse* v. *Bradford Banking Co.* (*w*), which was a case of dissolution of partnership, and assumption of all liabilities by the continuing partner declining to follow it, and deducing from the decisions in the House of Lords above adverted to, the conclusion, "that if a creditor had two principal debtors, and then one of them was notified to the creditor as a surety, from that time forward the surety had all the rights of a surety against the creditor, and the creditor was bound to look after his interests to this extent, that he must not give time to the other principal debtor or prejudice the interests of the surety. Upon this ground, his Lordship held that the plaintiff had been discharged through the bank having given time to the new firm."

The value of this decision is certainly not strengthened by his Lordship's finding "that the plaintiff was surety for the new firm *with the knowledge and assent of the Bank*," (the creditor), nor does it seem consistent with his Lordship's statement that, "with regard to the Bank, he (the plaintiff) was a principal debtor, and he remained at the present moment a principal debtor to them." So that, if this report be accurate, his Lordship finds the plaintiff to have been both principal debtor and surety to the Bank at the same time.

Mr. Warmington, Q.C., of Counsel for the Bank, gave immediate notice of appeal.

(*v*) 1 Q. B. D. at p. 542.
(*w*) W. N. (1893), 194.

In the present state of the law of England, subject to whatever doubt the last-mentioned decision may create, this proposition would therefore seem to be established. By virtue of an agreement *inter se*, made by two joint debtors, before or perhaps at the time, *but not after* they have assumed liability to their creditor, and of which the creditor only acquires knowledge after becoming such, one of such debtors may bind the creditor upon such notice to accord to him all the privileges of a surety.

In Ontario, we have, in the case of *Bailey* v. *Griffith* (*x*), decided in 1877, an authority which carries this proposition one step further. It was there held that a similar result follows even if the agreement between the joint debtors be made *after* they have become such. Another authority so holding is the Irish case of *Maingay* v. *Lewis* (*y*), decided in 1870, and already referred to. In the judgment delivered by Harrison, C.J., in *Bailey* v. *Griffith*, an ineffectual attempt is made to explain away *Swire* v. *Redman*, and the learned Judge considers himself bound to follow *Oakeley* v. *Pasheller* and *Maingay* v. *Lewis*, rejecting Mr. Justice Blackburn's explanation of the former case and of its misconception by the Irish Court which decided the latter. The learned Chief Justice, in dealing at pp. 431 and 434 with the admittedly broad language of *Oriental Financial Corp.* v. *Overend & Co.*, overlooks or ignores the fact that the suretyship agreement in that case was made *before*, not *after*, the surety and his co-debtor became bound to their creditor. Moreover, the Court found as a fact that there was, in the case of *Bailey* v. *Griffith*, actual assent by the creditor to the change of relationship between the debtors (*z*), so that the determination of the other question was clearly unnecessary to the decision of the case. For these reasons this case, even if it had not been since overruled, conflicting as it does with the clear enunciation of law in *Swire* v. *Redman* (*a*), could hardly be accepted as a

(*x*) 40 U. C. R. 418.
(*y*) 5 Ir. C. L. 229.
(*z*) 40 U. C. R. at p. 434, *ad fin.*
(*a*) 1 Q. B. D. 536.

satisfactory authority. *Bailey* v. *Griffith* and *Swire* v. *Redman* came up for discussion, however, in our own Court of Appeal, in *Birkett* v. *McGuire* (*b*), and the Provincial case was overruled, the doctrine of the English case being approved of by the majority of the Court. Hutton and McGuire were partners, and Birkett a creditor of the firm. Hutton bought out McGuire and assumed all firm liabilities. Hutton continued to deal with Birkett, incurred further liabilities to him, and paid him considerable sums on account. Notes were from time to time taken by Birkett from Hutton for the price of the new goods supplied as well as the indebtedness of the old firm assumed by Hutton, and statements were rendered to Hutton by Birkett, including both old and new items. McGuire now claimed that, *as a surety*, he was discharged by the giving of time to Hutton, and that in any case the payments made by Hutton to Birkett had wiped out the old firm debt, invoking the rule as to appropriation of payments to the earliest items of the account. The Court of Appeal (Patterson, J.A., dissenting) found against McGuire upon the facts as to the latter point, and on the law held him not entitled to the privileges of a surety as against Birkett. Mr. Justice Burton (*c*) ably discusses, and gives sound reasons for overruling, *Bailey* v. *Griffith*, and supporting *Swire* v. *Redman*. The learned Chief Justice agrees, and adds a protest against interference with "the plain rights of the creditor against his debtor." This case was carried to the Supreme Court of Canada, and the decision of the Court of Appeal was there reversed, Ritchie, C.J., and Strong, J., dissenting; but, as far as can be learned from the report in Cassel's Digest, p. 598, the judgment of the Supreme Court turned on the question of appropriation of payments and the amount thereof, and did not in any way affect the decision of the point now under discussion by the Court of Appeal (*d*).

(*b*) 7 A. R. 53.

(*c*) 7 A. R. at pp. 57, 58.

(*d*) See judgment of Maclennan, J.A., in *Allison* v. *McDonald*, 20 A. R. 695.

The latest decision in our own Courts upon this subject is to be found in the case of *Allison* v. *McDonald* (*e*). Armour, C.J., in delivering the judgment of the Queen's Bench Divisional Court, expressly approves of *Swire* v. *Redman* and *Birkett* v. *McGuire*. The Court of Appeal reversed the decision of the Queen's Bench Division (Maclennan, J.A., dissenting), but their judgment does not turn upon the question now under discussion, and Osler, J.A., expressly says, "If the case can be treated as simply one of principal and surety, I do not think the decision of the Court *a quo* can be quarrelled with." Burton, J.A., reaffirms his views, as expressed in *Birkett* v. *McGuire*; and Maclennan, J.A., though dissenting from the decision upon the point on which the case turned in the Court of Appeal, takes occasion to approve of *Swire* v. *Redman* and *Birkett* v. *McGuire*. No satisfactory principle can be deduced from the actual decision of the Court of Appeal in *Allison* v. *McDonald* as affecting the question under discussion. It certainly does not in anyway conflict with, but rather affirms the decision of the same Court in *Birkett* v. *McGuire*. We may, therefore, with reasonable certainty conclude that the law of Ontario is in accord with that of England as established by *Swire* v. *Redman*. And yet it must be conceded that if the broad language used in the decision of *Oriental Financial Corp.* v. *Overend & Co.* should be followed to its utmost logical result, the natural, though perhaps not the necessary, corollary was deduced in *Bailey* v. *Griffith*; for if it suffices to bind the creditor that knowledge of the suretyship reach him after he has assumed his position as creditor, it is difficult to appreciate the importance to him of the fact that the agreement creating the suretyship was entered into *after* instead of *before* he gave the credit or to understand how this fact can materially affect his position, or why equity should regard the debtor, who, when seeking and obtaining credit, conceals from his creditor his claim

(*e*) 23 O. R. 288; 20 A. R. 695. See also *In re Head*, *Head* v. *Head*, L. R. (1893), 3 Ch. 426.

to the rights of suretyship, as a person more worthy of its peculiar favour, than the debtor who by subsequent agreement becomes entitled to indemnity from his co-debtor, and thereupon claims similar rights. In either case the contractual rights of the creditor as against his debtors are the same, and in each those rights are infringed and derogated from without his assent (*f*). Yet even conceding this to be so, upon the ground that the decision in *Oriental Financial Corp.* v. *Overend* has stretched the consequences of the equitable doctrine of notice at least to its extreme limit, the broad language used in the House of Lords, though it was that of Lord Cairns, should be restricted to the particular state of facts then before the House for adjudication. If the doctrine laid down in this case be not an undue interference with contractual rights and obligations (*g*), and since it is a decision of the House of Lords it would seem presumptuous even to make such a suggestion, it is certainly going perilously near it; and to carry a single step further, than the decision in the House of Lords renders inevitable, the doctrine that, by mere notice of an agreement to which he is no party, a creditor can be bound to treat one of his principal debtors as a surety, and to extend its operation to an agreement between joint debtors *made after* the relationship of debtor and creditor had been created, would seem unwarranted and unwarrantable. To quote the language of Mr. Justice Lawson, one of the majority of the Irish Court of Appeal which decided *Maingay* v. *Lewis*:—"To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies, of a creditor, by an arrangement entered into between his debtors to which he was no party seems to me to be an interference with contracts very contrary to the spirit of our law. To-day a man has two debtors, both liable to him to the same degree, and to-morrow, by no act of his own, his dealings with those

(*f*) See *Birkett* v. *McGuire*, 7 A. R. at p. 90.

(*g*) See *Birkett* v. *McGuire*, 7 A. R. at p. 73.

parties are fettered by the obligations of a suretyship to which he never assented. Such a doctrine, too, if carried out fully, may produce very strange results, if it applies to all cases of liability originally joint and equal, but converted into primary and secondary liability by covenants to indemnify entered into between debtors" (*h*). But Mr. Justice Lawson, considering that *Oakeley* v. *Pasheller* necessarily determined that to be the law against which he so ably argues, felt himself bound implicitly to follow what he understood to be the decision in that case. Upon this judgment, the Court being divided, four for the appellants, three for the respondents, the decision in *Maingay* v. *Lewis* virtually rests.

Moreover, apart altogether from authority, does not the decision in *Swire* v. *Redman* seem more reasonable and more in accord with the sound common sense which underlies the law of contract than that reached in *Bailey* v. *Griffith*? And yet, if the doctrine of *Oriental Financial Corp.* v. *Overend, Gurney & Co.* be beneficial, and if it should be carried to its logical consequences, the conclusion of Mr. Justice Kekewich (*i*) would certainly seem fairly drawn from it, and it would not be altogether surprising to find the English Court of Appeal, or the House of Lords, should the case reach that tribunal, overrule *Swire* v. *Redman*. For the present, however, we must not anticipate any such result, but must deal with the law as it stands. Any person who may desire to make an independent study of this question will find it profitable to consult the authorities referred to in those above cited. They are much too numerous to be dealt with in a magazine article.

It will no doubt occur to the reader as somewhat odd that all the cases referred to are cases of persons originally joint debtors, and that no case has been discussed where the alleged suretyship was created by the substitution by the debtor of a stranger to the creditor as principal debtor in

(*h*) 5 Ir. C. L. at p. 231.

(*i*) *Rouse* v. *Bradford Banking Co.*, W. N. (1893), 194.

his stead. This is simply because, with the exception of Ontario mortgage cases above cited, there is no such case referred to in the text books or cited in the reports of the arguments or judgments in the authorities above dealt with, except cases where there were facts amounting to a novation, and the stranger really became principal debtor in lieu of the former debtor who became surety with the creditor's assent. However, the cases of joint debtors sufficiently elucidate the points in the law of principal and surety which are under consideration.

But even if the decision in *Bailey* v. *Griffith* stood unimpeached, and the proposition laid down by Mr. Justice Kekewich be ultimately upheld, it by no means follows that what two joint creditors can accomplish by an agreement *inter se* and notice thereof to their creditor, a sole debtor can effect by an agreement made with an entire stranger to the creditor upon giving notice thereof to the latter. The contention that an extension of time given by the creditor to this intruder, not amounting to a novation and not involving the intruder in any liability enforceable by the creditor, should suffice to discharge from liability the former sole debtor, now claiming the position of a surety, would seem to conflict with the fundamental principles of the law of principal and surety. At least one of the requisites to the operation of the equitable doctrine invoked must be wanting in such a case. For, as stated by Pothier in his work on Contracts (*j*):—"As the obligation of sureties is, according to our definition (*k*), an obligation accessary to that of a principal debtor, it follows that it is of the essence of this obligation, that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessary without a principal obligation, according to the rule of law *cum causa principalis non consistit, nec ea quidem, quæ sequuntur, locum habent.*" *L. 178; tt. de Reg. Jur.*

(*j*) Evans' Pothier, Vol. I. p. 229.
(*k*) *Ibid.* p. 228.

Here the stranger has never become a debtor to the creditor at all. For what principal debtor is the former sole debtor to become surety? Whose debt is he to assume or guarantee? There is no person indebted to the creditor except himself. Then again, an agreement to give time in order to discharge a surety must *be made with the principal debtor* (*l*). This intruder is not such a person. He is not a debtor of the person who is granting the extension of time. The case is much stronger than those in which there were two joint debtors, for in those cases at all events the person claiming the position of surety could point to a true debtor as his principal. Assuredly these cases have carried sufficiently far the interference with contractual rights and obligations upon the plea of giving full effect to the equitable doctrine of notice.

FRANK A. ANGLIN.

TORONTO.

(*l*) *Clarke* v. *Birley*, 41 Ch. D. 422.

(*To be concluded.*)

LANDLORDS' RIGHTS UNDER ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

In the administration of estates under assignments for the benefit of creditors, questions as to landlords' rights not infrequently arise, and it may be useful to state briefly what these rights seem to be.

The subject may be conveniently considered under three heads: the landlord's right of forfeiture; the landlord's right to payment; and the assignee's personal liability.

First, then, as to the right of forfeiture. It is well settled that, in the absence of special restriction to the contrary, every tenant, except a tenant on sufferance, has the right to assign the term (*a*), and it follows that the right of forfeiture must be dependent upon the infraction of such a restriction. In most leases there is to be found the statutory covenant that the lessee "will not assign or sublet without leave (*b*); and when a tenant who holds under a lease containing this covenant makes an assignment for the benefit of his creditors, the landlord is entitled to eject; and this without preliminary notice of the breach and without possibility of relief against forfeiture (*c*). But so far as this covenant is concerned, the danger of forfeiture may be avoided by expressly excepting from the assignment any lease that it is desired to preserve, a precaution, however, of little value except to an assignor who hopes to effect a settlement and resume his interrupted business on the demised premises. To the creditors leases are so seldom of value that it is scarcely

(*a*) Woodfall's L. & T., 5th ed., p. 269.

(*b*) R. S. O. cap. 106, sec. 4 and schedule B. (7).

(*c*) *Kerr* v. *Hastings*, 25 C. P. 429; *Magee* v. *Rankin*, 29 U. C. R. 257; *Barrow* v. *Isaacs & Son*, (1891) 1 Q. B. 417; R. S. O. cap 143, sec. 11.

necessary to pursue this possibility further, or to touch on the question of how far a lessor is bound to go in the way of assenting to an assignment or sub-lease by the making of which creditors might possibly gain pecuniarily. Moreover, any attempt at dealing with the term is, as a rule, further hampered by the use of the provision that, "if the term hereby granted shall be at any time seized or taken in execution or attachment by any creditor of the lessee or his assigns, or if the lessee or his assigns shall make any assignment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current *quarter's* rent shall immediately become due and payable, and the term shall immediately become forfeited and void"; and while much difficulty might be experienced in taking advantage of the "bankruptcy and insolvency" portion of this clause (*d*), probably almost any transfer of assets for the benefit of creditors would be held to be an "assignment for the benefit of creditors" within the meaning of this provision, so as to give the right to eject, for the tendency seem to be towards a construction in favour of the lessor (*e*). It is not unusual to qualify the declaration of forfeiture by the words "at the lessor's option," but even without these words the lessor is not bound to enforce the forfeiture (*f*). The acceptance, after an assignment has been made, of payment of arrears due before the making of the assignment, is not a waiver of the right of forfeiture (*g*). Such a proviso for forfeiture applies only in respect of the status of the holder of the term; and therefore the lessor, after a valid assignment of the term has been made, cannot take advantage of the fact that the original lessee has become bankrupt; nor can the assignee of part of the reversion enforce the right of forfeiture (*h*).

(*d*) *Clarkson* v. *Toronto Stock Exchange*, 13 O. R. 213; *Temple* v. *Toronto Stock Exchange*, 8 O. R. 705.

(*e*) *Ex parte Gould*, 13 Q. B. D. 454.

(*f*) *Baker* v. *Atkinson*, 14 A. R. 409; *Linton* v. *Imperial Hotel Company*, 16 A. R. 337.

(*g*) *Dobson* v. *Southeran*, 15 O. R. 15.

(*h*) *Smith* v. *Gronow*, (1891) 2 Q. B. 394; *Mitchell* v. *McCaulay*, 20 A. R. 272.

But enough of the question of forfeiture—a question of little practical value, for, in ninety-nine cases out of a hundred, the assignee, far from desiring to oppose a forfeiture, is only too glad to have the premises taken off his hands.

More important is the question of the landlord's right to payment. This is dealt with by sub-section 4 of section 28 of R. S. O. cap. 143, which (under the heading "Exemptions from distress") provides as follows:—"In case of an assignment for the general benefit of creditors, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year last previous to the execution of such assignment, and from thence so long as the assignee shall retain the premises leased." This is almost a transcript of section 74 of the Insolvent Act of 1875; and if section 9 of the Assignments Act, R. S. O. cap. 124, cannot be supported as providing merely for "exemptions from execution," it is questionable whether this sub-section effects a valid "exemption from distress," but the case now before the Judicial Committee for judgment will doubtless settle the point. It has been decided, under the corresponding section of the Insolvent Act of 1875, that the landlord has not an absolute preference, but merely a right of payment to the statutory extent—inaccurately described as a "lien"—dependent upon the existence of distrainable effects, so that unless there be distrainable effects (a distress need not actually be made), the landlord must rank as an ordinary creditor; and the present sub-section must be interpreted in the same way (*i*). It is the right of distress therefore which is in reality interfered with, and in applying to the present sub-section the decisions under the Insolvent Act, it is well to bear in mind that other restrictions as to distress not now in force then existed, so that the landlord's rights under the present law may perhaps be greater than the decisions under this section of the Insolvent Act would lead one to suppose, especially as provisions inter-

(*i*) *Linton* v. *Imperial Hotel Company*, 16 A. R. 337; *In re Kennedy, Mason* v. *Higgins*, 36 U. C. R. 471; *Mason* v. *Hamilton*, 22 C. P. 190 and 411; *In re Hoskins*, 1 A. R. 379.

fering with the right of distress are strictly construed (*j*). Originally under the English bankruptcy system a landlord was allowed to distrain for all arrears, but this right was curtailed from time to time, so that now, after the act of bankruptcy, the landlord can distrain for only one year's rent, and must rank for the balance of his claim. He can, however, distrain before the act of bankruptcy for all the recoverable arrears (*k*). Under the Insolvent Act of 1875, however, it has been held that, by distraining before the assignment, the landlord did not acquire any higher right, and that the distrainable amount was, by the subsequent assignment, cut down to the statutory dole; but that if before the assignment a sale had taken place, and the landlord had received the full amount of the arrears, he could not be compelled to refund (*l*). Much could be said in favour of the view that under the present isolated subsection the landlord, if he distrains before the assignment, is entitled to the full amount of the arrears, but rarely is a *fin de siècle* landlord foolish enough to let the rent fall so far into arrear as to make this a question of importance. For rent accruing due after the assignment the landlord may distrain, as the goods are not by the assignment placed *in custodia legis* (*m*), and the restriction on the landlord's right applies only for the benefit of the creditors (*n*), and would not relieve a surety (*o*); nor, of course, the tenant himself (*p*); nor a chattel mortgagee in possession before the assignment (*q*).

(*j*) *Tuck* v. *Fyson*, 6 Bing. 321; *McEdwards* v. *McLean*, 43 U. C. R. 454; *In re McCraken*, 4 A. R. 486.

(*k*) Robson's Law of Bankruptcy, 6th ed. p. 279.

(*l*) *Griffith* v. *Brown*. 21 C. P. 12; *Mason* v. *Hamilton*, 22 C. P. 190, and 411; *McEdwards* v. *McLean*, 43 U. C. R. 454; *In re McCraken*, 4 A. R. 486.

(*m*) R. S. O. cap. 143, sec. 28; *Briggs* v. *Sowry*, 8 M. & W. 729; *Ex parte Hale*, 1 Ch. D. 285; *Eacrett* v. *Kent*, 15 O. R. 9; *Linton* v. *Imperial Hotel Company*, 16 A. R. 337.

(*n*) *Railton* v. *Wood*, 15 App. Cas. 363.

(*o*) *Tuck* v. *Fyson*, 6 Bing. 321.

(*p*) *Young* v. *Smith*, 29 C. P. 109.

(*q*) *Brocklehurst* v. *Lawe*, 7 E. & B. 176.

It is as to the acceleration proviso of the forfeiture clause that, as far as the actual working out of estates is concerned, difficulty as a rule arises. Though an agreement of this sort is good as between the parties to it (*r*), it has, under the Insolvent Act of 1875, been held that to give effect to such an agreement would be a fraud upon creditors; and the landlord, under a lease providing that in the event of the lessee's insolvency the term should immediately become forfeited and void, and the next succeeding year's rent due and payable, was held entitled only to a year's arrears (*s*), but probably this is not an answer to such a claim now, though there is some divergence of opinion on the point (*t*).

It was also held, under the Insolvent Act of 1875, that as the assignment protected the goods from distress and as the accelerated rent did not become due until after the assignment had been made, the landlord, as far as the accelerated rent was concerned, could neither distrain nor rank as a creditor (*u*), but the later cases hold that the accelerated rent either falls due at the same instant that the assignment is made or at all events while the assignee "retains the premises leased," and that either way the landlord may recover (*v*). It is important to note that the amount to be recovered by the landlord is not necessarily one year's rent only, but the rent, whatever it may amount to, falling due "during the period of one year last previous to the execution of [the] assignment and from thence so long as the assignee shall retain the premises leased" (*w*), and that, as the same case decides, this restrictive sub-

(*r*) *London & Westminster Loan & Discount Co.* v. *London & North Western R. W. Co.*, (1893) 2 Q. B. 49; *Buckley* v. *Taylor*, 2 T. R. 600; *Young* v. *Smith*, 29 C. P. 109.

(*s*) *In re Hoskins*, 1 A. R. 379.

(*t*) *Linton* v. *Imperial Hotel Company*, 16 A. R. 337; *Baker* v. *Atkinson*, 11 O. R. 735; 14 A. R. 409.

(*u*) *Griffith* v. *Brown*, 21 C. P. 12; *In re McCraken*, 4 A. R. 486; *In re Hoskins*, 1 A. R. 379.

(*v*) *Baker* v. *Atkinson*, 11 O. R. 735; 14 A. R. 409; *Linton* v. *Imperial Hotel Company*, 16 A. R. 337; *Graham* v. *Lang*, 10 O. R. 248; *Eacrett* v. *Kent*, 15 O. R. 9.

(*w*) *Linton* v. *Imperial Hotel Company*, 16 A. R. 337.

section may by agreement be rendered wholly inoperative. The right of distress of a mortgagee as *quasi* landlord is limited to one year's arrears of interest, provided the assignee takes the proper steps to obtain the benefit of the Act (*y*).

That an assignee for the benefit of creditors incurs any personal liability under the covenants in a lease held by his assignor is a fact rarely taken into consideration, but results very unpleasant to the assignee may flow from his innocent acceptance of the trust. In an old case (*z*) it was held that, under a voluntary assignment for the benefit of creditors, the assignee was entitled to ascertain whether a lease held by the assignor was of any value to the creditors and to disclaim it, if not; but subsequently doubt was thrown upon the power to disclaim (*a*), and it was pointed out that value was not the test to apply (*b*); and finally it was definitely held that, if the assignee takes upon himself the execution of the trusts under an assignment which is in terms wide enough to transfer the lease, he becomes bound as assignee of the term (*c*). A specific reference in the assignment to the lease is not necessary; such general expressions as "all property of every sort and description"; "all personal estate and effects"; "all goods and chattels and personal estate"; "all property and effects;" are, unless the possibly onerous lease is specially excepted, sufficient (*d*). Under the Insolvent Act of 1875, all leases vested in the assignee, but he had the right to disclaim an onerous one, and this is also the present English practice.

(*y*) R. S. O. cap. 102, sec. 17; *Munro* v. *Commercial Building and Investment Society*, 36 U. C. R. 464; *Hobbs* v. *Ontario Loan and Debenture Company*, 18 S. C. R. 483.

(*z*) *Carter* v. *Warne*, 4 C. & P. 191; 1 M. & M. 479.

(*a*) *How* v. *Kennett*, 3 A. & E. 659.

(*b*) *Ringer* v. *Cann*, 3 M. & W. 343.

(*c*) *White* v. *Hunt*, L. R. 6 Ex. 32; *Kerr* v. *Hastings*, 25 C. P. 429; *Magee* v. *Rankin*, 29 U. C. R. 257; Robson's Law of Bankruptcy, 6th ed., p. 792.

(*d*) Burrill on Assignments, 5th ed., pp. 149, 155; *Ringer* v. *Cann*, 3 M. & W. 343; *Palmer* v. *Andrews*, 4 Bing. 348; *White* v. *Hunt*, L. R. 6 Ex. 32; *Magill* v. *Young*, 10 U. C. R. 301.

Formerly, however, the assignee, under the *damnosa hæreditas* doctrine, had the right to refuse a lease, and the *onus* was on the landlord to show acceptance; so that in many cases the question of what constituted acceptance came up, the extent to which the assignee might use the demised premises for the purpose of taking stock, selling goods, etc., and yet not be bound as assignee of the term, causing great difficulty (*e*). The extent of an assignee's liability under the general covenants in a lease, such as covenants to repair or keep in repair, is too large a subject—with all its ramifications of assigns named and unnamed; variations from statutory forms; and so on—to enter on here. Suffice it to say, that the assignee is at all events personally responsible for rent accruing due during the period that the term is vested in him, and this notwithstanding the fact that he assigns over before a gale of rent falls due (*f*), and clearly it is advisable, if the landlord will not accept a surrender, to as soon as possible assign the lease to some man of straw, for this, even for the express purpose of getting rid of liability, the assignee has a right to do (*g*).

R. S. CASSELS.

(*e*) *Ansell* v. *Robson*, 2 Cr. & J. 610; *Hanson* v. *Stevenson*, 1 B. & Ald. 303; *Copeland* v. *Stephens*, 1 B. & Ald. 593; *Turner* v. *Richardson*, 7 East 335; Burrill on Assignments, 5th ed., p. 596.

(*f*) Woodfall's L. & T., 15th ed. p. 273; *Swansea Bank* v. *Thomas*, 4 Ex. D. 94; *Ex parte Dressler*, 9 Ch. D. 252; *Wilson* v. *Wallani*, 5 Ex. D. 155; *Graham* v. *Lang*, 10 O. R. 248; R. S. O. cap. 143, sec. 2.

(*g*) *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; *Young* v. *Magill*, 10 U. C. R. 301.

EDITORIAL REVIEW.

Decentralization.

While the Attorney-General of Ontario is acceding to the request to establish a Court at London, Ontario, which must necessarily be followed by the establishing of Courts at other places in the Province, the Attorney-General of Quebec is proceeding in the opposite direction. Instead of spreading the strength of the Bench over the Province, he proposes its concentration at several points. The experience of the neighbouring Province ought to enter into the consideration of a question as important as that which is now being disposed of with as little ceremony as a private bill. It is a matter of vital importance to take the first step in a course that will eventually lead to the results which a system of decentralization must necessarily bring, viz., the weakening of both Bench and Bar.

The change cannot be accomplished either, without adding to the expense of the administration of justice. For the proper carrying out of the proposed scheme there must be a Registrar and a Clerk in Chambers. There must be books of record, and a stamp distributor; there must be a place of safety for the books and records, a place for filing papers, and a person to receive and file them. There must be a solicitors' and agents' book, and agents appointed to do local work. In other words, there cannot be another Court held without the requisites and conveniences of another Court and the accompanying expenses.

Again, the time of the Judges is so fully occupied now that it is impossible to see how a Judge can be spared from Toronto to take weekly Courts elsewhere. It would be impossible to carry on two weekly Courts at Toronto with the present number of Judges. How then can it be done in the way suggested?

After all, will the public be better served by the new arrangement? That is the main question. Is a suitor better served because his cause is argued in London than in Toronto? Does it not amount to an arrangement for the convenience of solicitors only? Is it fair to the Bench to compel the Judges to submit to the personal inconvenience which the local Bar now complains of? A little pause would be well before taking the step.

The Constitution of Canada.

The *American Law Review* notes the formation of commissions by some of the States of the Union to consider the question of uniform legislation. It refers to our constitution in the following favourable terms:—"We have more than once pointed out the fact that our Federal system presents the spectacle of a pyramid standing on its apex. We doubt whether it ought not to have been originally modelled on the plan of the constitution of the Dominion of Canada, which, if we understand it aright, commits general legislative power to the Parliament of the Dominion, and prohibits local legislation on any subject in respect of which the general Parliament enacts general laws." Our contemporary has not got exact information as to details, but he is sound in his principle. Our criminal law does not require a series of inter-provincial extradition treaties, one uniform law being enacted for the whole Dominion; nor is it possible for a man to be married in one Province, unmarried in another, a bigamist in a third, etc., on his way from the Atlantic to the Pacific, as he may be in the United States, as graphically described in a recent article in the *Contemporary Review*.

The Behring Sea Award.

The *American Law Review* for January-February suggests the award of the American Bar Association medal to Baron De Courcel, who presided over the Behring Sea Arbitration. It says, "Whatever politicians may think of that award, the opinions of capable lawyers will differ very

little upon the conclusion that it was in all respects legal and just; and that, although it decided all questions of technical law against the United States, the decision, even of those questions, was as favourable to us as to Great Britain; since we, as a maritime nation, are as much interested in preserving the principle of the freedom of the seas, as is the great maritime nation from which we sprung."

This opinion is all the more valuable, as the dissentient voices of the tribunal were from the United States. We can heartily agree with the *Review*, as might be expected; and have only to remark that if all who were concerned in assisting in the administration of private as well as public law, were to bear in mind that they are assisting in ascertaining simply the truth, whether of fact or law, instead of waging war in which it was essential to win at all cost, there would be less heart burning, and less ill-feeling. Great Britain and the United States have set an example to the world strikingly in contrast to that set by the European nations. And we feel confident in saying that if the award had been the other way, it would have been accepted as philosophically as it has been by the United States by the statesmen as well as the lawyers of the Empire.

BOOK REVIEW.

The School Law of Ontario; comprising The Education Department Act, 1891; The Public Schools Act, 1891; The Act respecting Truancy and Compulsory School Attendance; The High Schools Act, 1891, and the Amending Acts of 1892 and 1893; with notes of cases bearing thereon, the regulations of the Education Department, Forms, etc. By WILLIAM BARCLAY MCMURRICH, M.A., one of Her Majesty's Counsel, and HENRY NEWBOLT ROBERTS, of Osgoode Hall, Barrister-at-Law. Toronto: The Goodwin Law Book and Publishing Co. 1894.

The title page of this work indicates its scope. Since Dr. Hodgins' book on the school laws of the Province there has been no book of reference, though one was much needed. This publication is therefore very welcome to those who have occasion to refer to school law. It also places within reach the Departmental regulations, which are not always readily accessible to the practitioner. We would have been better pleased if the learned annotators had adhered to the recognized contractions in citing our reports.

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THE PRIVY COUNCIL AS A COLONIAL COURT OF APPEAL.

A LATE number of the *Canada Law Journal* contains the following: "*The London and Canadian Loan and Agency Company* v. *Duggan*, (1893) A. C. 506, which in the previous stages of its career was known as *Duggan* v. *London and Canadian Loan and Agency Company*, is a case to which we have already referred, *ante*, vol. 27, p. 289. It is one of those cases which are calculated to induce a sense of thankfulness that there is a Privy Council."

We venture to say that the decision of the Privy Council enunciated the law of this Province applicable to the particular case, merely because the Privy Council says that it is the law, and because there is no higher tribunal to which an appeal can be carried, and not because it is by any means clear that the decision could be supported upon legal principles.

The headnote to the report of that case is as follows: "Where the respondent had transferred shares as security for a loan, *held*, that the appellants, as derivative transferees from the lender, were not affected by a trust in favour of the respondent, unless such trust was clearly disclosed on the face of their author's title, or was otherwise notified to them. The words 'manager in trust,' appended to the signature of a bank manager, import that he held and transferred the shares in trust for his

employers, the Bank, and are not calculated to suggest that he stood in a fiduciary relation to some third person, so as to affect a transferee for value with constructive notice of such relationship."

The following extract is taken from the judgment: "The fate of this appeal must, therefore, depend upon the single issue whether the words 'manager in trust' appended to the designation and signature of J. O. Buchanan, in the transfer book, indicate that he was trustee for some beneficiary other than the Federal Bank, or merely import that he held the shares for behoof of the bank. Apart from the evidence, their Lordships have no hesitation in holding that the added words, according to their natural construction, mean that Buchanan, as an official of the bank, held in trust for his employers, and are not calculated to suggest that he stood in a fiduciary relation to any other person.

"It was argued that these words, even though they might not clearly indicate a trust for others than the bank, were at least so ambiguous as to cast upon the appellants the duty of making enquiry. Their Lordships are not of opinion that any such ambiguity exists. But the argument, had there been some foundation for it, would have come to nothing, because it is clearly proved that the Federal Bank intended Buchanan to hold for them, and for them only; and it is also proved, and is assumed by the learned judges who found for the respondent, that the appellants, if they had enquired, would have received a positive assurance to that effect."

Surely it cannot be supposed that the intention of the Federal Bank with reference to the matter is to be a gauge by which the terms of the trust in question are to be determined. If the transfer had been made direct to the bank (instead of to Buchanan), and if the word trust had not been used, still the bank would have been constructive trustees; and whether the bank had been trustees, or Buchanan was trustee, the actual trust was that which would have been declared by the Court, if

Duggan had brought an action against his first transferee to have the terms of the trust declared; and, in such an action, it would have doubtless been declared that the trust was, first, to pay out of the proceeds of the shares the amount of the loan which had been advanced upon the security thereof, and, secondly, to pay over any surplus to Duggan.

It may have been assumed by learned judges as stated by the Privy Council; but how is it possible to prove what would have been the answer given by an unknown person (*some officer* of the Federal Bank) to a question which was never asked?

It has long been looked upon as settled law that, when a person having notice of the trust is dealing with a trustee, a duty is (as a general rule) imposed upon him to make enquiry in the proper quarter as to the nature of the trust; and, in the event of no such enquiry being made, it will be presumed as against such person that, if he had made such enquiry, he would thereby have ascertained the true state of the facts (*a*).

The true state of facts in this case was, that each successive trustee who held the shares in question held them in trust, in the first place, to pay out of the proceeds thereof the claim of the corporation of which he was manager, or so much thereof as had been rightfully advanced upon the security of the stock, and, in the second place, to pay the surplus of such proceeds to the original owner of the stock; and it must be presumed that enquiry would have elicited the truth.

In this case, the Privy Council proceeded in one direction, and restricted the commonly-accepted equity doctrine as to notice to about the same extent that they proceeded in the other direction, and extended that doctrine in the case of *Bank of Montreal* v. *Sweeney* (*b*). These two decisions probably mark the boundaries of one swing of the judicial pendulum.

(*a*) *Jones* v. *Williams*, 24 Beav. at p. 62.
(*b*) 12 App. Cas. 617.

As is usual with Privy Council decisions, in neither of these cases do the Judicial Committee cite a single case or make any attempt to show how their decision is to be squared with existing authorities, which are to be found in the reports, and which authorities are looked upon by all other judicial tribunals as being worthy of citation.

It is to be remembered, of course, that the free citation of previous authorities has its inconveniences, for it forces the Court to enunciate the legal principles of general application by which they consider themselves bound and which they desire to follow; and it always appears to have been a rule (a most unsatisfactory rule) of the Privy Council to refrain, as far as possible, from laying down general principles, and to endeavour in each case to determine the question upon some narrow point peculiar to the case in hand.

Notwithstanding the exercise of all this caution, the Judicial Committee have had to turn some pretty sharp corners for the purpose of harmonizing some of their own decisions; take, for example, *R.* v. *Hodge* (*c*), and *Russell* v. *Queen* (*d*).

It is true that they have a precedent for this, furnished by the House of Lords, which Court got over one of its difficulties by saying that one of its previous decisions was founded upon its particular facts, and was not intended to establish any general principle, although reference to such previous decision would not indicate to anybody outside of that Court that there was anything special or peculiar therein which should prevent the principle therein acted upon from being applied in future cases. See, for example, *London Joint Stock Bank* v. *Simmons* (*e*), from the judgment in which the following is an extract: "The Court of Appeal appear to have been much influenced by the decision of your Lordships' House in the case of *Earl of Sheffield* v. *London Joint Stock Bank.* (13 App. Cas. 333.)

(*c*) 9 App. Cas. 117.
(*d*) 7 App. Cas. 829.
(*e*) (1892) A. C. 201.

The first observation that I would make is that if (as I believe) it be accurate that the question is one which is to be determined upon the facts of the case, no one case can be an authority for another. The only question of law decided in Lord Sheffield's case was that a purchaser even for value cannot insist upon his purchase if he knows that the person from whom he purchases has no right to sell; no very novel principle of law, nor one upon which, I should think, much doubt can exist."

Sir F. Pollock, referring to this case, says: "We are now to understand that *Lord Sheffield's case* did not affect any principal of mercantile law, but proceeded wholly on the actual notice of the pledgors' limited title which the bank was held to have had in the special circumstances of that case. *But is it altogether satisfactory when judgments in the House of Lords are so framed as to mislead even the Court of Appeal?*" (*f*).

We have not undertaken and shall not undertake to go with any minuteness into a discussion of the soundness of the decision in *London and Canadian Loan and Agency Company* v. *Duggan*, or in any other of the cases decided by the Privy Council, although many of these cases offer tempting material for examination and discussion. The most glaring of them would probably be found to be cases involving equity doctrines, the judgments in which give us inverted equity so adulterated with common law notions that it would require a chemical test to indicate the presence of any legitimate equity doctrine. For a single example of this, see *North-West Transportation Company* v. *Beatty* (*g*), which we venture to think is an extraordinary decision, wholly unsupported by authority, and that perhaps accounts for the fact that no authority is therein cited.

We are only interested here in showing what reason we have (to use the words of the enthusiastic writer in the *Law Journal*) for "a sense of thankfulness that there is a Privy Council."

(*f*) 8 Law Q. Rev. 267.
(*g*) 12 App. Cas. 589.

We should feel duly thankful for the existence of a Privy Council if it were so constituted as to "induce a a sense of thankfulness."

We venture to say that the constitution of that Court is of such a character that the Court while so constituted cannot reasonably be expected to "induce a sense of thankfulness." The personnel of that Court is as shifting as the Goodwin Sands. At one sitting it may be composed of the ablest judges in the land, and at the next sitting its chief characteristics may be senility and general weakness. The high position of that Court is likely to produce the serene sense of omnipotence and omniscience coupled with a profound belief in all things English which calls to mind the rebuke administered by the Privy Council to the Supreme Court of New South Wales in *Trimble* v. *Hill* (*h*), from which we extract the following: "Their Lordships think that the Court in the Colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal by which all the Courts in England are bound until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it. The Judges of the Supreme Court who differed from the Chief Justice were evidently reluctant to depart from their own previous decision in a case of *Hogan* v. *Curtis*, but they might well have yielded to the high authority of the Court of Appeal, which decided the case of *Diggle* v. *Higgs* as the English Court which decided *Batty* v. *Marriott* would have felt bound to do if a similar case had again come before it."

The Judicial Committee appear to assume that every decision of the Court of Appeal in England which has not been appealed to the House of Lords is right, and should operate as a binding authority upon the highest Court in a

(*h*) 5 App. Cas. at pp. 344-5.

Colony, such, for example, as the Supreme Court of Canada, even though that Court is unable to bring itself to agree with the judgment of the English Court of Appeal. This view of the Judicial Committee must be based upon the supposed inferiority of every Colonial Judge and every Colonial Court to every English Judge and every English Court, or upon the unwarrantable assumption that in every unappealed case an appeal was not taken because the judgment of the Court below enunciated sound law. If the latter assumption can for a moment be supposed to be correct, then it would logically follow that every unappealed decision of an English Judge of first instance should be equally binding upon the highest Court of every Colony.

Mr. Justice Burton of our Court of Appeal is not sufficiently meek to pass under this rod of the Judicial Committee, and he expresses his opinion accordingly in *Woodruff* v. *McLennan* (*i*), but some of our judges are not so minded (*j*).

It has also been decided by individual judges in this Province that they will follow decisions of our Provincial Court of Appeal in preference to the decisions of the Court of Appeal in England (*k*).

This thought also calls to mind the fact that the English Court of Appeal *refuses to even allow the citation of Colonial judgments*. The following extract is taken from the preface to the third edition of Bunyon's Fire Insurance:—"In the North British case already referred to, a protest appears to have been raised in the Court of Appeal to the citation of cases from the State Courts of the United States, and it is said that the following observations fell from the Bench (shorthand notes, printed for the litigants, p. 107, 46 Law J. Ch. 538). 'We are always in the habit of listening with the greatest respect to any decision of the Supreme Court (meaning thereby the Supreme Court

(*i*) 14 App. Rep. pp. 256-7.

(*j*) *Mason* v. *Johnston*, 20 App Rep. at p. 214.

(*k*) *McDonald* v. *McDonald*, 11 O. R. 187; *McDonald* v. *Elliott*, 12 O. R. 99-100.

of the United States); but we are not in the habit of hearing reports read of cases decided in our own Colonies; and there appears no reason why reports from the State Courts should stand higher? For example, why a decision of the Court of Maryland should stand higher or so high as a decision of the Court of Nova Scotia, which is liable to be appealed to the Privy Council?' As the Supreme Court of Appeal of the State of Maryland has a co-ordinate jurisdiction with the United States Courts, and there is no appeal or removal from one to the other except to a limited class of cases, such, for example, as those in which Federal rights are at stake, or citizens of different States are in litigation, it might be thought difficult to maintain such a distinction. Why, it might be asked, should a decision of the Court of Appeal of the Supreme Court of the State of New York on a mercantile question, unappealable to any Court, stand lower than an appeal to the Supreme Court of the United States from the Circuit Court?"

And why, it may be asked, should the highest Courts in the Colonies be bound to follow the decisions of a Court which refuses to hear "reports read of cases decided in our own Colonies"?

The English Court of Appeal is subject to the House of Lords, and is bound by its decisions. If the Colonial Courts are to be bound by the decisions of the English Court of Appeal, so that they have nothing to do but meekly and silently to put their neck under the yoke, they are *a fortiori* bound to follow (as of course they always would follow) a decision of the House of Lords.

What, then, are the Colonial Courts to do if the Judicial Committee express opinions at variance with the Judgments of the House of Lords, especially if these opinions are apparently expressed with an unconsciousness of the conflict, or if the House of Lords' decision happens to be later in point of time?

The Courts of this Province have felt embarrassed by this question (*l*).

(*l*) *Ross* v. *Scott*, 22 Gr. at pp. 32-3.

In this connection, we may call attention to the following extract from the *Law Quarterly Review* for April, 1892:—"We *accidentally* omitted to mention in our last issue that the reversal of *Johnson* v. *Lindsay* in the House of Lords, '91, A. C. 371, was anticipated some months before by two Judges of the Court of Appeal in New Zealand, who distinctly refused to follow the majority of the Court of Appeal at home."

We venture to think that the Privy Council as a Court for hearing Colonial appeals would not only be put in touch with the Colonies, but would also be materially strengthened by the selection of some of its members from the Bench or Bar of the Colonies, and by such reorganization as would prevent the constant and irritating variation of its own calibre. The consummation of this reform would perhaps "induce a sense of thankfulness that there is a Privy Council."

A. H. MARSH.

MORTGAGEE, MORTGAGOR AND ASSIGNEE OF THE EQUITY OF REDEMPTION.

(*Concluded.*)

I have dwelt thus at length upon the general principles of the law of principal and surety because in the Ontario mortgage cases, above mentioned, the question under discussion as between mortgagor and mortgagee is dealt with as depending for solution upon these principles.

Neither in *Mathers* v. *Helliwell* (*a*) nor in *Muttlebury* v. *Taylor* (*b*) is the discharge of the mortgagor by the extension of time put upon any other ground; in *Aldous* v. *Hicks* (*c*), the Court, in holding the mortgagor not discharged, based its judgment upon the application of the same principles; and in *Blackley* v. *Kenney* (*d*), the dictum of Mr. Justice Osler is an express affirmation of the suretyship of the mortgagor who has aliened his equity.

In dealing with these cases, I must, at the outset, confess my inability to understand how the learned Chancellor reconciles *Aldous* v. *Hicks* with Mr. Justice Osler's dictum in *Blackley* v. *Kenney* and his own statement of the law in *Muttlebury* v. *Taylor*. In *Aldous* v. *Hicks*, the right of the mortgagor, who has sold his equity of redemption, to claim the privileges of a surety as against the mortgagee, is explicitly denied by the Chancellor. Mr. Justice Osler, in *Blackley* v. *Kenney*, expressly affirms such right as "well settled" law. The Chancellor, in *Muttlebury* v. *Taylor*, says that "the law as enunciated in *Blackley* v. *Kenney* in no wise conflicts with what is decided in *Aldous* v. *Hicks*."

(*a*) 10 Gr. 172.
(*b*) 22 O. R. 212.
(*c*) 21 O. R. 95.
(*d*) 29 C. L. J. at p. 110.

If his Lordship refers to the actual decision in *Blackley* v. *Kenney*, that of course in no wise conflicts with *Aldous* v. *Hicks*. The two cases do not turn upon the same point. But can it be said that Mr. Justice Osler's dictum is in accord with the decision in *Aldous* v. *Hicks*? And yet it would seem to be this dictum that the learned Chancellor has in view—because he goes on to say, "Both cases recognize the law to be that the purchaser of an equity of redemption becomes the principal for payment of the mortgage debt, and that any dealing between the mortgagee and the purchaser which prejudicially affects the terms of the original contract for payment contained in the mortgage will discharge the mortgagor, as being in the circumstances merely a surety for the debt" (*e*). Is this consistent with *Aldous* v. *Hicks*? It is somewhat extraordinary that in the reports of *Aldous* v. *Hicks* and *Muttlebury* v. *Taylor* no reference is made, either in argument or judgment, to *Birkett* v. *McGuire* or *Swire* v. *Redman*.

In *Mathers* v. *Helliwell*, Vankoughnet, C., does not in so many words affirm the suretyship of the mortgagor, but he does expressly hold that a binding extension of time given by the mortgagee to the purchaser of the equity discharges the mortgagor, because "by extending the mortgage term the mortgagee deprives the mortgagor of her equity to compel the purchaser to pay off the mortgage and relieve her." But does the agreement between the mortgagee and the holder of the equity so affect the position of the mortgagor? It is respectfully submitted that it does not. Whether this duty of the purchaser of an equity be a mere "equitable obligation independent of contract" (*f*), or an obligation arising upon an implied contract (*g*), if it be an obligation on the part of the purchaser to pay the mortgage *at maturity* (*h*), or then to pro-

(*e*) 22 O. R. at 315.

(*f*) *McMichael* v. *Wilkie*, 18 A. R. at pp. 470 and 474.

(*g*) *Beatty* v. *Fitzsimmons*, 23 O. R. pp. 248-250.

(*h*) See judgment of Maclennan, J.A., in *Mewburn* v. *Mackelcan*, 19 A. R. pp. 741, 742; *Warwick* v. *Richardson*, 10 M. & W. at p. 296; *Leeming* v. *Smith*, 25 Gr. 256; *Canavan* v. *Meek*, 2 O. R. at pp. 645, 646; Wh. & Tud. L. C. (4th Am. Ed.), Vol. II., pp. 342-4.

cure the release of the mortgagor from all liability upon it, and if this obligation be to the mortgagor, how can any act or agreement of the purchaser and the mortgagee to which the mortgagor is no party change the nature of that obligation or deprive the mortgagor of any rights which it gives him (*i*)? If the obligation of the purchaser be merely one of indemnity, it is difficult to see of what right or equity the extension deprives the mortgagor. But unless the mortgagor has acquired the rights of a surety *quoad* the mortgagee, upon what principle of law or equity could a mere extension of time release him? Release by extension of time is the peculiar privilege of the surety. Of course, if the suretyship be taken for granted, *cadit quæstio* There is no attempt made in this case to show why the mortgagor should be considered entitled to the rights of a surety as against his mortgagee; nor is it stated, much less proved, by any chain of reasoning or authority, that the mortgagor has been relieved of his position as principal debtor, with its accompanying liabilities. The only authority cited is *Dickson* v. *McPherson* (*j*). In that case the surety was such *by contract with the creditor*. I do not overlook the fact pointed out by the learned Chancellor that in *Mathers* v. *Helliwell* the purchaser of the equity made himself directly liable to the mortgagee for future interest, at an increased rate, when obtaining the extension. I fail to appreciate the value of this "element" as a ground of distinction between *Mathers* v. *Helliwell* and *Aldous* v. *Hicks*. The judgment in the former case certainly does not rest upon that fact. It seems almost unnecessary to point out that the decision in *Mathers* v. *Helliwell* conflicts with *Birkett* v. *McGuire* and *Swire* v. *Redman*, and that the equities of McGuire and Redman were identical with those of Mrs. Townsley. If the law enunciated in *Aldous* v. *Hicks* be sound, notwithstanding the distinction pointed out by the learned Chancellor, it is difficult to see how the decision in *Mathers* v. *Helliwell* can be maintained.

(*i*) See *Macdonald* v. *Bullivant*, 10 A. R. at p. 589.

(*j*) 3 Gr. 185.

Mr. Justice Osler, in *Blackley* v. *Kenney* (*k*), treats it as "well settled" law, that, on conveying his equity of redemption subject to the mortgage, the mortgagor becomes entitled at the hands of the mortgagee to the rights of a surety. He does not reason the matter out at all, but relies upon a number of authorities which he cites. These it is proposed to discuss very briefly.

Mathers v. *Helliwell*, the first case cited, has been already noticed. If sound law, it is certainly an authority supporting Mr. Justice Osler's position. The next case relied upon is *Campbell* v. *Robinson* (*l*). A glance at this case, decided in 1880 by Spragge, C., shows that it is not an authority for the suretyship of the mortgagor *quoad the mortgagee*. The point for decision in *Campbell* v. *Robinson* was whether the mortgagor was, as against his assignee of the equity of redemption, entitled to indemnity. And though the Chancellor certainly does say broadly that "the position of the mortgagor selling his equity of redemption is that of a surety *to the purchaser* for the payment of the debt," he does not say that the mortgagor is entitled to claim the rights of a surety *as against the mortgagee*.

The next case cited by Mr. Justice Osler is *Calvo* v. *Davies* (*m*), and he also refers to *Paine* v. *Jones* (*n*). Both are New York decisions, and were cited to the Chancellor in *Aldous* v. *Hicks*. In both cases the suretyship of the mortgagor *quoad* the mortgagee is stated as settled law. The question is not argued nor are the judgments supported by any authority other than New York decisions. These cases would be authority for the dictum of our learned appellate Judge, if it were not also the law of the state of New York, that the purchaser of an equity of redemption becomes directly liable to the mortgagee (*o*). This fact, as pointed out in *Aldous* v. *Hicks*, makes a vital difference. If the purchaser be directly liable to the mortgagee he is

(*k*) 29 Can. L. J. 110.
(*l*) 27 Gr. 634.
(*m*) 8 Hun (N. Y.) 222; 73 N. Y. 211.
(*n*) 14 Hun 577; 76 N. Y. 274.
(*o*) *Burr* v. *Beers*, 24 N. Y. 178; *Lawrence* v. *Fox*, 20 N. Y. 268.

capable of being a principal debtor for whom the mortgagor can become a surety to the creditor; but if the purchaser, as in Ontario (*p*), be no debtor at all of the mortgagee, for whom is the mortgagor to be surety? *Murray* v. *Marshall* (*q*) seems to show that it is upon this direct liability of the purchaser to the mortgagee that the decisions establishing the suretyship of the mortgagor, *quoad* the mortgagee, are based in the State of New York.

In *Calvo* v. *Davies*, the discharge of the mortgagor is put upon two distinct grounds by the appellate Court: (1) suretyship; (2) an alleged interference with his right on payment of the mortgage to be subrogated to the position of the mortgagee as it was upon the original mortgage contract. Suretyship has been sufficiently discussed. Whatever right of subrogation the mortgagor may have, the retiring partners also had in *Swire* v. *Redman* and *Birkett* v. *McGuire*. If the mortgagor in *Calvo* v. *Davies* had a right to pay off the mortgage on maturity, and thereupon to be subrogated to the *original* rights of the mortgagee, the retired partners who were makers of the notes in the English and Ontario cases just mentioned had precisely the same right as against the holders of such notes. Extension of time did not discharge in these latter cases; neither should it in the former. And properly so, because the agreement for extension made by the mortgagee with the purchaser of the equity is not binding upon the mortgagor, and does not interfere with his contractual rights. He can still come in and assert his right to pay off the mortgage, or in the alternative claim to be relieved from liability. And if he pays the debt he has an immediate right of action against the purchaser for indemnity arising out of the latter's implied covenant; and also his right of indemnity against the mortgaged premises (*r*), arising out of his original contractual right to pay off the

(*p*) *Frontenac, Hysop*, 21 O. R. 577; *Williams* v. *Balfour*, 18 S. C. R. 472; *Henderson* v. *Killey*, 14 O. R. 137; 17 A. R. 456 and appendix; and 18 S. C. R. 698.

(*q*) 94 N. Y. 611.

(*r*) *Hamilton Provident L. & S. Co.* v. *Smith*, 17 O. R. 1.

debt and claim subrogation. Without his consent he cannot be deprived of these rights. The purchaser of the equity bought with notice of them, and the agreement for extension of time between the mortgagee and the purchaser may well be deemed to have been made subject to them. Should the mortgagee pay off the mortgage at or after maturity, and then proceed against the lands or sue the purchaser for indemnity, the latter, if the agreement for extension be deemed absolutely binding on the mortgagee, would have, as stated in *Swire* v. *Redman*, at p. 541, an action for damages against the mortgagee for breach of such agreement. "The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all." But may not the mortgagee, if sued for such damages by the purchaser, with much reason claim that the latter accepted the extension, knowing that it could only be granted subject to the contingency of the mortgagor claiming his right to pay off the debt and to subrogation, and that therefore the agreement itself was with the implied assent of the purchaser subject to that contingency? This would at all events seem a reasonable view to take of the situation.

It may be said that these are "stock" arguments, urged upon the Courts without success on behalf of every creditor who has sought to enforce his claim against a surety, asserting his discharge by reason of an extension of time given by the creditor to the principal debtor. Granted. This fact, however, does not affect the value of these arguments, when, as in the present case, the very question at issue is suretyship or no suretyship. If the suretyship of the mortgagor be taken for granted, the matter is certainly concluded by authority. Yet even in cases where the suretyship was undisputed, the force of these very arguments has induced eminent Judges to speak of the doctrine that extension of time given by the creditor to the principal debtor discharges the surety, in terms certainly not significant of approval. But, in any event,

Swire v. *Redman* and *Birkett* v. *McGuire* are for the present conclusive authority against the proposition of *Calvo* v. *Davies* that there is involved in the extension of time by the mortgagee such an interference with the mortgagor's right to pay off and claim subrogation as necessarily to release him. Then again, in the State of New York, by statute, there is no personal liability of the mortgagor for the mortgage debt apart from express covenant (*s*). So that, in that State, the personal liability of the mortgagor would seem to be collateral, and the land would not appear to be, as in England and Ontario, *prima facie* merely a pledge (*t*). May not the suretyship of the mortgagor in New York depend somewhat on this fact? In view of the grounds of decision assigned by the appellate Court in *Calvo* v. *Davies*, it is not surprising to find that in the State of New York the proposition established by *Swire* v. *Redman* does not seem to be law (*u*). This English case was cited in argument in *Calvo* v. *Davies*, but is not referred to in the judgment.

On the whole, under the law of the State of New York, an extension of time given to the purchaser of the equity subject to the mortgage, does discharge the mortgagor as being a surety. The same is probably the case in Illinois, where the purchaser of the equity is likewise held directly liable to the mortgagee (*v*). But in view of the differences upon the fundamental points just alluded to between Ontario mortgage law and that of those States, we can scarcely rely upon the decisions of their Courts in considering this question.

Then, Mr. Justice Osler cites *Barnes* v. *Mott* (*w*); but a very cursory glance at this case shows it to be not in point. The question there was as to the right of sub-

(*s*) *Spencer* v. *Spencer*, 95 N. Y. 353.

(*t*) Fisher on Mortgage, 4th ed. pp. 1-4; Coote, p. 1. But see *Hall* v. *Morley*, 8 U. C. R. 584; *Pearman* v. *Hyland*, 22 U. C. R. 202; *Jackson* v. *Yeomans*, 28 U. C. R. 307; *London Loan Co.* v. *Smyth*, 32 C. P. 530.

(*u*) *Dodd* v. *Dreyfus*, 17 Hun 600.

(*v*) *Union Mutual* v. *Hanford*, 143 U. S. 187.

(*w*) 64 N. Y. 397.

rogation in favour of a person paying off a mortgage in ignorance of a subsequent lien affecting the lands—a case very similar to *Brown* v. *McLean* (*x*).

George v. *Andrews* (*xx*) is next referred to. In this case the Court did not treat the mortgagor as entitled to the rights of a surety merely by reason of his having sold his equity subject to the mortgage, but considered that the dealing of the mortgagee with the purchaser in extending the time implied a recognition of and assent to his primary liability and to the suretyship of the mortgagor, and therefore operated to discharge the latter. There seem to be two objections to this view: the same transaction which is held to entitle the mortgagor to the rights of a surety is said to operate to discharge him altogether; the extension of time at the request of a purchaser only involves a recognition of the fact, that he is interested in preserving the equity of redemption, and does not necessarily imply any recognition of his liability to the mortgagee. In Ontario, a purchaser so obtaining an extension does not become directly liable to the mortgagee.

Finally, the learned Judge cites Jones on Mortgages, secs. 740, 741, where the proposition contained in the dictum under discussion is to be found, based upon the cases which have just been mentioned. But in sec. 742 a, 4th ed. vol. 1 (no doubt a later edition), Mr. Jones points out that, while this appears to be the law of the State of New York, the contrary doctrine is equally well established in many other States, and, as will be seen presently, by decisions of the Supreme Court of the United States.

Upon these authorities the learned Judge in Appeal considers the proposition of law enunciated in his dictum to be "well settled." It depends upon *Mathers* v. *Helliwell*, subject to the distinction suggested in *Aldous* v. *Hicks*, and the New York cases. While dealing with American law, let us for a moment glance at a few of the decisions of other American Courts.

(*x*) 18 O. R. 533.

(*xx*) 60 Md. 26.

The Supreme Court of the District of Columbia, in 1885, laid down this proposition. "An express promise made to the vendor by the vendee of real estate conveyed to him, subject to a deed of trust executed to secure a debt, that he will pay the debt, does not without the assent of the creditor make the vendee the principal debtor and the vendor a surety" (*y*).

In 1889, the Supreme Court of the United States, approving the last-mentioned case, says that a mortgagor selling his mortgaged premises to a purchaser who expressly assumes the payment of the mortgage debt does not *quoad* the mortgagee become a surety, and will not be discharged by an extension of time given by the mortgagee to such purchaser (*z*).

In 1892, the same Court, citing with approval both the foregoing cases, points out the difficulty of holding that by an agreement with a stranger the mortgagee discharges his only debtor, the mortgagor. In the same case Mr. Justice Gray clearly shows that the application of the New York and Illinois decisions to the contrary should be confined to States where the direct liability of the purchaser of the equity to the mortgagee prevails (*a*). See also *Cucullu* v. *Hernandez* (*b*). Then, in Connecticut, *Waters* v. *Hubbard* (*c*), decided in 1877, and *Beardman* v. *Larabee* (*d*), in 1883, lay down the law of that State to be that, although the vendor and the vendee, subject to a mortgage, become *inter se* surety and principal respectively, this relation does not affect the creditor-mortgagee. As to him the mortgagor is still principal debtor. In Connecticut, the purchaser of the equity is not directly liable to the mortgagee (*e*). The same doctrine is established in Iowa, and is held to apply to the case of a sale by one of two joint mortgagors to the

(*y*) *Shepherd* v. *May*, 115 U. S. 505.
(*z*) *Keller* v. *Ashford*, 133 U. S. at p. 625.
(*a*) *Union Mutual* v. *Hanford*, 143 U. S. 187, at pp. 190-1.
(*b*) 103 U. S. at pp. 115-6.
(*c*) 44 Conn. 340
(*d*) 51 Conn. 39.
(*e*) *Meech* v. *Ensign*, 49 Conn. 191.

other of his equity, the purchaser assuming the debt (*f*). In Michigan, *Crawford* v. *Edwards* (*g*), decided in 1876, is authority to the same effect. *Huyler* v. *Atwood* (*h*), appears to show the same doctrine to prevail in New Jersey. Finally, in *Connecticut Mutual L. I. Co.* v. *Mayer* (*i*), the Court of Appeal of Missouri, referring to *Calvo* v. *Davies*, speaks of it as standing alone and opposed to the weight of authority, and holds that where the grantee of mortgaged premises assumes the payment of the mortgage, the mortgagee is not bound by the relation of principal and surety thus established between the mortgagor and his purchaser.

Even in New York the decisions have not been uniform (*j*).

So that if, in the absence of any English mortgage case directly bearing upon this point, and in face of the conflicting dicta and decisions in our own Courts, resort is to be had to American decisions, the weight of their authority certainly seems to support the proposition of law laid down in *Aldous* v. *Hicks*.

I have dwelt at some length upon this dictum of Mr. Justice Osler, and the cases cited to sustain it, because it would seem to be the foundation for the statement of law made by the Chancellor in *Muttlebury* v. *Taylor*. No other authority is there cited for the suretyship of the mortgagor *quoad* the mortgagee.

The result of these cases would seem to be that at the present time *Mathers* v. *Helliwell*, (subject to the distinction pointed out by the Chancellor in *Aldous* v. *Hicks*) and the dicta in *Blackley* v. *Kenney* and *Muttlebury* v. *Taylor*, supported by New York and Illinois cases and perhaps the Maryland decisions, can be cited by those contending for the discharge of the mortgagor by an extension of

(*f*) *James* v. *Day*, 37 Iowa 164.

(*g*) 33 Mich. 354.

(*h*) 26 N. J. Eq. 504.

(*i*) 8 Miss. App. 18.

(*j*) *Marsh* v. *Pike*, 1 Sandf. Chy. 210; *Perkins* v. *Squier*, T. & C. 620; *Penfield* v. *Goodrich*, 10 Hun 41; *Myer* v. *Lathrop*, 10 Hun 66. See also *Teters* v. *Lamborn*, 43 Ohio 144; *Corbett* v. *Waterman*, 11 Iowa 86.

time given by the mortgagee to the purchaser of the equity of redemption; while *Aldous* v. *Hicks* supported by *Swire* v. *Redman*, *Birkett* v. *McGuire*, *Allison* v. *McDonald* and numerous American decisions of other States and of the United States Supreme Court can be cited by those denying that the mortgagor becomes surety *quoad* the mortgagee on selling his land, subject to the mortgage.

If the dicta in *Blackley* v. *Kenney* and *Muttlebury* v. *Taylor* be sound law, they extend the principle of *Oriental Financial Corporation* v. *Overend Gurney & Co.* to cases other than those of joint debtors; while the limitation engrafted upon that principle by *Swire* v. *Redman*, must be considered inapplicable except to the cases of joint debtors. For in these mortgage cases the alleged suretyship is almost invariably based upon an agreement *made after* credit has been given, and made between persons, of whom one is not in privity with the creditor.

The difficulty of making the mortgagor a surety without having a principal debtor liable to the mortgagee being very apparent, it is sometimes suggested that there is some special feature in the character of the mortgagor entitling him to exceptional privileges and immunities not enjoyed by the ordinary debtor. The suggestion is usually put in this way:—Originally the mortgagor personally and his land are liable to the mortgagee, the one primarily, the other as a pledge. On the transfer the land becomes primarily liable, and the mortgagor, being entitled to indemnity from his transferee, is in a position to claim from the mortgagee the rights *of a surety for the land and for him who* has assumed the obligation of clearing the land of its burden. It is thus sought, by making the land principal debtor with its owner, to overcome the difficulty arising from the fact that the purchaser is not liable to the mortgagee. This idea that the land becomes by the transfer the principal debtor in lieu of the mortgagor, *quoad* the mortgagee, is not to be found in the judgments in *Mathers* v. *Helliwell* and *Muttlebury* v. *Taylor*. It has been said to be countenanced, however, by a few words used by one of the judges of

the Court of Appeal in *Blackley* v. *Kenney*. Maclennan, J.A., says, "a deed from the husband (mortgagor) subject to his mortgage would make his wife (the grantee) and the land the principal debtor" (*k*). His Lordship does not affirm that they become principal debtors *quoad* the mortgagee. They certainly do as between the purchaser and the mortgagor.

"Whenever an owner in fee mortgages his estate the law has established that he intends to render himself personally liable for the mortgage debt and that the estate is a collateral security" (*l*). "A mortgage involves a loan, therefore a debt recoverable by action" even without a covenant (*m*). "A mortgage is a security upon real or personal property for the payment of a debt" (*n*). Such is the law of England; so that it is clear that at the outset the mortgagor himself is primarily liable and is in every sense of the word a *principal debtor*, the land being the pledge for his debt. How can this position be changed so as to affect the creditor–mortgagee without his assent?

Those advancing such a contention, involving an interference with the contractual rights of the mortgagee and obligations of the mortgagor, should at least be called upon to supply some sound reason in the absence of authority, why it should be accepted. Mr. Justice Maclennan, as already pointed out, does not say that either the land or its purchaser, by virtue of the transfer of the equity, would assume the position formerly held by the mortgagor *quoad* the mortgagee.

In the argument of *Muttlebury* v. *Taylor* (*o*), however, we find *Jenkinson* v. *Harcourt* (*p*) cited as sustaining this proposition. A very hasty perusal of that case will shew that

(*k*) 29 C. L. J. at p. 116,

(*l*) *Jenkinson* v. *Harcourt*, Kay, at p. 696.

(*m*) Fisher on Mortgage, 4 Ed. p. 4. See also Coote, p. 1, 4 Ed. p. 990. But see *Hall* v. *Morley*, 8 U. C. R. 584; *Jackson* v. *Yeomans*, 28 U. C. R. 307; *London Loan Co.* v. *Smyth*, 32 C. P. 530.

(*n*) Fisher on Mortgage, 4 Ed. p. 1.

(*o*) 22 O. R. at p. 313.

(*p*) Kay, 688.

it is not an authority for any such contention. It was a case between parties entitled under a voluntary settlement and the personal representatives of the settlor under his will. The rights or position of the mortgagee are not dealt with in the case, and it is only an authority for the proposition that, as between those claming under him and over whom he has full control, the mortgagor can place the burden of the mortgage debt where he pleases. No other authority has been advanced for this very singular proposition, that the mortgagor by an agreement with a stranger can make that which was the pledge, *principal debtor*, and himself, a mere surety to his creditor. The true proposition for which *Jenkinson* v. *Harcourt* is authority, which Mr. Justice Maclennan's dictum supports, and which those contending against the suretyship of the mortgagor, *quoad* the mortgagee, are most ready to admit, is as stated by Mr. Jones in his work on Mortgages, s. 740:—On the sale of the equity by a mortgagor subject to his mortgage, which the purchaser assumes, "the mortgaged property becomes *as between them* the primary fund for payment of the debt." The language of the first Chancellor of Ontario in *Thompson* v. *Wilkes* (*q*), would seem to indicate that the rights of the mortgagor of land after a sale subject to his mortgage, whatever they may be, do not depend upon his being such a mortgagor, but simply upon the fact that he is a person entitled, as a result of the transfer of his equity, to indemnity at the hands of his transferee. If this be so, these rights are neither greater nor less than those of any debtor whose debt some other person has assumed a primary or ultimate liability to pay, and who has given to his creditor notice of such arrangement.

To predict with any degree of certainty the result of an action by the mortgagee against the mortgagor upon his covenant, under the circumstances of our supposititous case would in the present state of our law be almost an impossibility. For much as the practitioner would be tempted to rely upon *Aldous* v. *Hicks* and the sound com-

(*q*) 5 Gr. at p. 595.

mon sense principles upon which that decision seems to be based, when he takes into account the dicta in *Blackley* v. *Kenney* and *Muttlebury* v. *Taylor*, together with the decision of *Mathers* v. *Helliwell* many troublesome doubts must arise to shake his confidence in the soundness of his own judgment, unless indeed he can satisfy himself that "the law as enunciated in *Blackley* v. *Kenney*" and *Muttlebury* v. *Taylor* "in no wise conflicts with what is decided in *Aldous* v. *Hicks*," and can then conclude with certainty what the combined effect of these decisions and dicta is.

It has often been said "*misera est servitus, ubi jus est vagum aut incertum.*" The truth of this maxim must be strikingly apparent to many mortgagees at the present time; perhaps still more apparent is it to the mortgagees' solicitors. Let us hope that when our Court of last resort in such matters does adjudicate upon the question at issue between mortgagor and mortgagee, its decision shall be such as not to introduce uncertainty into the general law of principal and surety, or to further unsettle contractual rights and liabilities.

About two months after the foregoing was written, *Rouse* v. *Bradford Banking Co.* was heard and determined by a Court of Appeal composed of Lindley, Kay, and A. L. Smith, LL.JJ., (*r*) (20th February, 1894). Their Lordships, Kay, L.J., dissenting, allowed the appeal from the judgment of Mr. Justice Kekewich, on the ground, not taken below, that the plaintiff, the retiring partner, had agreed "not to require the new firm to discharge the liabilities of the old firm so long as he himself was not called upon to pay them," (Lindley, L.J., 293), thus obviously contemplating that the continuing partners should obtain an extension of time if needed.

Such being the ground of decision it would not seem to have been necessary for their Lordships to discuss the

(*r*) 10 Times L. R. 291.

proposition of law upon which Mr. Justice Kekewich had based his judgment, viz., that by virtue of an agreement of two joint debtors made *inter se* after credit given, one of such debtors, upon notice thereof to the creditor, can compel the latter to accord him the rights of a surety. Kekewich, J., considered this to be the legitimate and necessary deduction from *Oakley* v. *Pasheller*.

Lindley, L.J., at p. 294, says he regards the facts in *Oakley* v. *Pasheller* as amounting to a novation—a substitution of the liability of the new firm for that of the old with the creditor's assent, and that therein is to be found the true *ratio decidendi* of the case. So viewed, His Lordship significantly adds, the decision in *Oakley* v. *Pasheller* "would present no difficulty." But he considers that he is bound by what he believes to be the view taken of that decision by Lord Cairns in *Oriental* v. *Overend*, by the majority of the Judges in the Irish Court of Appeal in *Maingay* v. *Lewis* and by V.C. Wood in *Oakford* v. *European Shipping Co.* (*s*). "Notwithstanding the reasoning of the Court in *Swire* v. *Redman, which I should adopt and follow if I were free to do so*, I am driven to the conclusion that now at all events the law has come to be what V.C. Wood and Lord Cairns said it had been decided to be in *Oakley* v. *Pasheller*" (*t*). But see Lord Justice Lindley's own observations in his work on partnership (*u*). His Lordship also comments, as I have done (*v*), upon the unsatisfactory character of the distinction between an agreement made by debtors after credit given and one made before but not brought to the creditor's notice until afterwards.

This seems to be another instance of the ever recurring difficulties created by appellate judges using broader language than is called for by the facts of the case before them for decision,—language which, though not "actually

(*s*) 1 H. & M. 190.
(*t*) *Vide supra*, p. 75.
(*u*) 5th Ed. p. 252.
(*v*) *Vide supra*, p. 73 *ad fin.*

binding" upon judges in lower courts, the latter find it impossible to disregard and difficult to restrict to the actual facts before the appellate tribunal—another instance too of the great evil of permitting, as it is respectfully submitted was done in *Oriental* v. *Overend*, fanciful equities to override fundamental principles of common law.

Kay, L.J., dissenting, maintains that *Oakley* v. *Pasheller*, fairly read, admits of but one meaning, namely, "that the information to the creditor of the subsequent arrangements by which his debtors become as between themselves in the position of principal and surety puts him under an obligation not to deal with the principal so as to prejudice the surety, just as would be the case if the debtors were originally in that position and the creditor discovered it afterwards."

A. L. Smith, L.J., on the other hand, while agreeing with Lindley, L.J., in the result upon the facts of this case, takes issue with those who hold that *Oakley* v. *Pasheller* decided what Kay, L.J., had stated to be his view of that decision, and expresses forcibly his own opinion that *Oakley* v. *Pasheller* only decided that a creditor was bound by an arrangement for suretyship of one for the other made by his joint debtors after credit given, where he was a party to such arrangement. His Lordship considered that there was no authority binding him to take any other view of that case, and if called upon to pronounce judgment upon this point in such a case as the present he would hold as in *Swire* v. *Redman* that the retired partner could claim no such equity as the plaintiff Rouse contended for.

This decision cannot be said to be satisfactory. Though only dealt with *obiter* the authority of *Swire* v. *Redman*, it must be granted, is somewhat weakened by these *dicta*. Yet it must be borne in mind that the decision of V.C. Wood, and the opinion of the majority of the Irish Court of Appeal, were clearly not binding upon the English Court of Appeal, and that, whatever weight should be attached to the view of *Oakley* v. *Pasheller* expressed by

Lords Cairns and Hatherly in *Oriental* v. *Overend*, the House of Lords in this latter case was dealing with an agreement *made before* not *after* credit was given, and it is only to such an agreement that their decision, *admittedly unsatisfactory*, need be held to extend. It is difficult therefore to understand why Lindley, L.J., differing in this from A. L. Smith, L.J., should have felt himself bound in the face of *Swire* v. *Redman* to forego his own view of what *Oakley* v. *Pasheller* did really determine to be the law (*w*).

For my part I prefer to take Lord Justice Lindley's personal view of *Oakley* v. *Pasheller* shared as it is by A. L. Smith, L.J., Lord Blackburn and Chief Justice Cockburn as well as by our own Court of Appeal. For the present *Birkett* v. *McGuire* states the law in this province and *Swire* v. *Redman* can hardly be said to have been overruled in England. Even if it were, however, and a like result were to ensue in this province, only one of many difficulties would be removed from the path of him who would hold the mortgagor discharged by an extension of time given by the mortgagee to the purchaser of the equity.

Attention should also be drawn to *Hillborn* v. *Brown* and *Land Security Co.* v. *Wilson*. In the former case heard by Robertson, J., at the Toronto non-jury sittings on 1st February, 1894, A. B. and C. were joint owners and joint mortgagors. A. and B. conveyed their interest in the equity to C., who assumed payment of the mortgage. On the mortgage maturing, C. obtained an extension from the mortgagee without the concurrence of A. and B., wherefore the latter claimed to be discharged from personal liability. The learned Judge held that they were still liable to the mortgagee on their covenant notwithstanding the extension of time given to C. The defendants will go to the Divisional Court.

In *Land Security Co.* v. *Wilson*, Mr. Justice Robertson, on the 9th instant, held that W., who had contracted to buy lands from the plaintiffs covenanting to pay for them,

(*w*) My attention has been drawn to a somewhat similar discussion of this "variegated decision" in Vol. 38, Solrs. Journal at pp. 267-8.

and had with their knowledge assigned his contract to H., who took possession of the property and subsequently paid the plaintiffs some interest, was discharged from liability to the plaintiffs by an extension of time for payment of arrears of interest given by them to H., who, the learned Judge held, would be liable to the plaintiffs in an action for specific performance. W.'s position is not identical perhaps with that of a mortgagor who has aliened his equity; the similarity between the two is however very great (*x*). There were in this case several special facts which may have influenced the result; but his lordship seems to assume that W. became a surety on assigning to H. with the knowledge of the plaintiffs. He finds that there was no novation, yet that "H. became the principal debtor to the plaintiffs" and W., his surety, and that, as such, W. was discharged by the extension of time. It is understood that the plaintiffs will carry this case to the Court of Appeal.

The reader might also see *In Re Errington* (*y*), *Bristol, etc.*, v. *Taylor* (*z*), and *Thompson* v. *Warwick* decided by the Chancellor, March 27th, 1894.

FRANK A. ANGLIN.

TORONTO, March 28th, 1894.

(*x*) *Parke* v. *Riley*, 3 E. & A. 215.
(*y*) L. R. (1894) 1 Q. B. 11.
(*z*) 24 O. R. p. 286.

EDITORIAL REVIEW.

Non-Jury Sittings.

Some weeks' experience of the non-jury sittings at Toronto shows that a complete clearance of the list of cases for trial has been effected. Some cases hang on, but from the fact that the parties do not seem eager to have them tried, it may be taken for granted that their trial is not of importance. The procedure for bringing cases to trial, however, discloses one defect. After the usual notice that the case will be tried at the expiration of ten days, the defendant must be constantly on the alert to see if the case is entered for trial. If, after a few days' constant watching, he is lulled into security and relaxes his watchfulness, he may discover, without any warning, that the case is on the day's list for trial. The plaintiff is not bound to give any notice or intimation of the setting down, and the defendant's only safe course is to remain on the alert or enter the case himself. In the latter case, the plaintiff may have reason to complain.

This state of uncertainty could be avoided by requiring the party entering the case for trial to give a short notice of the setting down or entry to the other side, which would enable him to get his witnesses together and instruct counsel. It was not to be expected that the new scheme would be absolutely perfect at once, but it is remakable that the defect which we have pointed out is the only one so far disclosed.

The Law Associations.

We received last month the Annual Reports of the County of York Law Association and the Hamilton Law Association. We regret that we have been unable, so far,

to publish them. An unusual number of contributions on more practical matters is our excuse; and in consequence, we have been obliged to overrun our usual number of pages for several months.

It is needless to say that these, as well as other county associations, are constantly increasing in stability and importance; and, in good time, the Province will be equipped with excellent libraries in every county town.

BOOK REVIEWS.

The Reports, 1893. Edited by JOHN MEWS, Barrister-at-Law. London: Published for "The Reports" Company, Limited, by Sweet & Maxwell, Eyre & Spottiswoode. Toronto: The Carswell Co., Ltd. Sydney and Melbourne: C. F. Maxwell. New York: Banks & Bros.

The Reports, which have been expected for some time, have at length arrived. The first two parts for the year 1894 come in paper covers for present perusal and reference, to be followed by the bound volumes at the end of the year, and then consigned to the waste paper basket; the whole series for 1893, in bound volumes for the shelves. Opposite the title page are the names of those gentlemen who form a Council of supervision for 1894, viz., Sir F. Pollock, Bart., A. V. Dicey, Q.C., C. M. Warmington, Q.C., Sir W. R. Anson, Bart., H. T. Atkinson, T. W. Chitty, F. W. Maitland and Thomas Snow, all Members of the Bar; and G. M. Clements and W. S. Rogers, Solicitors.

The complete series for 1893 is, as promised, in five volumes. Volume I. contains cases in the House of Lords and Privy Council, and Probate, Divorce and Admiralty Division, and in the Court of Appeal therefrom. Volume II. contains Chancery Appeals. Volume III., cases in the Chancery Division. Volume IV., Queen's Bench Appeals. And volume V., cases in the Queen's Bench Division. The number of a volume will always indicate its contents. Thus, 1, 6, 11, 16, and all numbers ending in 1 and 6, indicate H. L. cases, etc. Again, 2, 7, 12, 17, and all numbers ending in 2 and 7, indicate Chancery Appeals. And so with the other volumes. In the binding, distinctive labels indicate to the eye at once the desired volume. So much for the mechanical part of the work.

A comparison of the number of cases contained in The Reports with those contained in The Law Reports for the year 1893 shows an advantage in favour of The Reports. The latter contain 634 cases, the former 484. It is curious to note that some cases of importance reported in The Law Reports are altogether omitted from The Reports; while some of equal importance in the latter are omitted from the former.

The next thing that one naturally looks at is the head-noting. As regards mere length, a comparison of several leading cases shows that in some cases The Law Reports headnotes are longer than those of The Reports, in some cases shorter. But, in general, the disparity is not great in either case. In some cases reported in the former the headnotes are, standing by themselves, decidedly better in frame than the headnotes to the same cases in the latter. But the latter are, as a general rule, more accurate than the former. But in a great many cases the headnotes in The Reports are decidedly more concise than those in the Law Reports. Of all the work of reporting, the writing of a headnote is the most difficult. Absolutely correct appreciation of the facts and law of the case is the prime essential; ability to state either the proposition of law, or the facts with the holding, in the most economical language, is the next. A very striking instance of the application of these principles is seen in *Attorney-General* v. *Smith*, which is reported in L. R. (1893) 1 Q. B. 239, and 4 R. 233. In the former, the headnote occupies more than half a page; in the latter, seven lines. Another is *Re Kirkleatham, etc. Arbitration*, L. R. (1883) 1 Q. B. 375; 4 R. 194. The headnote in the latter report occupies three lines; in the former, three-fourths of the page. Instances of this kind might be multiplied greatly. So that for brevity and accuracy we must decide in favour of The Reports' headnotes. The advantages of this, apart from the scientific accomplishment of the end in view, are economy of space and economy of time.

Perhaps the chief commendation of a set of reports, well edited, is its cheapness, in days when legal literature

accumulates at a rapid pace; and every barrister in active practice must, perforce, keep *au courant* with modern decisions. In this respect The Reports have such a decided advantage over The Law Reports that they must soon drive the latter from the field unless the price of the latter is reduced.

We make the comparison in no spirit of unfairness; it naturally suggests itself as the first and only means of testing the value of the new publication. Both must depend upon their individual merits. And if they are equally meritorious the cheaper one must win.

Outlines of the Law of Torts. By RICHARD RINGWOOD, ESQ., M.A., of the Middle Temple and N. E. Circuit; Barrister-at-Law, etc., etc. Second Edition. London: Stevens & Haynes. 1894.

This book is founded on lectures delivered by the author to the students of the Incorporated Law Society. As a concise and elementary book for students, it seems well adapted. The arrangement is good, and the modern cases are all cited.

THE
CANADIAN LAW TIMES.

MAY, 1894.

TITLE BY ESTOPPEL.

(*Doe d. Irvine* v. *Webster*, 2 U. C. R. 224).

TITLE by Estoppel is a highly technical branch of our law, and depends for its validity upon principles formulated in the very early stages of English jurisprudence. The most casual enquirer into the subject soon finds himself enveloped in an atmosphere of antiquity, deciphering Rolle's Abridgment and the yet more ancient authorities which are there collected. Modern decisions are but superstructures built upon those old foundations. If carried beyond the line of their support they lose stability; and if carried far beyond it they eventually topple over. The case we have selected for criticism is, we fear, an example of the latter kind. Professing to be built upon the old foundations, it has itself become the support of many other cases for the last half century; but time has laid bare such serious defects in its construction that we question its ability to support any more.

When a man having no title to lands executes a deed, averring in precise and unambiguous terms that he is seised of the lands in fee simple, in favour of a purchaser for value without notice, the latter takes what is called a title by estoppel. And if the legal estate subsequently devolves upon the grantor, it vests immediately in the

grantee and thereby *feeds* the estoppel (*a*). Thenceforward the vendor and all persons claiming under him are estopped from alleging, as against the purchaser, that the legal estate in the lands was outstanding and did not pass by the deed. Consequently, if the vendor, after acquiring the legal estate, by purchase or otherwise, should execute a conveyance in favour of a subsequent purchaser for value without notice of the previous deed, the subsequent purchaser would take nothing by his deed by reason of the estoppel. The doctrine in question thus presupposes fraud in the grantor, who sets his seal to a falsehood, and negligence in the grantee, who omits to examine and obtain the title deeds. Doubtless there are cases in which the elements of fraud and negligence are not to be found—at all events, not in their native state—in which the conduct of the parties or of one of them, arose from mistake—a circumstance which helps to account in some measure for a doctrine otherwise so repugnant to justice. If the estoppel had been confined to the grantor and his heirs, justice would seem to have been fully accomplished, giving the negligent or over-confiding grantee a remedy on his covenants. But to enforce the estoppel against an innocent purchaser for value without notice, who took all the precautions which the former grantee neglected to take, is surely the reverse of justice. The policy of our Registry Laws is so opposed to the doctrine in question, that were it not for a custom which is becoming prevalent amongst mortgagees, of registering their mortgages before advancing their money, it would probably have died a natural death.

It is not every deed, however, that has the effect of creating an estoppel.

From Comyns' Dig. Vol. 4, p. 196, we extract a few exceptions to the rule that a man is estopped by his deed, observing at the same time that the learned annotator uses the word "record" as including "deed."

We find then that there is no estoppel:—

"(E[2]) Where the truth appears by the same record.

(*a*) *Doe d. Christmas* v. *Oliver*, 5 M. & R. 202.

(E') Where the thing is consistent with the record. (Example). If a deed, release, etc., be enrolled upon record, the defendant may plead that nothing passed by the deed, or, not seised at the time, etc., for these pleas are consistent with the record. 1 Rol. 862, 1 35.

(E') Where the allegation is uncertain.

So an estoppel ought to be certain to every intent. Co. Lit. 353 b: 303 a. And therefore if a thing be not directly and precisely alleged, it shall not be an estoppel. Co. Lit. 352 b."

Passing over the first two exceptions, we shall, for the present, confine our attention to the third, on the meaning and scope of which nearly all our modern cases depend. The case of *Bensley* v. *Burdon* (*b*), decided in 1830, was deemed to be so much in point by the Court in our leading case, that they reserved judgment until a note of the decision in appeal (*c*) was obtained. There a deed of release was executed in 1803 by A. in favour of B., which contained a recital that A. was "seised or possessed of, or well and sufficiently entitled unto" the lands therein mentioned, in reversion or remainder expectant on the death of his father, and which purported to "grant, bargain, sell, alien, release and confirm" the remainder or reversion in fee expectant, etc., with covenants for title. A. had in fact no title in remainder or otherwise, his father and elder brother having previously suffered a recovery so as to bar the entail and acquire the fee. In 1805, A.'s father died, having devised the lands to A., who thereupon sold and conveyed them to C. Vice-Chancellor Leach held that B. took a title by estoppel, and the judgment was affirmed on appeal by Lord Chancellor Lyndhurst.

Different views have been taken by different judges as to the precise *ratio decidendi* adopted by the Lord Chancellor. Perhaps the most authentic testimony which can be adduced is that of Lord Tenterden, who had occasion to inform

(*b*) 2 S. & St. 519.

(*c*) 8 L. J. 85.

himself accurately upon the subject a few months after the judgment in appeal was pronounced. This occurred in *Right d. Jefferys* v. *Bucknell* (*d*). There A. having an equitable fee in certain lands mortgaged the same to B. by lease and release. The release recited that A. was legally *or equitably entitled* to the premises conveyed, and the releasor covenanted that he was lawfully *or equitably* seised in his demesne of and in and otherwise well entitled to the same. The legal estate was subsequently conveyed to A., and he afterwards, for a valuable consideration, conveyed the same to C. Upon ejectment brought by B. against C., it was held, firstly, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him after the execution of the release; secondly, that the release did not operate as an estoppel by virtue of the words "granted, bargained, sold, aliened, remised, released," etc., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time of the release; and thirdly, that this case did not fall within the rule that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for valuable consideration without notice, a legal interest which was not in A. at the time of the mortgage to B., A. having then only an equitable interest, which passed to B., whose title as to that was not disputed.

Lord Tenterden, in delivering the judgment of the Court thus refers to *Bensley* v. *Burdon*: "The present Master of the Rolls, then Vice-Chancellor, by whom this case was first decided, according to the report in 2 Sim. & Stu., held that this was an estoppel, upon the general ground that it was a deed, indented, and that the nature of the conveyance, namely lease and release, made no difference. The Lord Chancellor confirmed this judgment, *but put it on this solely, that it was an allegation of a particular fact*, by which the party making it was concluded." His

(*d*) 2 B. & Ad. 278.

Lordship, then commenting upon the recital in the case before the Court, went on to say:—"There is a want of that certainty of allegation which is necessary to make it an estoppel," and judgment was given accordingly.

We now come to *Doe d. Irvine* v. *Webster*. The head note reads:—"Where the nominee of the Crown, before any patent issued for the lands on which he was located, by deed poll conveyed away the lands and all his interest in them; and afterwards the patent was issued in his name, and he then made a second deed to another person, *Held*, that the second grantee was estopped by the first deed from claiming the land."

Our first observation upon this case is that it was the decision of an equally divided Court, Robinson, C.J., and Jones, J., agreeing with the trial judge (McLean, J.), while Macaulay and Hagerman, JJ., dissented.

Bearing in mind the importance of the precise words on which an estoppel depends, we next observe that in this particular case the deed in question was not forthcoming when the case was heard. Robinson, C.J., says (at p. 225): "It is unfortunate that the deed first made by Knapp, having been either irregularly given up to the parties, or improperly obtained since the trial, was not before the Court upon the argument in banc; and we are not now in possession of this deed, or of any transcript of it. This is to be regretted, because it is upon the nature of that conveyance that the case turns; and it is most desirable that we should know its precise language. It is admitted that it was a deed poll, executed by Knapp alone, whereby for a valuable pecuniary consideration, he '*granted, bargained and sold*' the land to Wood; that it contained no recitals whatever, but did contain a covenant that Knapp was seised in fee, and the common clause of warranty of title. More than this we are not informed of."

At p. 237 the learned Chief Justice thus enunciates the law:—"The rule, I take to be, that where a man plainly and absolutely assumes to convey an estate when he has none, he cannot be allowed to maintain against his deed,

that nothing passed. . . . But in this deed there is a warranty which I take to be sufficient to found the estoppel upon, though not indispensable to it, and there is besides a covenant that the grantor was seised in fee, and had good right to convey, which I take to be an assertion of title, and something even more than that. When a grantor covenants that he is seised he expressly asserts that he is seised, and binds himself to the assertion."

To the same effect is the judgment of Jones, J., who says, at p. 254:—"Where a grantor by express words grants a fee simple in a particular lot of land, no explanation of the nature of the estate is requisite; and such words, clearly sufficient to convey a fee simple in an estate, may perhaps be considered to operate by estoppel without any recital. But certainly a covenant that the grantor is seised of a good, perfect and indefeasible estate in fee simple, and that he hath good right and lawful authority to sell, must be considered a more positive and direct allegation of seisin, than a recital, which is, that whereas, etc. . . . In this deed there is, moreover, a warranty of title, and it seems that this is considered as equivalent to a recital."

The case thus decided that the plaintiff had a good title by estoppel on three grounds:—(1) By the grant itself; (2) By the grantor's warranty of title; (3) By the grantor's covenants for title.

It will be convenient to deal with these grounds separately. As we have already said, *Doe d. Irvine* v. *Webster* professes to be based upon the law of England. It does not pretend to introduce (if indeed it could) any new theories of the law of estoppel applicable only to Upper Canada. But in England the current of decision seems to have run all the other way. Let us now deal with the first ground, that title by estoppel may be acquired by the grant itself.

In *Heath* v. *Crealock*, two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor,

(*e*) L. R. 10 Ch. 22, decided in 1874.

with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised, or otherwise well and sufficiently entitled in fee simple. The solicitor trustee received the purchase money and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee filed a bill against the mortgagor and the purchasers praying for foreclosure against them. It was held, that though the purchasers were purchasers for valuable consideration without notice, they could not avail themselves of any legal estate acquired by means of the reconveyance, which, having been obtained by fraud, must be cancelled; and that they had purchased only the equity of redemption. And it was also held, that under the form of conveyance adopted, neither the plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers.

Lord Cairns, L.C., in delivering judgment, said (at p. 30):—"But the way in which it was said they (the purchasers) had obtained a legal estate was this: It was said that at the time when Stephens conveyed to them upon the occasion of their purchases, he had no legal estate, but that he afterwards, by virtue of the reconveyance to him, obtained a legal estate; that by the first conveyance he was estopped, and that the estoppel created by the first conveyance was, to use the technical expression applied to such cases, fed by the estate which Stephens acquired under the reconveyance, and that thus the legal estate became complete. Now, in my opinion that argument was founded altogether on a fallacy. There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. *They were ordinary conveyances by grant; the operative words of which, as is well known, would create*

no estoppel; and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance. The recital was in substance the ordinary one in such cases. It recited that Stephens was seised or otherwise well and sufficiently entitled to the property in question, free from incumbrances. If the recital had been a recital simply that Stephens was seised, there might have been an estoppel, *but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous.* It is a recital which, in substance, amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass. There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers."

Sir G. Mellish, L.J., said (at p. 34), "I think that the case is governed by that of *Right d. Jefferys* v. *Bucknell* (*f*). The recital there was a recital that the person conveying was legally or equitably seised; but it was laid down by Lord Tenterden, in delivering the judgment of the Court, and it is no doubt a very old rule of law, that to create an estoppel the averment in the recital must be certain and precise; and it seems impossible to say that when the recital is that the conveying party is seised, or otherwise well entitled to an estate in fee simple, that means he is seised of a legal estate in fee simple; the reason being that the recital involves another alternative."

This view of the law was implicitly accepted by Jessel, M.R., in the case of *The General Finance Co.* v. *The Liberator Society* (*g*), who adds his testimony to that of Lord Tenterden in reference to the *ratio decidendi* of *Bensley* v. *Burdon*, in the following language :—"To the same effect is the case of *Right* v. *Bucknell* before Lord Tenterden, where he refers to a case of *Bensley* v. *Burdon*,

(*f*) 2 B. & Ad. 278.

(*g*) L. R. 10 Ch. D. 15, at p. 22.

which came before Sir John Leach, who decided—*as it is now settled he was wrong in deciding*—that a lease and release would operate as an estoppel without more, and that it does not matter whether the word is 'release' or 'grant.'"

The second ground relied upon by the Court in the case under consideration was the clause of warranty. The use of warranties in deeds has become wholly obsolete. Mr. Leith tells us in his work on Blackstone (published in 1864) p. 327, that an express clause of warranty "is a kind of a covenant real, and can only be created by the verb *warrantizo* or warrant;" and at p. 262, that this clause, in a deed, was "entirely superseded by covenants *for title*."

In Elphinstone, on the Interpretation of Deeds, p. 411, under the head of "Warranty" we read:—"Conveyance in fee with clause of warranty; eviction on prior title for years; the grantee can bring covenant on the warranty (*Rudge v. Pincombe*, 1 Roll. Rep. 25 . . . A warranty in a lease for years is a covenant: Shep. Touch. 163)." The Judges in *Doe d. Irvine* v. *Webster*, also refer to the warranty as a species of covenant. We pass on, therefore, to the third ground of estoppel relied upon, namely, the covenants for title contained in the deed in question.

The leading case in England upon this point is *The General Finance Co.* v. *The Liberator Co.* (*h*), an extract from which we have already given. There A., by deed, purported to grant a freehold estate to B. by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid." The mortgage was accepted by B. on the faith of certain forged title deeds produced and handed to him by A. At the date of the mortgage, A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate and

(*h*) L. R. 10 Ch. D. 15.

mortgaged it to C. During the argument of the stated case before Jessel, M.R., by Chitty, Q.C., and Farwell, for the plaintiffs, the learned Judge put the following question to counsel (at p. 18): "*Can you produce any authority for the proposition that an estoppel can be created by covenant?*" to which this significant answer was given: "*We have not been able to find any direct decision upon the point in the books or in any of the cases on estoppel* collected in Dart's Vendors and Purchasers, but there is authority that, in order to ascertain whether a deed contains a sufficient averment of title, you must look at the whole deed and not merely at one particular part of it." In deciding the case in favour of the defendants and against the alleged estoppel, Jessel, M.R., says (at p. 21):—"As far as I am concerned, I shall treat the authorities as binding and conclusive, for I am not going to enquire how they came to be decided in the way they were; there they are." After referring to *Heath* v. *Crealock*, *Crofts* v. *Middleton* (*i*), and other cases already mentioned *supra*, the Master of the Rolls goes on to say, at p. 23:—"What then does this deed convey? It has no recital at all. *It is a common grant, which of course will not do*, but the mortgagor thereby covenants with the mortgagee in the usual way, 'that the mortgagor has full power to grant and convey the said premises in manner aforesaid;' and then there are other covenants which were not relied upon—for instance, that the mortgagee after default should quietly enjoy.

Now it has been said that that covenant contains that precise statement which is necessary in order to support this kind of estoppel. In the first place I am of opinion that there is no such precise statement in the covenant.

The mortgagor has power to convey even if the legal estate is outstanding in a bare trustee. He can compel the trustee to come in and grant the estate, and in that way he really has the power to convey. He has power to call upon the trustee to convey to him and also to convey 'in manner aforesaid' He has power to convey if he has the whole

(*i*) 2 K. & J. 194, as to the necessity of a precise representation.

beneficial interest. The words of the covenant can be fully complied with without his having a single atom of legal estate. . . . "There is one other observation which I have to make upon the case, which is this: *I am not prepared to decide that a covenant will do at all.*" His Lordship then proceeds to shew that a covenant is not, in its nature, a statement of fact upon which an estoppel can be founded, but an agreement by the covenantor that if he has not the power to convey he will be liable in damages. From these two decisions it is manifest that the first ground relied upon in *Doe d. Irvine* v. *Webster* has been completely overruled by the Court of Appeal in England, and that the other two grounds are without foundation so far as the law of England is concerned. But it may be said, and indeed it has been said by one of our most eminent Judges, that *Doe d. Irvine* v. *Webster* has been so long the law of Upper Canada that it is now too late to inquire whether it was rightly decided or not. This remark fell from the present Chief Justice of the Supreme Court in *The Trust & Loan Co.* v. *Ruttan* (*j*), decided in 1877. That was an action brought for breach of a covenant for title—in respect of lands situate in Ontario. One Thompson had applied to the plaintiffs for a loan, and a mortgage was executed by the latter to the former on 10th April, 1855. Thompson had no title at the time, but afterwards, by deed dated 22nd June, 1855, obtained a conveyance from the defendants containing covenants for title. The deed and mortgage were registered on the 28th July, 1855, but the money was not advanced until 7th August, 1855.

As a matter of fact the defendants were trustees for a third party, and had no beneficial interest in the lands, and on 15th November, 1867, a decree was made, in a suit brought for the purpose against the company and the trustees, in favour of the *cestui que trust*, directing the company to execute a certain conveyance to new trustees, and ordering them also to pay the costs. The report of this case before the Supreme Court upon the point in

(*j*) 1 S. C. R. 564.

question, is, to say the least of it, unsatisfactory. There is not a trace to be found of any argument upon the subject of estoppel at all, and owing to a variation between the headnote and the body of the report, we are left in the dark as to the effect of the decision. If title by estoppel had been set up by the appellants it is in the last degree unlikely that counsel for the respondents would have failed to direct the attention of the Court to *Heath* v. *Crealock*, decided three years earlier, a case which not only negatived the view that the estoppel could arise by virtue of the operative words of a deed, but which, as we shall presently point out, contained another and a complete answer to any estoppel in such a case as that before the Court. After printing the judgment of Ritchie and Strong, JJ., the former of whom says nothing on the subject of estoppel at all, the reporter tells us that, "The Chief Justice and Taschereau and Fournier, JJ., concurred in the foregoing judgments."

But the headnote on the point is this:—*Held* also (*per* Strong, J., the Chief Justice concurring), that assuming the deed of the 10th of April to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seised in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of the 22nd June, 1855. [Henry, J., dissenting.]" Mr. Justice Strong, in in his judgment, says, at p. 584: "But for another reason, I think, the appellants are entitled to succeed on this appeal. Granting that the mortgage deed was absolutely delivered and accepted as a perfect deed, as early as the date it bears, I should still be of opinion that the plaintiffs would be entitled to recover in this action. This mortgage deed of the 10th April, 1855, although it contains no recital, comprises the usual absolute mortgagor's covenants for title. Now, for upwards of 40 years, it has been held in Upper Canada, that covenants for title, especially the usual covenant that the granting party is seised in fee at the date of the deed, a covenant which this deed contains in the absolute not in the ordinary restricted form, are as effectual in working an estoppel as a recital to the same effect would

have been. The cases to which I refer, and which are always referred to as the leading cases on this point are three: *Doe Hennessy* v. *Myers* (*k*), *Doe Irvine* v. *Webster* (*l*), *M'Lean* v. *Laidlaw* (*m*). Whether these decisions, attributing to the covenants the same efficacy as positive certain recitals, are right, it is now too late (See Ram on Legal Judgments, p. 292) to inquire as the principle has become a fixed rule of the law of property in the Province of Ontario, too well established therein to be shaken; and it is, of course, the law of that Province that this Court must administer on an appeal relating to real property situated there, just as much as it is the Scotch law which the House of Lords administers with reference to land in Scotland. . . . This was the doctrine acted on by Vice-Chancellor Leach in the case of *Bensley* v. *Burdon*, upon which *Doe Irvine* v. *Webster* in a great measure proceeded. . . . This decision was afterwards affirmed in appeal by Lord Chancellor Lyndhurst and on the same grounds."

Mr. Justice Henry took an opposite view of the law:—"It is admitted," he tells us at p. 598, "on all sides, that where a party sells and conveys land by deed, to which he has *no* title, and subsequently obtains one, the estate by estoppel reviously existing, is fed; and the deed, taking effect in *interest*, it is no longer a title by *estoppel*. The grantee becomes, therefore, the owner in fee—the title of all others being thus centred in him. As regards covenants the law is far different. The conveyance of the legal title and the covenants go *with the land* to a *subsequent* assignee. I maintain, however, that it is only *thus* they pass, and not by 'estoppel.' *They pass only by assignment.* . . ." His Lordship also quotes the following passage from 2 Sug. on Vend., 8th Am. Ed. p. 240:—"A covenant real cannot be conveyed to the assignee of the land unless the assignor has a capacity to convey the land itself to which the covenant is incident. Where the grantor is not seised of the

(*k*) 2 O. S. 424.
(*l*) 2 U. C. R. 224.
(*m*) 2 U. C. R. 222.

land at the time of conveying, *his covenants of warranty* do not attach to the land and run with it."

We have said that *Heath* v. *Crealock* contained another and a complete answer to any estoppel in *The Trust & Loan Co.* v. *Ruttan*, apart from any objections which might be raised to *Doe d. Irvine* v. *Webster*. The point is not noticed by Mr. Justice Strong, but it is introduced by Mr. Justice Henry in his judgment, at p. 599, as follows:— "There may be a question whether the deed to Thompson conveyed the *title* to him, as the Court of Chancery, by its judgment—binding on the appellants who have adopted it as the groundwork of their action—*declared it null and void*, so far as we are enlightened by the pleadings and evidence, and that the appellants took no title under it. . . . The case is peculiar, but I am at a loss to find, in the absence of the declaration of trust, how the appellants had, under the circumstances, anything more than a title by estoppel; and if they always remained without title, the covenants of the respondent cannot, though said to run with the land, be said ever to have reached them, because no title ever did."

It will be remembered that in *Heath* v. *Crealock*, the deed by which it was contended the legal estate passed, had been set aside. Upon this branch of the case Lord Cairns said, at p. 31:—"Then, is there anything taken away from them which they are entitled to in respect of their contract for further assurance? It appears to me there is not, because the case of the purchasers now must be this: 'We are entitled,' they must say, 'by virtue of this covenant, to require Stephens to pass to us any interest which he has acquired in this land, *whether he acquired it by fair means or by fraudulent means*.' Now, let me test that in this way: Suppose the covenant for further assurance had been in this form: 'I, Stephens, covenant that if hereafter I should acquire any further interest in this estate, whether I acquire it by fair means

(*n*) L. R. 10 Ch. 22.

or by fraudulent means, I will convey it to you.' Is that a covenant which a purchaser could have enforced? I think, clearly not; and yet the purchasers must contend that they are entitled to maintain such a covenant at law, and to enforce it; otherwise they cannot object to this decree on that ground. In my opinion a covenant so framed would have been invalid as regards one alternative; and in my opinion the purchasers in this case could only insist on Stephens conveying to them what he had acquired by fair and honest means."

But there was yet another objection to any estoppel in *The Trust & Loan Co.* v. *Ruttan* which seems to us as formidable as the fact that their mortgagor's deed had been set aside.

We have seen that from earliest times there can be no estoppel "where the truth appears by the same record," nor "where the thing is consistent with the record" (Com. Dig. Vol. IV. p. 196). In other words, the party claiming the benefit of title by estoppel must be a purchaser for value without notice. Now, in this case, the Trust & Loan Co. had the most ample notice of the defective title, not only by reason of the title being a *registered* one, but by reason of their having had the mortgage fully executed (as was assumed by Mr. Justice Strong) in their actual possession for months before the deed to Thompson was executed. So far as the registered title was concerned the defence was perfectly "consistent with the record." It would be a misfortune if the important point now under consideration could be said to have been finally decided by this case. It is not so, however, and we shall find that when the question next arose before the Supreme Court, Mr. Justice Strong willingly accepted the English authorities as conclusive. But before this occurred, the following prophetic language was utterred by Hagarty, C.J.O., in *Nevitt* v. *McMurray* (*o*). After referring to *Doe d. Irvine* v. *Webster* and the other cases cited by Mr. Justice Strong in *The Trust & Loan Co.* v. *Ruttan*, his lordship

(o) 14 App. Rep. at p. 131.

says:—"But when we are asked, as here, to apply the doctrine of estoppel in its most odious form, to deprive an innocent owner of his estate, it is a very unpleasant consideration that if it were not for our being bound to follow these old authorities *there is every reason to believe that the law there laid down is opposed to modern decisions and would not now be upheld in England.*"

In the following year (1887) the question again arose before the Supreme Court in the case of *McQueen* v. *The Queen* (*p*). The lands in question were, as in our leading case, situate in Ontario. We regret that in attempting to get at the point or points decided by the Court, we have again to deal with a most unsatisfactory report. The argument of counsel is a very important matter, scarcely less so than the decision itself; for the decision only applies, in fairness, to the case as presented to the Court. A striking illustration of this may be seen in a recent case before the Supreme Court (*q*), where one of the reasons given for a judgment apparently at variance with a previous judgment of the Court was, that the objection raised in the later case "was not taken" in the earlier one."

Now in *McQueen* v. *The Queen* we are treated to *six pages of head note and no argument at all.*

The value of this case as regards the present enquiry, is that it clears up the ambiguity we pointed out in the report of *The Trust & Loan Co.* v. *Ruttan*, and shews that Mr. Justice Strong did not feel himself bound by his expressions of opinion in the latter case.

In delivering judgment, his Lordship says, at p. 72:—"The covenants for title, according to a recent English authority, *The General Finance Co.* v. *Liberator Building Society* (*r*), do not by themselves create any estoppel, and although this is certainly contrary to a former decision of

(*p*) 16 S. C. R. 1.

(*q*) *Ellis* v. *The Queen*, 22 S. C. R. at p. 13.

(*r*) L. R. 10 Ch. D. 23.

the Court of Queen's Bench of Upper Canada (*s*) *the reasons for the decision given by Jessel, M.R., seem to be conclusive.*"

In a still later case, *Sidney Coal Co.* v. *Sword* (*t*), the question of estoppel by deed once more came before the Supreme Court, when Mr. Justice Strong again followed the law of England, and repudiated the authority of *Doe d. Irvine* v. *Webster*. He says, at p. 158, "Then the replication to the fifth plea sets up an estoppel in this that the appellants claiming under and deriving title from the respondent's husband, are estopped from denying his seisin. This defence is attempted to be supported by a reference to some Ontario cases by which we are not in any way bound, and the soundness of which is, moreover, in my opinion, open to question. . . . The deed did, it is true, contain covenants, and I am not unmindful that the Court of Queen's Bench for Ontario in the case of *Doe Irvine* v. *Webster* (*v*), decided that an estoppel could be created by the covenants in a purchase deed; but whatever effect this decision may have in the Province of Ontario, it is not binding upon us in deciding a Nova Scotia appeal, and since Jessel, M.R., in the case of the *General Finance Co.* v. *Liberator Society* (*w*), decided exactly the reverse, and that for reasons which must commend themselves to every property lawyer, I do not see that we can properly disregard his great authority on such a point in the present case."

It would thus appear that although *Doe d. Irvine* v. *Webster* has not yet received its *coup de grâce* at the hands of an appellate court, the props on which it rested have given way, one by one, and the ancient edifice is tottering to its fall.

In questions of priority between successive mortgagees, the acquisition of the legal estate is a matter of great moment, and it may be useful to suggest that the

(*s*) *Doe Irvine* v. *Webster*, 2 U. C. R. 224.

(*t*) 21 S. C. R. 152.

(*v*) 2 U. C. R. 224.

(*w*) L. R. 10 Ch. D. 15.

practice of having a mortgage executed and registered before a loan is closed is not unattended with risk. If the mortgagor has the legal estate at the time, well and good. But suppose he has not? Suppose that it is outstanding in the hands of his vendor, as in *The Trust & Loan Co.* v. *Ruttan*; or in the hands of a bare trustee, or otherwise. When and by what process does the mortgagee afterwards acquire it? And if the latter fails to acquire it, will his defective security prevail against a subsequent mortgagee who does obtain the legal estate, or even against an execution creditor of the mortgagor?

We are not aware of any case directly in point, and we doubt whether a decision of the question would be such an easy matter as it may look.

A. C. GALT.

EDITORIAL REVIEW.

The Late Principal of the Law School.

The sudden and unexpected demise of Mr. W. A. Reeve, Q.C., the late principal of the Law School at Osgoode Hall, was a great shock to the profession as well as to those more immediately connected with the School. Though Mr. Reeve had been ailing for some time, he appeared to be in better health immediately before his death than he had been for some time previously.

Owing to the unfortunate circumstance, the Treasurer of the Law Society and the Chairman of the Legal Education Committee attended at the opening of the school the next morning, and out of respect for the memory of the late Principal declared it closed for the term, after expressing great regret at his sudden demise and referring in eulogistic terms to his work.

Mr. Reeve, though of course under an obligation to devote his whole time to the school, took a deep personal interest in it which was not the result of his obligation to the Society. He had at heart the welfare of the school and the students. Being well read, he was so master of his subjects that his lectures were exceptionally useful, and were highly valued by the students.

Witness Called by Judge.

A curious case of practice at Nisi Prius has just occurred in England, where the question was raised as to right of cross-examination of a witness called by the Judge. The case was *Coulson* v. *Disborough*, 10 Times L. R. 439, an action for malicious prosecution and false imprisonment. During the progress of the defence, the jury intimated that

they would like to hear the evidence of the defendant's son upon a certain point, but he was not called. After the evidence was closed and counsel for both sides had addressed the jury, the learned Judge called the defendant's son and put certain questions to him, but refused to allow the plaintiff's counsel to cross-examine him. The jury found a verdict for the defendant, and the plaintiff moved for a new trial. The Court refused the application. The Master of the Rolls said, "Now, when a Judge called a witness under these circumstances he did it to elicit the truth, and the Judge himself would examine the witness. The Judge would not allow either counsel to examine him in chief. Moreover, neither counsel had a right to cross-examine the witness. The witness could only be cross-examined by leave of the Judge. If the witness said anything material against either of the parties, the Judge would in his discretion probably allow that party to cross-examine the witness, but only in reference to the answer which the witness gave affecting the party, and would not allow a fishing cross-examination for the purpose of trying to find out something such as was sought to be done in the case." In this case what the witness said was said to be irrelevant to the issue, although the report does not state what it was. But if the remarks made are to be applied in general, they would seem to be too restrictive of the right to prosecute what the learned Judge set out upon, namely, an enquiry to elicit the truth. The case might have been decided upon the sole point that the answers in chief were irrelevant, and that cross-examination would have been a waste of time. But if the witness knew anything relevant to the issue, whether it appeared by the examination in chief or not, it would seem to be contrary to the very purpose of the trial to exclude anything that he might say.

Bankruptcy and Insolvency.

In *The Attorney-General of Ontario* v. *The Attorney-General of Canada*, L. R. 1894, A. C. 189, in which the validity of the ninth section of the Assignments and

Preferences Act was in question, their Lordships again intimate, as they had before done, that it is not necessary or expedient to define what is covered by the words "bankruptcy and insolvency" in the British North America Act —a resolution which will be most grateful to lawyers, but most disappointing to the public. A strict definition, whether excluding or including Provincial jurisdiction, would be a boon to those whose assets are wasted in trying to determine the law. The judgment, however, does define in a general, but ambiguous, way what is within Provincial jurisdiction by its *ratio*. Conceding that "a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated," their Lordships, while not doubting that such matters would be within the powers of the Dominion Parliament, whose authority must necessarily override that of the Provinces in so legislating, still say that "it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion, are excluded from the legislative authority of the Provincial Legislature, when there is no bankruptcy or insolvency legislation of the Dominion Parliament in question." We may take it then that whatever is ancillary to bankruptcy or insolvency law is within the jurisdiction of the Provinces when the Dominion does not legislate; but in the absence of a definition of "bankruptcy and insolvency," or of what constitutes a bankruptcy or insolvency law proper, it is difficult to ascertain what is merely ancillary.

BOOK REVIEWS.

A Canadian Manual on the Procedure at Meetings of Municipal Councils, Shareholders and Directors of Companies, Synods, Conventions, Societies, and Public Bodies generally, with an introductory review of the Rules and Usages of Parliament that govern Public Assemblies in Canada. By J. G. Bourinot, C.M.G., LL.D., D.C.L., D.L., Clerk of the House of Commons; author of Parliamentary Procedure in Canada; Manual of Canadian Constitutional History; Federal Government in Canada; Canadian Studies in Comparative Politics, etc. Toronto: The Carswell Co., Ltd. 1894.

Mr. Bourinot, if he has not compiled this book in self defence, has at least provided a ready means of disposing of the many questions, which he tells us are constantly being submitted to him, by reference to his comprehensive work. No one is better qualified to undertake such a task. The scope of the work includes, in addition to the rules and procedure in Parliament, the rules and procedure for public meetings and societies, corporate companies, synods, church conferences and courts, and municipal councils. The book is comprehensive without being diffuse. Perhaps not the least useful portion of it is a proposed code of rules for councils generally, and an analytical index to the procedure of the councils of the cities of Ontario. We bespeak for the work a wide circulation, and do not doubt that it will become authoritative.

Mayne's Treatise on Damages. Fifth edition. By John D. Mayne, of the Inner Temple, Esq., Barrister-at-Law,

and LUMLEY SMITH, of the Inner Temple, Esq., one of Her Majesty's Counsel, Judge of the Westminster County Court, late Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes. 1894.

This standard work needs no word of commendation. The present edition brings down the law to the present time and contains all the modern cases.

The Law relating to Shipmasters and Seamen, their Appointment, Duties, Powers, Rights and Liabilities. By JOSEPH KAY, Esq., M.A., Q.C., of Trin. Coll., Cambridge, and of the Northern Circuit, etc., etc. Second edition. By The HON. JOHN WILLIAM MANSFIELD, M.A., of Trinity College, Cambridge: author of a pamphlet on "Maritime Lien," and assistant editor of "Marsden's Collisions at Sea;" and GEORGE WILLIAM DUNCAN, Esq., B.A., late Junior Student of Christ Church, Oxford; both of the Inner Temple and the Northern Circuit, Barristers-at-Law. London: Stevens & Haynes. 1894.

This work does not profess to comprehend the whole law of shipping, but deals simply with that which relates to the subjects indicated in the title. The law of shipping is so extensive, peculiar and complicated that without a treatise devoted to the special subject in hand one is almost lost. It is the province of this treatise to simplify the exceedingly complex laws relating to this branch of shipping law; and it is saying nothing too much to say that the end has been accomplished. In addition to the pure law on the subject the book contains a vast amount of useful information for passengers on passenger boats, and all the details necessary for the guidance of the master, etc.

Partnership between solicitors. A collection of precedents, with remarks and notes. By V. DE S. FOWKE, of

Lincoln's Inn, Barrister-at-Law, and EDWARD B. HENDERSON, of Lincoln's Inn, and the North Eastern Circuit, Barrister-at-Law. With an appendix on solicitors' accounts. By JAMES FITZPATRICK, Fellow of the Society of Accountants and Auditors (incorporated). London: Sweet & Maxwell. 1894.

The precedents will be found useful foundations for drawing articles of partnership between solicitors. The information as to solicitors' books and the mode of keeping their accounts is particularly useful. This is a matter which ought to receive more attention than it does in this country, and we can heartily recommend the adoption of the suggestions made.

THE
CANADIAN LAW TIMES.

JUNE, 1894.

THE DEVOLUTION OF ESTATES ACT AND CREDITORS.

Cautions.

"CAUTION" is now the watch-word of all who find themselves involved in the meshes of *The Devolution of Estates Act.*

As it was originally passed, the Act was comparatively clear in its purpose, simple in its language, and, when explained and interpreted by the Courts, was moderately successful in curing the evils at which it was aimed.

It had its defects, of course (minor defects we think them), and equally, of course, the Legislature considered that it was its duty to remedy them, small or great. The result was a fancy piece of legislation, which may be ingenious, but is too complicated to stand practical every-day wear and tear. The remedy applied is known as a "Caution." It was intended to benefit the heir or devisee, and no one will be found to assert that it has failed to do so. But whether any one else has benefited by it, will be the object of this article to consider.

To understand what defect in the Act the Legislature attempted to remedy when they passed the amendment of 1891, and to ascertain whether that defect was really

removed, it will be necessary shortly to consider the law as it stood at that time.

In *Re Reddan* (*a*), the learned Chancellor gave it as his opinion that the effect of *The Devolution of Estates Act* was to abolish the distinction between real and personal property for the purpose of administration, and to cast the whole upon the personal representative for distribution as personalty. He likened the absorption of realty by personalty to the fusion of law and equity. This interpretation of the Act, however, was found to make a more radical change in the law of property than the Legislature apparently intended. It was pointed out in a criticism on the decision, that to cure the defects in the law for which the Act was passed, it was not necessary to assimilate the devolution of real estate to that of personalty, but that the appointment of *an universal successor* to the deceased, who should represent all his property and all his liabilities until his affairs were settled, would provide an ample remedy, without disinheriting the heir. And this, it was argued, was the real intention of the Act, viz., that realty should be distributed in the same manner, by the same mode or through the same channel, as personalty. The heir or devisee therefore, it was said, *could only claim title by conveyance from the executor or administrator.*

This reasoning, so far as it refers to the non-assimilation of realty and personalty, appears to have commended itself to the Courts, for we find that in the next case (*b*) which came before them, the right of the administrator to sell realty, except where needed to pay debts, was denied. Almost at the same time, it was decided, in *Martin* v. *Magee* (*c*), that land devolved on and became vested in the executors as assets for the payment of debts, and that these being paid or there being none, the executors held the bare legal estate for the devisee of the land, or in other

(*a*) 12 Ont. R. 781.

(*b*) *Re Mallandine*, 10 Occ. N. 226. See also, *per* Falconbridge, J., *Re Wilson & Incandescent Electric Light Co.*, 20 Ont. R. 397.

(*c*) 19 Ont. R. 705.

words, that, subject to debts, the beneficial interest in the land passed to the devisee, who made title as the real owner, *without the necessity of any conveyance from the executor*. This decision proving unsatisfactory to the parties interested, the Court of Appeal was called on to declare the law. While the decisions stood thus, and without waiting for the result of the appeal in *Martin* v. *Magee*, the Legislature hurried to amend all defects real and imaginary, past, present and future in the Act as then interpreted by the Courts.

By 54 Vict. cap. 18, sec. 2, it was declared that executors and administrators have power to sell and convey real estate for the purpose, not only of paying debts, but also of distributing the estate among the parties beneficially entitled, subject to certain restrictions; thereby carrying out the purpose of the original Act, and recognizing the necessity of appointing the executor or administrator as an universal successor to the deceased, for the purposes mentioned before. If the Act had stopped here, it appears to us that the remedy would have been ample.

The decision of the Court of Appeal in *Martin* v. *Magee*, given shortly after this Act was passed, reversed the finding of the Court below, and decided that the devisee or heir could not make a title without a *conveyance from the executor or administrator*, whether there were debts or not.

No simpler method of quickly, cheaply and efficiently administering an estate could well have been devised, than that of vesting all the assets in the representative appointed by the Court, and authorizing him to pay the liabilities, and distribute the residue according to law, or to the wishes of his testator. But here the law-makers seem to have become alarmed. Some one must have pointed out to them the remarks of the Chancellor in *Re Reddan*, where he states that "no greater change has been effected in the law by any recent legislation." They apologize, as it were, for being so radical as to appear to wish to alter or amend a landmark so ancient and venerable as the law of descent of real property, and hasten to

put on record the fact that they really had no idea they were going so far.

In a late letter to the *Empire*, a former member of the Local House alleges, as a reason why amendment was necessary at this time, that, as the Act stood originally, "probate or letters of administration were required in every case, thus entailing unnecessary expense, which the people objected to." He adds that the public will rejoice to know "that, during the present year, it has been enacted that real estate shall vest without the necessity of probate or letters of administration." The Legislature, therefore, proceeded to right themselves with the people whose pockets were touched, and with that view provided that, after a year from the death of the testator or intestate, it should not be necessary for an heir or devisee to obtain the consent of the executor or administrator to a devise or bequest of real estate not disposed of or conveyed by him during the year, but that the same should then vest in the heir or devisee by operation of law. And this was done with the sole object of saving the parties interested (in about one estate out of every ten) from the expense of proving the will, or administering, and of the drawing and registration of a deed from the personal representative. Everything else seems to have been lost sight of in this desire to cheapen the procedure.

It can never have occurred to them that the chief reason for passing *The Devolution of Estates Act* was to provide an easy means by which creditors could reach the real property of the deceased. It has already been pointed out by other writers, that one beneficial result of the original Act has been to reduce the expenses of winding up estates by abolishing to a great extent administration suits, and suits by creditors seeking to enforce their claims against real estate. But this does not seem to have satisfied our economical legislators. So they proceeded to experiment with the Act by engrafting upon it an ingenious device, borrowed and adapted apparently from *The Land Titles Act*.

By 54 Vict. cap. 18, sec. 1, the "Caution" was first introduced.

The section reads as follows:—

"Real estate not disposed of or conveyed by executors or administrators within twelve months after the death of the testator or intestate shall, at the expiration of the said period, be deemed thenceforward to be vested in the devisees or heirs (or their assigns, as the case may be) without any conveyance by the executors or administrators, unless such executors or administrators, if any, have caused to be registered in the registry office, etc., of the territory in which such real estate is situate, a "caution" under their hands that it is or may be necessary for them to sell the said real estate, or part thereof, under their powers and in fulfilment of their duties in that behalf. And in case of such caution being so registered, this section shall not apply to the real estate referred to therein for twelve months from the time of such registration, or from the time of the registration of the last of such cautions, if more than one are registered."

Thus the very principle of the Act was sacrificed. But was such a sacrifice necessary? Was there any real evil to be legislated away? We believe not. We believe that the benefit derived from *The Devolution of Estates Act* by all parties, as it was interpreted by the Court of Appeal, far outweighed the disadvantage of any slight additional expense. The original Act, too, had the great advantage, when explained by criticism and decision, of simplicity. It could be readily understood by the people at-large, and, if it were not thoroughly understood by parties working under it, at least they were not injured by their ignorance.

We venture to say, however, that not one layman in a hundred knows that there is now a necessity to register a caution to prevent an estate from vesting, or has even heard of a caution; and yet his ignorance of this fact may do him an irreparable injury. We are of opinion that, in dealing with a matter of such vast and general importance

as the devolution of real estate, simplicity of procedure should be one of the first aims of the Legislature, and that the introduction of such an unheard-of innovation in the law of the descent of real property as "a Caution," only tends to mystify and confound the large portion of the public who are interested in such matters. So sudden and radical a change in such an important branch of the law would seem to need a better excuse than is offered for this amendment. But the damage has already been done, the principle of the Act has been violated, and the public are beginning to experience the results, and some of them at least, have not much cause to rejoice.

The only reported case, in which the Courts have been called on to deal with a "Caution," is *Re McMillan, McMillan* v. *McMillan*, in which judgment was given by the Chancellor on 17th October last (*d*). In that case the testator died on the 11th October, 1891, having devised land to his son with a direction to pay debts. On the 23rd May, 1892, the son mortgaged the land devised, and the mortgage was duly registered. The executors named in the will renounced, and letters of administration with the will annexed were granted on 28th September, 1892, to the plaintiff, and an order for administration having been granted on 8th December, 1892, the mortgagee of the devisee's interest was made a party in the Master's office, *as a subsequent incumbrancer* on 18th February, 1893. No caution was registered.

It was held that twelve months after the testator's death, no probate having issued and no caution being registered, the whole estate in the land became vested by operation of law in the devisee or his assigns (see sec. 1 of the amending Act of 1891); that on the 17th October, 1892, the right of the personal representative ceased, whether the devisee had or had not dealt with the land, that the Act of 1891 recognizes a transmission of interest pending the year by the original devisee, and that the mortgage was operative as between him and the mortgagee

(*d*) 24 Ont. R. 181.

when it was made, *and it became fully operative as to the land*, and as against the personal representatives of the testator, when the year expired, in the absence of any warning that the land was needed for their purposes. The mortgagee was therefore discharged from the administration proceedings. Here is a warning to executors, and a pleasant surprise to creditors! The result of the decision seems to be that the mortgagee of the devisee obtains priority over the creditors of the testator, and the testator's debts cease to be a charge upon the lands so devised, because no caution was registered. It would appear, however, as though the decision had gone a step too far. Upon the death of the testator an equitable estate in the land immediately vested in the devisee, and there is no doubt that pending the year the devisee had a right to deal with his equity, subject to all rights of the executor or administrator. As soon, however, as a personal representative was appointed, the legal estate, by virtue of the first section of the original Act, vested in him, and remained so vested for a year from the testator's death, unless by his own act he had divested himself of it. If he considered that it might be necessary to sell the property in fulfilment of his duties, either to pay debts or to distribute, then, to prevent the legal as well as the equitable estate from vesting in the devisee at the end of the year, he should have registered a caution against the land, the effect of which would have been to have prevented the vesting of the legal estate in the devisee for a further period of twelve months from such registration. Not having disposed of or conveyed the real estate during the year, he however neglected to register a caution; and thenceforward the property became vested in the devisee or his assigns. So far we agree with the decision. We further agree that the mortgage in question became fully operative as against the personal representative at the expiration of the year. But we cannot follow the decision of the learned Chancellor when he holds that at the same time it became "*fully operative*" *as to the land*. The mortgagee can occupy no better position than the devisee. And we can

find no section of the Act or amendments which liberates the lands in the hands of the devisee or his assigns from the testator's debts, where such lands *have been permitted to become vested in the devisee.* Certainly the first section of the Act of 1891 contains no such enactment. It might be contended that the sixth section of the same Act effected this result, but upon close inspection it will be found, we think, that it does not. It provides that persons purchasing real estate from a devisee whose devise has been assented to by executors, etc., by deed, etc., or purchasing from an heir-at-law or devisee to whom the same has been conveyed by executors, etc., shall be entitled to hold the same freed from any unsatisfied debts of the deceased owner, not specifically charged thereon, otherwise than by his will; and this is followed by a provision giving creditors rights of *personal redress* against the executors, administrators, devisees, heirs-at-law, or next of kin. Thus it would appear that land which is permitted to become vested in the devisee or his assigns is not *expressly* freed from debts in his hands. In support of the Chancellor's decision, it may be contended, however, that *inferentially* the land is freed from the testator's debts in the hand of the devisee or his assigns, if no caution be registered within the year. The land vests at the end of the year in the devisee, or his assigns, unless the executor or administrator gives warning, in the manner prescribed, that he may need the lands for payment of debts or for the purposes of distribution. The inference, it may be claimed, is that if no warning be given, the lands are not needed for the testator's debts, and therefore vest freed from them. The wording of section one and two of the Act of 1893 would appear also to strengthen this inference. In the case in question, the administrator, after the lapse of the year, could still have registered a caution, upon furnishing certain proofs, and such caution would have had the same effect as a caution registered within twelve months from the testator's death, save as regards persons who in the meantime might have acquired rights for valuable consideration from or through the heirs or devisees. So, it

might be argued, if the devisee has parted with his land for valuable consideration before the registration of the caution, the purchaser would hold it freed from the testator's debts, and the personal liability of the devisee would alone remain to satisfy the creditors. It might be contended therefore that at the end of the year, no caution being registered, both the devisee and his assigns are entitled to presume that the property is not required for debts, and that they can deal with it freed from debts, the personal liability of the devisee only being reserved, should it afterwards appear that the property was required for that purpose. But, as we stated before, we think that the decision has gone too far in stating that the mortgage in question from the devisee became fully operative *as to the land* at the expiration of the year, no caution being registered. Cases will arise where probate or administration of an estate will not be taken out until the twelve months have expired. The property, by the third section of the Act of 1893, has in the meantime vested in the heirs or devisees. Probate or administration is subsequently issued, and the executor or administrator at once proceeds to register a caution. Meantime one of the devisees, probably the most impecunious one, has parted with the property for valuable consideration. Can it be possible that the testator's creditors have no claim upon the property disposed of, but must be satisfied with the personal liability of a worthless devisee?

We think it should require the most positive enactment to liberate the lands from the testator's debts, and we cannot agree that the mere neglect to register a caution raises any inference such as we have mentioned.

It must be remembered that the amendment introducing the caution was passed merely to obviate the necessity of a deed from the legal personal representatives in certain cases. The caution only affects the vesting of the legal estate, and in our opinion it was never intended to do more. No inference whatever as to the land being needed or not needed for the payment of debts can, we

think, be drawn from the fact of the warning not having been given.

It may be said that the decision in *Re McMillan* does not go as far as we have mentioned, but we think it does.

It is there held that the mortgage given by the devisee "became fully operative as to the land," and therefore McMillan's estate was depleted by the amount of the mortgage, and his creditors might have suffered to that extent.

The fact that it was stated by counsel that the money raised by the mortgage was actually applied in payment of the testator's debts, does not alter the principle of the decision. It cannot be said either that the mortgagee was entitled to the privileges of an innocent third party dealing with the land. When his mortgage was made, he took subject to all right of the legal personal representative, and, had a caution been registered during the year, the land might have been sold by the administrator altogether free of his mortgage. The decision is, that at the end of the year *the absolute right accrued to him;* and if to him, why not, by the same reasoning, to the devisee, whether he had dealt with the property or not? But we submit that the mortgagee was properly added as a party in the Master's Office, that his *claim against the land* was not prior to the creditors of the testator, that, as he derived his title from the devisee, he took the land (as did the devisee, whether so expressed by the will or not,) subject to the testator's debts, and that he was bound to show in the Master's Office, if the land in question were needed to pay creditors, that the mortgage money was so applied, before he would be entitled to the priority he claimed.

This is the only reported case defining the effect of the non-registration of a caution. It is difficult to say whether the creditor or the legal personal representative will be most inconvenienced by it. Like the famous "tar baby" which Uncle Remus tells of, the heir or devisee is "layin' low" and "aint sayin' noffin'". His motto might well be

"Everything comes to him who waits," and "without the necessity of a conveyance" too.

When the amending Acts were passed in 1891 and 1893, defects in them were pointed out by this Journal, and much litigation was anticipated as the result, owing to the confused and careless way in which they were drawn. We will not weary the reader with a repetition of these defects. They still remain, and it can now safely be said that the "caution remedy" was no remedy at all, and that it would have been better to have "borne the ills we had, than fly to others which we knew not of."

The amendments are but unhealthy growths upon the Act, and are the outcome of no general desire for amendment. The principle of the Act was sound, and to abolish the "Caution" and repeal the amendments would, we think, be for the public good.

R. A. BAYLEY.

LONDON, ONT.

Lands as Assets.

It is a question of some interest to the profession, and one on which some difference of opinion has lately been expressed, what is the proper form of defence to be pleaded by an executor or administrator, who has administered the personal assets of the deceased and has lands unsold, (and possibly at the time unsaleable though of much value), out of which to satisfy unpaid creditors, and what should be the form of judgment for the plaintiff who succeeds in an action against an executor or administrator under such circumstances, having regard to the change effected by *The Devolution of Estates Act*.

Another question of some importance is, How far can an executor or administrator assert or resist a claim, for or against the estate, without becoming personally liable to the opposite party for the costs of the action should the

former fail in the action; and is his liability secondary, "failing assets of the deceased," or must he pay the costs personally in the first instance, and recover them again from the estate?

The forms of pleading and judgment as in common use and as they appear in the various works on practice, were settled at a time when executors and administrators had no power over the lands of the deceased, and such lands could only be made available for payment of debts (if at all) by execution under the statute, and though one might expect to find cases where the testator had by his will made his lands assets for the payment of debts in the hands of his executors, none such appear to be reported, nor are referred to in the text books, so that the matter comes up as one of first impression to be decided on principles of justice, and as far as possible by analogy to the law in regard to personal assets.

Prior to *The Devolution of Estates Act* a plaintiff suing an executor or administrator in this Province, and being met with a plea of *plene administravit*, as was settled by *Gardiner* v. *Gardiner* (*e*), might reply "lands of the deceased liable to be taken in execution" and proceed to judgment, which, if he succeeded on the merits and lands were proved or admitted (but not as assets in hand), would go for the amount due for the purpose only of enabling the plaintiff to proceed against the lands.

The plea of *plene administravit* was held to relate to goods only, and by pleading it the executor or administrator relieved himself from personal liability for debt and costs, and the plaintiff went on solely to pursue his remedy against the lands, or perhaps assets *in futuro*.

If, however, the executor or administrator failed to plead *plene administravit* and the plaintiff succeeded in his claim, or judgment went by default, the judgment would be *de bonis testatoris aut si non de bonis propriis for costs only*

(*e*) 2 O. S. 554.

(*f*), and it was conclusive as an admission of personal assets in proceedings on the judgment, but in no case save where the executor or administrator was guilty of misconduct, as by knowingly pleading a false plea, did he become personally liable until the assets were exhausted.

At the time *Gardiner* v. *Gardiner* was decided, and at the time of the subsequent cases of *Nugent* v. *Campbell* (*g*), *Seaton* v. *Taylor* (*h*), *Sickles* v. *Asselstine* (*i*), and *Mein* v. *Shortt* (*j*), there was a diversity of opinion among the Judges as to the propriety or necessity of altering the form of the judgment where there were no personal assets, but only lands liable to execution, and, among other views expressed, Sherwood, J., was strongly of opinion that the form of judgment *de bonis testatoris* should be adhered to, as upon it execution could, under the statute, issue against lands, and any change might tend to cast doubt upon the titles of persons who had previously purchased lands under executions issued upon such judgments; while Robinson, C.J., plainly declared that judgment should be special to conform to the circumstances and should go for the amount due *to be levied out of the lands*.

By *The Devolution of Estates Act* lands become in all cases assets in the hands of the executor or administrator, and in so far as this alters the liability of the executor or administrator to account for the lands, it is submitted that a change will be required in the pleadings and judgment, but that in so far as the remedy against the lands is concerned the judgment which was proper before the Act will be proper now, the lands being at both times *assets for the payment of debts*, but only since the Act *assets in the hands of the executor or administrator*.

Although we have no decisions directly in point, we are not wholly without authority as will be seen from a perusal

(*f*) See also *Lince* v. *Faircloth*, 14 P. R. 253.

(*g*) 3 U. C. R. 301.

(*h*) 3 U. C. R. 303.

(*i*) 10 U. C. R. 203.

(*j*) 9 C. P. 244.

of the cases above cited. The learned Judges prepared their judgments with an elaboration which has proved valuable not only in settling the law of the Province in those early days, but in elucidating points which arise in our own day, and in the matter under discussion we are aided by references in the judgments to the position of the parties as it might be if no personal assets remained, and if lands were assets in the hands of the executor.

To quote from the judgment of Chief Justice Robinson in *Gardiner* v. *Gardiner* (*k*) :—"Whether lands are to be looked on as in the hands of the defendant or not, they are liable to satisfy the damages as the plaintiff has averred . . . The defendant must succeed on the fourth plea because it contains the necessary *plene administravit* as to goods. . . . She having exonerated herself as to goods; it is for the plaintiff to reply that the debtor died seised of lands. . . . That there are lands and that they are liable to satisfy debts, comes properly from the plaintiff by way of replication as a new fact to shew why the defendant having administered all she can administer should nevertheless not obstruct the plaintiff's action. If the administrator chooses to deny this he does so at his peril; if he admits it he subjects himself to no responsibility, and the plaintiff proceeds to judgment, and obtains as the fruit of it the same process against the deceased debtor's lands as against his goods. . . . Considering that the existence of any assets which can be administered (i.e., goods or personal assets) is denied on the one hand and not affirmed on the other, I think the judgment should be special to conform to the circumstances, and *should award the debt to be levied of the lands and tenements* of which the intestate died seised, and which remain liable to satisfy the debts due."

Again, Draper, C.J., in *Sickles* v. *Asselstine* (*l*) :—"The object of the plea of *plene administravit* is to avoid an admission of assets to satisfy the debt claimed. It has no operation to defeat the plaintiff's right to judgment against

(*k*) P. 601. (*l*) At p. 206.

the estate of the testator. If the plea be true it also protects the executor from liability for plaintiff's costs *de bonis propriis*. The plaintiff, however, after admitting the truth of the plea, affirms as new matter that the deceased at the time of his death was seised of divers houses, lands, etc., which were, and still are, in the hands of the defendants as executors, etc. . . . If the executors confess the replication, they admit real assets in their hands to be administered sufficient to satisfy the debt, and if there be any analogy between such an admission, and an admission of personal assets they are bound by it and subject to make good any deficiency *de bonis propriis*."

Now applying to lands as *assets in hand* the rules applicable to personal assets, in the light of the *dicta* above quoted, and remembering that, while the point has, at times, been considered doubtful, the more general opinion is that lands made assets in the hands, etc., do not lose their character so as to be brought within the description "goods," the following results are fairly deducible:—

1. Executors or administrators, having exhausted the whole estate, should plead *plene administravit, real and personal assets.*

2. If they hold only lands of insufficient value they should plead *plene administravit præter real assets of the value of* $.

3. If they hold land more than sufficient for the claim they should plead *plene administravit goods* and admit lands.

It is submitted that a plaintiff succeeding on his claim and not disproving these pleas could only have judgment in the respective instances, as follows:—

1. For the amount due and costs to be levied of the goods and lands hereafter to come to the hands, etc.

2. For the amount due and costs to be levied of the lands, etc., so far as the same will apply, and as to any balance to be levied of goods or lands *quando*, etc., if

the executor has disputed the claim, costs will be against him personally failing assets of the estate (*m*).

3. For the amount due to be levied of the lands of the deceased come, etc., and failing such for costs only *de bonis propriis* (unless, as hereafter suggested, the costs stand on a different footing in this Province).

The difficulty under the form of judgment *de bonis testatoris* will arise whenever the judgment gives also a personal remedy against the executors in the event of assets being insufficient, and the executor or administrator may find it necessary to move to stay proceedings against him as for want of goods until the lands are exhausted.

Where the judgment is against the estate only the form would make little difference, as execution against lands could issue on the judgment *de bonis* under the statute, though the form might justify the plaintiffs in proceeding upon the judgment against the executors personally, if a return of *nulla bona* were made, without first resorting to the lands.

The forms heretofore in use are not cast-iron forms settled by legislation, and it would appear to be common sense and justice, now that a second class of assets, viz., lands, has been put in the hands of the executor, to substitute or add in the forms the word "lands" or "real assets," wherever the exigency of the case may require it.

That the plaintiff may have to wait a year or longer to obtain the fruits of his judgment is no hardship, for such would be his position had he recovered judgment against the debtor in his lifetime, having only unproductive realty, or that and personalty, which is exhausted in payment of other debts before plaintiff finds it.

There seems to be no authority for requiring an executor or administrator to distribute the personal assets *pari passu* among creditors, so long as there remains realty apparently of sufficient value to meet all claims. The creditor can only require a winding up of the estate within

(*m*) *Squire* v. *Arnison*, 1 Cab. & El. 365.

a reasonable time, and sale of the real estate either in administration proceedings or under his execution, with a remedy against the executor and creditors overpaid should it eventually prove insufficient, unless indeed the fact of no bids being received for land placed by competent valuators at a large value is evidence of "no assets."

It would seem reasonable that costs should stand on the same footing, and that, in the absence of misconduct on the part of the executor or administrator, he should be protected from personally paying costs so long as there remain any assets which can be taken in execution.

In Morgan & Davey and Morgan & Wurtzburg on costs, and in Daniell's Chancery Practice and other works the rule is very broadly stated that, "Executors and administrators stand in the same position as other litigants in respect to costs, and where unsuccessful are personally liable to pay the costs of the opposite party." A perusal of the cases there cited, however, shows, I think, that they do not support the rule as stated, and that wherever a personal liability to pay the costs in the first instance had been upheld there has either been an obvious absence of assets or misconduct in the party made liable, and in no other English case do we find a direction to enter judgment otherwise than "failing assets of the estate."

In *Marshall* v. *Willder* (*n*), cited in Williams on Executors (1893 Ed.), p. 1859, as the leading authority on the subject, and in *Squire* v. *Arnison* (*o*), we find the proper form of judgment against an executor or administrator for costs to be "*de bonis testatoris aut si non de bonis propriis*," and this is followed in *Lince* v. *Faircloth* (*p*).

In several cases in our own courts, however, the rule as above quoted is followed, and the authority cited is Morgan & Davey, p. 288.

(*n*) 9 B. & C. 655.

(*o*) 1 Cab. & El. 365.

(*p*) *Lince* v. *Faircloth*, 14 P. R. 253.

Thus, in *Great Western Railway* v. *Jones* (*q*), Mowat, V.C., says, "The settled rule is that in litigations with third persons executors are liable personally to pay costs whatever the state of the assets may be. . . . Had Mrs. McNab taken the trouble to ascertain the facts before putting in her answer, and thereupon submitted to the relief prayed instead of putting plaintiffs to proof of their case, and had she set up in her answer that she had no assets of the deceased, the case might be open to different considerations." And in *Smith* v. *Williamson* (*r*), (an action of ejectment brought by an administrator), Rose, J., citing *Great Western Railway* v. *Jones* and *Buchanan* v. *Smith* (*s*), says: "A trustee or executor stands in the same position as any other litigant with respect to costs. I see no misconduct of the defendant leading to the litigation to constitute any good cause for depriving her of costs. *The plaintiff Smith must look to the estate for indemnity.*"

Until these cases are overruled, or distinguished on some inherent special circumstances, and the rule as therein laid down modified to correspond with the English law on the subject, it would seem that an executor or administrator in this Province, whether as plaintiff or defendant, may find himself compelled to pay the costs of an action long before the amount can be realized from the assets of the estate, though there may be on hand a sufficiency of assets to pay eventually both debt and costs.

Since the above was written the case of *McKibbon* v. *Feegan* (*t*) has been decided, in which was considered and settled the proper form of judgment to be entered for the plaintiff, a creditor, in an action against the personal representative of his deceased debtor, where the plaintiff proved his debt and the defendant proved her plea of *plene*

(*q*) 13 Gr. at p. 350.
(*r*) 13 P. R. 126.
(*s*) 17 Gr. 208.
(*t*) 21 App. Rep. 87.

administravit. The Court holds that, while formerly the defendant would have been entitled to the general costs of the action, as having succeeded on a plea in bar, and the plaintiff could not have judgment of assets *quando*, this arose simply from the strictness with which parties were held to their pleadings, and that under the present system, judgment in such a case may be so moulded as to protect the defendant and yet give the plaintiff judgment against future assets. The tendency, therefore, seems to be towards altering the old forms of judgment to suit present circumstances.

WALTER. A. GEDDES.

TORONTO.

EDITORIAL REVIEW.

The Judicial Committee of the Privy Council.

The *Canada Law Journal* comes to the defence of the Privy Council in an answer to Mr. Marsh's contribution to this journal on the decisions of that august board. It is hardly fair to couple Mr. Marsh's name with that of a certain senator, for while the latter, under the privileges accorded by parliamentary law and practice, assailed the individuals and indulged in satirical remarks on the persons of members, Mr. Marsh's criticisms are confined to the decisions and their methods. Strong and adverse criticism of judgments, even of the higher courts, can never be objectionable. More than one fallacy in the judgments of very high courts has been exposed by discussions of its terms, and it is too much to say that the Privy Council can never go wrong. It can certainly never go wrong in one sense, and that is the sense in which Mr. Marsh speaks of its judgments as being final, and, therefore, unalterable except by Act of Parliament.

No doubt the policy of the Board, to decide only the case in hand without committing itself to the enunciation of a general principle—a policy first propounded by the Chief Justice of Ontario—is a safe one from the Board's point of view; as it leaves it at large to deal with the question of principle on subsequent occasions and "distinguish" the prior decisions. But in a final court where the main object, in constitutional cases, is to set at rest a principle of government, the public lose largely by this policy. Not only do they fail in ascertaining the true grounds of the decision, but they are driven to heap up a myriad of solitary precedents until a general rule can be extracted from them.

To lay down, rightly or wrongly, the limits of constitutional or legislative action, is to introduce certainty, where uncertainty before prevailed, and as a consequence security and confidence. To say that a definition cannot or will not be given of a constitutional or legislative item in contention is to produce insecurity and restlessness, and to banish confidence and induce litigation.

The charge of unfairness or partisanship has, as far as we know, never been laid at the door of the Judicial Committee, and cannot be introduced into the discussion; nor can it be denied that many of its judgments are lucid, logical and convincing. But it must be confessed that it is difficult to reconcile some of the decisions. To say that a subject, in one aspect, lies within the jurisdiction of the Dominion, and in another aspect within that of the Provinces does not help us. That is a dictum of the Privy Council, and has largely contributed to the confusion.

It is utterly impossible to reconcile *Hodge* v. *Reginam* and *Russell* v. *Reginam*, notwithstanding anything that may be said to the contrary. To hold that the Dominion may prohibit the sale of intoxicating liquor, or permit its sale under highly restrictive regulations, and at the same time to hold that the provinces may license its sale and so restrict and regulate it, is surely inconsistent. The right of the Province is an exclusive one, and to permit the interference of the Dominion on the plea of making laws for peace, order and good government of Canada, is to permit its interference with every phase of Provincial jurisdiction —the very thing sought to be avoided by the Act. The fact that the very question so determined by their Lordships has to go through the same course of discussion again, the very fact that the best lawyers to-day will not venture an opinion as to where lies the prohibitory power, show that the decisions in question have confused rather than cleared the question.

So, in relation to bankruptcy and insolvency, a very lucid delimitation of the scope of a bankruptcy law was given by Lord Selborne in *L'Union St. Jacques* v. *Belisle*,

L. R. 6 P. C. 31; 1 Cart. 63; yet in *Atty-Gen. of Canada* v. *Atty-Gen. of Ontario*, L. R. (1894), A. C. 189, it is said that it is not necessary to define the terms. In view of the former case, and *Tennant* v. *Union Bank*, 6 R. Jan. 38, the decision in the last case was most unexpected. In passing, we might remark that *L'Union St. Jacques* v. *Belisle* was not decided, as Mr. Lefroy says, in the *Canada Law Journal* of 1st May, on the ground that the Provincial Legislature could deal with insolvency, but on the ground that it could deal with the property of a company so as to enable it to arrange its affairs in such a manner as to prevent its becoming insolvent—a very different matter.

Again, *Tennant* v. *The Union Bank* is hopelessly in conflict with *Citizens Ins. Co.* v. *Parsons*.

Nor can we agree with the suggestion that the inconsistencies are produced by the Act itself. The instances given do not indicate it. Marriage and Divorce are assigned to the Dominion, but the solemnization of marriage to the Provinces. This is a well defined division of the subject. The relationship of the contracting parties, their qualifications to contract marriage, their impediments and disabilities, and the dissolution of the marriage tie, all originated in ecclesiastical law. The contract or ceremony which created the status was purely legal. Instead of an inconsistency here, there is a scientific and historical division clearly understood. Neither is it inconsistent to assign to the Dominion every subject which trenches upon the subject of property and civil rights. Take out property and civil rights, and how many subjects are left to legislate upon, except matters purely public? The scheme of the Act is to assign all matters to the Dominion Parliament except such are assigned to the Provinces. To give all that one has to one person except certain articles which are given to another, does not produce an inconsistency even where the articles are all of the like kind. Again, the regulation of trade and commerce comprehends so much more than the licensing of shop, saloon, and other such businesses, that there is no inconsistency in assigning the

latter subjects to the Provinces. The same remark applies here. The inconsistency arises when it is endeavoured to argue that shop, saloon, tavern and other licenses, are a part of the regulation of trade and commerce, when the Act expressly excepts them from Dominion jurisdiction and assigns them to the Provinces.

Nor can we agree that the assignment of the criminal law to the Dominion conflicts with the power given to the Provinces to impose penalties for the breach of a provincial law. The criminal law as such stands alone. The Provinces are limited in making penal laws to imposing penalties for breach of their own laws. The right to legislate in this respect is defined by the power to make the laws which it is a provincial offence to break.

Perhaps the most unhappy instance of conflict is that which suggests that there is an inconsistency in allowing to the Dominion the power to raise money by any mode of taxation, which would include direct taxation, while the Provinces are exclusively authorized to make laws respecting "direct taxation within the Province in order to the raising of a revenue for provincial purposes." A government without power to tax would be helpless. The power to levy taxes must therefore have been given to each. The Dominion may raise money by any system, the Provinces by one. But it is fallacious to suggest that direct taxation is the exclusive privilege of the Provinces. It is direct taxation in *order to the raising of a revenue for Provincial purposes* that is the exclusive right and privilege of the Provinces. In other words, the Dominion is restrained from raising a revenue for Provincial purposes by direct taxation within a Province.

We think it clear that inconsistencies in the Act do not appear at any rate from the instances given.

Imperial Taxation in the Colonies.

The proposal of the Chancellor of the Exchequer to levy succession duties on personal property in the colonies, even if it does not become law, is a matter of very serious

concern, pointing as it does to the necessity for increasing the Imperial revenue by means which would no doubt be popular in the United Kingdom on account of the ease to the mass of voters resident there.

The policy, from an Imperial point of view, apart altogether from other considerations, is a doubtful one. The great mass of voters would be glad enough that the revenue should be supplemented from a source which would not affect them; and as there would be no responsibility to this large mass, the temptation to spend largely would always be excused to the large majority of the electors on the score that they were not affected.

But from the point of view of the owner of the property, the matter is one of great hardship. Personal property has a local *situs* for administration and taxation; and as it is liable in this Province to probate and succession duty, if it belonged to one who died domiciled in the United Kingdom, it would be subjected to a double succession duty. As a very large amount of the stock of the large concerns in Canada is held by persons resident in the United Kingdom this double tax would be a serious matter. The *Law Journal* points out a difficulty in the way of enforcing such a law. Referring to *Huntingdon* v. *Attrill*, L. R. (1893), A. C. 150, it suggests that the courts of the colonies might not be obliged to enforce a revenue law by the Imperial Parliament.

Law and Athletics.

We learn from the *Law Journal* that the Solicitor-General, has been beaten in "an important tennis handicap." "He showed much skill, and wanted but a trifle more fortune to have scored several contested points." Not a few of the successful men at the Bar, not to speak of the Judges, have been athletes, but it is rare to hear of a man occupying the position of the Solicitor-General having the time, energy and ability to engage in outdoor sports. Whether it is from want of energy, or from an idea (mistaken, we think) that it is not

compatible with their calling, athletic sports are not engaged in as they might be by our men at the Bar. Now that golf is becoming popular, however, we may hope for an improvement.

Fighting for Principle.

The *Albany Law Journal* reproduces from the *St. James' Gazette* some remarks by the Master of the Rolls in giving judgment in a case in which the appellants said that they were contesting the action as a matter of principle. "I recollect," his Lordship said, "once acting as counsel in Liverpool in a case where some important Liverpool people were concerned. They said to me, 'We are defending this case upon principle.' I said, 'If it is so, I think I know a point of law, a miserable point of law, on which the case for the other side could be upset. Of course you will not take advantage of it if you are fighting on principle.' They said, 'Well, we should like to win'; and I said, 'Now I know exactly what you mean by saying you are defending on principle.'"

Necessary "baggage."

From a standard and entirely sober digest of Illinois reports, under the title "Carriers," and a subdivision as to baggage, we quote the following digest paragraph:—"56. Two revolvers in the trunk of a grocer who went into the country to purchase butter. *Held*, that but one revolver was reasonably necessary." So says the *Albany Law Journal*.

Over-Hanging Trees.

The question of the right to cut off the boughs of a neighbour's trees over-hanging the boundary line without giving him any notice was determined in *Lemmon* v. *Webb*, 10 T. L. R. 467. Mr. Justice Kekewich held that the defendant had no right to cut off the boughs without giving reasonable notice to the plaintiff, and gave the plaintiff judgment for £5 and costs. The Court of Appeal reversed this.

Lord Justice Lindley said that the right to cut off the boughs was undoubted, in which he agreed with the trial Judge; but on the question of notice he differed. The case of entering upon another's land to abate a nuisance, or the case of an emergency, was not applicable. Here the nuisance was on the defendant's land. Following *Earl of Lonsdale* v. *Nelson*, 2 B. & Cr. 311, their Lordships held that no notice was necessary. Their Lordships refused the successful party his costs of the action, "having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the defendant." The whole question of notice seems to be one of neighbourly or unneighbourly conduct. If the right to remove the boughs, or have them removed, exists, as it undoubtedly does, then the removal of them must be done, either by the owner or by the person who suffers from them. The latter must make his bow to the owner and request him to cut them off, or may keep his hat on and do it himself. In the latter case he has the choice between being obliged to pay damages for what he had a perfect right to do, but which he did without due politeness, and losing the costs of establishing that he was perfectly right from the beginning. Now, however, that the law as to notice has been established by the Court of Appeal, he cannot be mulcted in damages, but may still have to be polite in order to save his costs.

Judges as Authors.

Not long ago, we think, a remark fell from one of the English Judges that Lord Justice Fry's opinion as expressed in his work on Specific Performance, could not be taken as authoritative, though the same opinion expressed on the Bench would have the weight of authority. No doubt that is technically true; but substantially the same end would be arrived at by the judicial adoption of the text book opinion, if the Judge agreed with it, and so it would have double weight as an authority. Lord Justice Lindley, himself an author, does not hesitate to take the opposite view as to the weight of an opinion expressed in a text

book. In the case of *Lemmon* v. *Webb*, just referred to, His Lordship read an extract from Gale on Easements, and continued, "This passage has the authority of the late Mr. Justice Willes, who edited the edition from which I have read the foregoing extract." We believe there is some tradition about the authority of a deceased author; but we never could see how his death could improve what he had written. An early death before writing anything —but that is perhaps getting too near home.

> "Swans sing before they die; 'twere no bad thing
> Did certain persons die before they sing."

Solicitor's Right to Throw up Retainer.

In *Underwood* v. *Lewis*, 10. T. L. R. 465, the Court of Appeal held that a solicitor who had accepted a retainer to bring a common-law action could not throw up his retainer, even upon giving his client reasonable notice, without some good reason for it. What is a good reason is not shown, excepting in one case, namely, the failure to supply funds. As a matter of prudence a client would do well to change his solicitor if he found that his solicitor wanted to get rid of him. The contract, however, ought to be mutual. The client can apparently change his solicitor without notice and without cause; at least that is, and has been, the common practice here for many years. If so, why cannot the solicitor reciprocate? Notice is necessary in the latter case, as the client might otherwise be injured. But there seems to be no good reason for holding the solicitor to a fast bargain when the client is free.

Injunction at Defendant's Suit.

The interesting question of the defendant's rights against a plaintiff has been considered in *Carter* v. *Fey*, 10 T. L. R. 486, where, on a motion by a plaintiff for an injunction to restrain the defendant from carrying on business within a certain area contrary to his covenant, the defendant made a cross motion to restrain the plaintiff from using the defendant's name contrary to his covenant. The motions were made before the delivery of any pleadings.

Mr. Justice Kekewich refused the motion, and on appeal the Court of Appeal affirmed the order. The judgment was put upon the ground that the relief asked for by the defendant did not arise out of and was not incidental to the plaintiff's claim on the writ. The only connection between the motions was that they both arose out of covenants in the same deed. If the injunction had been incidental to the purpose of the action, their Lordships thought the defendant would have been right; but he could not ask for relief outside the action any more than could the plaintiff.

The result would have been different if the defendant had delivered a counter-claim. *Ex hypothesi* a counter-claim would have been based upon something which the defendant would have been permitted to litigate in the action; but if he could not wait until the time arrived at which the counter-claim would be delivered, then he would have to issue a cross writ.

CORRESPONDENCE.

A Serious Question of Jurisdiction.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—In 1892 an amendment was made to the Municipal Act in reference to the liability of the County Councils to contribute towards the construction of bridges of one hundred feet in length or over, and for arbitration in the event of the township and county being unable to agree.

This amendment was found to be very difficult of interpretation, and a considerable amount of litigation ensued in consequence; so much so, that at the recent sitting of the Legislature an Act was passed repealing the amendment in question, but providing very properly, as I should have thought, that such appeal should not affect the costs already incurred in any arbitration, action, suit or proceeding now pending, but that the question of costs might be adjudicated upon and determined as if the Act had not been passed.

An action which had been brought was standing at the time of the passing of the Act in the Court of Appeal, but the effect of the Act was to deprive the parties of their right to proceed with the appeal except for the purpose of disposing of the question of costs.

On the facts being mentioned, Chief Justice Hagarty expressed great indignation at being called upon to adjudicate on a mere question of costs. Mr. Justice Burton said he had no particular desire to hear the case, but thought he had no option unless the Court was to set itself above the Legislature, and the Chief Justice then announced his

intention to take no part in the case, but to remain merely that there might be the statutory quorum to constitute a Court.

I think with great submission that the remaining Judges should have intimated to the Counsel engaged that under these circumstances the case would have to stand over until the Court was properly constituted.

It is of course clear that when the Legislature named four Judges as necessary to constitute a Court, it meant four Judges sitting for the purpose of hearing and determining. If three Judges had followed the course pursued by the Chief Justice, would it not be a *reductio ad absurdum* to hold that the remaining Judge would have jurisdiction to decide the case?

But this does not end the matter. Is it not manifest that any decision now given by the three remaining Judges will be a nullity?

Yours, etc.,

A JUNIOR.

REVIEW OF EXCHANGES.

Albany Law Journal.—17th February, 1894.

Jurisdiction in Actions for Injuries to Real Property in a Foreign State, by F. P. MURRAY. Recent decisions in England hold that the English Courts may entertain the action when the defendant is resident within the jurisdiction and the remedy is *in personam*, local venue having been abolished, In New York it was recently held that the plaintiff attorned to the jurisdiction by bringing the action, and if the defendant did not object, the Court could try the action; upon which the learned writer remarks, "but it seems that the plaintiff confers it by, instituting the action, so far as he is concerned, and yet the defendant may take it away by objection!"

American Law Review.—January-February, 1894.

Bankruptcy Legislation, by EDWIN S. MACK. A history of the English and American bankruptcy laws.

Agent and Servant essentially identical, by CHARLES CLAFLIN ALLEN. The subject is discussed under the following heads: agent defined; principal defined; the essence of agency; servant and agent historically compared; servant and agent in Blackstone's time; distinction between servant and agent evidential; test of discretion evidential.

The Seal: its Origin, Evolution and Abolition, by H. C. MCDOUGAL.

The Right of a Public principal, upon Discovery of Fraud, to Recover from a Third Person Money Paid upon its Contracts, by GEORGE URQUHART. The learned writer discusses the right of a government or municipality to recover money over-paid, or wrongly paid to persons who have made a corrupt bargain with the agent of the public body. Authority is scarce, but the English and American cases support the right.

Wrongful Interference by third Parties with the Rights of Employers and employed, by WM. L. HODGE. Though a third party is not bound by a contract between two others, he is under a duty or obligation not to interfere with its performance. There must be allegation and proof of actual and specific damages, and the defendant's act must be malicious, in the sense of being aimed at obtaining some advantage for himself at the plaintiff's expense, or at least injuring the plaintiff by causing him loss or damage. In a recent American case a non-union man was discharged, on the threat of a union to notify

labour organizations that the house where he was employed was a non-union house. He sued the union which made the threat, for loss of employment, and recovered. This phase of the subject is discussed under the following heads:—Where there is an express contract for a definite time; where there is only a general employment; a right of action against the party induced is not necessary to support the action against the third party; if the defendant's act be legal in itself, and violates no superior right in another, it is not actionable without it be done maliciously and cause damage to the other. English and American cases are cited.

Ibid.—March-April, 1894.

Memorial of the General Assembly of South Carolina to Congress in the Matter of Receivers of Railroad Corporations. This paper is a protest against the interference of the United States authorities with railroads in the State, and a challenge of the right of the United States Courts to administer equity by means of the appointment of receivers. Some English cases on appointing receivers as managers of railroads are cited.

Land Transfer Reform, by CHARLES F. LIBBY. A review of the Torrens System of land transfer.

Necessity for the Suppression of Lobbying, by SAMUEL MAXWELL. Some cases are cited in which contracts made to influence legislative bodies have been held void; and the learned author adds remarks as to the necessity for preventing "log-rolling."

The Value of Precedents, by J. W. MCLOUD.

Should the Ultra Vires Doctrine be Applied to Business Corporations? by FREDERICK H. COOKE. The learned writer distinguishes between public corporations, and private corporations whose sole object is commercial enterprise. In the former case, the functions of government being assumed, there is a necessity for limiting the acts of the corporation. But he thinks that the same rule ought not to be applied to industrial corporations. What one man might do ought to be allowed to be done by a hundred as long as they do not infringe the laws of the State.

Spendthrifts, by H. CAMPBELL BLACK. The learned writer shows how, at the Roman law, a spendthrift was inderdicted, and a guardian appointed, in the same manner as if he were a lunatic. This element of jurisprudence still exists in countries having the Roman law for a basis. It never was the law of England. But in some of the United States statutes have been passed, not so much for the protection of the individual, as for the protection of the community, so that the spendthrift when he had wasted his substance should not become a burden on it. Cases under these statutes are cited.

THE
CANADIAN LAW TIMES.

JULY, 1894.

INJUNCTION AND NEGATIVE COVENANTS.

I WOULD like to supplement Mr. Marsh's article (*a*); and to help to resolve some of the problems which his subject presents; for the text books give one no help. The difficulties arise in two classes of cases:—

1. Contracts relating to personal service.

2. Contracts for the sale or purchase of goods.

In these cases, as is well known, equity will not decree performance—saving of course those within the Pusey Horn line. But equity will sometimes restrain a contracting party from rendering to others the services which he had previously pledged to the plaintiff. It will not compel A. to sing at the plaintiff's theatre, but it has sometimes restrained him from singing elsewhere. It will not compel B. to purchase goods from the plaintiffs, but it has sometimes restrained him from buying elsewhere. Under what circumstances, if at all, ought this to be done?

The following rules have been suggested:—

I. *Prior to 1852* it appeared to have been established that an injunction should never go, unless the Court could

(*a*) *Ante* p. 1.

enforce performance of all the covenants of *both* parties (*b*).

II. *Subsequently*, Rule I. was modified so that it read: An injunction should never go unless the Court can enforce performance of the *plaintiff's* covenants; that the Court could not enforce performance of *all* the defendant's covenants was deemed immaterial (*c*).

III. *Prior to 1852* there had existed the doctrine of *continuing relations*:—Although the Court could not compel performance by the plaintiff of his covenants, yet if the plaintiff had, so far, performed these, and was continuing to do so, the Court would grant an injunction in his favour (*d*). This rule has, however, been displaced (*e*).

IV. *In 1852* it was held that a breach of a *negative* covenant would be enjoined, although performance by the defendant of any affirmative covenants could not be decreed; provided that the Court could compel the plaintiff to perform his part of the contract (*f*).

V. *In 1858* Rule IV., as to negative contracts, was extended to cover certain affirmative covenants; for "affirmative covenants may involve a negative" (*g*).

VI. *In the same year* the doctrine of *special value* was introduced. An injunction may go when the personal services, or the goods, are of special value, although the covenant may not be in negative form, and although specific performance could not be decreed (*h*). This is no longer law (*i*).

VII. *In 1878* it was held that an injunction will go (even where the covenant is affirmative) in cases of irre-

(*b*) See cases in table, *postea*, Nos. 2, 3, 4, 10, 11, 19, 25, 26, 28.

(*c*) See 5.

(*d*) See 21 and, after 1852, 16.

(*e*) See 11, 13, 15, 17.

(*f*) See 5.

(*g*) See 31.

(*h*) See 31.

(*i*) See 8.

parable injury; where damages would be an inadequate remedy; to stay multiplicity of actions, etc. (*j*). The case was one in which performance of the correlative duties could have been decreed.

VIII. *In 1883* it was said that the tendency of recent decisions "is towards this view, that the Court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equity jurisdiction, then an injunction may be granted in support of the contract, whether it contain, or does not contain, a negative stipulation; but that if, on the other hand, the breach of contract is properly satisfied by damages, then that the Court ought not to interfere whether there be or be not the negative stipulation" (*k*).

Before proceeding to a short discussion of these various and somewhat conflicting, propositions, let me ask attention to the table of cases accompanying this article. For convenience I have numbered the cases, and shall make use of the numbers instead of repeating the reference. Observe that prior to 1852 (5) the law had assumed an intelligible form (*l*), in harmony with Rule I.: that is to say, an injunction would not be granted, unless the Court could enforce the performance of *all* the covenants of *both parties*, even if the covenant were negative.

Then came the disturbing, and much misunderstood *Lumley* v. *Wagner* (5). Mdlle. Wagner had agreed that she would sing at the plaintiff's theatre, and would *not* sing elsewhere. Lord St. Leonards recognized that he was powerless to compel Mademoiselle to sing, with acceptable grace, for the plaintiff; but he held that as there was a covenant which he could enforce—namely, the negative one, not to sing elsewhere—an injunction ought to go accordingly. Mark, however, two points:—(1) "If I had only to deal with the affirmative covenant of the defendant, that she would perform at H. M. Theatre, I should not

(*j*) See 34.

(*k*) See 24.

(*l*) See 2, 3, 4, 10, 11, 19, 25, 26, 28.

have granted an injunction"; and (2) that there were no correlative duties on the part of the plaintiff which the Court could not enforce:—"Both the covenants are on the part of defendant," said the Judge. This case is authority for injunction, therefore, only where (1) there is a negative covenant; and (2) where performance of the correlative covenants, if any, can be enforced. Although this is clear enough, it happened that on the next two occasions upon which an employer sought to enjoin an employee, injunctions were issued upon the authority of Mademoiselle's case, although there was no negative covenant (6 and 7). This extension of Mademoiselle's rule was afterwards disapproved, and the case itself said to be "an anomaly which it would be very dangerous to extend" (8).

While the law of injunction at the instance of an employer was running this tortuous course, the employee, on his part, made various efforts to confine his master to covenanted courses (*m*). But he met with much less success. "We cannot make you work for the defendant, so we will not prevent him discharging you," was the invariable answer to his appeal for an injunction. "But I am here at work. You need not compel me. I am willing and hereby offer," he replied. But in vain. "If the bishop (the defendant) could not, as plaintiff, compel Mr. P. (the plaintiff) to perform specifically those duties and services which he is seeking to compel the bishop to permit him specifically to perform, the Court ought not, I apprehend, to aid Mr. P. for such a purpose" (10).

So far as we have gone, therefore, an employer may enforce a *negative* covenant against an employee, *if performance of any correlative duties on the part of the plaintiff can be directed*; and an employee never can obtain an injunction against his employer because, *ex hypothesi*, there always are correlative duties which cannot be enforced. This is intelligible enough (negative covenant, and no unmanageable correlative duty, equals injunction); and fain would I leave it there. But some of those carping questions

(*m*) See 10 to 18.

(such as those that go to spoil all theology) have persistently obtruded themselves, and must be given their answers. There are the troublesome questions, first, What is a negative covenant? and, second, Who is an employee within the rule?

What is a negative covenant? Surely that is easy enough —"that she will *not* sing elsewhere"—was not this made clear enough in 1852? Clear enough, no doubt, if law is a matter of grammar and phrasing. But supposing that it aims at something else, namely, the administration of justice on something like a scientific basis, what then? Here, in 1858, for instance, we have a man contracting that his ship will go to a certain place, at a certain time, and load for the plaintiff; and the Lords Justices (very reasonably, I think) remarked: This means that the ship is *not* to go elsewhere at the same time!—"affirmative covenants may involve negative," they said (31). No doubt they may, but in that aspect of the matter what becomes of the rule applied to Mademoiselle? Lord St. Leonards there said: "Even in the absence of any negative stipulation she would have broken the spirit and true meaning of the contract"; but added: "If I had only to deal with the affirmative covenant I should not have granted any injunction." *That* rule is intelligible, although somewhat barbarous—wherever a "not," there an injunction; if no "not," no injunction.

If, however, in view of the 1858 suggestion of involved negatives, we must modify the rule, we shall only escape barbarism, to fall into mysticism, or metaphysics. We may endeavour to take refuge in this, that *every* affirmative promise involves a negative; in which case our rule for injunctions, in negative covenant cases, must be enlarged so as to include all affirmative covenant cases as well, and so becomes a rule ready for limbo. But if we stand our ground and say that breach of *some* affirmative covenants will be enjoined because they involve their negatives, and others will not because they don't, I can offer, as a discriminating guide, only the suggestion of Lord Justice

Lindley: "The principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other, some special thing upon which you could put your finger" (8). This is the only rule offered to aid one in such case, and when I say that I am afraid it is unintelligible, I mean only, of course, that to my mind such it is. Any one can test it, however, for himself by endeavouring to apply it (without first looking at the judgments) to the following cases: "I will employ you as Receiver *for life* of the rents of the Parish of X." (10); "You are to be the *irremovable* agent of the company" (17); "I shall have the *exclusive* right to supply beer to a certain house" (20); "I shall sell to you *all* the get of coals from a certain mine" (23); "I will give my *whole* time to your business" (8, 32); "*No* member is allowed to act" (9). If you say that all these promises involve their negatives, then I ask you to try and think of some promise that does not; afterwards, look at the cases last referred to and see what the Judges thought of the negatives being involved; then try and walk straight across the room.

We are then in a predicament and must, it seems, choose between three. An injunction will go (1) when the form of the covenant is negative (and no unmanageable correlative covenants); (2) whatever the form may be; or (3) whenever it is negative either grammatically, or (having crossed the room) we feel that it involves the negative. One hardly knows which of the three to select. For the first is pure barbarism; the second is tabooed by everybody; and the third is unintelligible. We seem urged to adopt Dr. Johnson's directions as to a salad, which, he says, being a rare work of art, requires, for its proper preparation, much nice discernment of flavours, and much attention not only to gustibility, but to proportion and beauty; but which, he maintains, ought, once properly made, to be incontinently heaved from the window.

Who is an employer within Mademoiselle's rule?—The doctrine of *ubi* not, *ibi* injunction, (although stated to be "well settled practice" by Lord Cairns as late as 1878 (34), and acted upon by a Divisional Court in 1894 (9)), has to encounter damaging attack from another quarter. "Could it possibly be argued," asked Kay, L.J., in 1891, "that an injunction could be obtained to prevent" *a domestic servant* from working for another? (8). I have heard funnier things than that argued quite solemnly; but supposing that our *chef* is *hors d'* injunction, no matter how indispensable we may think him, what shall we say about our bookkeeper, our chief clerk, our *manager?*

The owner of a ship agreed to go to Suez, and ship a cargo. Page Wood, V.C., in 1858, refused to grant an injunction against sending the ship elsewhere, upon the ground that the Court could not compel complete performance of the contract. But he was overruled by the Lords Justices, because a ship was a chattel of special value (31). The next trial Judge, in a case of special value, of course, granted the injunction; but, oddly enough, the decision was reversed again. This happened in a case (8) in which the defendant agreed to act as the plaintiff's *manager* and give to his duties his *whole time.* Kekewich, J., granted an injunction to restrain other employment of defendant's time, upon the ground of special ability or value. But the Lords Justices now took the other view, Kay, L.J., putting the question about the domestic servant.

The truth, I believe, is that the doctrine of "special value," well known in specific performance cases, has here no proper application at all. For breach of a contract for the sale of ordinary chattels, the sufficient remedy is damages, and a plaintiff is therefore left to his action at law. But no damages (it is said) will compensate for the non-delivery of such a chattel as a Pusey horn, therefore Equity directs delivery of the specific thing. That is intelligible. But what is there intelligible in this: We cannot compel you to sing for the plaintiff; but, because

you are a *prima donna* (and not a mere scene shifter), we will restrain you from singing for any one else? It may be answered that the plaintiff could do the shifting himself, but not the singing—or easily get some one else to do it. But the reply is complete: The Court does not propose to get the plaintiff out of that difficulty, but only to embarrass the defendant. The Pusey Horn must go to the plaintiff, because he cannot do without it; but Mademoiselle will not go to the plaintiff, so he *must* do without her. His remedy, then, is *not* the specific thing at all (for he cannot get it), but damages, as may indeed readily be seen from this also, that if the employer could make as much *money* by doing nothing, as by catering to public amusement, he would certainly do nothing. It is not the singer he wants (as he might conceivably want the horn), but the money which the singer will bring him. The horn, presumably, he would not sell; but had he the singer's talents at command, would he keep them shut up, or would he turn them into money? (*n*).

In fact the Court with reference to Mademoiselle took this peculiar ground. We cannot make you sing for the plaintiff; you have broken your contract with him, and will, no doubt, have to pay him smartly in damages; but in the meantime we shall condemn you to silence. It seems to me that if Madamoiselle has to pay the damages she pays the sufficient penalty; and is entitled to her time, to earn the damages, if for nothing else. The Court will not enforce specific performance of a contract for the sale of a horse; and who ever suggested that the Court ought not only to give the purchaser damages for breach of contract, but also to enjoin the owner from selling the horse to any one else? And if the horse were the only two-minute animal in the world, would the suggestion be any the more reasonable? Again, supposing that Mademoiselle's agreement extended over 5 years; that she at once broke it; was sued for damages, and paid them; would she nevertheless

(*n*) See, however, 9, at p. 130.

be restrained, for the remaining four years, from singing for others? I should hope not. Then can the employer subject her to *both* penalties merely by changing the date of his writ—issuing it at the end of the 5 years instead of the beginning? I should hope not again. Let the punishment fit the crime.

Whatever, then, is left of our *Lumley* v. *Wagner* rule, our *ubi* not (expressed, or involved), *ibi* injunction, must be held subject to three dread uncertainties: (1) Does your "whole time," your "exclusive right," etc., involve a "not"? (2) Are you of any "special value"? I don't mean in your own estimation, or in the plaintiff's, or in the trial judge's, but in that of the last Court that may hear your particular case; and (3) Does it make any difference whether or not you are of any "special value"? —the Lords Justices have it both ways. And perhaps Dr. Johnson's advice, although drastic, may yet be followed.

Prior to Mademoiselle's time, as we have seen, the law clear and intelligible and in harmony with Rule 1. The Judges are slowly emerging from the influence of this lady of evidently "special value," and are now on the point of return to ante-aberration times, where we may rest quietly once more.

Sir G. Jessel was the first to feel the difficulties involved in the later decisions. In 1873 he refused an injunction to restrain the breach of a covenant to raise and sell to the plaintiff "all the get of coals" of a certain mine, for a certain term (23). He said, "if it is right to prevent the defendant from selling coals at all . . . why is it not right to compel him to raise and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down, or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases, that is the class of cases in which the Court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach, by the contracting party, of one or more of the stipulations of the contract; and the class of cases in which it refuses to interfere."

Lord Selborne in 1873 (33) said: "I can only say that I should think it was the safer and better rule, if it should eventually be adopted by this Court, to look, in all such cases, at the substance, and not to the form."

Lord Justice Fry in 1883 (24) expressed himself as to the tendency of the decisions towards intelligibility, in the language quoted above in Rule VIII; and added, "I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation, and a contract containing an affirmative stipulation which implies a negative."

Lord Justice Lindley in 1891 (8) said: "I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. . . . Every agreement to do a particular thing, in one sense, involves a negative. . . . I confess I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend."

And Mr. Marsh very properly adds: "The equity doctrine upon the point is in a plastic condition and has not yet assumed any definite and ultimate shape, nor is it likely to do so until the whole question has been dealt with by some Court of final resort."

Correlative Duties.—In the meantime, however, is there, among these illusive involved-negatives, and special-values, any solid ground at all whereon a single Judge may find some footing. I think there is. Rules III, IV, V, and VI have gone, or will (as I think) go by the board (or the window); and Rules I, II, VII, and VIII (summed in VIII) will be finally established. *En attendant*, Rule II, alone, has claim to stability:—"Injunction should never go unless the Court can enforce performance of any correlative duties on the part of the plaintiff." This rule includes cases in which the defendant's covenant is in negative form. The authorities in support of this proposition are clear, numerous and convincing. They are principally those decided

in 1818 (25), 1836 (4), 1838 (26), 1842 (28), 1843 (10), 1845 (19), 1849 (11), 1852 (5), 1853 (12), 1857 (13), 1862 (14), 1863 (15), 1864 (32), and 1865 (17 and 18).

It is clear that where, as in *Lumley* v. *Wagner* (5), or *De Mattos* v. *Gibson* (31), or *Donnell* v. *Bennett* (24), the only correlative duty is payment of money, the Court is confronted with no difficulty. So also, as in *Cory* v. *Yarmouth* (29), where a bridge owner with an exclusive right to the traffic, obtained an injunction against interference with his trade by boats, the Court would have had no difficulty in compelling the plaintiff to keep open his bridge. But there are four cases which, without a word of explanation, might be thought to oppose themselves to Rule II.

1. In *Rolfe* v. *Rolfe* (30), the agreement was that the plaintiff should employ the defendant in his business, and the defendant agreed *not* to carry on business for himself. The defendant withdrew from the plaintiff's employment and commenced business on his own account, and an injunction went against him, although the Court could not have compelled the plaintiff to give the defendant employment. It will be observed, however, that the defendant having left the plaintiff's employment was not entitled to return. He could never, for example, have sued for damages for refusal to take him back again, and there was not therefore any correlative duty to be performed by the plaintiff. It should also be observed that Shadwell, V. C., who decided the case, has too frequently refused injunctions when he was unable to compel performance, to leave any ground for suspicion that he intended to establish, in this case, contrary doctrine (*o*).

2. The second case which requires explanation (*Dietrichsen* v. *Cabburn* (21) may be distinguished, upon the ground that although the Court could not compel the plaintiff to perform his part of the agreement, yet as the plaintiff was performing his part voluntarily, he was entitled to an injunction. (I shall return to this case).

(*o*) See the cases 3, 4, 26, 10.

3. The third is *Catt* v. *Tourle* (20). In this case the plaintiff had the exclusive right to supply beer to any public house erected upon certain land. He was under no obligation, and if he were, could not be compelled, to supply it; but, being perfectly willing to do so, he obtained an injunction from the Lords Justices restraining an occupier from purchasing elsewhere. The case is therefore in flat contradiction to the theory I am sustaining. It is, however, full of mistakes. The judgment proceeds upon the cases of *Rolfe* v. *Rolfe* (30), and *Lumley* v. *Wagner* (5). In neither of these, however, was there any correlative duty which the Court could not compel performance of. The former I have, a moment ago, so explained; and in the latter the plaintiff's only duty was to pay money. The judgment then proceeds to overrule *Hills* v. *Croll* (19) — a case on all fours—Giffard, L.J., saying: "Unless it be taken as laying down that the Court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length it is contrary to *Lumley* v. *Wagner*, and must be considered as overruled." But it does go "that length," and is not "contrary to *Lumley* v. *Wagner*." On the contrary, Lord St. Leonards in this latter case expressly approves *Hills* v. *Croll* (see p. 626); distinguishes a previous decision of his own (28), (in which he refused an injunction), upon the ground that there *were* there correlative duties which the Court could not enforce; and distinguishes also another case by reference to the same doctrine. It is submitted therefore that this case, proceeding as it does, upon clear misapprehension, cannot be taken as an authority as against all those already cited.

The fourth case is very recent (9). In it there was no correlative duty which the Court could not enforce. The language of Wright, J., therefore, is *obiter dictum* when he says: "Until the decision in *Donnell* v. *Bennett* (24) the doctrine in accordance with which such stipulations were enforced by injunction, was seriously interfered with by the supposed rule that, where there could be no specific

performance of a contract on the one side, there ought to be no injunction on the other side; but since the decision in *Donnell Bennett* this view has been somewhat altered." A closer reading of *Donnell* v. *Bennett* will show it to be a vigorous effort in the other direction.

Continuing Relations.—I promised to return to *Dietrichsen* v. *Cabburn* (21). It raises this question as to the universality of Rule II (relating to the unmanageable correlatives), whether, granted that the Court cannot compel the plaintiff to perform his part of the contract, yet if the plaintiff is *voluntarily performing* his part, is he not entitled (other objections absent), to an injunction against breach by the defendant?

The agreement in the case just mentioned was that the plaintiff was to act as the defendant's agent for the sale of a certain drug, which the defendant was to supply the plaintiff at 40 per cent. discount; and the defendant promised *not* to sell to any one else at less than 25 per cent. discount during 21 years. The trial Judge (Shadwell, V. C.,) refused an injunction because he could not compel the plaintiff to act as the defendant's agent; could not compel performance of the correlative duties. But Lord Cottenham on appeal reversed the decision, saying that he could not "see any difference between a consideration actually paid, and a performance alleged by the plaintiff of all he had undertaken to do." There is a dictum of Page Wood, V. C., to the same effect (16).

Both of these authorities may be considered to be overruled. Four years after Lord Cottenham's decision, Wigram, V.C., (11) said: "It is impossible to read Lord Cottenham's judgment. . . . and to suppose he intended to throw any doubt on what was considered the settled rule of the Court. The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him; and if that which the defendant is entitled to.

be something which the Court cannot give him, it certainly has been the generally understood rule, that that is a case in which the Court will not interfere. It is, however, contended that according to the allegations in the bill, the plaintiffs up to the time of complaining, had performed all they were bound to do; but if this be so, still *there remains behind something* the Court cannot secure to the defendants; and if that which remains to be done by them hereafter be something the Court cannot secure to the defendants, I cannot help thinking the case may fall within the observation of the V. C. in *Ranger* v. *G. W. Ry. Co.*, 1 Ry. Ca. 50." Lord Cottenham himself, too, in a shortly subsequent case (22) said: "If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. doing anything which may, or can, prevent him from so delivering the goods?" His implied answer is, No.

The dictum (above referred to) of Page Wood, V.C., is amply atoned for by his judgments in *Stocker* v. *Wedderburn* (13); *Peto* v. *Brighton Ry.* (15); and *Mair* v. *Himalaya* (17), which are in entire harmony with the remarks just quoted from Wigram, V.C. All the cases (10) to (18), and several of the others are to the some effect; and the language of Lord Cairns in (34), if confined to the particular case, is not contrary.

Resume.—We are now in a position to summarize.

1. The doctrine of continuing relations (Rule III.) no longer exists.

2. The doctrine of special value (Rule VI.) no longer exists.

3. The doctrine of negative covenants (Rule IV.), extended logically to involved negatives (Rule VI.); and so either, by including all affirmative covenants, made ready for limbo, or, by the walking-across-the-room process made unintelligible, is tottering to its fall.

4. The doctrine that an injunction should never go, unless the Court can enforce performance of the *plaintiff's* covenants is at present the law (Rule II.)

5. It will, however, shortly be merged in the doctrine which prevailed prior to 1852—an injunction should never go unless the Court can enforce performance of all the covenants of *both parties* (Rule I).

6. And probably find its last, and best, expression in the language of Rule VII, or VIII.: "If the contract as a whole is the subject of equity jurisdiction, then an injunction may be granted in support of the contract, whether it contain, or does not contain, a negative stipulation; but that, if on the other hand, the breach of contract is properly satisfied by damages, then that the Court ought not to interfere whether there be, or be not, the negative stipulation."

JOHN S. EWART.

WINNIPEG.

TABLE OF CASES.

No.	DATE		JUDGE	NEGATIVE AGREEMENT	RELIEF GRANTED	RELIEF REFUSED	JUDGMENTS AND NOTES. Latter in ( ).
		I. PERSONAL SERVICES. *Bill against servant.*					
1	1812	Morris v. Coleman, 18 Ves. 437 ..	Eldon	x	x	.....	(Explained by same Judge in (2) to be a case of partnership. See also (3)).
2	1819	Clark v. Price, 2 Wils. C. C. 157..	"	.....	.....	x	Reporter—Cannot indirectly compel specific performance.
3	1829	Kemble v. Kean, 6 Sim. 335.....	Shadwell ..	x	.....	x	Actor—No partial performance possible.
4	1836	Kimberly v. Jennings, 6 Sim. 341.	" ..	x	.....	x	Clerk— " " "
5	1852	Lumley v. Wagner, 1 D. M. & G. 604	St. Le'nards	x	x	.....	Singer—Negative covenant and no correlative duties.
6	1857	Webster v. Dillon, 3 Jur. N. S. 432	Page Wood.		x	.....	Actor—*Ex parte*, following (5). (But there a negative covenant).
7	1873	Montague v. Flockton, L.R. 16 Eq. 189	Malins	.....	x	.....	Actor—(Disapproved in (8), because no negative covenant).
8	1891	Whitwoood v. Hardman, 1891, 2 Ch. 416	Justices ..	"Whole time"....	.....	x	Manager—(5) an anomaly, not to be extended.
9	1894	Grimston v. Cunningham, 1894, 1 Q. B. 125.....	Q. B. Div..	"No member is allowed"	x	.....	Actor.
		II. BILL BY SERVANT.					
10	1843	Pickering v. Ely, 2 Y. & C.C.C. 249	Shadwell ..	"For life".....	.....	x	Receiver of Rents—Correlative duties could not be enforced.
11	1849	Waring v. Manchester, 7 Ha. 482..	Wigram ..	.....	.....	x	Railway contractor do do
12	1853	Johnson v. Shrewsbury Ry., 3 D. M. & G. 913	Justices ..	.....	.....	x	Railway contractor do do

13	1857	Stocker v. Wedderburn, 3 K. & J. 393	Page Wood.	.....	.....	x	Manager do do
14	1862	Ogden v. Fossick, 4 D. F. & J. 426	Justices ..	.....	.....	x	Manager (?) do do
15	1863	Peto v. Brighton Ry., 1 H. & M. 468	Page Wood.	.....	.....	x	Railway contractor do do
16	1864	Brett v. East India, 2 H. & M. 404	Page Wood.	.....	.....	x	Agent — After plaintiff's discharge. Some ground for bill if before.
17	1865	Mair v. Himalaya, L. R. 1 Eq. 411	"	"Irremovable." ..	.....	x	Agent—Correlative duties could not be enforced.
18	"	Munro v. Wivenhoe Ry., 11 Jur. N. S. 612	Justices ..	.....	.....	x	Railway contractor do do do
		PURCHASING GOODS.					
		III. *Bill to restrain purchasing elsewhere.*					
19	1845	Hills v. Croll, 2 Ph. 60, and note; 1 C. P. Coop. 83	Lyndhurst..	"*All* his acids." ..	.....	x	Correlative duties to furnish acids could not be enforced.
20	1869	Catt v. Tourl, L. R. 4 Ch. 654....	Justices ..	"Exclusive right to supply beer"..	x	.....	Follows 5 and 30, and disapproves 17.
		IV. *Bill to restrain selling elsewhere.*					
21	1846	Dietrichsen v. Cabburn, 2 Ph. 5; 1 C. P. Coop. 72	Cottenham.	... .	x	.....	Plff. had performed his part. (Query, Was plff. bound to do anything? And see Wigram, V. C. in 11.
22	1850	Heathcote v. Staffordshire, 2 M. & G. 100	"	.....	.....	.....	Referred to for Lord Cottenham's dictum, to set off against his judgment in 21.
23	1873	Fothergill v. Rowland, L. R. 17, Eq. 132	Jessell	"All the get of coals"	.....	x	Follows dictum in 22.
24	1883	Donnell v. Bennett, 22 Ch. D. 835.	Fry	"All parts of fish"..	x	.....	Where negative clause enforce it. Authorities *tending* other way.
		V. OTHER CASES—As analogies.					
25	1818	Smith v. Fremont, 2 Sw. 330	Eldon	.....	.....	x	Correlative duties could not be enforced.

TABLE OF CASES—*Continued.*

No.	DATE		JUDGE.	NEGATIVE AGREEMENT.	RELIEF GRANTED.	RELIEF REFUSED.	JUDGMENT AND NOTES. Latter in ( ).
26	1838	Baldwin v. Society, 9 Sim. 394....	Shadwell..	"Exclusive right to publish."...	.....	x	Correlative duties could not be enforced.
27	1840	Hooper v. Brodrick, 11 Sim. 47 ..	Shadwell..	.....	x	.....	Tenant restrained from doing anything to forfeit license.
28	1842	Gervais v. Edwards, 2 Dr. & W. 80	Sugden ..	.....	.....	x	"Court must execute the whole contract."
29	1844	Cory v. Yarmouth, 3 Ha. 593.....	Shadwell..	.....	x	.....	Bridge owner restrained carriage by boats.
30	1846	Rolfe v. Rolfe, 15 Sim. 88.....	Shadwell..	"Not to carry on business" ..	x	.....	
31	1858	DeMattos v. Gilson, 4 D. & J. 276	Justices ..	.....	x	.....	(Injunction against using ship otherwise than as contracted — Ship peculiar value, (See same Court, 1862, in 14).
32	1864	Frith v. Ridley, 33 Beav. 516	Romilly ..	"Whole time.".....	.....	x	"Contract must be enforced in its entirety or not at all."
33	1873	Wolverhampton Ry. v. London Ry. L. R. 16 Eq. 443	Selborne..	.....	x	.....	Injunction to restrain diversion of traffic.
34	1878	Doherty v. Allman, 3 App. Cas. 709	Lords	.....	.....	x	(Lord Cairn's support of Rule VII.)

EDITORIAL REVIEW.

Supreme Court Judges' Retiring Allowance.

The Minister of Justice, in introducing a measure to increase the retiring allowance of the Judges of the Supreme Court of Canada, has opened up a large question, and at the same time elicited from his critics in the House a most unfavourable reply. Probably this effort is but a test of the strength of the Government on the whole question of judicial salaries, to be followed, if successful, by a general measure to increase the salaries of Provincial Judges. We trust it is.

Standing by itself, the measure is a questionable one. It proposes that a Judge of the Supreme Court, after at least five years of his service in that Court, which, when added to his service on the Bench of the Exchequer Court of Canada, or any of the Superior Courts, or a Court of Vice-Admiralty, will make in all fifteen years, having attained seventy years of age, shall be permitted to retire on an allowance equal to his full Supreme Court salary. If the principle is good for the Supreme Court it is good for the Provincial Courts; if not good for the latter, why is it good for the former? The Minister pleaded for the measure, that it was desirable to keep the Supreme Court strong and vigorous. If it is to have this effect why not apply it to the other Courts? The suggestion of the Minister was an unpleasant one to make. The passing of a new law implies a present necessity for it, which, in the case of the Supreme Court, does not exist. But, apart from this, it is a question whether ripe experience is not a better qualification for a Supreme Court Judge than the energy and vigour which belong to younger men. The work of that Court is not to be compared with the work of Courts whose Judges are occupied with Circuits, weekly Courts, and full Court sittings, with relation to the call for physical vigour and energy. Its work is more dignified

and important, but the only physical powers it calls out are those expended in the sittings.

Even assuming all that can be said in favour of the measure, there is a side of the question which has not been adverted to. There may easily arise a case in which a Judge with failing powers, before the age of seventy, might retire, on the two-thirds allowance, if he had not in view the possibility of a retirement on a full allowance. We should, in such a case, be subject to a distinct and emphatic evil—that of a Judge, unable properly to fulfil his duties, occupying his seat in order to fill up the time necessary to entitle him to a larger pension. And, on the other hand, it does not secure the retirement of a Judge at the age mentioned unless it is made compulsory. To make such a law compulsory would undoubtedly, from time to time, deprive our Courts of some of their ablest Judges.

The question naturally brought forth expressions of opinion upon the larger question of judicial salaries generally. It was stated as a principle that there was no reason why a Judge should retire on full salary when no other person in the public service could do so. But of all the branches of the public service that of the Bench is the most onerous—the work the most incessant. There is no branch so poorly paid, both with relation to the amount of work done and with relation to its importance and responsibility.

The strength, vigour and ability of the Bench, whether of the Supreme Court or the Provincial Courts, will best be secured, not by increasing the retiring allowance, as a bait to failing Judges, but to increase the salaries, so as to attract those who, by their vigour, strength and ability, have shown themselves the superiors of their fellows in the practice of their profession.

The Privy Council on Bankruptcy.

We are glad to have from Mr. Lefroy himself an interpretation of his article in the *Canada Law Journal* of the 2nd April, which we misquoted as 1st May.

It is not necessary to issue a challenge, especially as at this season of the year most of us are occupied in fighting flies and other pertinacious insects, and not each other. It is sufficient to point out the mistake, if mistake there is. But we warn our correspondent against the vice which has been attributed to the Privy Council, namely, so delivering himself that he has to interpret himself. It may be in order for us now, to show how we arrived at our conclusion.

Mr. Lefroy gives a quotation from his article, but dissociates from the context, and so (no doubt unconsciously) deprives it of a great deal of its meaning. Just before the quotation in his letter, he wrote, in the article referred to, with reference to the late case before the Privy Council, "Apart from the importance of the judgment as throwing light upon what is meant by bankruptcy and insolvency, it possesses much constitutional interest by reason of the *dicta* in the concluding portion of it, in which their Lordships observe that it may be necessary, by way of provisions ancillary to a system of bankruptcy legislation, to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature." The *dicta* are then quoted, and Mr. Lefroy then proceeds, "It will, of course, be remembered that so far back as the case of *L'Union St. Jacques* v. *Belisle*, etc.

As the subject matter under discussion was bankruptcy and the ancillary provisions of a bankruptcy law, we think we might be pardoned for assuming that the meaning of the passage was that the case cited was a case of an insolvent company, and that its affairs were for that reason subject to the jurisdiction of either body. And even taking the passage by itself, we might assume that; because "Property and civil rights" is not a subject common to the legislatures; while insolvency, as now understood, is so common, to a certain extent.

We are glad to be corrected, but we are sorry that it is so difficult to convey the meaning of these decisions.

CORRESPONDENCE.

The Privy Council and Insolvency.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—Will you permit me to refer to the article, in the number of your valuable periodical for this month, entitled "The Judicial Committee of the Privy Council," in reference to a matter which, though of no importance to any one else, is of some importance to myself. You say in that article:—"In passing, we might remark that *L'Union St. Jacques* v. *Belisle* was not decided, as Mr. Lefroy says, in the *Canada Law Journal* of May 1st, on the ground that the Provincial Legislature could deal with insolvency." I challenge you, with all respect, to show any portion of that article in which I either expressly or by implication made any such statement. It is true that I stated in that article:—"It will, of course, be remembered that as far back as the case of *L'Union St. Jacques* v. *Belisle* their Lordships had said that a local legislature is not incapacitated from enacting a law otherwise within its proper competency, merely because the Dominion Parliament might, under section 91 of the British North America Act, if it saw fit so to do, pass a general law which would embrace within its scope the subject matter of the local law." It is indisputable that their Lordships did, in that case, enunciate that general proposition, but how you can deduce from this or anything else in the article the meaning on my part that that case was decided on the ground that the provincial legislature could deal with insolvency I am at a loss to understand, especially as I immediately go on to contend that any such view is contrary "to the express words of the Act, and to the teaching of the reported decisions upon it."

Yours faithfully,

A. H. F. LEFROY.

TORONTO, 21st June, 1894.

BOOK REVIEW.

Ruling Cases. Arranged, annotated and edited by ROBERT CAMPBELL, M.A., of Lincoln's Inn, Barrister-at-Law, Advocate of the Scotch Bar, and late Fellow of Trinity Hall, Cambridge. Assisted by other Members of the Bar. With American Notes by IRVING BROWNE, formerly Editor of *The American Law Reports* and *The Albany Law Journal.* Vol. I. Abandonment—Action. London: Stevens & Sons, (Lt'd.). Boston, U. S. A.: The Boston Book Co. 1894.

This is the first volume of a work which, in its inception, appears to one as stupendous, and in its completion will be invaluable. The editors think that the Digests "fail in usefulness by their want of information as to the principles of the decisions, and as to the relative importance and authority of the cases contained in them." The design of the work is to furnish the information by means of a Ruling Case, followed by its application in detail illustrated by minor cases.

Without quarrelling with this statement, the Editors, we think, merely state the widely different purposes of both works, which will never clash with each other, but will co-exist, each serving its purpose; as the Editors' compilation amplifies in the way stated the work of which the Digest is but the basis.

The scheme of the work is to state a rule, which is in reality a proposition of law deduced from leading, or as the Editors say, ruling, cases. The ruling case then follows, and the English and American notes on the subject come last. The idea of compiling leading cases, which is not new, is combined with the idea of a Digest by arranging

in the order and under the Titles which we get in the latter, the information to be got in the former, but in a larger shape. In the well-known compilation of Leading Cases we have to depend on the index solely, or the name of the case for information on a particular branch of a subject. In a Digest we depend on the Title as a guide but are driven to the Report for the information. In the Ruling Cases, we have both the Title for guidance and the Rule, Leading Case and Notes for information. The notes are in general short. But if the occasion arises, as it no doubt will, for larger notes, we would suggest the advisability of catch-words or lines as guide-posts.

The Titles of the volume are Abandonment, Abatement, Acceleration, Accident, Accord and Satisfaction Account, Accretion, Accumulation, and Action.

THE
CANADIAN LAW TIMES.

AUGUST, 1894.

ONTARIO LEGISLATION, 1894.

THE acts of a moribund parliament are, in some respects, like the final disposition of his affairs by a dying man. There is the necessity in each case for making peace with all men and all classes of men. Various dispositions of favours are made, for the reason generally that the departing one has no further use for what he disposes of. And we regret to say that we discover in the statutes, as we have all discovered in the wills of persons about to depart this life, some dispositions and provisions which would not be made by legislators or testators in vigorous health, and not immediately to be called to an account of their doings.

Chapter 18 of the statutes for this year corrects the result of an oversight in the Act for the increase of salaries to the judges. Several of the occupants of the Bench are in receipt of an allowance from the province for provincial services. This was overlooked when the Act was passed at the last session to increase their salaries, and the result would have been, but for this statute to correct the error, that those judges who were in receipt of the allowance would have an excess of salary of one thousand dollars a year over their brother judges. The Act in question restricts the operation of the previous statute to those judges who were not in receipt of the old allowance.

By Chapter 19 the Summer Sittings of the High Court for the County of York are dispensed with, except where the judges deem it necessary. This enactment is on account of the recent rearrangement of the sittings, which has proved such a boon that the want of sittings during the present summer has not been felt at all.

Chapter 20 is one of those statutes to which we referred at a former page, partly as one of those dispositions which a dying legislature has made to placate those who felt that they could call to account the departing members, and partly as a disposition made which would not have been made if the Legislature had retained its sound, healthy sense and administered its affairs in the ordinary business way. It is the first step toward the complete wreck of our system of administration of justice; and, if persisted in by "developing" the principle, we may expect the complete destruction of our system of administration of justice. The idea of a court which has of itself a local habitation does not seem to have been grasped by the legislature. The Court, in its relation to the Crown, administers the justice of which the Sovereign is the fountain. Necessarily justice must be administered at the residence of the Court. There its records are kept, and there the Court resides. It is no fiction that the Court must have a residence. It is an actual reality. The very hypothesis upon which the assizes are held is that the trials will take place at the residence of the Court, "unless before" that happens the judges are sent to the locality in which the venue is laid. No clear distinction is, therefore, drawn between the real curial business and the mere commission of a Judge sent to the country to try causes. Consequently, any attempt to disintegrate the Court by authorizing or requiring the holding of sittings of the Court at other places than the actual residence of the Court, effects a complete change of the whole principle upon which our courts are based and maintain their existence.

As we pointed out before, in order that sittings may be effectually carried out in other places than Toronto, there

must be all the paraphernalia of a Court at each place where the Court is intended to sit. Even if such necessary accompaniments were provided for, there would still be the difficulty of finding the records in years to come. It is a matter of common knowledge that local records are kept in places which provide no security whatever for valuable papers, that they are in disorders in some places, and that there is great difficulty, in many cases, in tracing them at all. Even the change in the system of the Surrogate Courts occasions great difficulty, at the present day, in in some cases in finding the records of old wills. And if it becomes necessary hereafter to search for records, which will then be old, to prove facts or establish a title, it will possibly, and not improbably, occasion a very vast amount of expense in getting the necessary information, even if success is attained.

So much for the principle and utility of the scheme. The next consideration is one which, perhaps, should have been placed first, and that is, are the public better served by the new system? If experience is of any value in this respect we have only to turn to the Province of Quebec, in which the decentralized system of administering justice is in force. While the Attorney General of Quebec has been pointing out the vast benefits derived from the centralization of the Courts of Ontario, and has been referring in eulogistic terms to the results attained as a plea for the reformation of the system of Quebec, whose results will not compare with ours, our Attorney General has proceeded in exactly the opposite direction, by abandoning that system which Quebec is endeavouring to attain to, and putting into operation the very system which the experience of Quebec teaches them to abandon. That, of itself, should have occasioned a pause, if it were not sufficient to justify a refusal to advance a single step in that direction.

In looking to the source of this legislation, we find that there is no request for it made by the public, who are the persons really interested in all legislative changes. So far as we know, no complaint has been made, and no com-

plaint could be made, of the administration of justice
Ontario, either in its practical results, or in the theo
upon which the system is based. It would be difficult
find a system better suited to our requirements. It wou
be more difficult to find a body of men who, for the salar
provided, would do the work and do it as well as the Judg
of Ontario. We may say that we have no arrears; litig
tion is fairly speedy, and results are quickly attaine
Provision is made for review, re-investigation and appe
and no one can complain that his case will not receive
thorough an investigation as it is possible to provide
in any system of judicature. Where then, comes t
necessity for change? There is no real necessity from a
point of view mentioned, and the responsibility for t
change remains with a very small body of local prac
tioners. From them arises the complaint, that in order
argue their cases, they have to travel to Toronto; and
little deference is paid to the convenience of the Judges,
the state of business at the residence of the Court, and
the convenience of nine out of ten or, perhaps, ninety-ni
out of a hundred of their brother practitioners, that th
must needs have the Judges of the Court go to them inste
of themselves going to the Court. This probably is t
highest point that the demagogue has ever attained. W
should not be surprised after this, if a demand were ma
for the Provincial University to hold its lectures a
examinations at every county town for the convenience
students, instead of requiring the students to go to the se
of the University.

The returns made of the business transacted in t
outer towns show that almost an infinitesimally sma
proportion is done in the towns for which sittings of th
Court are now provided. Instead of a small expenditu
by local practitioners for railway fares, we now shall ha
an enormous expenditure for the travelling expenses of th
Judges, the providing of local records, with places in whic
to keep them in security, and all the innumerable pett
expenses attending the erection of any Court, howeve
small, at a particular place. The result is that the publi

will have to pay a large amount annually in order to save half a dozen practitioners their casual expenses in coming to Toronto.

In summing up the results, we find on one side of the account the convenience of a few practitioners; on the other side of the account, the indignity of compelling the Judges to wait on the local Bar, the increased expense to the public of administering justice, and, what is the worst feature of the affair, the complete abandonment of the principle upon which our Courts are based.

We have not taken into account at all the fact, which is also an important one, that under the present arrangement we have just enough Judges, and no more, to transact the business of the Courts. If a Judge happens to be ill, or if his private business calls him away for ever so short a time, the effect is felt at once; for our staff is not more than sufficient. If two Judges a week have to be taken from the Court to attend the sittings at Ottawa and London, the result will be a weakening of the strength of the Courts, and, undoubtedly, delays in the administration of justice; and this will call for the appointment of more Judges, adding largely increased expense for the avowed and only purpose of relieving local practitioners from what is, after all, but a slight inconvenience.

Once the system is established that Ottawa and London are to have local sittings, the cry will come up from other points that they, too, must have local sittings; and if the principle is maintained, the necessary development will result in dividing the Province into districts, with resident Judges, bringing with it all the inconvenience and evils that the Province of Quebec is now trying to remedy.

If our remarks are considered rather strong with regard to local practitioners, we can only say that we regret the necessity of speaking strongly on the subject. The administration of justice cannot be too carefully guarded. If the public are not well served, reform is essential; but this is the only reasonable ground for making a change. To subordinate the convenience of hard working Judges to that

to benefit a child whose parent neglected his duty; bu such cases must necessarily be rare. The Act enables th Court to deal with the proceeds of the property, whic would include not only the growing income but th purchase money into which the property might be con verted. In the latter case, there would be implied th power to sell, which would be entirely contrary to th provisions of the settlement, and would enable the Court in fact, to destroy the settlement. If the meaning of th Act should, however, be limited in that respect, and th meaning of "proceeds" restricted to rents and profits, th whole result of the legislation would be that the Court i empowered to compel a parent, out of his income, to main tain and educate his child. That jurisdiction the Hig Court has never exercised, although frequent application are made for maintenance and education out of infants own property. It would, however, be a very extreme cas where infants' property could be resorted to, on the groun alone that the parent, able to maintain his own child refused to do it. If the basis of the settlement is to b maintained and the *corpus* of the property is to be pre served for the reversioner, or stranger appointee, then th result which we have referred to, is the only one to b attained. If the larger principle of utilizing the *corpu* itself for the infant is to be resorted to, the probability i that a settlor in future will, instead of limiting the propert in the usual way, adopt the form usually adopted for set tling property on spendthrifts, and will limit his propert to the tenant for life until some disposition unauthorize by the settlement is attempted, and then over to some on else. We should judge, however, that the Courts woul hesitate long before they would adopt the principle o taking property which in the end might pass to a strange or revert to the settlor, for the purpose of maintaining an educating the children of a tenant for life in whom the set tlor had so little confidence as to restrict his enjoyment o it to the term of his life.

In Chapter 23, the Division Court Act receives atten tion. The first noticeable amendment is that by which

the Judge is empowered to deliver judgment in a reserved case without fixing a day for it. The exciting cause of this amendment, which appears in the fourth section, was no doubt the case of *Re Forbes* v. *The Michigan Central Railway Co.*, 20 App. R. 584. In that case the parties by mutual consent were to put in authorities on the law of the case, and the learned Judge rose without naming a day on which he would give judgment pursuant to section 144 of the Act. Thus, the trial had not ended, for the argument had not been concluded. The learned Judge, subsequently to the reading of the authorities put in, handed to the clerk a judgment upon which the clerk entered judgment. Prohibition was granted on the sole ground that the Judge had not named a day for delivering his judgment. Thus the plaintiff was not only deprived of the legitimate fruits of his litigation, but was compelled to pay a large sum in costs for the oversight of the Judge. The only reasonable ground ever suggested for the provision is that the unsuccessful party might have time in which to move against the judgment for a new trial. But in this case the defendant's solicitor, on examination, admitted that he knew of no ground for a new trial and could not suggest one. The salutary amendment in question will prevent the recurrence of such an injustice, inasmuch as it permits the Judge to deliver judgment at his convenience, and requires the clerk to enter the judgment and give notice to the parties.

By the eighth section liberty is now given to issue an execution against lands in the Division Court, in cases where the amount unsatisfied on the judgment is at least $40. A writ against goods must first be returned *nulla bona*, and thereafter the clerk is to send a writ against lands to the sheriff, if required. We see no particular reason why the issue of a writ against lands should be delayed until after the return of a writ against goods, nor why the cases should be limited to those in which the amount of the debt is $40. If a plaintiff recovers judgment for $40, the debtor, by paying ten cents to the bailiff can free his lands altogether from liability for the debt,

and fearlessly make a fraudulent conveyance of them thereafter, as the creditor is not entitled to execution against them. If it is desirable to limit the right to execution against lands, still it is not desirable to postpone the right to execution when the limit is reached. No valid objection can be made to concurrent writs, one to go to the bailiff, the other to the sheriff. The creditor must withdraw his writ against the lands at his peril, on satisfaction of the writ against goods, as in other cases, and no injury would be done. For some reason, not easy to see at first glance, the price paid for the privilege of issuing execution against lands is the loss of the usual Division Court remedies. The lands writ is to have the same effect as if issued from the County Court; and the remedies on the judgment are to be the same "as if the judgment had been obtained in the County Court." This takes away from the creditor the usual proceedings by way of judgment summons in the Division Court, which are usually found to be more effective than in the higher Courts. It takes away also the right to get an order for payment by instalments which the Division Court may order. By a subsequent sub-section, however, there are some rights preserved, subject to a Judge's order. There can be no further use for a transcript to the County Court, and so the controversy as to the meaning of "proceeding" which arose in *Jones* v. *Paxton*, 19 App. R. 163, cannot again arise. But, this aside, no further proceedings in the Division Court shall be had after execution is issued against lands, except by order of a Judge of the Court, or if certain conditions exist to which we shall presently refer. Thus, if lands lie in one county and goods are found in another, the Judge must be applied to in order to enable the creditor to seize the goods if they are found after the lands writ has been issued. A judgment summons can issue only by the same leave, and so on. If, however, the party files an affidavit that the judgment is unsatisfied, and that the execution against lands has been returned unsatisfied, or that he believes the debtor has not sufficient lands in the county in which

the execution is lodged to satisfy the debt, the prohibition against further proceedings is removed.

A question may arise here as to whether a writ against lands issued under this Act will bind an equity of redemption. The writ is to have the same effect as if it had issued from the county court. This is a crude way of expressing intention. It may have exactly the same effect, but may be limited as to the subject matter to be seized or affected. The term "lands," without a special interpretation clause, would primarily mean such lands as were exigible at common law. It required special legislation to include within the scope of an execution, such interests as equitable estates, equities of redemption, contingent, executory and future interests, *et hoc genus omne*. A short clause making it certain that all such estates or interests as were exigible under a writ issued from other courts should also be exigible under a writ issued from the Division Court would have settled this doubt. As it is, the effect of a writ is to be the same, but query as to what interest it will affect.

After endeavouring to make oneself familiar with the provisions of these sections, it is a little startling to find in chapter twenty-six, section two, that the same subject is again dealt with, a little less in detail. Whether the legislature, in section five, was conscious of the prior amendments to the Division Courts Act, and intended to repeal the inconsistent provisions of chapter twenty-three, or whether it was a saving clause to prevent trouble which they could not foresee, we shall probably never know. But if that section refers to the prior Act, then the question immediately arises whether section three of the Act now in review is to supersede the provisions of chapter twenty-three as to the right to issue execution against lands. As we have pointed out already, under the prior Act, the right to a writ against lands arises only after the writ against goods has been returned *nulla bona*. Under the Act now in review, no condition precedent for the issue of such a writ is imposed. The bare right is given to a writ where the

judgment is recovered for the sum of forty dollars or upwards, irrespective of costs, and it apparently is not necessary to issue a writ against goods at all.

The next matter to note is that under the prior Act, such a writ may be issued where the judgment, or unsatisfied portion, amounts to forty dollars. Under the present Act, the right to issue such an execution exists only in the case of a judgment for forty dollars exclusive of costs. Here we have probably a key to the solution of the problem presented, inasmuch as where the judgment is for forty dollars, debt, the right exists without condition. Where the costs must be included to make up the forty dollars, the writ can only be issued (under the prior Act) after the writ against goods has been returned *nulla bona*. That such an intention was at the base of the two enactments, is most improbable—but that is the result. It is also probable that, under the latter Act, all Division Court remedies will still remain, as the Act does not take them away in the manner in which they are taken away by chapter twenty-three.

The Legislature, rather unnecessarily we think, in section four, provides that in proving title under a sheriff's conveyance, it shall be sufficient to prove the judgment recovered in the Division Court, without proof of prior proceedings. This, instead of enabling, is rather restrictive. We believe that the law is that a writ is *prima facie* evidence, without actual proof, of the judgment, and that the conveyance is *prima facie* evidence of the writ: *Doe d. Spafford* v. *Brown*, 3 O. S. 98; *Mitchell* v. *Greenwood*, 3 C. P. 465. Reference may also be made to *Freed* v. *Orr*, 6 App. R. 690.

Until this session, a Division Court had no jurisdiction over any person residing out of the Province. By the twelfth section of the Act in review, jurisdiction is given to these Courts over defendants though they may reside out of the Province. This may or may not be effectual as regards foreigners. The ordinary distinction always recognized, between a British subject resident out of the

jurisdiction and a foreigner, has been completely ignored. The jurisdiction attempted to be conferred is to be as full and effectual "as if the defendant resided in the Province." This is an assumption of sovereignty over the whole world such as would not be attempted by the Imperial Parliament itself. The summons is to be served, and not a notice of the summons, as in the High or County Courts, and one could hardly blame a foreigner for denying jurisdiction such as this Act attempts to assert. If an action were to be brought in a foreign court on a judgment recovered here, it might well refuse to concur in the validity of a proceeding based upon the assumption of the same jurisdiction over the foreigner as over a British subject.

A very useful provision is made in section 16, by which, where the Division Court is found not to have jurisdiction, the action may be received to the High Court "by writ of certiorari." Writs of certiorari were abolished in 1888, but it is so long ago that the Legislature may be excused for having forgotten it.

Chapter 25 provides that no increased witness fees to professional persons or experts shall be taxed, without a certificate of the trial Judge or other officer before whom the evidence was given, that the evidence given was of a professional character. Solicitors will henceforth be prepared with certificates for the signature of the Judge, at the time of the trial.

As to the remainder of Chapter 26, we may say that a radical change has been made in the law as to the issue and renewal of writs of execution. By the first section, which comes into operation at the beginning of next year, every writ of execution shall be issued against both lands and goods, the same form being adhered to, with an addition of a phrase for lands and tenements.

By section two, it is enacted that it shall not be necessary to renew any writ now in the sheriff's hands, or hereafter to be issued, from year to year; but all such writs shall remain in force for a period of three years or until

satisfied or withdrawn. This section has already occasioned a good deal of discussion in the profession. The section does not state the date from which the three years is to be computed. Grammatically, the three years should be computed from the date of the Act, as the Act is speaking and not the writ. But the probability is, and we hazard the opinion, that the intention was that the writ should remain in force for three years from its teste. Undoubtedly, writs issued after the Act will remain in force for three years from the teste, and no reason can be suggested for adopting a different rule for writs now in sheriffs' hands. No doubt, this enactment, although not so expressed, will extend to all writs against lands issued from the Division Court under enactments already referred to.

Passing over the Act respecting libel, which is a grotesque instance of class legislation, we come to Chapter thirty-four, the exciting cause of which was the case of *Pierce* v. *Can. Perm. L. & S. Co.*, 24 Ont. R. 426, recently decided by Mr. Justice Ferguson, and now before the Common Pleas Division. In that case, a building mortgage had been made, by the terms of which the money was to be advanced to the mortgagor from time to time as the building progressed. When a portion of the money had been advanced, the mortgagor made a second mortgage. And the learned Judge held that the second mortgage took priority over all moneys advanced by the first mortgagees subsequent to its making.

This decision is in accordance with the law of England as settled by *Rolt* v. *Hopkinson*, 9 H. L. C. 514, and *Menzies* v. *Lightfoot*, L. R. 11 Eq. 456, where it was laid down that a second mortgagee, giving notice to a first mortgagee, takes priority over all subsequent advances made by the first mortgagee.

The principle upon which the law is settled in England is purely equitable, the basis of the decisions being that the first mortgagee, at every advance, acquires a new interest in the property—that is to say, he imposes upon

the mortgagor a new obligation as to the money advances, and gives him a new right to redeem. The fact that the mortgagee is tenant in fee under his conveyance is ignored on account of the nature which the transaction assumes in equity. The basis of the Ontario decision is the same; but, instead of actual notice being given by the second mortgagee, the registration of his mortgage was held to be sufficient notice to the first mortgagee, on the ground that the first mortgagee, by his subsequent advances, was acquiring a new interest in the land, and was therefore bound by the registration of the second mortgage. With great respect for the learned Judge, we must say that the decision is open to criticism. The genius and spirit of our registration laws is to ignore equities. Priority is given, not to equitable rights, but to conveyances as such. And we should have been inclined to say, but for the decision, that the first mortgagee having acquired the whole fee simple in the land was in his priority secured by registration, and that no equitable rights which a subsequent mortgagee could have, could in any way interfere with his position.

The question is attempted to be set at rest by the Act in review, which was intended to remove doubts upon the question. Whether it has removed the doubt in question is, itself, open to doubt. The clause is too long to reproduce, but a careful perusal of it will show that the very point in issue has not been affected. The enactment declares that the first mortgage shall be deemed to be a security upon the lands to the extent of the moneys actually advanced, up to the face value of the mortgage. In the cases already cited, the moneys advanced were held to be a charge, and were necessarily so; but the priority of the different amounts was affected by registration of the second mortgage. What the legislature intended to do was to declare that all advances on the first mortgage should be a charge prior to the second mortgage; but they have, unfortunately, omitted to say that. They have contented themselves with saying that they shall be a charge. We

shall be very much astonished if we do not find that the law remains just as before.

Chapter thirty-five is an Act to save mortgagors a dollar or two in the registration of their mortgages. It provides that it shall not be necessary to "register in full" a mortgage when the mortgagee does not require it. But for some strong expressions in the Act as to what the Legislature considers to constitute registration, a serious question would have arisen as to whether registration would be effected at all by the entering of the mortgage in the abstract index. In *Lawrie* v. *Rathbun*, 38 U. C. R. at p. 261, the Queen's Bench were called upon to determine what constituted registration. It was pointed out that the duties of the Registrar were of a two-fold nature. First, he must register; secondly, he must give the evidence of registration. Registration consists in entering the instrument in the book provided and filing it with the affidavit of execution. These two requisites are paramount. The other duties are subordinate. If this decision is now law, it is clear that registration does not take place unless the Registrar enters the instrument in full. The Legislature, in the Act in review, proceeds upon the hypothesis that the registration is the entering, that is, the mere copying into the book, and that registration, technically speaking, by which the rights of parties are affected, takes place in some other way. When it speaks of "registration in full" it means "entering in full." But as entering in full is registration, which cannot be partial or anything else but registration, there is no meaning to be assigned to the term as used in this Act but that which may be inferred from its provisions alone. It is this to which we referred as a strong expression. The intent of the Act is to dispense with copying and save the expense. But still the Legislature intends that the mortgage shall be registered. We must, therefore, assume that for the purpose of this Act only, registration of a mortgage may take place without resorting to the otherwise essential element of transcribing the instrument. Capital is sensitive, and with the question presented we should prefer no

to risk a decision, and would recommend the registration of all mortgages as heretofore. In any event it will always be necessary to read the instrument in full, and nothing is saved to the next person dealing with the land. The writer has met with a case of a registered mortgage intended to be in fee, which conveyed only a life estate, and which had been passed by several solicitors who placed faith in the mortgagee's solicitors. This may occur again. Again, provisions may be inserted in the mortgage which may seriously affect the devolution of the estate; and it is absolutely essential in every case that even discharged mortgages should be perused thoroughly. Such legislation is short-sighted, and it only increases the work of searching titles. The whole title is expected to be found in the registry books, and the saving of a dollar from time to time is not a sufficient reason for weakening the beneficial effects which flow from our excellent system of registration.

The next clause provides for the registration of notices of sale under powers of sale in mortgages, and declares that "such registration shall have the same effect . . . . as in the case of any other registered instrument." We cannot see that there was any necessity for this enactment, nor that any good can come of it. The objects of registration are two, viz., to preserve priority, and to give notice to persons subsequently dealing with the land. No question of priority can arise as to a notice of sale; and as the notice itself must be served and the service proved before registration, the Act cannot have been intended to provide for notice to parties affected.

By the next clause of the Act, provision is made for registering a conveyance of land made before but not tendered for registration till after a plan had been registered. The Registry Act requires that no conveyance shall be registered after a plan of the land has been registered, unless the conveyance refers to the lots on the plan. The new provision permits this where any party to the conveyance has died prior to the registration of the conveyance, or when it would, in the opinion of the Registrar be

inconvenient or impossible to obtain a new instrument This must be proved by affidavit; but unfortunately th form of affidavit required does not require the deponent t state the facts upon which to enable the Registrar to form his opinion. It merely requires the deponent to state tha it would be inconvenient or impossible to obtain a new instrument; and we presume that the Registrar mus therefore base his opinion upon the credibility of th deponent. The lots are to be identified by the deponen and the Registrar is then to enter the instrument as th lots shown on the plan.

By chapter forty-one any married woman under twenty one years of age, who is of sound mind, may bar her dowe by joining with her husband in a conveyance to a purchase for value, or a mortgagee, in which a release of dower i contained. Why could not the clause have read "to a purchaser or mortgagee for value"? In the way it is put one might argue that she might bar her dower in a volun tary mortgage though not in a voluntary conveyanc absolute. The section proceeds that she may "in like manner" release her dower "to any person to whom such lands or hereditaments have been previously conveyed." What is meant by "in like manner"? Must the release be for value also? Or must it only be in form as previ ously required? And again, why not to any perso claiming under the person to whom the land was previously conveyed?

EDITORIAL REVIEW.

The Constitutional Aspect of the Railway Strike.

The task of the United States authorities in maintaining peace and order in consequence of the riots occasioned by the railway strike in the United States, discloses a curious phase of the constitution of that country. Each state, being a sovereign state, has the essential prerogative right of maintaining order within its own limits. The United States, exercising a delegated authority only, may not, of course, transgress the limits assigned to them by the various sovereignties. Hence, when the necessity arises for strenuous means to maintain order within one of these states, as a political entity, and the Executive of the State differs with that of the United States as to what means are necessary to maintain or restore order, the question immediately arises, What authority the United States has to interfere? The fiction, as we understand it, was resorted to that the mail service of the United States was interfered with, and as this is a subject matter within the legislative and executive jurisdiction of the United States, they immediately became seised of the right to interfere, not for the express purpose of restoring order, but for the purpose of removing the obstruction to the mail service occasioned by the rioting. This, and the interference with inter-state commerce, which is also subject to United States jurisdiction, were the only grounds upon which the interference

could be justified. If no subject of United States jurisdic tion had been affected, we presume that the United State would have been powerless on constitutional grounds t interfere. A cognate question arose in the case of th Mafia troubles in Louisiana. And the first diplomati reply of the United States to the Italian Government wa to the effect that the state authorities were sovereign, an had alone the right to deal with the question there involve although subsequently, we believe, they made a satisfactor explanation of the affair. As, in all public relations wit other countries, and as in the maintenance of the nationa dignity, the United States are looked to in order to maintai both unimpaired, it seems to us that these two instance disclose a serious defect in the constitution of the Unite States. When we speak of the interference as being base on a fiction of law, we take it that the end to be gained wa the restoration of order, though the re-establishing of th mail service was an integral, but secondary, factor.

That the interference of the United States was neces sary and beneficial no one will deny, but it established precedent which is in direct contravention of the principl upon which the constitution is based. In Canada, on th contrary, the Dominion Parliament has jurisdiction t make laws "for the peace, order and good government o Canada," and may interfere, when necessary to maintai order, on that ground alone. It seems, as *The America Law Review* recently stated, that the constitution of th United States is like a pyramid resting upon its apex.

The Law School.

It seems necessary to state that the appointment of Principal to succeed the late Mr. Reeve, Q.C., in the Law School at Osgoode Hall, has not been made. The impres sion seems to have got abroad that an appointment wa made almost immediately after the late Principal's death Not only did the press of Toronto fall into the error, bu

our contemporary the *Western Law Times* announces the appointment.

The Law Society has already found it necessary to contradict the rumour in a public manner, and we take occasion to repeat the contradiction.

The Society is still asking for applications for the position, and will be prepared to receive them up to the 8th September next, after which the appointment will be made.

Obituary.

It is a somewhat remarkble thing that the Lord Chief Justice of England, Sir Francis Johnston, Chief Justice of the Superior Court of Quebec, and Sir Matthew Begbie, Chief Justice of British Columbia, should all have died within a few days of each other, and all after long periods of public service.

Sir Matthew Begbie was one of the Judges of British Columbia appointed by Her Majesty when that Province was a Crown Colony, and took part in the celebrated case commonly known as the Thrasher case, in which the Court held (reversed by the Supreme Court of Canada) that the British Columbia Act respecting the administration of justice could not affect the Judges on account of the origin of their appointment. Mr. Justice Crease is the only survivor in that Province of those who were appointed by the Queen. The other Judges have all been appointed since confederation.

Lord Chief Justice Russell.

The appointment of Lord Russell of Killowen, to the position of Lord Chief Justice of England, was expected. His Lordship combines the qualifications of a great advocate with those of a great lawyer.

The Unity of Husband and Wife.

The *Albany Law Journal* has it that an Iowa Judge has just rendered decision, in which the above principle appear in a new light.

A man and his wife were charged with conspiracy and were discharged by the Judge, on the ground that it takes two persons to make a conspiracy, and husband and wife are only one.

Our contemporary suggests that Mr. W. S. Gilbert would find in this a good subject for another comic opera.

BOOK REVIEWS.

Real Property Statutes of Ontario: Being a selection of Acts of practical utility. By ALFRED TAYLOUR HUNTER, LL.B., of Osgoode Hall, Barrister-at-Law, Author of a "Treatise on Power of Sale under Mortgages of Realty." Toronto: Carswell & Co. 1894.

Since Mr. Leith's treatise on the real property statutes we have had no work upon the subject, although one was sadly needed. The original intention of Mr. Leith was to continue his treatise in separate volumes as new statutes appeared for commentary. But he never carried his whole scheme into operation, with the result that we have had but one volume upon the subject. That volume, however, contained the principal real property statutes. The great advance made in legislation and interpretation has, however, left Mr. Leith's book somewhat in the rear, and we are greatly indebted to Mr. Hunter for the very able and complete work which he has placed before us. The statutes dealt with are the Act respecting the Law and Transfer of Property, the Mortgage Act, the Partition Act, the Short Form Statutes, the Devolution of Estates Act, the Limitations Act, the Vendor and Purchaser Act, the Custody of Title Deeds Act and the Registry Act.

It is impossible at a hasty glance over this work, which contains over six hundred pages of text, to indicate its

exact value; but, from the manner in which Mr. Hunte has treated the first statute mentioned, we have great con fidence in his ability to deal with the remainder of th subjects. The work displays unusual industry and abilit which we feel justified in saying was expected of him o account of his former work.

While we miss a good many cases which might hav found a place in the notes, and are disappointed at no finding a commentary upon some portions of the statute The loss is perhaps compensated for by the discovery some fresh ideas and decisions, which the writer had no before seen.

The whole treatise is a most valuable one, and we can not recommend it too highly to those who have anythin to do with real property law.

THE

CANADIAN LAW TIMES.

SEPTEMBER, 1894.

HOW ELECTRIC STREET RAILWAYS VIOLATE THE LAW.

THE quiet and the usefulness of many of the residential streets in Toronto, as localities for the restful homes of busy and tired business and professional men and their households, has been very materially invaded by the noisy forceful rush, the jerky and bumping rattle, uniting occasionally in a vibration of the adjoining premises like the quivering of an earthquake,—the weird whirr, the metallic moaning in *crescendo* and *diminuendo*, and the sharp stinging clang of the bell of the electric street railway motors. These intermittent noises during the day are said to disturb the ordinary physical comfort of the households along the line of railway. But when during "the silent watches of the night," rest and refreshment, so essential to human health, are sought in "tired nature's sweet restorer, balmy sleep," the forceful rush, metallic noise and loud rumble of the electric motor subject human endurance to a trying test (*a*), so that many of the disturbed sleepers would prefer the more natural and rythmic cadence of the sound of horses's feet as described in the words-simile of Virgil: "*Quadrupedante putrem sonitu quatit ungula campum.*"

(*a*) Noises arising from working operations carried on during the night to the discomfort of occupiers of adjoining houses, are a nuisance: *Webb* v. *Barker*, W. N. 1881, p. 158. See further as to noises at night, *State* v. *Haines*, 30 Me. 65, and *Bishop* v. *Banks*, 33 Conn. 118.

The streets of a civic municipality are public highway and their ordinary and legitimate use is for the trav thereon of foot passengers, horses and carriages, using th same for business or pleasure. And the history of railwa legislation indicates that any invasion or derogation of th public and common right to the user of the highway h been grudgingly conceded and efficiently safeguarded b the legislature. But it is alleged that, without any appa ent legal right to run their carriages at a higher rate speed than is allowed to ordinary persons or other priva companies, or is lawful or appropriate for vehicular trav on a highway, the private company operating the street rai way exceed their legal right of user of the civic highways b running their electric motors and trailers at varying rat of speed up to twenty-five miles an hour (*b*). If the moti power were horses, such a racing speed would bring th company within the punitive rule which forbids "furio driving" on the streets and highways (*c*). And as incide to this "furious" rate of speed, it is said that the inte mittent noise and rattle of the motor machinery, and th sharp clang of the alarum bells,—which are sometimes mad to play the "devil's tattoo" on some streets,—cause marked depreciation of the value of property, and such material disturbance and annoyance to the dwellers on th line of railway, as interferes with the ordinary, comfortab and restful enjoyment of their homes and properties.

Nuisances arise from a violation or infringement of th common law rights of an individual or a community in th enjoyment of the ordinary physical comforts of huma existence. They are defined to be invasions of another rights by acts or agencies offensive to the senses; annoyances or disturbances which unduly interfere wit the ordinary enjoyment and comfort of life. The nuisanc may be either public, or private, or both. (1) Publ nuisances operate as infringements on the general an

(*b*) See *Ewing* v. *Toronto Railway Co.*, 24 Ont. 694.

(*c*) A right of highway cannot in common sense, or law, include right to race thereon: *Sowerby* v. *Wadsworth*, 3 F. & F. 734.

public and common law rights of a community as acts or omissions which interfere with and unduly diminish the full and appropriate exercise of certain particular rights by the public. (2) Private nuisances are acts or omissions which cause physical annoyance or inconvenience, to an individual, and essentially interfere with the comfortable enjoyment of his property, in breach of the maxim *sic utere tuo ut alienum non lædas*. (3) Mixed nuisances are those which injuriously affect both the public and individuals as indicated above.

But overlaying these general definitions of common law rights, there must be given full play to another and more general rule which requires each member of a community to surrender for the public interest a portion of his private rights for the benefit of, and in recognition of his subordination to, the higher and more enlarged rights which are based on public policy, and are essential to the peace, order, and good government of the whole community.

We have in a former article in this journal, discussed the question of "excessive speed as an element in cases of negligence or reasonable care" (*d*). And we showed that the legislative restriction on the speed of a locomotive or railway engine in the thickly peopled portion of a city, town or village was limited to six miles an hour, unless the track was properly fenced (*e*). And the legislature has further safe guarded the public, and imposed on railway companies, as appurtenant to their franchise, the duty of maintaining fences, with openings, gates or bars, cattle guards at crossings, overhead bridges with fences, and signboards with the words "railway crossing" at every level crossing of the highway. The object of the legislature in making specific and stringent rules in respect of steam engines and railways is to prevent them being dangerous to passengers,

(*d*) *Unlimited Speed on Street Railways*, Vol. 13, p. 255.

(*e*) The English Railway Act provides that a railway company shall not exercise their powers respecting a highway in such a manner as to make it dangerous, or extraordinarily inconvenient for passengers or carriages using such highway.

horses or cattle (*f*). For whatever within the limits of t highway are likely or calculated to frighten horses, o endanger passengers, may be a nuisance. They are define to be such as make the danger obvious, and the duty of th municipality to control the user is perfectly clear, and ma be determined upon a consideration of the character of th nuisance, the amount of travel on the highway, and al other circumstances (*g*).

Though a railroad, where its construction on the street of a city or town is sanctioned by legislative and municipa authority, is not a nuisance *per se*, when it is operate reasonably, and in a careful and proper manner, yet it track may be operated in such a manner as to cause direct injury or annoyance, from a want of consideration an care in operating it according to proper regulations an restrictions. And where the rights of the owners of abuttin property were unreasonably affected or abridged by a rail road company whose track ran through a city street, it wa held liable to the owners of the adjoining properties for th discomfort and other injurious effects caused by thei manner of running their trains (*h*). And a license fro the state authority or civic corporation is no justificatio for that which comes within the definition of a nuis ance (*i*).

Thus the landing of emigrants at the North Battery i a thickly settled part of New York, although under a agreement between the State authorities on Immigratio and the city council, where it appeared that such landin of emigrants would seriously impair the comfort of th inhabitants of that locality, was held to be a nuisance, an an injunction was granted to prevent such use (*j*).

The amount of inconvenience or annoyance caused t the public or a party, which will constitute a nuisance i

(*f*) *Smith* v. *Stokes*, 4 B. & S. 84.

(*g*) *Ayer* v. *City of Norwich*, 39 Conn. 376.

(*h*) *Louisville* v. *N. R. Co.*, 15 S. W. Rep. 8 (1891).

(*i*) *Ntchols* v. *Pixley*, 1 Root (Conn.) 129.

(*j*) *Brower* v. *Mayor of New York*, 3 Barb. 254.

a question of degree dependent on varying circumstances, and cannot therefore be precisely defined. A few references will, however, illustrate the limit where a lawful franchise or business carried on in an unreasonable manner, or so as to become an annoyance to the occupier of adjoining property, comes within the definition of a legal nuisance which equity will interfere to restrain by injunction.

The running of railroad cars and engines, ringing bells, and letting off steam in the neighbourhood of a church or meeting house, were held to be annoyances to the members of the congregation worshipping there; and furthermore operated to depreciate the value of their property, and therefore a nuisance (*k*).

So where the rights of a private owner of property were in like manner injuriously affected by a railroad company, the Court maintained the owner's right as paramount to the excessive use of the railroad franchise. In giving judgment, Baldwin, J., remarked: "The plaintiff's damages are not pecuniary. The objects he had in view in having his home where he fixed it were not profit, but repose, seclusion, and a resting place and home for himself and his family. If these objects are in effect defeated, or if lawless danger impends over them by persons acting under the colour of law, and that law is exceeded, or not considerately pursued, a Court of Equity will enjoin the parties committing the wrong, and prevent an excess or abuse of the powers granted to them by the legislature" (*l*).

It will be seen from the above that to make out a case of special injury to a person's property, something injuriously affecting the ordinary and comfortable use and enjoyment of it for the purposes to which it is appropriated, must be shown. And it may also be shown as a material element in damages that the user of the highway by the railroad has reduced the value of the abutting properties. Thus where it was shown that properties in adjacent streets, not affected

(*k*) *First Baptist Church* v. *Schenectady R. Co.*, 5 Barb. 79.

(*l*) *Bonaparte* v. *Camden & A. R. Co.*, 1 Bald. Cir. R. 231.

by the railroad, had increased in value since its construction, while the plaintiff's property had but only slightly increased in value, it was held there was evidence that injury to the plaintiff's property preponderated over the public benefits derived from the railroad (*m*).

And the balance of convenience or benefit to the public as between an individual and the public, cannot affect the question whether the injurious act complained of which effected a benefit to the public, is or is not a nuisance; for it is too remote a benefit to the public to say that the encouragement of a trade of a single individual, or company, which is useful to the public is therefore one which should not be restrained in the public interest; but such a consideration will influence the Court with regard to the form in which it will restrain the act complained of (*n*). And it makes no difference where the operations, which created the alleged nuisance, were not carried on for profit, but in the interest of a large section of the public (*o*); nor where a jury finds that the inconvenience arising from the nuisance was counter-balanced by the public benefit arising from the defendant's acts (*p*).

"What difference can it make as to the commission of an illegal act, whether a man acts on behalf of or benefits thousands, or acts on behalf of himself only? The act being illegal the party injured has a right to be protected" (*q*). The maxim recognized as applicable to these common law rights of the individual or community against the public convenience appears to be, *Quæ legi communi derogant stricte interpretantur.*

Any business or user of lawful rights, therefore, which causes annoyance and discomfort to those residing in the

(*m*) *Bernheimer* v. *Manhattan R. Co*, 13 N. Y. St. 913; 26 Abb. N.C. 88.

(*n*) *Attorney-General* v. *Terry*, L. R. 9 Ch. 423, disapproving of *Rex* v. *Russell*, 6 B. & C. 566; *Works* v. *Junction R. Co.*, 5 McLean, U.S., 425; *Cline* v. *Cornwall*, 21 Gr. 129.

(*o*) *Attorney-General* v. *Birmingham*, 4 K. & J. 528; *Attorney-General* v. *Colney Hatch Asylum*, L. R. 4 Ch. 146.

(*p*) *Rex* v. *Ward*, 4 Ad. & E. 384.

(*q*) *Per* Wood, V.C., in *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 47.

neighbourhood of it, and which materially interferes with the ordinary physical comfort of human existence, or which tends to decrease the value of their property, may be adjudged a nuisance. The discomfort complained of must not be such as affects the mere delicacy or fastidiousness or so-called elegant or dainty modes and habits of certain members of a community. It must be a physical annoyance which abridges and diminishes, seriously and materially, the ordinary comforts and enjoyments of physical existence to the occupiers and inmates of the houses affected—whatever may be their rank and station, or age, or state of health (*r*).

The frequent ringing of a peal of bells in early morning and through the day, for the purposes of the devotional services of a religious community close to the adjoining premises of the plaintiff, was held to be a violation of the law respecting nuisances. And an injunction was granted restraining the defendants from ringing the bells so as to occasion any nuisance, disturbance, or annoyance to the plaintiff and his family residing in his dwelling house (*s*).

The statutory rule regulating the speed of travel on public highways prescribes that "no person shall race with or drive *furiously* any horse or other animal, or *shout* (*t*) . . . upon any highway" (*u*). And municipalities are empowered to pass by-laws for regulating the driving of horses and other cattle on highways and public bridges, and *for preventing racing, immoderate or dangerous driving or riding thereon* (*v*): a power which, taken in connection with their other statutory powers, clearly authorizes the municipalities to prevent the "furious driving" or excessive and dangerous velocity of street railway electric cars.

(*r*) *Walter* v. *Selfe*, 4 DeG. & Sm. 322; *Crump* v. *Lambert*, L. R. 3 Eq. 409.

(*s*) *Soltau* v. *DeHeld*, 2 Sim. N. S. 133.

(*t*) Municipalities are empowered to pass by-laws for *regulating* . . . shouting and other unusual noises, or noises calculated to disturb the inhabitants: 55 V. cap. 42, sec. 489, sub-sec. 46.

(*u*) R. S. O. cap. 195, sec. 5.

(*v*) 55 V. cap. 42, sec. 479, sub-sec. 14.

The English Act as to furious driving provides that "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same *furiously* so as to endanger the life or limb of any passenger," he shall be liable to a fine (*w*).

There is no definition of the term "furious driving" in either the English or Ontario Acts. It must always be a question of degree in respect of the locality and its legitimate uses. But the object of both Acts is the same, viz., to prevent such immoderate speed in driving carriages or riding horses as might endanger the lives or limbs of ordinary passengers on the highway or street.

Under the English Act a person was indicted for riding a bicycle at a "furious" pace on a highway. It was contended that the clause of the Act cited applied only to carriages drawn by horses or animals. Mellor, J., in giving judgment said: "It may be that bicycles were unknown at the time when the Act was passed; but the legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to the life or limb of any passenger. . . The furious driving of a bicycle is clearly within the mischief of the section, and seems to me to be within the meaning of the words, giving them a reasonable construction." Lush, J., added: "It is quite immaterial what the motive power may be. It is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous" (*x*)."

The Railway Acts of the Dominion and Province restrict the speed of locomotives and railway engines through the thickly peopled portions of cities, towns and villages to "six miles an hour" (*y*). Traction engines for the conveyance of passengers and freight are limited in cities, towns and villages to three miles an hour, and elsewhere to six miles

(*w*) 5 & 6 Wm. 4, cap. 50, sec. 78 (Imp.).

(*x*) *Taylor* v. *Goodwin*, 4 Q. B. D. 228; 48 L. J. M. C. 104.

(*y*) R. S. C. cap. 38, sec. 28; cap. 109, sec. 51; R. S. O. cap. 170, sec. 100.

an hour (*s*). The English Locomotive Act restricts the speed of a locomotive "propelled by steam or other than animal power," on a public highway and through a town to two miles an hour (*a*). And the Tramway (Ireland) Act restricts the speed of a locomotive on a tramway in a city, town or village to six miles an hour (*b*).

It is said there is no express rule specially regulating the speed of electric motors on our highways or streets, unless it can be considered as governed by the statutory rule regulating the speed of locomotives. But if the judicial mind follows the lead of the English Courts, an analogy may be found in the legislative rules governing the speed of locomotives on railways which may be applicable to the speed of the electric motors on the streets of the thickly peopled portions of our cities and towns.

A case suggestive of such an analogy occurred in England in 1881. The appellant was charged with running a a motor tricycle at a higher rate of speed than that authorized by the Locomotives Act (*supra*). It was capable of being propelled by steam, or by the feet of the rider, or by both, and could be driven at a speed of nearly ten miles an hour. There was no noise, or escape of steam, and apparently nothing which could frighten horses, or cause danger to passengers, beyond the rate of speed. It was held to be a "locomotive" within the meaning of the Act of 1865.

Lord Coleridge, C.J., said: "It is probable that the statutes were not pointed against the specific form of locomotive described in this case. Indeed such a locomotive was not known when they were passed, and possibly not contemplated. As, however, it seems to come within the very words of the statute, we cannot, upon any true ground of construction, exclude it from their operation. It appears that the principle of the invention is capable of extension to larger carriages, and would shew that a locomotive similar in construction and principle to that which is the subject

(*s*) R. S. O. cap. 200, sec. 8.

(*a*) 28 & 29 V. cap. 83, sec. 4 (Imp.).

(*b*) 44 & 45 V. cap. 17, sec. 5 (Imp.).

matter of this case might by reason of its size and power become much more dangerous" (*c*).

Thus, in cases where the specific machines had not been invented or known when the Acts were passed, the Courts found means to apply the leading principle of the protective legislation which was to safeguard the public in their user of the streets and highways; and to prevent the furious driving or excessive speed of vehicles or carriages, driven by mechanical power, other than animal power, which would endanger or imperil the safety of the life or limb of any passenger having the common law right of user of the street or highway; for, as stated by Lush, J. (*supra*), it is immaterial what the motive power may be; any kind of vehicle which might be propelled at such a speed as to be dangerous comes within the prohibition of the law (*d*). And it may be conceded as immaterial whether the mechanical motive power producing the speed is steam or electricity.

The Street Railway Act (*e*) empowers a municipal council to pass by-laws regulating the traffic on street railways, and for "providing for the *safety* and convenience of passengers"; and the Toronto Railway Act provides that the speed on the street railway shall be "determined by the City Engineer and approved by the City Council" (*f*). These municipal powers, as well as those "for preventing immoderate or dangerous driving or riding," lie dormant; and a general law may yet be necessary to settle the question.

The high rate of speed of these electric street railways must be a great source of profit to the company operating

(*c*) *Parkyns* v. *Prest*, 7 Q. B. D. 313.

(*d*) A further illustration of this judicial policy is given in *Williams* v. *Evans*, 1 Ex. D. 277, where a "rider of a horse" was held to be a "driver." The object of the Act was to protect persons lawfully using a highway, and one way in which a person passing along a road may be injured, is by another person riding furiously upon horse-back. The legislature does not forbid furious driving in express terms: *per* Field, J.

(*e*) R. S. O. cap. 171, sec. 12, sub-sec. 6.

(*f*) 55 V. cap. 99, condition 26.

them. It enables it to economize the number of cars used on each route; for one car can make two journeys over its special route in the time used by a slower speed, and thereby earn for its company the profits of the double journey. But the occasional destruction of the life, or mutilation of the limb, of a citizen, or smash of a vehicle, by the "furious driving" of a motor car should warn the company that such casualties deplete profits so earned; and should also warn the civic authorities to be more alive to their duty and responsibility by providing for the safety of their citizens, and by mitigating the irritating disturbance caused by the excessive velocity and noise of the electric cars—especially during the night-time.

The legislative policy in this Province, as to locomotives and traction engines, and in England as to tramways, has been to restrict the rate of speed at which locomotives or machines propelled by steam, or by any other than animal power, shall pass through a thickly peopled portion of a city, town or village, to six miles an hour. Whether this restriction applies to the Electric Street Railways, either by operation of statutory law or legal analogy, may be determined on a special case between a municipality and a street railway company (*g*).

The illustrations given in this article will assist those interested in the question, in considering whether the excessive and disturbing noises of electric street railways violate the law as to nuisance, whether the electric motor on such railways comes within the definition of "locomotive," and whether its high rate of speed comes within the definition of "furious driving," and so violates the legislative policy in safeguarding human life and the general public in their legitimate user of the streets and highways, in the thickly peopled portions of our cities, towns and villages.

JURISPERITUS.

(*g*) See as to the Toronto Railway, 55 V. cap. 99, sec. 18, and R. S. O. cap. 170, secs. 4 and 100.

Mr. Bishop in his work on Criminal Procedure agrees with this construction of ancient common law and suggests that an indictment lies in the county where the wound is given (*h*).

Guiteau, it will be remembered, was prosecuted under a statute of the United States providing for the punishment of any one who commits the crime of murder within the exclusive jurisdiction of the U. S. (*i*). The provision especially referred to, is that "any one who commits murder within any fort, arsenal, magazine, dock-yard, or any other place or district, or country under the exclusive jurisdiction of the U. S. . . . shall suffer death." It was contended in this case (*j*) that to constitute sufficient of the crime upon which to base an indictment, the blow or cause of death and the death of the victim must both occur within the district or the state as the case might be. But, the Court upon review of this point both upon common law grounds and the statute as interpreted in the light of practice in the United States, held that the offence was complete within the meaning and spirit of the law when the felonious act took place that resulted in the death of the victim. Thus affirming the doctrine advanced by Lord Hale and upheld in the case of *Rex* v. *Burdett*, by Chief Justice Abbott (*k*).

The Court in this Guiteau case then concluded that it was well established by the common law where a felonious blow was struck in one county and death ensued in another the crime of murder was complete where the blow was struck. And, finally excluding the common law notions, "We find that the Statute regards murder as an act committed by the offender, an act committed in the place designated. Read in this light, the plain and sensible meaning of the words includes all acts committed there which are found, within the year and day limited by the

(*h*) 1 Bishop Crim. Proc. sec. 51.

(*i*) Sec. 5339 Rev. St. U.S.

(*j*) 1 Mackey, 498; S. C., Am. Rpts. 247.

(*k*) See 1 Hale P. C. 426; 4 B. & Ald. 169.

law of murder, to have combined all the facts which constitute murder. We find nothing in the Statute, as we find nothing in the common law, which indicates that an act is not murder in a particular place, because the consequence of that act happened in some other place. If the act of the offender achieves murder, then that act is murder; and if that act is done in the place designated, then in contemplation of this Statute the offender commits there the crime of murder."

In *Riley* v. *State* (*l*), the Tennessee Supreme Court said in a case where the cause of death occurred in one county and death ensued, as a consequence, in another, under a special statutory provision providing that trial should be had "in the county where the offence may have been committed," that this was in effect a nullification of the force of the Statute of 3 & 4 Edw. VI. that the blow which resulted in death was the offence and the death a mere consequence.

As to the exact limits of the "county" or "vicinage," Blackstone merely remarks that "visne" the district from which jurors were drawn at common law meant "county." Bouvier says "vicinage," "neighbourhood, vicinity." Anderson in his admirable work uses the terms "neighbourhood, county." The French "voisinage" and Latin "vicinus," meaning "near," show the origin of the word.

In speaking of this matter of the jury and within what limits they should be drawn, Coke Litt. 3, 464, has it "of that town, parish or hamlet, or place known out of the town, parish or hamlet, within the record, within which the matter of fact issuable is alleged, which is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact."

Chitty says (*m*) the jury at common law must come "from the very ville or place where the offence was committed."

(*l*) 9 Hump. 646.

(*m*) 1 Crim. Law, 500.

Under the ancient common law murders were tried just as near the place where they occurred as possible, and by jurors selected from the closest neighbours and those having the acutest knowledge of the facts of the crime for the *super visum corporis*.

The Statutes fixing the matter of calling jurors in criminal cases seem to have been subjected to no material change as regards felonies until the passage of the Statute 6 Geo. IV. cap. 50, sec. 13.

Much of this old English law and practice was adopted by the American Colonies, and upon the adoption of the Federal Constitution and the erection of the territory into States, much of the old criminal jurisprudence of the mother country was adopted *in toto*, either through the constitutional function or by legislative enactment in the different States. The Federal Constitution left with the several States the trial and punishment of its criminals (*n*), and by further provision provided for "a speedy and public trial" by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law" (*o*).

It may readily be seen then that the question of the limit to this district within the State from which the jury is to be drawn, may depend largely upon the force of the old common law in the particular State to which reference is had, and the passage by the legislature thereof of certain laws regulating and prescribing these limits. But with this question we have not so much to do. It was intended that what has been said so far in this paper should be as an introductory to the discussion of the question as to the jurisdiction between States where the *corpus delicti* may be said to be incomplete in either. That is the agency that produces the fatal result, and the resultant effect, as death, occur within the limits of separate States. And it is intended as heretofore indicated to confine the discussion to the crime of murder.

(*n*) Art. 3, sec 2.

(*o*) Art. 6, Fed. Con.

The questions raised by an argument of the law involved are of vast importance. At the same time, the disposition of the matter in this event rests largely upon the interpretation and application of State laws. The constitutionality of statutes giving sovereign authority in the matter of homicide where the cause of death occurs in one State and death results in consequence in another, has been often upheld. Indeed it might be regarded as very necessary that this should prevail in all States of the Union in order to render the failure of justice impossible.

Let us now proceed to the discussion of the main question.

In the first place, constitutional authority is delegated to all States to try and punish all crimes committed against the peace and dignity of its citizens. Thus, each State is given absolute criminal jurisdiction of homicide committed within its border.

There could arise no difficulty in the disposition of this class of criminals where the *corpus delicti* was complete within the confines of any State. But with the element of criminal agency located in one sovereign jurisdiction and the fatal effect in another, the grave character of the inquiry is at once apparent.

It would be absurd to claim that the criminal authority of a State extended beyond its limits. It is axiomatic that it does not. We have the law of inter-state rendition, which supplies what is lacking in the criminal authority of the State to reach criminals who flee beyond its jurisdiction. Were it not for this law the worst crime might go unpunished, for the reason that no authority was given the police power to follow and lay hands upon the one who had committed the crime beyond its territorial limit. Just as the absence of an international extradition law with any other nation would prevent the punishment of a crime committed in any of the territory of this country by one who had fled beyond its borders and taken refuge in that particular nation. But the science of the law has provided all means necessary to the just administration thereof.

This doctrine, however, does not apply to cases where a crime is perpetrated partly in one and partly in another country, provided the thing which is done towards the crime is a substantial act of wrong. The American States, in the administration of the criminal law, as we have before observed, are entirely distinct and separate as among themselves.

In case of the fatal cause being applied within the jurisdiction of one State and the necessarily fatal termination or result of the injury inflicted occurring within the jurisdiction of another State, there are two lines of argument which may be followed in arriving at a correct conclusion of the question of jurisdiction. The one line is that that the infliction of the injury is the beginning of the *corpus delicti*, or criminal transaction. The wound is the result of first infliction, and only operates towards the consummation of the crime. That the agency which set this state of things in motion, or which produced the disease to the system which resulted in death, was an ever present and abiding cause and outrage which only ended with the life of the victim (*p*).

The other line of argument is that the responsibility as an agency in the commission of the crime begins and ends with the infliction of the injury. The disease and death resulting are mere consequences of the injury, the acts of the victim who, dying within the jurisdiction of a State, other than the one where the cause of death was first inflicted, relieves the criminal of responsibility except to the proper authority within the jurisdiction where the injury was first inflicted (*q*).

(*p*) See *Com.* v. *Macloor*, 101 Mass. 1; *Tyler* v. *People*, 8 Mich. 320.

(*q*) Bishop, New Crim. Law, vol. 1, sec. 116. See also Bishop, Crim. Proc. 1, sec. 51; *State* v. *Carter*, 27 N. J. Law 500; *Ex parte McNealy*, App. Ct. W. Vir. decided February 6, 1892. In the last case above, Brannon, J., giving the opinion, says: "I regard the crime as committed where the mortal wound is inflicted."

And further, referring to a provision of the Statute or Code of the State, cap. 144. sec. 6, that if a person stricken without the State die within it, the offender shall be prosecuted and punished as if the mortal blow had been given in the county where the death occurs, Mr. Justice Brannon says: "I must for myself say that I have not been able to relieve

The Michigan case of *People* v. *Tyler*, before referred to, is undoubtedly the leading case in opposition to the theory that the crime is complete with the infliction of the fatal wound which results in death.

The prosecution in this case was had under a statutory provision.

"If any mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered, on the high seas, or on any other navigable waters or on land, either within or without the limits of the State, by means whereof death shall ensue in any county thereof, such offence may be prosecuted and punished in the county where such death may happen" (*s*).

Mr. Justice Manning giving the opinion says, "The shooting itself and the wound which was its immediate consequence, did not constitute the offence of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder;

myself from serious doubt as to the validity of the second clause of section six, chapter 144, Code, subjecting to punishment here a person striking a blow outside this State when the consequent death occurs within this State."

And also: "Under this statute, a man dealing a blow in California or Australia, if the stricken person comes here and dies, may be tried here, far away from the scene of the tragedy, where his character is known; far away from friends to aid in his defence, far away from the witnesses of the act, with no power in the State to compel the attendance of those witnesses. The law of California or Australia may punish the act under the same facts in a certain way; ours with more severity. Does the prisoner know of our law when he strikes the blow? Is he bound to know of our law? He is not, neither in fact does he know, nor in theory is he bound to know, our law when he delivers the blow. He cannot tell into which one of the many countries of earth the victim may wander within the year and day before death, and he cannot study the laws of all the States." The Court, in this West Virginia case, although reasoning strongly against the logic of its conclusion, held the act of the legislature as valid and denied the writ.

Bishop on Crim. Law above cited, holds that "if a material part of any crime is committed upon our soil, though it is the lighter part, legislation with us may properly provide for the punishment of it here, at least where no jurisdiction abroad has in fact been taken. But to punish a foreign murderer because his victim came among us to die, is to usurp the functions of the foreign government."

That, in fact, to render our interference pertinent or just, something should occur within our jurisdiction as a menace to the peace and dignity of our people. For a man to die among us under such circumstances as above recited, is not a menace to or disturbance of our peace.

(*s*) Howell Ann. St. sec. 9420.

and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones (the name of deceased) into Michigan where they continued to operate until the crime was consummated in his death."

According to the indictment the respondent was held for the crime of murder alleged to have been committed on board the brig Concord while on the river St. Clair without the limit of the State boundary but within the limit of Canadian territory. The wounded man was brought into Michigan, and after languishing a few days died. Respondent was indicted and tried in St. Clair County, Michigan, in pursuance of the provision of the Statute before referred to. In the absence of this statutory authority the Court concedes its lack of jurisdiction.

Although this case does not fairly present the question of jurisdiction intended to be covered in this discussion—the inter-state relation—still the principle is much the same, subject to the difference which treaty relations may make. The case is a celebrated one, and came before the Michigan Court at a time when the ability of the Court had come to be recognized all over the land. In the former review of the same case found in another report (*t*), the question before the Court was mainly as to whether or not the United States Circuit Court was not the proper tribunal for this case. The Court held not, and reviewed at length existing treaty regulations and U. S. statutory provisions relating to the admiralty jurisdiction of the Courts of the U. S. within certain inland waters, lakes, rivers and bays. All of the members of the Court wrote opinions, the one simply enlarging upon, or amplifying some point which in the mind of the writer was of more importance than some other.

It was still an unsettled question before the Michigan Court as to the jurisdiction of the local court of that State under the special statutory provision before referred

(*t*) 7 Mich. 161.

to. The case soon came before the same Court for a final determination of this perplexing question (*u*).

The majority of the Court, as we have already seen, held the Act, under which prosecution was had, constitutional and affirmed the verdict. But Mr. Justice Campbell, by far the ablest of Justices then constituting the Court, at least in the abstract principles of the common law, dissented in an able opinion, and, the assertion is here ventured, that the case of *Tyler* v. *People* is better known at this date by reason of the dissenting opinion of Justice Campbell than for the main opinion of his brethren.

His reasoning in the case is based upon the science of the law and is similar to that of Bishop. He says, "The offence mentioned is the blow or wound followed by death, and not the death, or languishing and death, alone. And we can not very well conceive of a murder at common law, or at all, which does not include the active agency of some one in the infliction of that injury which is the cause of death."

The doctrine of constructive presence, he shows further in his opinion, should have no applicability here. To claim that where a crime is committed, or, we will say a gun shot wound given to a person in Georgia who is afterwards brought into Michigan, possibly for the purposes of benefiting the health or aiding in the recovery of such person, and this person die within the year and day of such wound, that the person inflicting such wound in Georgia has legally and technically been present through all the suffering and languishment consummating the crime begun hundreds of miles away, is a legal fiction and absurdity. The intent, as we know, is an essential ingredient of the crime of murder. When was the intent of the prisoner made manifest? Assuredly at the time the wound was given. But did the criminal intent end there? It did certainly unless the prisoner followed his victim into Michigan intending to inflict another wound in case the one given did not prove fatal.

u) 8 Mich. 320, *supra*.

Again, what act was done in Michigan by Tyler that violated its laws in any way or disturbed its peace and dignity? Nothing. Suppose for instance the mortal blow was given in a State where the highest penalty for crime was imprisonment for life, and the victim wandered into a State and died and the crime of murder was there punished by death? What then? Would advocates of this theory counsel giving effect to the laws of the latter and take the life of a person who had never raised his hand against those laws except as indicated by the technical interpretation of a stupid statute?

In this case, Justice Campbell, in summing up, says: "We have no legitimate concern with the actions of men in Canada not breaking our peace or assailing our sovereignty. It is not pretended by any one that when Tyler shot Jones he was at the time in any sense offending against the laws of Michigan. Had Jones died on the spot this State could not have interfered with Tyler for it. And so long as Jones remained abroad, Tyler was confessedly no infringer of our laws. Tyler committed no act of violence within our borders. For aught that we know, he may have been occupied in yielding aid instead of injury. What then can render him a criminal against this State? When and how did he disturb our peace and good order? Jones was not brought here in the prosecution of any murderous design. So far as Tyler is concerned, he might have been carried to Canada as well. Had Jones lived for a few months, although afterwards dying of his wounds, he might have traversed half of the States of the Union, and Tyler could have had no voice in controlling his motions. He might go where murder is punished by death, or he might come here where it is merely a State prison offence; and yet Tyler would be responsible, if this prosecution can be maintained, to any state or country against which the voluntary choice of Jones might make him a constructive offender" (*u*).

(*u*) See, in support of Justice Campbell, *State* v. *Carter*, 27 N. J. Law, 499; *People* v. *Gill*, 6 Cal. 637.

This theory is at variance with the science of the criminal law. It is not possible to offend the dignity or disturb the peace of the people of one State by an act committed in another. It seems strange that such a theory should have been upheld by the courts of Massachusetts and Michigan.

These States, with perhaps others, assert the constitutionality of these statutory provisions.

In the case of *Green* v. *State* (*v*), the Court held a Statute authorizing a prosecution for murder to be had in the country where the fatal blow was struck valid, although the victim died out of the State. This same court held that the crime of murder was committed where the infliction of the fatal blow occurred, coupled with the unlawful intent. And further say, "the subsequent death of the injured party is a result or sequence rather than a constituent elemental part of the crime."

To the same effect is the case of *United States* v. *Guiteau, supra.*

While, in a review of this question by the Maine Supreme Court (*w*), the Court, while admitting that the local State authority sometimes has jurisdiction over the crime where death occurs, adds, "but we are satisfied that when this is so it is not because the crime is to be regarded as having been committed there, but because some rule of law, statutory or otherwise, expressly confers such jurisdiction. The modern and more rational idea is that the crime is committed where the unlawful act is done."

This Maine Statute is very similar to the Michigan Statute. The Court in this case held it had no jurisdiction because the mortal blow was given in a fort of the United States where Congress has exclusive jurisdiction by express terms of the Constitution, and any State Statute made to contravene such authority must necessarily be unconstitutional.

(*v*) 66 Ala. 40; 41 Am. Rpts. 744.

(*w*) *State* v. *Kelly*, 76 Me. 331.

The Court goes on to state that a local State authority cannot have jurisdiction unless when a mortal blow is inflicted in a fort, and the person so wounded dies out of the fort, and it is conceded the crime is committed where death results. "This, as already stated, is a doctrine which we cannot sustain. It is condemned by the weight of modern authority, English as well as American, *and is opposed to reason.*"

It might be claimed perhaps that the above case is not precisely in point; but it will be noticed that the Court itself goes a little outside the mere point, and hits hard a fiction of the law.

In conclusion, then, by the common law and the more modern and rational view, the *corpus delicti* is complete in murder where the fatal injury, which ends in death, is done. This conclusion is founded on the reason and science of the law.

That, perhaps, except as statutory provision is made, no jurisdiction is conferred on the local authorities at the place of death.

And, finally, the validity of Acts of the State Legislatures in assuming to fix a place for the punishment of the crime of murder other and different from that recognized by the authority of the common law and the reason and science of the law in its more modern interpretation, is open to severe criticism and doubt.

PERCY EDWARDS.

OWASSO, MICHIGAN.

EDITORIAL REVIEW.

Law Reform.

"Law Reform" is about to become the sport of the politicians. It is, perhaps, an open secret that the Attorney-General is making preparations, and gathering information for, we will not say law reform, but changes in the system of the administration of justice.

The suggestion that something ought to be done comes from those who do not know what is wrong, nor how to remedy it. We do not refer to the Attorney-General, whose generous course of conduct is always to try and please every one who wants anything done; but to a section of unrestful politicians who must be doing something, and who think that everything about law and lawyers is wrong —must be wrong—and therefore that they might as well commence with some change in that quarter and justify their political existence.

We have not heard during the last twenty years that there are any crying evils in the administration of justice. The days of the endless Chancery suit are gone by. The days of special pleading and technicalities are numbered with the past. It is barely possible at the present time for the most astute lawyer to lead away the discussion from the fact to be tried, or to tangle his adversary in a net of technicalities, and slay him before he gets to trial.

Since the Administration of Justice Act was passed in 1873, there has hardly been a murmur against the administration of justice in this Province. The Judicature Act was intended to complete what was then begun; but if it had not first been adopted in England we should perhaps never have had it here. Since that time such grumblings as were heard came from the lawyers themselves. They did not live up to the character so often given them by the public, of keeping the law and practice in such a state that they could make more money out of their clients. Their grumblings were on account of the weaknesses disclosed

in the working of the Judicature Rules for several years after they were passed; and they set to work with a will to render the working of the Rules more smooth and easy, and rather to their own loss than profit. Every change that was made was made in the public interest and not in their own.

Now let us hear what is wrong before an attempt is made to introduce changes. Litigation is not more expensive here than it is elsewhere in a country of our size and importance; it is fairly speedy, and the end soon attained. Our Judges are men of the highest probity; most industrious and active in the performance of their duties; and command the respect of the whole community.

It is true that, from one source, we hear that the most appropriate change to be made would be to have, as Judges of first instance, men of the highest learning, "even-tempered," etc., etc. And that such men cannot be got at the present salaries. If the present Judges of the High Court do not come up to these requirements, we are afraid that on this earth no salary will bring the proper men to the position. Besides the scheme is a little faulty. Why not extend the quality of learning and temper to the Court of Appeal. It would be most disastrous to have men of the highest learning to try cases. They would invariably give the right decision in the first instance; and the Court of Appeal, being composed of Judges of less learning and worse temper, would invariably reverse them. Some one said that if every case in Meeson & Welsby had been decided the opposite way it would not have done any harm to English law. Perhaps not. But think of the disappointment of "the other side." Think of his maledictions heaped on the heads of Judges who, from bad temper or lack of learning, decided against him.

Perhaps it might be said that things would even up in the end under such a system in this way. The Judge of first instance would decide correctly. Then the Court of Appeal would reverse him. The next time the question arose, the Judge of first instance would decide wrongly, following

the Court of Appeal in the former case. Then the Court of Appeal would again reverse him, "distinguishing" the case from the former one. After a short course of instruction of this kind, the Judges of first instance would always decide wrongly, intimate that they did so with great hesitation, and invite an appeal. Then the Court of Appeal would reverse them, and so ultimately the right decision would come. The scheme has its good points. It is fascinating—but dangerous.

We are assuming, of course, that there would always be a reversal. And we think that we are quite justified. An amusing story in this connection is told of the late Chief Justice of Quebec, Sir Francis Johnson, by the *Green Bag*, which we may be pardoned for reproducing. One of his judgments was appealed, and on being met by Judge M——, who sat in appeal, the latter said: "Well, Frank, I have just sustained a judgment of yours." "Yes? Well, my dear M——, I still think I was right."

Besides, the class of politicians who are bent on law reform are in the arena of provincial politics, and as the Province does not pay the judges, all hope of reform of this kind is shut off from that quarter. We rather think that these gentlemen are after the money part of the business, and want to reduce the expenses of law. They are more apt to commence where they have the power, and to cut off the gratuity lately granted to the judges by the Province, rather than augment it. So we may abandon the projected changes as out of the question.

What else is the trouble? We have not yet heard any general complaint. Every practising lawyer, and perhaps every judge, if asked what improvements he would suggest, will have his own ideas of change; but they will not agree on what ought to be changed. Change is not reform, though some proceed on that principle. Every lawyer has a grievance. Something has miscarried, and he is prone to put it on the practice, or some one else's stupidity; and he conceives a scheme for preventing a recurrence of it. He gets over it, however, and is ready to laugh at his neighbour, who, when his turn comes, laments the decay

of learning and growth of prejudice on the Bench, or utters maledictions upon the state of the practice; and only hesitates to expose the whole affair in the newspapers because he is not quite sure where the fault exactly lies. If he does not in the end appeal, he lies in wait for the next unfortunate.

We might suggest a number of reforms, or perhaps we ought to say changes. We might suggest that pleadings should be drawn so as to raise the exact point, and not leave it to come out in the evidence. But that would require the solicitor, after learning his facts, to acquaint himself intimately with the law before drawing his pleadings. We might suggest that counsel should in getting in the evidence confine himself to that which is directly applicable to the issues. We might suggest that solicitors, and barristers too, should never advise an appeal on the mere chance of succeeding; that they should be able to accept the undoubted and inevitable. That would shorten and cheapen litigation and reduce the number of appeals. But Acts of Parliament will not accomplish it.

Speaking of Acts of Parliament suggests something. Why is it so hard to get at the meaning of an Act of the Legislature? There is hardly a statute passed that is not open to severe criticism, on account of its obscure or complicated diction. There is hardly one passed that it is not found necessary to amend before a year or two have passed. Indeed there is one instance, in the statute book of last session, where two Acts on precisely the same subject were passed, with different provisions on the same matter in each. 57 Vict. cap. 23, sec. 8, and cap. 26, sec. 3. Litigation is sure to ensue, and "law reform" will be talked of all the more loudly. It would be a good thing to eradicate the source of the disease and await results. If all the actions raised on account of the doubts entertained as to the meaning of statutes were wiped out, a very appreciable amount of litigation would disappear.

Again, the most important and vital changes are made in the law from time to time without a thought of what the effect will be on the whole body of law. No previous enquiry

is made, no advice taken, no discussion asked for. Those skilled in the law are ignored; and the result is that a new vein of doubt has to be worked by the lawyers before the treasures of the Act can be found.

If any radical change is to be made let a full enquiry be made, first, as to the causes of complaint, if any; secondly, as to the best mode of remedying the evils; thirdly, when the policy is decided on, let the task of putting the amendments in shape be confided to competent persons. All great changes, and many minor ones, have in England been brought about in this way. Commissions on Prohibition, Fees, and what not, are issued to ascertain facts; why not when the administration of justice is to be improved? If a House composed largely of laymen can improve the law without consulting those who are skilled in it, then the Law Society might as well suggest improvements in agriculture and the manufacture of binder twine.

It is dangerous to experiment with the administration of justice. Nothing gives such a feeling of security to the public as the knowledge that the law is certain, and its execution rapid. Once uncertainty, and change for the sake of change, prevail, all confidence is lost.

Retirement of Sir Thomas Galt.

After twenty-five years of faithful service, Sir Thomas Galt, Chief Justice of the Common Pleas, retires from the Bench. On the retirement of Sir Adam Wilson, the Bar were enabled, on account of his public leave-taking, to express their warm appreciation of the valuable services which he had rendered in his public life, and their admiration of his estimable personal qualities.

Sir Thomas Galt, however, has retired without giving the Bar the opportunity, except in private, of expressing their regret at his departure and their appreciation of his long and useful service. Notwithstanding this we all desire to say how deeply we shall feel his loss. While he did not stand amongst the greatest and most learned of our Judges, he was endowed with a strong and sound common sense,

which prevented him from being led away by refinements of logic and subtlety of debate. His truly gentle disposition, and uniform geniality, gained for him the most affectionate regard of all who met him. Osgoode Hall will will not seem like the same place without him.

As a retired Judge Sir Thomas is now *ex officio* a Bencher of the Law Society, and we shall still have the opportunity and pleasure of seeing him in his place amongst the Benchers. Long may he enjoy a well earned holiday.

The New Rules.

We have received a copy of the long expected amendments to the Rules. The great length of time during which these amendments have been in preparation, would have induced one to believe that very radical or weighty and important alterations were to be made, if we had not long ago been warned against the rumbling of mountains.

We have not had an opportunity of going into the details of the changes as yet, but shall take the liberty of offering some comments upon them before long.

BOOK REVIEWS.

Treaties on the Patent Law of the Dominion of Canada: Including the Revised Patent Act, as amended to date, with annotations. The Patent Office Rules and Forms, general Forms, and Forms relating to practice in the Exchequer Court of Canada, etc. By JOHN G. RIDOUT, (late C. E.), Barrister, Solicitor, etc., of the firm of Ridout & Maybee, solicitors of Patents and Experts, of the City of Toronto, Canada. Toronto: Rowsell & Hutchison. 1894.

We have English and American books on Patents, and many English and American as well as Canadian, authorities to refer to. But we have hitherto had no text book, or annotations of our Patent Acts, to guide us in searching for cases, or determining the value of the authorities when found. Our Patent Acts, containing, as they do, portions of English and American legislative enactments, necessarily drive us at times to American, and at times to English, cases in order to ascertain how the enactments have been understood and dealt with.

Mr. Ridout has now performed the task of bringing together all the legislation of Canada down to the present year, and annotating it. Reference to English, Canadian and American cases are made, cross-references to the portions of the acts affecting each other, inconsistencies and crudities pointed out, and suggestions for amendments made.

In addition to reported cases, some hitherto unreported are cited, and the decisions and rulings of the Patent office are also referred to, and a number of useful forms are appended.

The book displays a great deal of industry, and comprises all that the practitioner can require both in practice and the construction of our acts.

The Opinions of Grotius as contained in the *Hollandsche Consultatien En Advijsen.* Collated, translated, and annotated by D. P. DE BRUYN, B.A., LL.B., Ebden essayist of the University of the Cape of Good Hope; advocate of the Supreme Court of the Colony of the Cape of Good Hope, and of the High Court of the South African Republic. London: Stevens & Haynes. 1894.

Whenever Blackstone declares that what he says is also the opinion of Grotius, we are apt to take the statement as authoritative, for two reasons, perhaps three. We don't know where to find Grotius' opinion; we could not read it if we found it; and at any rate Blackstone is generally right, whether Grotius agrees with him or not. But now there is no excuse for us if we want to test Blackstone.

Grotius' opinions are rather jurisprudential in their use than otherwise, but the statement of a principle is useful in municipal law at times as well as in the study of jurisprudence. The present translation and arrangement puts before us in very interesting and readable form these old opinions, and to the important cases the Editor has added annotations which are intended for the South African lawyers.

THE

CANADIAN LAW TIMES.

OCTOBER, 1894.

SPECIFIC PERFORMANCE OF CONTRACTS IN THE ROMAN LAW.*

WHEN persons enter into a contract it may be assumed, without discussion, that they usually contemplate the performance rather than the breach of it.

What is it then to perform a contract? If the contract is for the payment of money, it is performed by the payment. If it is for the doing of certain services, the services are expected to be rendered to comply with the terms of the contract. If it is for the purchase of land, performance is accomplished when the price is paid and the conveyance executed. In all these instances what the parties intend upon entering into the contract is the fulfilment of its terms. It is not left to the option of either party to get rid of his liability by declaring his unwillingness or determination not to do what he has promised. If there were such an option, contracts would not be entered into, trade and commerce would be paralyzed, and the progress of civilization retarded.

When one of the parties contracting has the subject of the contract under his power, the laws of several States enforce the contract in its terms. A distinguished writer on Jurisprudence (*a*) says that the specific performance of

* See Vol. II. p. 1.

(*a*) Holland, 6th ed. 288.

a contract which the person of incidence is endeavouring to repudiate, though familiar to English equity, and German Law, ancient and modern, is opposed to the principles of Roman Law and of the systems derived from it. This latter statement is conceived to be erroneous, and an endeavour will be made to shew that specific performance is not opposed to the principles of Roman Law, nor of the systems derived from it.

The genius of a people is reflected in the spirit of the laws by which they are governed. And if we find the character of a people displayed in the writings of its best and wisest men, we may expect to find the laws in accordance with it. And if these writers strongly accentuate the necessity, the advantage, of a rigid compliance with pledged promises and the disgrace of breaking them we will have little difficulty in ascertaining the nature of the laws.

That the Roman people during the long progress of its history was conspicuous for its fidelity to engagements has been the verdict of the greatest historians. We find it recorded that the wise and pious king Numa, the immediate successor of Romulus, and thus at the dawn of the Roman nation, desirous of the advance of the nation in the arts of peace and civilization, instituted a festival to the goddess Faith, and the flamens, while employed in her worship, were to have their hands covered to signify that faith was to be carefully observed (*b*). We may disbelieve the very existence of Romulus and Numa, but if we find fragments of laws attributed to these persons, we shall not, perhaps, be wrong in believing that there was at least some real ground for the fragments being placed at a very remote period and in a certain order of time (*c*).

At a later period we find it related that Calavinus, though himself deeply stained with crime, was shocked by the proposal of his son, Perolla, to assassinate Hannibal,

(*b*) Livy, 1, 21.

(*c*) Clarke, Early Roman Law, 5.

with whom he had joined hands and swore to be faithful to him (*d*).

Cicero says that the foundation of justice is faith, constancy and truth in promises and agreements (*e*), and in chapter 13 he maintains that faith is to be observed in promises made to an enemy. He tells the story of Regulus, against the entreaties of relations, and friends, returning to a certain death rather than break his promises to enemies.

Aulus Gellius (*f*) relates a conversation in which Cæcilius ascribes the progress of the Roman people, from its small origin to its subsequent magnitude, chiefly because it worshipped faith, and preserved it sacred, as well in public as in private affairs.

The duty of observing the faith of contracts was enjoined in the writings of the jurists, and in the constitutions of the Emperors.

Ulpian (*g*) observes, "Quid enim tam congruum fide, humanæ quam ea, quæ inter eos placuerunt servare." And again (*h*), "Nihil magis bonæ fidei congruit quam id præstari, quod inter contrahentes actum est."

Paul (*i*):—"In omni contractu bonam fidem præstare debeat."

Tryphonius (*j*):—"Bona fides, quæ in contractibus exigitur, æquitatem summam desiderat."

The Emperor Antoninus (*k*):—"Pacti conventionisque fides servanda est."

The Emperors Diocletian and Maximian (*l*):—"Bonam fidem in contractibus considerari æquum est." And

(*d*) Livy, 23, 8, 9.

(*e*) De Off. 1, 7, 6.

(*f*) Noct. Att. xx. 1.

(*g*) Dig. de pactis, 2, 14, 1.

(*h*) In Dig. de act. empti, etc. 19, 1, 11, 1.

(*i*) In Dig. Mand. vel. contra, 17, 1, 59, 1.

(*j*) In Dig. Deposit. vel. contra, 16, 3, 31 pr.

(*k*) In the Code de pactis, 2, 3, 7.

(*l*) In Code de Obl. & Act, 4, 10, 4.

again (*m*):—" Circa locationes atque conductiones maxime fides contractus servanda est."

The Emperor Alexander (*n*):—" Ut contractus fides servetur."

Diocletian and Maximian (*o*):—*Good faith* does not permit that at any time, even in virtue of an imperial rescript, one can recede from a contract of sale duly entered into, without the consent of the other party. And in the same title, l. 6, these emperors say, that a contract of sale cannot be rescinded by the seller, offering even double the price. And in the following law (7), in answer to some soldiers, they are informed that sales legally made cannot be rescinded, and they are advised that it would not be for their interest to have it otherwise, as it might be used against them.

Ulpian (*p*):—" Grave est fidem fallere."

Poets also, who are said to have more influence over a people than legislators, recognized Faith as a goddess to be worshipped:—

Sil. Ital. 2, 479:—

" ad limina sanctæ
" Contendit Fidei."

Sil. Ital. 13, 281:—

" despectat ab alto
" Sacra Fides."

Virgil, Æn. 1, 292:—

" Cana Fides, et Vesta, Remo cum fratre Quirinus
" Jura dabunt."

Ib. 7, 365:—

" Quid tua Sancta Fides? quid cura antiqua tuorum."

Seneca, Octavia, Act 2, 397:—

" Tunc illa virgo, numinis magni dea,
" Justitia, cœlo missa cum sancta Fide
" Terras regebat mitis."

(*m*) In Code de loc. et cond., 4, 65, 19.

(*n*) In Code de pactis act empt. et vend., 4, 54, 2.

(*o*) In Code de rescind. vend., 4, 44, 8.

(*p*) In Dig. de pec. const., 13, 5, 1.

Quintilian, Declam. 848 :—

"Fides supremum rerum humanarum vinculum est."

Almost innumerable instances of the sanctity attached to faith, to good faith, and the reprobation of bad faith, may be seen in Brisson, De Sign. Verb. under the word *Fides*.

Having thus shown how faith, and the faith of contracts, was inculcated, enjoined, and celebrated by Emperors, Jurists, Moralists, Poets, Historians and Orators, we will add the opinion of Gibbon, than whom no one was better acquainted with the character of the Roman people.

"The Goddess of Faith (of human and social faith) was worshipped not only in her temples, but in the lives of the Romans; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements" (*q*).

The means by which this essential attribute of contracts, faith, was enforced, was by action in the Courts. The XII tables recognized the obligation of contracts and gave actions to compel the performance of them. But how did the law enforce contracts and conventions? Did it permit a promiser to offer damages in lieu of what he had promised to do? In agreeing to sell a farm did it give him the power to say, "I will not perform my agreement, but I will pay what damages you can prove you have sustained?" That would not be enforcing *fides contractus*. Giving damages is not carrying out the contract; it is a penalty for its breach. The Emperors Diocletian and Maximian, as we have seen, (*r*) declare that a sale agreed upon by mutual consent cannot be rescinded, though the seller should offer to the buyer double the price. Now this double price was the highest amount that could be recovered by action in cases in which the quantity or nature of the thing is determined, as in sales, hirings, and all other contracts (*s*).

(*q*) Decl. & Fall, c. 44.

(*r*) C. 4, 44, 6.

(*s*) C. 7, 47.

If so, why should the promiser not be allowed to give out of Court as much as could be recovered against him in Court? Plainly the option was denied him. He must do what he had agreed to do, unless the other party consented to relieve him. The option was with the person of inherence. When this law speaks of double price or value as the extreme limit of damages in an action upon a sale, it must refer to cases in which the sale could not be enforced specifically, by reason of the inability in the seller to fulfil it, which might arise from a variety of causes, *e.g.*, a sale to a purchaser without notice.

The same remark applies to the law also already mentioned (*t*).

The same Emperors (*u*) pronounce that a sale not completed, may be annulled by a pact and common consent in which case if the purchaser has paid earnest money he may recover it in an action on the pact; but they proceed to say that if the purchaser has paid part of the price he has rather an action to compel the seller to give the thing agreed upon than to sue for the money paid. Sin vero partem pretii persolvisti; ad ea, quæ venditorem ex venditione oportet præstare, magis actionem, quam ad pretii quantitatem, quam te dedisse significas, habes. Two actions are here stated as competent to the purchaser, one to recover the part of the price he had paid, but the preferable one was to sue for specific performance.

In another instance (*v*) it is said that if a purchaser sues upon the contract of sale, to have a vacant possession delivered to him, the president of the province will inquire if the price has been paid, if it has not been paid he will provide for the restitution of the property. Here the right of the purchaser to sue for and to obtain the delivery of a vacant possession is made to depend only on the fact of the payment of the price.

(*t*) C. 4, 44, 7.

(*u*) In C. Quando liceat ab empt. dis., 4, 45, 2.

(*v*) C. de act empt. & vend., 4, 49, 8.

In another instance (*w*) where one Julian had sold slaves that did not belong to him to persons who knew that, the President of the province will order the purchasers to restore them to the owner; if the purchasers were innocent, Julian will be ordered to restore the price to the owner. In this the very articles sold are to be restored, the purchasers with notice were not at liberty to say we will pay you the damages you have sustained.

Again (*x*), a person sold his land under the condition that unless the price were paid at a specified time, the purchaser should lose the earnest money and the ownership remain to the seller; fides contractus servanda est.

And in the law referred to (*y*), where land had been sold with the condition that the purchaser should restore it on repayment of the price either at a specified time, or at any time, and the seller was ready to pay the money which the purchaser refused to accept, an action was given *ut contractus fides servetur* for the recovery of the land and the profits since the offer of the money. So that in this instance the seller would recover the land itself and not damages merely for the purchaser's not complying with the agreement.

In the Code de pactis inter empt. & vend. (*z*), a person had sold his land at a low price, in consideration of an agreement by the purchaser; which the purchaser had not fulfilled, *non impleta promissi fide*; the seller was entitled to have the land restored to him with the profits, and when the price is restored to the purchaser no one will have suffered any injury.

And in the next law under the last title (*a*) where a sale had been made under a condition to be void if price repaid at a specified time, there was no right to ask to be freed from this agreement even by a rescript of the Emperor,

(*w*) C. de reb. alien. non alien., 4, 51, 1.

(*x*) C. de pactis inter empt. & vend., 4, 54, 1.

(*y*) C. 4, 54, 2.

(*z*) 4, 54, 6.

(*a*) 4, 54, 7.

"*remitti hanc conventionem rescripto nostro non jure petis.*" But if the purchaser refuses to comply with the agreement he would be compelled to restore the property, upon the deposit or tender of the price: the land itself.

The method of procedure may have varied during the three well known periods of the *legis actiones*, the *formulæ*, and the *extraordinaria cognitio*, but the end was identical, that fidelity to engagements was to be compelled.

During the reign of the *legis actiones* the object of the litigation, if real, was actually or symbolically in Court. The XII. tables recognize this. Table VI. 5, "When the litigants plead by laying their hands on the disputed property in the presence of the magistrate." And Gaius (*b*) who wrote while the *formulæ* prevailed, states that under the older system the Judge condemned the defendant in the thing itself *sicut olim fieri solebat.*

The formulary system was introduced by the Æbutian law, probably of the second decade of the 6th century of the city, A. U. C. 520. Very little is known of the provision of this law, but it is supposed to have empowered the Prætors, (1) to devise a simple form of procedure for causes already cognizable *per legis actionem*, (2) to devise forms of action to meet cases not cognizable under the older system; and (3) themselves to formulate the issue and reduce it to writing (*c*).

Under this system a Judge, in condemning a defendant had no alternative but to do so in money (*d*). The judgment gave the defendant an option either to do what he ought to do or pay the money. Walker, in his notes on the perpetual edict. p. 56 n 3, remarks that in *rei vindicatione* "the award was only optional in form; and it was really intended that the defendant should restore the thing, unless it had ceased to exist; and only pay the alternative assessment, if the restoration was impossible, not if he was

(*b*) 4, 48.

(*c*) Muirhead, Roman Law, 358.

(*d*) Gaius 4, 48.

simply unwilling to restore. Hence in cases of fraud or resistance, force, *militaris manus*, would be called in to enforce recovery of the thing itself." And he shows how this was accomplished by tacking on a *stipulatio judicatum solvi*.

It would require very clear evidence to lead us to believe that every action sounded only in damages. Would a person unjustly taking possession of land be permitted to say I will keep the land and pay you the value of it? Would a depositary be permitted to refuse to return the deposit by paying damages? So in a hundred cases that might be mentioned was it at the option of the defendant to keep his promise or to break it?

Besides the ordinary proceedings by formula, there always existed, and was exercised when necessary, the jurisdiction of the prætor in the *extraordinaria cognitio*.

Under one or the other system a mode was provided for securing the exact performance of agreements.

Paulus, a distinguished jurist of the classical period, and therefore during the period of the *formulæ* and who was associated with Papinian, Gaius, Ulpian, and Modestinus in the Valentinian law of Citations, says in his Recept, Sent. (*e*), Si id quod emptum est, neque tradatur neque mancipetur, venditor cogi protest, ut tradat aut mancipet.

And Ulpian mentioned above (*f*), says, Et in primis ipsam rem præstare venditorem oportet, id est tradere; quæ res, si quidem dominus fuit venditor, facit et emptorem dominum. Si non fuit, tantum evictionis nomine venditorem obligat (*g*).

And under (*y*) Ulpian states, Qui restituere jussus, judici non paret, contendens non passe restituere, si quidem habeat rem, manu militari officio judicis, ab eo, possessio transfertur. . . Si vero non potest restituere, si quidem dolo fecit, quo minus possit, is, quantum adversario in litem

(*e*) 1, 13, 2, 4.

(*f*) In the Dig. de act empt. & vend. (19, 1, 11, 2).

(*g*) Dig. de rei vend. (6, 1, 68).

sine ulla taxatione in infinitum juraverit damnandus est. Si vero non potest restituere, nec dolo fecit, quo minus possit, non pluris quam quanti res est, id est, quanti adversarii interfuit, condemnandus est. Hæc sententia generalis est, et ad omnia, sive interdicta, sive actiones in rem, sive in personam sunt, ex quibus arbitratu judicis quid restituitur locum habet.

It thus appears that the rule applies not only to vindications, in which the owner seeks to recover his property, but also to actions *in personam* in which, as in case of sale, the plaintiff desires to acquire the ownership.

The word *restituere* is applied not only where the object of the action is to re-establish a former condition of things, but to create a new one, such as the action *empti venditi*, &c. (*h*).

Early in the Empire, and during the reign of the *formulæ*, it became the practice in certain cases for the magistrate to abstain from adjusting a *formula* and making a remit to a *judex*, and to keep the cause in his own hands from beginning to end (*i*).

Diocletian (*j*) instructed the Provincial governors that unless prevented by pressure of business, or, according to a constitution of Julian (*k*), when the matter was of trifling importance, they were themselves to hear the causes brought before them from first to last, as was already the practice in the *extraordinariæ cognitiones*.

But in A. D. 342 (*l*), the two sons of Constantine enacted in emphatic terms that "the *formulæ* at law which lay a trap for everybody's doings by means of a pettifogging minuteness of attention to words, be cut away by the roots."

(*h*) Savigny, Traite, 5, 133, n. f. & citations there.

(*i*) Muirhead, Roman Law, 368.

(*j*) A. D. 294, C. 3, 3, 2.

(*k*) A. D. 362, C. 3, 3, 5.

(*l*) C. 2, 58, 1.

The effect of these constitutions was to abolish the distinction between the proceedings *in jure* and *in judicio*, and between actions *in jus* and *in factum*, and *actiones directæ* and *utiles*. The interdict was turned into an *actio ex interdicto*; admission of the power of amendment of the pleadings; condemnation in the specific thing claimed, if in existence, instead of its pecuniary equivalent, and execution accordingly by aid of officers of the law (*m*).

Amos, in his Roman Civil Law 388, states the effects of these changes in the law in the later imperial times, that the judge was no longer limited to a simple sentence prescribing the amount of damages, or releasing the defendant from all liability, but he could, and must, afford the fullest relief of all sorts. He was, in fact, an administrator as well as a judge. He directed the transfer or retransfer of property, the cancelling of documents, and the the restitution of civil conditions.

Muirhead further remarks (*n*): In all cases in which the demand was that a particular thing should be given or restored, and the plaintiff desired to have the thing itself rather than damages, execution was specific and effected through officers of the law.

In the Inst. (*o*), Justinian says that, "For the recovery of the thing are given all real actions; and of personal actions almost all those which arise from contract, as the action for a sum lent or stipulated for, a *commodatum*, a deposit, a mandate, a partnership, a *sale* or a letting to hire, etc." (*p*).

And in Inst. (*q*), "A judge ought, as much as possible, to take care that his sentence awards a thing or sum certain, even though the demand on which he pronounces may have been for an uncertain quantity."

(*m*) Muirhead's Roman Law, 388.

(*n*) p. 389.

(*o*) 4, 6, 17.

(*p*) Sandars' translation.

(*q*) 4, 6, 32.

Justinian himself decided according to these principles (*r*); where a pecuniary condemnation had been pronounced against an heir who refused to deliver a legacy in kind (a slave), he was astonished at the folly of the judge who had not condemned the heir to give the slave but only the value of it, while it was the slave itself which was the object of the litigation. If such a case should present itself again he did not believe there would be found a judge so imbecile as to render such a sentence."

This instance has been sometimes referred to as a special one in favour of liberty; but a similar rule prevailed in the case of anything bequeathed (*s*); in the case cited in the note are considered reasons for not complying specifically with the terms of a bequest and giving value instead; showing that but for these particular reasons it must have been complied with.

A very learned author, and at present a distinguished Judge, the writer of the best book on the specific performance of contracts, in English law, says: (*t*) "It is certain that the Roman law gave a title to damages as the sole right resulting from default in performance, and did not enforce specific performance directly or in any other manner than by giving such right to damages. It held to the maxim, '*Nemo potest præcise cogi ad factum.*'"

From what has been said above, it appears that probably during the whole legal history of Rome, and certainly for centuries before the time of Justinian, a litigant might have specific performance of a contract of sale, and that giving a title to damages was not the sole right resulting from default in performance.

There were indeed certain cases in which damages alone were given for default in performance: these were such as involved the personal act of the person to perform them, *e.g.*, to dig a ditch, to copy a manuscript, etc., and

(*r*) l. 17, C. de fid. lib. 7, 4.

(*s*) l. 70, 8, Dig. de leg. 1.

(*t*) Fry on Spec. Per., 3d. ed., p. 4.

as he could not be compelled to dig or to write against his will, the only alternative was to condemn him in damages.

For the assertion that the Roman law held to the maxim '*Nemo potest, etc.*,' the only authority cited is Pothier (*u*).

In the preceding s. i, Pothier discussed the cases *auquel l'obligation consiste à donner*, and in the concluding paragraph he says when the thing due is a body certain, and that the debtor, condemned by the sentence to give the thing, has it in his possession, the judge on the request of the creditor must permit him to seize it and to put himself in possession; and it does not suffice for the debtor to offer damages resulting from the non-performance of the obligation, and he refers to his Traité du Contrat du Vente, n. 67.

The s. 2, quoted by the learned author treats of cases in which the obligation consists *à faire ou à ne pas faire*, and in which he indeed says that in an obligation for damages are resolved all the obligations *de faire quelque chose*, for *Nemo potest*, etc.

Turning to the treatise on the contract of sale, Pothier says that the maxim *Nemo potest*, etc., only applies when the act included in the obligation is a simple act of the person of the debtor, *merum factum*, as to copy papers or to dig a ditch. He thinks that in case of the refusal by the vendor to deliver the thing sold, that he has in his possession, the Judge may permit the purchaser to seize and remove it, if it is a movable; or to put himself in possession, if it is land or a house, and to expel the seller from it by the aid of a sergeant, if he refuses to depart, and that his opinion is followed in practice.

So that instead of Pothier being an authority for the universal application of that maxim to all obligations, it is confined to a special and limited class in which specific performance would not be granted in England.

(*u*) Tr. des oblig., part 1, c. 11, art. 2, s. 2.

The French jurist was thoroughly familiar with the Roman Law, and he uses the phrases *à donner* and *à faire*, as the equivalents of *dare* and *facere* in that law. *Dare* meant to give in property, *dari cuiquam id intelligitur, quod ita datur ut ejus fiat* (*v*). *Dare proprie est accipientis facere* (*w*). *Facere* was applied to any other act positive or negative including giving otherwise than in property (*x*). The learned author of the work on specific performance seems to have overlooked, or neglected, this essential difference between *dare* and *facere*, and the objects to which they were applied.

It has been argued that specific performance was not a remedy for a broken agreement in the Roman Law, because many of the texts in the Digest and Code speak of damages being given in such a case.

Thus Code 4, 49, 4 says that the seller who through malice and obstinacy does not deliver the thing sold, the President of the province will condemn in damages. But it is not said that this is the only remedy the buyer has to obtain justice.

And the Dig. 19, 1, 12 has also been cited for the same purpose. In that instance Celsus says, If I have bought the cast of a net and the fisherman refuses to cast it, the loss is to be valued having regard to the uncertainty as to what the cast would produce. If he has caught fishes and refuses to give me the fishes their value will be estimated.

Specific performance would be no remedy in that case for the fishes would be putrid before it could be tried.

And so, in the Code 4, 49, 10 a butcher not furnishing meat according to his agreement was liable in damages. The meat would not be worth much at the end of even a rather speedy case.

The conclusion to be drawn from the various laws in the Code and Digest on the matter would seem to be that

(*v*) Inst. 4, 6, 14.

(*w*) Brisson. *sub voce.*

(*x*) Savig. Oblig. 1, 364, 371, 372.

specific performance was the rule at the option of the party injured, and that the doubts arose as to the right to sue for damages when the agreement was not for damages but for something else, and that the Roman Law on this subject was what the Reviewer in 8 L. Q. 250 says is now the law on the continent, that damages were given where specific performance was impossible.

It would appear, therefore, that this remedy by specific performance is not opposed to the principles of Roman Law (*y*). It remains to be inquired if it is opposed to the systems derived from it.

The system in France is derived from the Roman Law. Pothier's whole work on obligations shews that to be the case. It is entitled a treatise on different matters of the Civil Law, applied to the use of the bar, and of French jurisprudence; and a large part of the Code Napoleon on this subject is taken almost verbatim from Pothier's work.

The Reviewer cites Demolombe's Traité des Contrats, 2d ed. 1, 486, in which the French law is stated, and it agrees with Pothier, though he begins with a statement that "it is true that at Rome all the sentences of a Judge ended in a pecuniary condemnation," which is correct enough when the *formula* so directed him. But it is inaccurate at a time when there were no *formulæ:* and also when the trial was under an *extraordinaria cognitio.* Dernberg on Prussian Private Law, as quoted by the Reviewer, more accurately says, that *in the classical epoch* Roman Law assumed that every judgment must be for damages or money, and the older conception has still a material influence on the law of Justinian. This also leaves out of sight that the *extraordinaria cognitio* was a mode of trial during that epoch.

Huber belonged to the Dutch school; and in his commentary on the Institutes, 3, 16, he states the right to specific performance there as wider than the rule of the

(*y*) Holland Jur. 6th ed. 283.

Roman Law as found in Pothier's work; as he saw no reason why he who does not wish to do, *facere*, what he had promised should not be compelled, as well as he who broke his faith and refused to give, *dare*, what he had promised. And Mencken in a note quotes from the law of Saxony that a person refusing to obey a judgment ordering the performance of an act, *facti*, may be sent to prison, etc., and that a discharge by offering damages is entirely taken away.

The law of Holland and of Saxony was based on the Roman Law.

The modern French, German, Louisianian and Egyptian codes are based on the Roman Law (*z*).

The learned author already referred to having concluded that the Roman law did not authorize a remedy by way of specific performance for the breach of a contract, proceeds to speculate as to the origin of this kind of remedy. He says, "The origin of this branch of equitable jurisdiction is not to be sought for in the Roman law. Perhaps it is rather to be found in the Ecclesiastical law" (*a*). In support of this theory he refers to the advice given by St. Paul to the Corinthians, as found in the revised version, 1 Cor. vi. 1 *et seq.*: "Dare any of you, having a matter against his neighbour, go to law before the unrighteous, and not before the saints? . . (v. 5). Is it so that there cannot be found among you one wise man, who shall be able to decide between his brethren? But brother goeth to law with brother, and that before unbelievers." (v. 6).

St. Paul adds (v. 7), "Nay, already is it altogether a defect in you, that ye have lawsuits one with another. Why not rather take wrong? Why not rather be defrauded?" etc.

The author also (*b*) quotes Pliny's well known letter to Trajan (Pliny Epist. x., 97), "that Christians bound

(*z*) Amos, Roman Civil Law, 418.

(*a*) P. 8, s. 9.

(*b*) P. 9, s. 22.

themselves by an oath not to commit theft, robbery, or adultery, not to break their word, *ne fidem fallerent*, and not to deny the existence of a deposit when called upon by the depositor. These words *ne fidem fallerent* cover a wide area of moral obligation, and the jurisdiction of the Court of the Christians if it undertook to enforce it would be ample. In these few words we may perhaps find the germ of many things which we are more or less familiar with. . . . This applied to contracts is perhaps the origin of the jurisdiction in specific performance."

It is probable enough that in pursuance of their struggle to place the ecclesiastical power above the civil power, of which there are numerous examples in our own history, the clergy may have asserted a right to take cognizance of secular contracts, and to have enforced them specifically. But it may be permitted to doubt if this was done in pursuance of St. Paul's advice to the Corinthians. And the cases from Bracton's Note Book (*c*), could not have been decided under the provisions of the Canon Law (*d*). For these cases are noted under the years 1219 and 1227, while the decretals of Gregory IX. were not published till 1234. If the clergy in these cases relied upon any authority, it is more probable that it was to the principle of the Roman Law so often repeated that *fides servanda est*—a law with which they are generally credited as being familiar.

The decretal of Gregory IX. (*e*), declaring *studiose agendum est, ut ea, quae promittuntur opere compleantur* is no stronger than the repeated declaration of the Roman jurists and Emperors that "*fides contractus servanda est.*"

It is apprehended that St. Paul had no notion of appointing an ecclesiastical tribunal for the decision of secular matters. He was giving a good advice to refer matters to arbitration, to a judge or arbiter selected for the

(*c*) P. 9, s. 28, Fry.

(*d*) Fry, s. 32.

(*e*) Lib. 1, tit. 35, c. 3.

occasion, and not to go to law before the unbelievers—a recommendation that would scarcely apply to English Courts in Bracton's time, when the nation was a Christian nation ruled by Christian Kings, and the laws administered by Christian judges. These same kings and judges were well satisfied apparently that justice and equity could be well administered by the law of Rome, since so much of them has been incorporated by Bracton in his book.

The verses in which St. Paul reproves them, v. 7, "Why not rather take wrong? Why not rather be defrauded"? shows that he had no intention of establishing an ecclesiastical court. He wished the Corinthians not to go to any court, either righteous or unrighteous, he wanted them to suffer wrong rather than go to law even before a believer.

The quotation from Pliny does not appear to be of much value in this connection. He says that the Christians bound themselves not to do certain things which were already prohibited by the law. So that the oath in fact was to obey the law. *Fidem fallere* was not a matter of peculiarly Christian cognizance, and *ne fidem fallerent* was just what the law asserted.

The Christian Fathers seem to have had a high opinion of the Roman laws. Duck (*f*) quotes St. Augustine and others who agreed with him as saying that the glory of empire had been granted by God to the Romans, on account of their virtues and good works, which was chiefly the cause that their laws were the most just and holy ever made in the world. *Leges enim Romanorum divinitus per ora principum emanarunt*, says Augustine quoted by Gratian.

If these were their opinions they would not be likely to see any necessity for an ecclesiastical tribunal for secular matters.

(*f*) *De usu et authoritato Jur. Civ. Rom.* 21.

The language of the stipulation seems originally to have involved a pledge of faith as sacred as an oath—Spondes, Spondeo—appears to have had a religious signification (*g*).

The letter of M. Renault, a distinguished French advocate, printed as an appendix to Fry on Specific Performance, is not of much importance on the question of the specific performance of *obligationes dandi*, as it is confined to *obligationes faciendi*. But he begins his letter by an express statement that it is not every obligation *à faire ou à ne pas faire* that necessarily resolves itself into damages, but only that of which the effective execution is impossible by way of constraint. The instances he gives are agreements for personal acts, to sing at a theatre, etc., the specific performance of which would not be granted in England.

W. PROUDFOOT.

(*g*) Muirhead, Roman Law, 227 *sq*.

EDITORIAL REVIEW.

Signature by Auctioneer's Clerk.

In *Sims* v. *Landray*, L. R. 1894, 2 Ch. 318, two questions were raised, first, whether the filling in of a purchaser's name in a memorandum of purchase of land was a good signature, and secondly, whether such signature by the auctioneer's clerk was good, under the following circumstances:—The defendant was declared the highest bidder and the purchaser of a parcel of land sold by auction. The auctioneer's clerk went to the defendant, who was unknown to the auctioneer, to obtain his name and address. The defendant went to the table and stood beside it while the clerk filled in his name and address in the memorandum as follows:—"I, Joseph Gilbert Landray, of etc., etc." The defendant refused to sign, as he had not his cheque book with him, but said he would call again and sign the contract and pay the deposit. He subsequently declined to complete. Romer, J., held that there was authority given by the purchaser to the clerk to sign for him, as his standing by in order to watch the clerk's entry, after giving his name and address for the express purpose of being written in the memorandum, was a sufficient authority; and also that the insertion of the name in the body of the memorandum was a sufficient signature.

The matter is not new, both points having previously been decided, but the questions involved are interesting.

Mr. Justice Romer's remark, however—that "the auctioneer is not only the agent of the vendor, but he is also the agent of the purchaser, the highest bidder; and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser, a

memorandum sufficient to satisfy the provisions of the Statute of Frauds, stating the particulars of the contract" —is a littte too broad. Like a good many general propositions it requires limitations to be imposed upon it. In *Bartlett* v. *Purnell*, 4 Ad. & E. 792, Lord Denman, C.J., said, "No doubt an auctioneer *may be* agent for both parties. . . The auctioneer is not, *ex vi termini*, agent for both parties; that depends upon the facts of the particular case." In that case the purchaser bid at the sale on an agreement that a debt of £200 due to the purchaser should be set off against the price. It was held that the auctioneer's act in writing down the name of the purchaser was not a signature binding the purchaser to the conditions of the sale, but a mere necessary way of fixing the price.

Both Benjamin, s. 270, citing *Warlow* v. *Harrison*, 1 El. & El. 295, and Campbell, p. 141, citing *Payne* v. *Cave*, 3 T. R. 148 and *Warlow* v. *Harrison*, and p. 422, agree in saying that the auctioneer, until the hammer falls, is the agent of the vendor alone. Upon the fall of the hammer, which indicates the acceptance of the purchaser's offer or bid, the auctioneer is from the nature of the case and the usual practice in such matters the assumed agent of the purchaser to sign the contract. In *Bird* v. *Boulter*, 4 B. & Ad. 443, Taunton, J., said, "Pitt may be considered not only as the agent of the vendors, but also of the purchasers. By *their silence* when the hammer falls, he has their authority to execute the contract on their behalf." See also Story on Agency, 59, where it is said that the authority to sign is a *presumed* one. That it is not a general one, is clear from the fact that where the auctioneer is selling his own property he is not entitled to sign for the purchaser.

If the authorities cited are to be relied upon, it appears that the auctioneer has authority to sign only if the purchaser does not object, or in other words revoke the assumed authority.

As to the right of the auctioneer's clerk to sign, it is clear that as clerk or agent of the auctioneer, who is the

presumed agent of the purchaser, he has no authority. The agent to sign must be appointed by the purchaser not by the purchaser's agent. In *Hope* v. *Dixon*, 22 Gr. 489, it was held that a signature by an estate agent's clerk was not sufficient, though the agent had authority to sign. Very slight evidence, however, may satisfy as to the authority of the clerk. And in the case in review, the standing by which the clerk wrote the name without objection was held sufficient.

As to the entry of the name in the body of the memorandum, it is sufficient to recall the number of cases in which it was held that a holograph will was well executed, when it contained the testator's name although it was not formally signed. The Act now requires that it should be signed "at the foot or end thereof." There is no such requisite in the statute of frauds. Signature, not subscription, is required. Authentication of the instrument is all that is necessary. "Mr. Foljambe presents his compliments," was held sufficient in *Ogilvy* v. *Foljambe*, 3 Mer. 53, where Mr. Foljambe wrote the complimentary epistle. See also *Western* v. *Russell*, 3 V. & B. 187; *Propert* v. *Parke*, 1 R. & My. 625; *Morrison* v. *Turnour*, 18 Ves. 175.

Sale by Mortgagee to Himself.

In *Astwood* v. *Cobbold*, 6 R. June, 55, the Judicial Committee, on an appeal from the Supreme Court of Jamaica, had to decide whether a power of sale in a mortgage was exhausted after an invalid sale, and what was the true reason of the invalidity of a sale to the mortgagee or some person for him. The facts were that the mortgagee sold to his son-in-law, who paid nothing. The conveyance was not at the time registered. Subsequently, a sale was made to a stranger, and the whole history of the transaction was set out in the conveyance to him, in which the mortgagee joined, affecting to sell under his power. The Supreme Court of Jamaica held the whole transaction to be a fraudulent one of which the new purchaser had notice, and consequently that the mortgagor might redeem. This the Judicial Committee reversed.

Their Lordships, in dealing with the transaction between the mortgagee and his son-in-law, declined to infer fraud; and, in effect, laid it down that the reason why a sale by a mortgagee to himself or his agent is invalid is not on account of fraud, but because the same person cannot be vendor and purchaser. Lord MacNaghten, in delivering judgment, said, "the so-called sale was, of course, inoperative. A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another. But such a transaction is not necessarily a fraud or evidence of a fraud. The thing may be done without a dishonest intent. It may be a cloak for fraud or it may be a mere blunder." In fact a mortgagee, notwithstanding his going through the form of conveying to himself, remains just as he was, mortgagee. There being no one to receive the estate from him by the conveyance, it cannot pass from him, and he remains just as before, a mortgagee subject to redemption. So, when he conveys to another for himself though the legal estate may pass by the operation of the conveyance, the grantee holds it, *ex hypothesi*, for the mortgagee, subject to his control, and therefore subject to the rights of the mortgagor to come in and demand a reconveyance on redemption. The conveyance amounts to no more than an assignment of the mortgage.

It is clear then that the power may be exercised notwithstanding such a conveyance. It is not in fact an exercise of the power at all, and cannot exhaust it. The Committee accordingly held that the sale to the new purchaser was a valid exercise of the power.

CORRESPONDENCE.

Proof of Notice of Mortgage Sale.

To the Editor of THE CANADIAN LAW TIMES :

SIR—The profession generally will agree with your remarks in reference to the Statute passed last Session (chap. 35), respecting registration of mortgages and notices of sale. No doubt the object in providing for the latter is to preserve the notice and proof of its service from loss, but the framer of the Statute has evidently overlooked the fact that service of the notice is only one of the necessary steps in making title under the power of sale. The evidence of regularity is always a troublesome matter, and it seems to me a simple means might be provided to get over the difficulty. I would suggest that a vendor be at liberty to produce all his proofs before a Master of the Supreme Court, and, upon the latter being satisfied, that he grant a certificate to that effect in duplicate and that such certificate be registered. In this way the proofs would be filed in the Master's Office, and the expense would be trifling compared with the advantage.

Yours, etc.,

A. P. POUSSETTE.

PETERBOROUGH.

[The matter is not of sufficient importance to require legislation. The vendor under a power of sale has to satisfy the purchaser of the regularity of his proceedings. If he does that he is acquitted. If he cannot do so, it is not probable that he could satisfy a Master. The same remarks would apply to every point of proof in a title. Ed. C. L. T.]

THE

CANADIAN LAW TIMES.

NOVEMBER, 1894.

RECENT AMENDMENTS TO THE RULES.

THE New Rules, while they contain many important changes, do not (at least in the opinion of the writer) cover the ground; they only pretend to be a piece-meal alteration of the existing state of affairs. We are no nearer having a complete Code of Practice. The new patch on the old garment is already behaving after the fashion of such attempts at cobbling.

Some three years ago a committee of the County of York Law Association, acting with the Master in Chambers and the Registrar of the Queen's Bench Division, began consideration of the Rules and Tariff. The other County Associations, acting in concert, transmitted a large number of suggestions to the central committee. The profession at large was also applied to, and a great deal of material was accumulated from these various sources. A valuable manuscript, in the preparation of which the late Master in Chambers occupied himself for some years, gave the outline which was afterwards expanded into a report.

These facts are mentioned as warrant for the statement that the report of the committee is fairly representative of the opinion of the profession as to the changes deemed desirable. Rather more than two years ago the report was laid before the Judges in printed form, and the New Rules

are, at least to a considerable extent, the outcome of it. As to what has been done, the rules speak for themselves. The limits of this article confine the writer to a short statement of what has been left undone.

The report began with an urgent recommendation that the Code of Practice should be revised, and the committee was of opinion that a case for revision had been made. It was pointed out that while the rules purport to be a complete code, they are not in effect so. It is thought sufficient in several instances to declare the continuation of an existing practice, or to refer to the English practice at such and such a date. It becomes yearly more difficult to discover what the practice was at a certain remote period. To give an example: we have no rules at all governing the practice under the Settled Estates Act. The statute refers us to the condition of affairs as they existed in England in the year 1865. At that time, the English practice was in a very unformed state. It has since been rendered much more simple and effective. It would have been an easy matter to adopt the present English Act and Rules.

Again, the rules with regard to bailable proceedings are so old fashioned and complicated, that it is said the framers of the Consolidated Rules frankly confessed their inability to interfere with the ancient structure without doing as much harm as good. This complication is unnecessary. The rules as they stand could be swept away and their duty much more effectively done by a few simple enactments. As to the consolidation of actions, and the circumstances under which defendants may properly sever in their defences (among other matter), the Consolidated Rules lay down no practice. In many respects they are deficient as a Code, and until this is remedied the element of uncertainty (with the delay and expense that must attend uncertainty) will never be absent.

It seems, therefore, to be a matter of regret that the system of piece-meal emendation has been adopted, and that another opportunity of constructing a complete and consistent code has been lost.

Rule 23 defines the duties of the Clerk of Records and Writs. It was obviously passed with the intention of carrying into effect the fusion of the offices then in contemplation. There is no similar rule with regard to the offices of the Registrars of the Queen's Bench and Common Pleas Divisions. Power is nowhere conferred upon either of those offices to receive or file pleadings, certify proceedings, issue writs of execution, or do any one of the numerous acts which are done and have daily been done for years. There being no power to do the acts, there is no power to exact the fees. It is therefore the fact that, in this very heart of the legal system of the Province, thousands of dollars of fees are yearly collected in these two offices without warrant or authority. This was surely something deserving to be remedied. The obvious remedy was to carry into effect the fusion which was in effect provided for by the Consolidated Rules.

Rule 28. The Clerk of Assize will continue to exist "in gross," and except when actually in Court, or upon those few days when he occupies his office down town, those who desire to transact business in connection with the Assizes will have to seek him where they may find him.

Proposed Rule 40 *b*. Injustice has more than once been done by the refusal of a Referee or Master to give the grounds of a decision to which exception is taken. There appears to be nothing unreasonable in compelling him to do so; but this recommendation was rejected.

Rule 144. It has so often been advocated in these columns that the Accountant should be required to open a separate account for each individual to whose credit an ascertained amount is directed to remain in Court, that it is unnecessary to further comment on the matter here. Presumably it was deemed it would be too perilously easy for individuals to ascertain the amount of money to their credit if such account were opened; it would approximate to the convenience which an ordinary bank affords, and might induce extravagance.

Rules 161, 162. These rules call upon the Accountant to prepare a number of lists and statements once in each year. It is stated that this is not done and that it would be impracticable to do it. There is no great safeguard in retaining rules which are not obeyed.

Rule 191. This rule stands unaltered, and continues a monopoly to the Toronto General Trusts Company. Perhaps there are too many pros and cons in connection with this subject to discuss it here.

Rule 193. Where a mortgage made to the Accountant is paid off, the mortgagor has to apply for an order to compel the Accountant to sign a discharge. This order is practically granted on *præcipe*, the only material required being the certificate of the Accountant that the amount has been paid into Court. The fact that an order must be issued is no safeguard; the real safeguard is the issue of the Accountant's certificate, and mortgagors might very well have been saved the four or five dollars which it costs to issue an order.

Rule 219. It was proposed to add to the duties of the Divisional Courts the consideration of such motions or proceedings as might be referred to them by a Judge. Without explanation, it is difficult to see why this should not have been done. Whatever might be said against the adoption of such a suggestion, there might at least be said in its favour that it would save both time and money to litigants.

Rules 254 and 1212. Sheriffs have practically a monopoly of the service of process; that is to say, although a solicitor may save both time and money to his client by effecting service, he is in effect forbidden to do so until the Sheriff has made an attempt and failed, as he is not allowed to tax the costs of such service against the other side. Why should the interests of Sheriffs be so carefully guarded at the expense of litigants?

Rule 271. Clause "H" as proposed, reads:—"Where the action is upon a contract or judgment, though the same be not within any of the classes already enumerated; but it

appears to the satisfaction of the Court or a Judge that the defendant has assets in Ontario of the value of $200 at least which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action." Before the consolidation, this clause was in existence. The general understanding is that it was dropped out by mistake. It was thought desirable to re-introduce it. The fact that a defendant has assets within the jurisdiction might fairly render him liable to be sued here; it gives the Court that control over his property which has been held to be the basis upon which jurisdiction rests.

Rule 279 directs that proceedings down to judgment shall be carried on in the office where appearance is to be entered. There was, and is, a certain amount of doubt as to whether the expression "down to judgment" embraces "judgment" itself. There would have been no harm in clearing up the doubt.

Rule 280 says: "An issue may be filed in the County in which it is directed to be tried." The committee desired to substitute for the word "may" the word "shall"; but this has not been done, and it will still be uncertain where the filing should take place.

Rule 281 says, that a defendant appearing after the time limited for appearing shall, *on the same day*, give notice to the plaintiff's solicitor. This sometimes prescribes an impossibility, as where the plaintiff's solicitor does not live in the same town as the defendant, or has no agent there.

Rule 299 apparently confers a remedy; but machinery is lacking to give it effect. It allows a plaintiff, where a notice is filed disputing only the amount of his claim, *to proceed as if the defendant had filed a defence disputing only the amount of his claim.* But there is no mode of procedure elsewhere laid down to cover the case where a defendant has filed a defence disputing only amount." The rule therefore carries the matter no further. The committee was of opinion that under these circumstances there might be a provision for a speedy reference to take an account,

and that such account might be taken, as in mortgage actions, before the officer whose duty it was to enter judgment. This suggestion being rejected, matters remain as before, and a plaintiff will have to go to trial or move for judgment or a reference.

Rules 399 to 423 are the rules relating to pleading, and under this head it is not amiss to give a quotation from the judgment of the Court of appeal in *Ostrom* v. *Benjamin*, 20 A. R. 336. "It would be a new departure in this Court if we were to hold parties conclusively bound by their pleadings. We had a notable instance not long since in which the plaintiff contended that the facts of the case were not as presented in the statement of claim but as set forth in the defence; while counsel for the defendants, on the other hand, contended that the truth was to be found not in the defence but in the statement of claim; and the judgment proceeded upon facts not alleged by either and scarcely referred to on either side upon the argument."

The Queen's Bench Divisional Court, in *Stratford* v. *Gordon*, 14 P. R. 407, speaks of the pleading in that case as being "obscured by the verbosity which now passes for pleading," and also intimates that the pleading under review lacked preciseness and was unnecessary. It was nevertheless retained upon the record. The fair conclusion is that at the present day anything "will pass for pleading." Is this altogether the fault of the degenerate practitioners of our time? It would perhaps be an impertinence to assert that it is not. The committee felt that a remedy should be applied, and recommended the introduction of the English Rules of Pleading—either that or a practical abolition of pleadings, as they seem to have lost their value in the eyes of the Bench? The subject is one deserving of consideration, and no doubt has received consideration. We must assume that the Judges are satisfied with the present position of matters, and there is a certain relief in knowing that in the event of the absence of a solicitor, his office boy can fill his shoes with entire satisfaction in this regard.

Rule 476 prescribes that where the time for doing any act expires on Sunday or other day on which the offices are closed, it may be done on the next day when the offices are open; but there are certain acts and proceedings which are not done in "the offices," and it was thought the words "juridical day on which the proceedings in question can be taken" would have met such cases; but the powers that be do not approve the change.

Rule 488. A new rule was drafted to follow this rule in the following terms: "Where it is made to appear to the Court or a Judge that the officer or officers of a corporation, or the party or parties who is or are liable to be examined for discovery under Rule 487, is or are unable through ignorance of the facts to afford the discovery to which the other party is entitled, and that any other person or persons who is or are an employee or employees of the said corporation or party or parties, or who was or were such at the time the question arose between the parties, is or are cognizant of the facts, an order may be made for the examination of such person or persons for the purpose of discovery." See *Leitch* v. *Grand Trunk*, 13 P. R. 369, where the following language is used:—"The test therefore, even under the former practice of the propriety of making a particular officer or even servant of the corporation a party, or of interrogating him, seems to have been his ability to give the necessary information, and that in my opinion is the test which is still to be adopted." So long as the right of discovery is granted it should be effective. Does it not verge upon the absurd to grant or withhold discovery because, for example, an engine driver is or is not driving a bob-tail train, or to condemn a litigant to ignorance until the trial because his adversary states that a certain manager, clerk or employee alone knows the facts?

A new rule was proposed as 506 *a* to the following effect:—"Where it is made to appear to the Court or a Judge that it is difficult or impossible to enforce or execute a judgment, order or writ without discovery, the Court or a Judge may order the examination of any person for dis-

covery in aid of such judgment, order or writ." This is perhaps a rule which would not be very often called into action; but on the rare occasions when it is needed, it is very badly needed. There have been cases where it has proved entirely impossible to realize the advantage of a judgment because of some fraudulent concealment on the part of the person against whom it should be executed. From an *a priori* view, the rule may have appeared to have been unnecessary, just as it is difficult to tell from glancing at a pair of boots whether they would hurt one's feet or not. The only satisfactory method of ascertaining that fact is by wearing the boots. The suggestions embodied in the rule came from practitioners who have been made painfully sensible of the defects in the practice at certain points, but because the advantages of the suggested alterations were perhaps not entirely obvious, and their Lordships had, or made, no opportunity for learning the reasons for them, they have gone by the board.

Rule 509. This was to have been changed by making provision for production and discovery where contribution or indemnity is claimed as between co-defendants. As it now stands it will be inefficient. Furthermore it says, "A third party who has been served by a defendant under rule 329, and has entered an appearance, etc." Now it is rule 328 and not rule 329 that authorizes the bringing in of third parties, and rule 332 (*c*) is the rule providing for contribution or indemnity between co-defendants, so that rule 509, as it stands, entirely fails in its object, and we have, therefore, no provisions as to production of documents and examination between defendants and third parties and co-defendants.

Rule 536 authorizes any person affected by an *ex parte* order to move to rescind it. The ordinary understanding of the expression "*ex parte*" has been expanded in the case of *Flett* v. *Way*, 14 P. R. 123 to cover cases of default where notice has been given. There being a little doubt whether the language of the rule was not thus unduly strained, it was thought desirable to expressly cover the

case of parties who have had insufficient notice, or of those who through accident or mistake have failed to appear; but this suggestion was not adopted.

Rule 562 allows one party to an action to serve notice that he intends to call the opposite party as a witness, nothing being said as to the payment of conduct money or as to the place where the person whom it is desired to call happens to reside. It has been held (1) that this right does not exist where the party, whose evidence it is thus sought to obtain, lives out of the jurisdiction; (2) that the ordinary conduct money and witness fee must be paid. It was thought it would make the practice somewhat clearer if the practice laid down in these decisions was declared in the rule, and it is not easy to see why the change was not made.

Our rules make no provision whatever for compelling a person not a party to an action to allow discovery before trial, of documents in his possession. It sometimes happens in this way that one of the parties is kept in absolute ignorance of papers which have a most important bearing on his suit. The committee deemed that, under proper safeguards an order might be made directing such a witness to produce, either upon an examination or otherwise, such documents as might be in his hands. He would of course not be ordered to produce anything which he could not as a witness be compelled to produce at the trial. This would have been a most helpful rule, and so impressed was the late Master in Chambers with its desirability that he drafted the rule in its proposed form, and used his best efforts to have it adopted.

Rule 620 while making provisions as to the non-abatement of actions does not cover the case of death of either of the parties during a reservation of judgment. There is no reason in the nature of things why, under such circumstances, there should be a new trial or argument. It is hoped at some future time this amendment will be made.

A new Rule (640*a*) was proposed in the following terms:—"Where the defendant admits the plaintiff's claim

in whole or in part but sets up by way of counterclaim thereto a money demand, payment into Court of the amount of the plaintiff's claim, or any part thereof, may be dispensed with by the Court or a Judge, and the Court or a Judge may permit the defendant so counterclaiming to plead as a defence to the plaintiff's claim the offer of the set off of the amount of such counterclaim against the whole or part of the plaintiff's claim, and such plea shall have the effect of a plea of tender." This was framed to meet a very genuine case of injustice. The plaintiff, A., was absolutely worthless and desired to harass the defendant, B.; B. acknowledged that A. had a valid claim against him to the amount of $500, but refused to pay because he had a claim to a larger amount against A., the claims being entirely independent of one another. On several occasions B. offered to set off the one claim against the other. B. was a good mark for costs, and A. brought suit. B. could not pay the claim into Court because A. would have been only too glad to take out the money in full satisfaction, and tax costs. He had no course but to counterclaim. The action ultimately came down to trial, when A. recovered judgment with costs, and B. likewise. The judgments were set off; but as the claims were independent, the lien of the solicitor intervened, and a set-off of costs was refused. The result was that B., who had been in the right throughout, had to pay his own costs and A.'s costs of the main action, while he had nothing better than an unrealizable judgment for debt and costs against A. It seems probable that had the purpose of this proposed rule been fully comprehended, the principle of it would have been adopted and a grave injustice of this kind prevented in the future.

It frequently happens that by reason of an admission of liability, or a partial judgment, the sum in dispute in a High Court action dwindles down so as to bring it within the jurisdiction of the County Court or Division Court. A Rule (652*a*) was drafted to allow a transfer of the action under such circumstances to the lower forum. The writer is quite sensible that in this, as in numerous other

instances, he only has in mind the advantages of the changes proposed, and not the arguments against them. Here, as elsewhere, it is with extreme diffidence that he states the opinion that this would have been a move in the direction of curtailing litigation and diminishing its cost.

Rule 685 deals with exhibits put in at the trial, and, as all practitioners at Osgoode Hall know, this trivial detail occasions a great deal of trouble. After taking a great many opinions upon the point, the committee thought that exhibits should remain in Court until judgment was given and during any stay of proceedings ordered by the trial Judge, and that thereafter they should be delivered out to the parties respectively upon notice, unless a motion was made to the Divisional Court, or the Court of Appeal, in which case, unless it was otherwise ordered, the exhibits should remain in Court. This would have for ever put an end to the trouble continually arising by reason of lost and mislaid exhibits.

Rule 689. The remarks in connection with the last rule apply to this also to some extent. The record is handed out to the successful party, and there is never a sittings of the Divisional Court but that some case is thrown over or delayed because of its non-production. There is no real object in handing it out, because it must be filed when judgment is entered. It might just as well be left in Court where either of the parties could take a memorandum of the endorsements upon it with a view to settling the judgment or otherwise. As matters now stand, records are not forthcoming when wanted although the party moving or appealing has used all possible diligence in the matter.

Rule 702 authorizes an order to be made for "inspection of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute." This is sometimes not sufficient to answer the ends of justice. It may happen that it is essential to take samples or to make tests or investigations;

and, with all proper safeguards, there should be power to allow this to be done.

Rule 738 permits a defendant to give a notice submitting to the payment of the interim alimony and costs claimed by the plaintiff. The amount claimed is nearly always excessive. It was suggested that the defendant should be allowed to give a notice in turn submitting to the payment of such sum as he deemed reasonable. If thereafter a motion for interim alimony were made, and the amount which the defendant proposed to pay should be found to be reasonable, no order should be taken out until a default occurred.

Rule 744. There is always a doubt as to whether the leave of the Master in Chambers to move under this rule should be embodied in an order. It was proposed to save expense by permitting him to endorse such leave on the notice of motion, or, if it was thought expedient, to issue an order.

Rules 759 and 761 deal with the settlement of judgments. The idea of the committee was that judgments should be settled, where possible, before the Registrar or other officer who sat in Court when the case was tried. That, therefore, judgments in cases tried at Toronto should be settled in Toronto, and that judgments in cases tried elsewhere than at Toronto should be settled where tried. The Rules have been amended. Judgments in Toronto cases are to be settled in Toronto. All judgments delivered elsewhere than at Toronto are to be settled in the country; but there is no provision whatever for the large class of cases tried in the country where judgments are delivered in Toronto. It seems as though the intention had been to adopt the suggestion of the committee; but through some curious mistake this has not been done, and the result is the deadlock alluded to.

Rule 769 deals with the signing of judgment pursuant to any order or certificate, and requires that the same should be sealed with the seal of the Court. The reason

for this requirement is obscure, as it is not the custom to put the seal of the Court upon such certificates, for example, as those of a Master's or of the Accountant. The committee proposed a change in this respect; but it was not adopted.

A rule was suggested as 782*a* in the following terms: "Where any party claims to be entitled to some further or other relief than is granted by the judgment in respect of the subject matter of the action, such relief may be granted upon petition." This was not a mere idle amendment, but was to cover a case where, for some reason, the judgment as it stands becomes ineffective (*a*). One cannot see what difficulty or danger could arise from the conferring of this power, and there are reasons in its favour strong enough to counterbalance any but very strong arguments against it.

Rule 802 requires that the evidence should be filed when a motion is set down for the Divisional Court. This rule is systematically disregarded, and necessarily so, because in perhaps one half of the cases the evidence is not prepared at the time when it is requisite to set the case down. To make the rule effective, it was proposed to authorize the setting down of the case without the production of the evidence, but to direct that the case should not be put upon the peremptory list until the evidence was produced, and also to require the moving party, by rule, to do that which he is by unwritten practice compelled to do, viz., to cause the records and exhibits to be transmitted to the proper officer.

Rule 837, notwithstanding the statute 54 Vict. cap. 12, still requires that in County Court appeals ten copies of the appeal book should be deposited. The committee thought that the rule and the statute should be brought into accord. As matters now stand there will certainly be confusion.

To Rule 838 the same remarks apply.

After a good deal of deliberation, the conclusion was come to that it was not expedient to allow the appellant

(*a*) See *Myers* v. *Hamilton Provident*, 15 P. R. 39.

in a County Court appeal to prepare the appeal book without reference to the other side.

The proposed rule (838 *a*) read:—"A draft of the case mentioned in the preceding rule shall be settled in the manner provided by Rule 814, and reasons for and against appeal shall be delivered between the parties in the same manner in all respects as in High Court appeals." Not only is this suggestion rejected, but the latter part of Rule 848 is struck out, which reads,—"In case the respondent is of opinion that any necessary matter has been omitted, he may at any time before the hearing, leave with the Registrar a memorandum briefly referring to such omitted matter." A respondent now is deprived of any safeguard, but is practically at the mercy of an unscrupulous appellant. It is all very well to say that he can orally inform the Court of the deficiencies of the appeal book; but *litera scripta manet.*

Rule 886. There is a case not provided for by the rule, and which appears to be a *casus omissus.* Where execution has been issued in favour of a person who has died since the issue of execution, and it is desired to renew the writ in favour of his executors, there is, of course, no reason why such a step should not be taken; but in no reading of the rule can this be done; it only speaks of an application for leave to issue execution, not to amend an execution already issued. It is not likely that this difficulty would suggest itself on an *a priori* view, and the importance is emphasized of not relying exclusively upon such a view.

Rule 1135 deals with the inspection, detention and preservation of property "which is the subject-matter of the action," but inspection is frequently necessary of property which is not strictly "*the* subject-matter of the action." The late Master in Chambers, pressed by this difficulty, proposed to substitute the words "any property, the inspection of which is necessary to the proper determination of the question in dispute." It is a pity that this valuable suggestion was not adopted.

Rule 1214. It sometimes happens that *ex parte* orders are made which make costs costs in the cause, or otherwise deal with them. The Taxing Officer holds himself bound by such orders. It was deemed advisable that he should have the power of disallowing the costs awarded by an *ex parte* order as he has the power of disallowing certain other unnecessary or improper charges.

Rule 1216. Costs are with us, in theory, an indemnity to the successful party. Very often large expense must be incurred in procuring evidence. The English practice allows the necessary and proper costs of procuring evidence to be taxed to the successful party. If the indemnity theory is to be consistently maintained, they should be allowed here. As it is no longer necessary to revise pleadings, there is something to be spared on this head which might go in the direction indicated.

Proposed Rule 1247 *b*. A motion has now to be made to take a bond off the files. This is one of the "nickle in the slot" applications which nine times out of ten have no merit but to put four or five dollars in the pocket of a solicitor. It was suggested that the bond might be given up either for cancellation or suit upon the consent of the solicitor upon the other side; but apparently it imagined that in so doing a risk of some kind would be run, and the practice in the future will be as it has been in the past.

It was also suggested by a committee that where money was paid into Court as security, it might be paid out on consent of the other side without an order. Of course upon such a consent an order could instantly be obtained. Where is the necessity for it; and what is the safeguard? It may be truly said of solicitors in this country, as a rule, that they do not desire to put their clients to more costs than are necessary; but the practice compels the taking of certain steps such as this at a loss of time and money, which might well be saved to solicitor and client.

It is impossible in this article, already too long, to deal with other rejected amendments of less importance doubtless, but still not unimportant. When the time comes for a revision of the Code perhaps they will not be neglected.

With the assistance of the Taxing Officers the committee made a very careful revision of the Tariff which was embodied in their report. As nothing has been heard of it yet, it is confidently hoped that it is receiving the attention which it deserves.

Since the above was written another batch of Rules has come out, and one of them calls for special remark.

Consolidated Rule 1177 provides that the costs of every examination "otherwise than at the trial of an action" should be costs in the cause; but that the Court or Judge in adjusting the costs should, at the instance of any party, enquire, or cause enquiry to be made, into the propriety of having made such examination. If upon such enquiry it appeared to the Court or Judge or Taxing Officer that the examination had been unreasonable, vexatious or at unnecessary length, the costs occasioned by it should then be borne in whole or in part by the party in fault. The Rule concluded by providing that the Taxing Officer should make enquiry without any direction. In addition to this Rule, Consolidated Rule 1195 provides for a direction being made to the Taxing Officer to look into any proceedings and disallow such as he may find to be improper, unnecessary or to contain unnecessary matter or to be of unnecessary length. In case of such disallowance, the party whose costs are so disallowed is to pay the costs occasioned to the other party. This rule likewise confers upon the Taxing Officer the power, of his own motion, to make such an investigation. Now, Rule 1177 has been rescinded and Rule 1848 substituted therefor, and the new Rule provides (1) that the costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines, unless it is otherwise ordered, as to the whole or part of the examination, by a Judge of the High Court in actions in such Court, and,

in actions in the County Court by a Judge of that Court. (2) No costs of obtaining the allowance of such costs against the opposite party shall be taxed unless so ordered.

This Rule has been passed in consequence, it is presumed, of an impression existing that at present examinations are improperly had, or are extended to an unnecessary length. It may or may not be that this is the case. Assume that it is. Having in view the superseding Rule and Rule 1195 above referred to, the new Rule appears to postulate three things,—(1) that there is a tendency on the part of the average solicitor to hold unnecessary examinations and to unnecessarily prolong examinations. To put it frankly, to deliberately incur costs which might be dispensed with. (2) That the Taxing Officers are not competent to correct this grievance. (3) That the Judges for some reason are not ready to "cause enquiry to be made" or "direct the Taxing Officer to look into the matter." It has been assumed that examinations are unnecessarily had and unnecessarily prolonged; but, every reputable practitioner will truthfully and indignantly deny that he has ever incurred expense in this way except in so far as, according to his best judgment, it was to his client's interest to do so. This Rule must be aimed against the disreputable fraction of the profession; and to keep that fortunately small fraction from offending, the whole profession is to be punished.

As we have reason to know with the highest satisfaction, the Taxing Officers are not incompetent. They are always willing to make investigation as to the necessity or propriety of any proceeding and to disallow the same or any portion of it. This postulate likewise seems to disappear.

Lastly. Have the Judges themselves the will (as they have the power) to correct the evil through the proper legitimate means afforded by the Rules alluded to? If not, why not? It may be asking too much of the Judges that they should themselves perform this duty; but the

Rule itself seems to contemplate that they should merely direct the enquiry and leave that officer of the Court to perform the duty who is best able to do it. Has this means of overcoming the evil been tried? If it has been throughly tested and found to be inefficient, then it may be time to attempt another remedy, but surely not till then. The new Rule opens up such a vista of petty squabbling applications avowedly only about costs, that one would fancy the already overworked Judges would shrink from the prospect.

It seems to be contemplated that the aforesaid applications are to be made for love, as no costs are to be allowed unless ordered. Why should this be? Here applications are made compulsorily. Why should the successful party not have his costs of right? What reason is there for departure from the good old rule that "with the hide the tail should go"?

W. H. BLAKE.

EDITORIAL REVIEW.

Practising before a Relative.

The question whether a barrister should practise before his father has been again raised in England. According to the *Law Journal*, Mr. Asquith was asked in the House of Commons whether there was any rule to prevent barristers, whose fathers were chairmen of Quarter Sessions, from practising at such Sessions, and his answer was necessarily in the negative.

The same question was discussed some years ago in the *Central Law Journal* of 7th April, 1882, in commenting upon which we took the view now taken by the *Law Journal*. If a barrister makes a choice of his relative's Court, or chooses a class of business that necessarily falls into that Court, or, we might add, if he suspects that he is being employed because of the relationship, and continues so to practise, his conduct is of course reprehensible. If, however, it is only in the ordinary course of business that he has to go into his kinsman's Court occasionally, there is no objection to such a course of conduct. It would be a great hardship to lay down a rigid rule that a barrister should be shut out of a Court because he had a relative on the Bench.

Chief Justice Meredith.

The appointment of Mr. W. R. Meredith, Q.C., to the Chief Justiceship of the Common Pleas rendered vacant by the resignation of Sir Thomas Galt, is one that has been received with unfeigned expression of satisfaction on all sides. Mr. Meredith was, if we may judge from the balloting for Benchers at the quinquennial elections, the most popular member of the bar in the Province. We

believe that he always headed the poll. In his public life, as a member of the Legislative Assembly of the province, he was highly esteemed by his opponents as well as by his friends; and no breath of suspicion ever touched him.

It is a most unusual circumstance that two members of a family should both occupy seats on the Bench at the same time; but we now have two brothers (consanguineous, not judicial) upon the Bench of our High Court of Justice. The offices of standing counsel to the cities of Toronto and London become vacant by Mr. Meredith's elevation. Mr. T. G. Meredith, a brother of the Chief Justice, has, we believe, been appointed standing counsel for the city of London, but the council of the city of Toronto has not yet fixed upon his lordship's successor.

Names of Chief Justices.

While we are on the subject of Chief Justices, it is worth mentioning as a curious circumstance that the christian names, John and Thomas, have for many years been the most common names not only amongst the Chief Justices, but amongst the other dignitaries at Osgoode Hall. The present Chief Justice of the Common Pleas is the only head of a Court who is not named John. In the Court of Appeal, out of six Chief Justices, or presiding judges, from 1862 to the present time, three have been named John, and one Thomas. In the Queen's Bench and Queen's Bench Division there have been two Chief Justices out of three since 1878, both named John. In the Court of Chancery and the Chancery Division, there have been two chancellors only since 1869, both named John. The present Master in Chambers bears the same christian name; so do the Master of Titles and the two Taxing Officers. The late Chief Justice of the Common Pleas was named Thomas. The Master in Ordinary bears the same name. The Master before him bore the same name; while one out of the two remaining Masters of the Court bore the name John. It is true that the same person occupied the various offices at different periods. The late Chief Justice of Ontario was Master in

Ordinary, Vice-chancellor, Chancellor, and Chief Justice. While the present Chief Justice of Ontario was Chief Justice of the Queen's Bench. But it is a remarkable thing that the name so pertinaciously adheres to the office. It is also curious to note that three Prime Ministers of Canada out of four, since 1867, have been named John.

Tenants' Fixtures.

A decision of the Chancellor's just given, which will shortly appear in the Occasional Notes, will probably do much to discredit the statutory short form of lease as an instrument of conveyance, if the decision is sustained. It already bears a very bad character, being completely ignored by English conveyancers, and having occasioned much difficulty in this Province in ascertaining its meaning. The case is *Argles* v. *McMath*. It arose on the refusal by the landlord to accord to his tenant the right to remove fixtures which he had put up in the demised premises under a short form lease. The covenant under which the landlord claimed the fixtures were the covenants to repair and to leave in repair. The seductive short form which tenants so freely sign does not indicate its true meaning. By the long form the lessee covenants that he "will, during the term, well and sufficiently repair . . and keep the demised premises with the appurtenances in good and substantial repair, *and* all fixtures and things thereto belonging or which at any time during the said term shall be erected and made, etc." He also covenants that he "will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, *together with* all buildings, erections and fixtures thereon, in good and substantial repair, etc." It is clear from both these covenants that the demised premises are considered as distinct from the fixtures. If the covenant to leave in repair embraced "the demised premises" only, it probably would not include fixtures put up by the tenant after the lease. At least one would feel inclined to exclude from the scope of the covenant

what was not in existence at the time it was made, in favour of the tenant and against the landlord. Perhaps the element of hardship would enter too largely into such an interpretation, but the improbability of such an agreement being made would be largely in favour of an interpretation which would reasonably express the intention of the parties. The words of the covenant are however clear. The tenant agrees to repair the fixtures—not those put up by the landlord—but generally those which at any time shall be erected, and he covenants to yield up to the landlord, not only the demised premises, but also all erections and fixtures thereon, not confining himself to those erected by the landlord. The case is undoubtedly one of great hardship; and though the parties may be concluded by their contract, as a question of fact it may be unhesitatingly stated that there is not one case in ten, perhaps not one in a hundred, in which the parties ever intended that expensive fixtures put up by the tenant at the going into possession should become the property of the landlord at the expiration of the term. The statutory form will evidently bear a good deal of revision, but in the meantime such a consequence may easily be avoided by using the long form of covenant and confining its operation to fixtures erected by the landlord.

The Principal of the Law School.

The Benchers of the Law Society have appointed Mr. N. W. Hoyles, Q.C., principal of the Law School in place of the late Mr. Reeve, Q.C. Mr. Hoyles' practice was largely confined to Equity, while the subjects of his lectures, according to present arrangement, are entirely dissociated from that interesting branch of law. So far as experiment has served to test his powers, however, the result is eminently satisfactory, and the Law Society is to be congratulated on having secured a principal who will maintain the school in its efficiency.

The Toronto Non-Jury Sittings.

The non-jury sittings at Toronto have been kept up continuously since their opening, but not without the usual

proportion of postponements. The scheme of proceeding from week to week has its advantages. It resulted in clearing off a batch of cases which had fallen into arrear because there was no one to try them. It also has the inestimable advantage of preventing current business from falling into arrear. But it has one defect which produces a great deal of trouble, and which might be easily remedied. The defect is that a case may be set down for trial at 3 o'clock of one day and appear on the peremptory list for trial the next day. It thus affords a most excellent opportunity for scoring an advantage. The plaintiff, after giving notice of trial, may at the expiration of ten days, set down the case for trial. The defendant is thus put in the position of being ever on the watch with his witnesses. He must be ready to summon them in hot haste to appear within eighteen or nineteen hours for the trial. In some cases this is impossible. His only other alternative is to set down the case himself, and so relieve the strain; but this, on the other hand, may occasion a strain to the plaintiff.

The simple remedy is to require either party setting the case down for trial to give notice of the setting down a reasonable time before trial. The parties must be in readiness at the expiration of the time mentioned in the notice of trial, and could have their witnesses on the alert; the notice of setting down would give a reasonable time in which to collect them and bring them to the trial. As the rule now stands the result has been to occasion many applications for postponement on the ground of surprise.

BOOK REVIEWS.

Ontario Game and Fishery Laws. A digest, alphabetically arranged, with references to the various statutes and orders in council in force on October 1st, 1894. By A. H. O'BRIEN, M.A. Second edition. Issued under the authority of the Ontario Fish and Game Commission. Toronto: 1894.

Mr. O'Brien's little hand-book or pocket-book, if you please, brings into compass the various provisions respecting fish and game, so that the sportsman may readily refer to any enactment he requires. The method of arranging the work in titles, so as to form a sort of dictionary, is exceedingly good, and enables one to find what is wanted with little or no trouble.

THE

CANADIAN LAW TIMES.

DECEMBER, 1894.

AN INSOLVENT LAW.

IT should be the aim of an insolvent law to distribute the effects of the debtor in the most expeditious, the most equal, and the most economical mode; and to liberate the person of the debtor from the demands of his creditors when he has made full surrender of his property.

The term of "Bankrupt Law" was generally applied to statutes regulating the winding-up of the estates of traders; and an Insolvent law to the case of non-traders. In Canada, however, the term "Insolvency" is now usually applied to the position of anyone, trader or not, who is unable to meet his engagements.

Any provision for the winding-up of insolvent estates should be available to creditors as well as to debtors. It should not be an optional, but a compulsory provision. The Ontario statute respecting assignments and preferences by insolvent persons has recently been held, by the Privy Council, to be within the competency of the Provincial Legislature, as it contained no compulsory process to compel an assignment, and was therefore not an insolvent law, the authority to enact which is confined to the Dominion Legislature by the 91st sec. of the British North America Act.

The Dominion Legislature has for many years declined to pass an insolvent law. But recently persistent endeavours have been made by creditors, and especially by the Boards of Trade of our larger cities, to induce the Dominion Government to take action in the matter. The bankers, however, are by no means anxious for such a law, and are satisfied apparently with things as they are. And the Province of Quebec, it is understood, is indifferent on the subject, its own system of procedure providing means for the equitable distribution of an insolvent's effects.

The Ontario law on the subject has been found to provide a fairly just and equitable mode of securing a division of an insolvent's property within the limits prescribed by it, but it fails to have full effect from the want of compulsory process to compel an assignment, and not providing for the discharge of the debtor.

It is suggested that an Act of the Dominion Legislature, supplying these defects, with some other amendments, would provide an effectual insolvent law, expeditious and not costly, and might easily be adapted to all the provinces.

In consequence of the pressure brought to bear upon it the Dominion Government at the last session of Parliament introduced an Act respecting insolvency into the Senate, which was passed by that body, but did not pass the Commons. It will probably be introduced again at the next session. It is an elaborate bill, of 131 sections, and well and intelligibly drawn to carry out the scheme of the draftsman. It was for the most part, it is understood, drafted by the Boards of Trade or in pursuance of their resolutions. But the scheme appears to be open to objection on several grounds, and the following suggestions are made in the hope of procuring some modification of the bill when it next comes before Parliament.

The writer has only seen the bill as originally introduced into the Senate, but he understood that some amendments were made in it, not numerous, but in one or two instances of some importance.

The bill (s. 2 (*c*)) provides that in proceedings for the discharge of a debtor the courts to which applications are to be made are the higher courts of the provinces; while in all other proceedings the county courts, or other similar inferior courts are to be applied to. A much simpler and less costly mode would be to require all applications to be made to the higher courts—it would tend to greater uniformity of procedure, and be less affected by local circumstances. The grounds upon which a receiving order is to be made require just as much skill, consideration and ability as those upon which a debtor is to be discharged; yet in the one case application is to be made to the inferior, in the other to the superior, court (s. 7). By the 121st and 122nd sections an appeal is granted from every final decision of the court (inferior). While the court remains the inferior court there will be a crop of appeals involving much cost, which would be avoided by substituting the superior for the inferior courts. Receiving orders made by an inferior court would only have effect within the county, while if the debtor had principal places of business in other counties other orders would be required—this would be avoided and expense saved if the order were made by the superior court.

Official Receivers are to be appointed by the Governor General in council for the several districts (s. 17) in whom the debtor's property is to vest until the appointment of a liquidator (s. 19). The creditors may at the first meeting appoint a liquidator, who is to give security, etc. (s. 25) whom the creditors may remove (s. 25 (2), and in whom the property is to vest.

The use of the Official Receivers is only to protect the property until the creditors appoint a liquidator, and there is no need for such officials. There are in existence County officials who could efficiently discharge this duty, and thus save expense. Let the Judge granting the receiving order also name a liquidator, as he may do under s. 25 in certain cases, or direct the sheriff or some local officer to take possession of the property and hold it till

the creditors appoint a liquidator. Or a trust company might be made to occupy the status of both an official receiver and a liquidator under the bill, as was suggested at a meeting of bankers, who should have charge of an estate from the beginning, and in whose hands it might be kept until it was wound up.

There would appear to be little use for the appointment of inspectors (s. 29). The liquidators ought to be men of ability and experience; they have to give security for the faithful performance of their duties; they have the whole estate vested in them (s. 26); they are under the entire control of the creditors; and if any difficulty should arise in the administration they could always consult the creditors and receive directions from them. It is said indeed in s. 26 that the inspectors shall not be paid any renumeration for their services unless voted by the creditors at a general meeting. But who can doubt that the meeting will be influenced by the consideration that unpaid services are little worth. And every inspector will in fact be paid.

Provision is made (s. 35, *et seq.*) for a discharge of the insolvent with the consent of the creditors, who are three-fourths in value and a majority in number. The bankers, it is understood, are generally opposed to any composition, but this it is apprehended may be left to the consideration of the creditors themselves, and the small minority may reasonably be bound by so large a majority of those interested. Among other conditions essential to a discharge is one (s. 36) that requires a payment of at least one-third of the claims entitled to rank on the estate; and the same is required before a discharge can be obtained without the consent of the creditors (s. 46). It is said that this limit of one-third has been raised to one-half by amendment in the senate. Considering the manner in which a large number of traders' debts are incurred—of the strong competition of creditors to place their goods—the travellers they employ to press upon small and other traders, the purchase of their wares—the character of the retail dealers

in small towns, villages, or country places, ignorant of book-keeping, and of the safe and reasonable mode of disposing of these goods—the limit might well be retained at one-third or even dispensed with altogether. In the case of discharge with the consent of the creditors, it might safely be left to the large majority required of the creditors to grant a discharge to an honest but unfortunate debtor who has surrendered all his property, even though no dividend has been received. And in the case of a discharge, with or without consent, the Court might reasonably investigate the way in which the debts had been incurred; and the conduct of the creditors as well as of the debtors should be circumstances affecting the right to a discharge, or the qualifications attached to it. But while the discretion of the creditors should be limited to one-third or less, they should not have the power of requiring more than one-third. Among the transactions that may be avoided by the creditors is that mentioned in s. 66. By this section a sale of real or personal estate made for value to an innocent purchaser within thirty days before the date of insolvency is void; it is not required to have been made with a fraudulent design on the part of the debtor, and the proceeds may have gone into the general estate for the benefit of creditors. In most, if not all, of the bankruptcy and insolvent acts beginning with that of Elizabeth a purchaser in good faith has been protected, and it is unreasonable and unjust to deprive him of a purchase honestly made.

There is another provision as to the powers of the creditors which is of a harsh and cruel kind, and should not find a place in such a law. The receiving order (s. 19) is to vest in the official receiver, and (s. 26) in the liquidator, among other things, the *letters* of the insolvent without requiring them to relate to the estate; and s. 34 enables the creditors to obtain an order for the delivery by the Postmaster of all letters and available matter directed to the insolvent to the liquidator, who is to open and read them in the presence of the insolvent and the clerk of the

Court, and retain possession of such of them as relate to the estate. This it is believed is an unprecedented and unjustifiable proceeding enabling the liquidator and other parties to become acquainted with the private affairs of the insolvent, which no one but himself should have the knowledge of.

In this bill, and in others of the same nature, it has been usual to avoid transactions of the insolvent simply because they have taken place within 30 days of the insolvency. Fraud in such transactions is *presumed*. It is contrary to a well known principle of law that fraud is not to be *presumed*, it has to be proved. If the acts complained of are actually fraudulent there will be little difficulty in proving the fraud; and the fact of their taking place within the 30 days may, with other circumstances be used as an argument to prove it. But simply by itself an act done within 30 days should not be *presumed* to be fraudulent.

Voluminous and elaborate as this bill is, it does not seem to have reached cases in which fraud may be perpetrated. It has been the fault of all such bills from the time of Elizabeth to attempt to enumerate all the ways in which fraud may be effected, and if any are not covered by the list the natural conclusion is that they are liable to be set aside. To take instances from the Ontario statutes; the giving a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, to defeat or delay creditors, or with intent to give a preference was declared to be null and void. But refraining to put in a defence to the action, or abandoning a defence by withdrawing a plea, or consenting to an order striking out the defence—all of which frauds, of the same nature, and as great as those enumerated might be effected, were held not to be avoided because not enumerated. The 65th sec. of this bill does not cover such modes of committing frauds, and there does not seem to be any other section that includes them.

Why not adopt a simple but effectual sentence revoking or annulling every act done by the insolvent in fraud of his creditors with a person having knowledge of the fraud?

Since writing the foregoing the writer has seen the amended bill. The original applied to *all debtors*, the amended confines it to *traders*. An insolvency law is for the benefit of debtors as well as of creditors,—the creditors want the estate distributed, the debtors wish to be discharged from liability. An unfortunate debtor who is not a trader, upon surrendering his property should be relieved from liability. By the English Bankruptcy Act of 1861 all insolvent debtors, traders or non-traders, were admitted to the relief of a bankrupt's charge.

Sections 129 to 153 have been added. They apply to incorporated companies, and are made a substitute for proceedings under the Winding-up Act. No reason is assigned for this transfer of jurisdiction. The Winding-up Act affords an efficient means of liquidating the insolvent estates to which it is applicable, and the proceedings under it will not be more costly nor protracted than those under the insolvency bill. Indeed, so many of the sections of the Winding-up Act have been transferred bodily into the insolvency bill, as to render it improbable that the proceedings will be less costly.

WM. PROUDFOOT.

SPECIFIC PERFORMANCE.*

Want of Mutuality as a Defence.—It is a general rule governing the granting of relief by way of specific performance that the remedy must be mutual, and that if one of the contracting parties is entitled to this relief, so also is the other. Thus if a purchaser of land is entitled to specific performance, so also is the vendor, although in his case the relief obtained by him is in effect but little more than an order for the payment of his purchase money, which relief could have been obtained at law (*a*). So, where one of two contracting parties agrees to do something of which the Court cannot enforce specific performance in consideration of the other doing something which the Court could specifically enforce, the former cannot succeed in an action for specific performance by reason of the lack of mutuality of remedy (*b*). Therefore, where a defendant railway company agreed with plaintiff contractors that the plaintiffs should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, with a proviso for its sooner determination, and an action was brought by the contractors to restrain the company from committing a breach of this contract, Lord Justice Knight Bruce said: "It is clear in the present case that, had the defendants been minded to compel the plaintiffs to perform their duties against their will, it could not have been done. Mutuality, therefore, is out of the question, and, according

* The following article consists of extracts from lectures delivered before the students of the Law School at Osgoode Hall.

(*a*) *Addersley* v. *Dixon*, 1 Sim. & St. 607 and at p. 612.

(*b*) *Blackett* v. *Bates*, L. R. 1 Chy. 117.

to the rules generally supposed to exist in Courts of Equity, that might have been held sufficient to dispose of the matter; cases, however, have existed where, though the defendant could not have been compelled to do all he had undertaken to do by the contract, yet, *as he had contracted to abstain from doing a certain thing*, the Court has interfered reasonably enough" (*c*). It is by reason of the want of mutuality of remedy that an infant cannot maintain an action for specific performance (*d*). When a contract for the sale and purchase of land, falling under the operation of the Statute of Frauds, is signed by one only of the contracting parties, there arises an apparent exception to the rule as to mutuality, for such a contract may be specifically enforced by the one who has not signed the contract as against the one who has signed the contract; while the latter could not get specific performance against the former.

Sir John Leach, M.R., says: "It must be admitted that such now is the settled rule of the courts, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and, next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual (*e*)." In *Reuss* v. *Picksley* (*f*) the question arose as to the validity of a contract falling within the 4th section of the Statute of Frauds, and which consisted of a written offer signed by one of the parties, which offer was accepted by parol by the other party. It was argued that the principle of the sufficiency of a parol acceptance ought to be confined to a case where the writing assented to is in itself a memorandum *of an agreement*, and not a mere offer. It was argued that where there was a written *offer* signed

(*c*) *Johnson* v. *Shrewsbury, &c., Railway Co.*, 3 DeG. M. & G. at p. 927.

(*d*) *Flight* v. *Bolland*, 4 Russ. 401.

(*e*) *Flight* v. *Bolland*, 4 Russ. 301.

(*f*) L. B. 1 Ex. 342.

by one of the parties, a subsequent acceptance, without writing by the other party, could not be sufficient to turn a proposal into an agreement, or memorandum sufficient to satisfy the Statute of Frauds. The one state of affairs, it was argued, supposes that the two parties have verbally made an actual contract with each other, and when the terms of such contract are reduced to writing and signed, that is sufficient to bind the party signing, but if the memorandum is of an offer only, that assumes there has been no actual contract between the parties. The Court refused to give effect to this argument, and held that a proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds.

It seems, however, that if A. makes a written offer to B., signed by himself, whereby he offers to sell B. such an interest in lands as would fall within the provisions of the Statute of Frauds, although B. may accept this offer by parol only, and may upon such an acceptance maintain an action for specific performance against A., yet, if A. requests B. to give a written acceptance, which he refuses to do, A. may thereafter *at any time before the commencement of an action by B.* retire from the contract to this extent that the Court would not thereafter enforce specific performance against him (*g*). Where there is a *want of mutuality at the time of the making of the contract* because of the inability of one of the parties to complete the contract upon his part, the other party thereto may withdraw from the contract so long as such want of mutuality continues, but *if, while the contract is still subsisting, this defect is cured by subsequent events* the contract then becomes binding upon both parties and there can be no withdrawal. Thus, if a vendor contracts to sell property to which he has no title whatever, there is such a lack of mutuality that the purchaser can withdraw from the

(*g*) *Martin* v. *Mitchell*, 2 Jac. & W., at pp. 427-8; and *Williams* v. *Williams*, 17 Beav. at p. 216.

contract at any time before action brought by the vendor, and before the vendor has acquired title, unless the purchaser, after acquiring knowledge of the state of affairs, has estopped himself from rescinding upon this ground, by thereafter treating the contract as valid and subsisting; but if the purchaser does not choose to rescind upon this ground, the vendor may bring his action for specific performance, and then he will be entitled to a judgment with a reference to the Master as to title, and the vendor may then for the first time show his title in the Master's office, and he may, in fact, wholly acquire his title after the order of reference. In order that the purchaser may relieve himself of the contract by virtue of the principle now under discussion, he must, before action brought, repudiate the contract upon the ground of the vendor's want of title, and if he unsuccessfully attempts to repudiate the contract upon the ground of fraud or otherwise, he cannot after action brought sustain that repudiation by showing that the vendor at the time of the attempted repudiation had no title (*h*).

It seems that this principle applies only where there is an *absence of title* in the vendor as distinguished from a mere question of conveyancing, and that therefore the principle does not apply where, although the vendor has not got the legal title in himself, he yet has an equitable or legal right to enforce a conveyance to himself (*i*).

This is but an example of the general rule that although the contract at the time of its inception may be incapable of being specifically enforced by reason of want of mutuality, yet if this defect be subsequently removed before the contract is rescinded, the Court may then order specific performance (*j*).

(*h*) *Hoggart* v. *Scott*, 1 R. & My. 293; *Wylson* v. *Dunn*, 34 Ch. D. 569; *Paisley* v. *Wills*, 19 O. R. 303; 18 App. R. 210.

(*i*) *Robinson* v. *Harris*, 21 O. R. 43.

(*j*) *London &c. Ry. Co.* v. *Winter*, Cr. & Ph. 57.

There was apparently a want of mutuality in the case of *Bolton Partners* v. *Lambert* (*k*), in which case a person acting as agent for the owner of land entered into a contract for the sale thereof by accepting an offer to purchase the same, but in so doing he exceeded his authority, by reason whereof the contract was not binding upon the vendor. Subsequently the purchaser withdrew his offer to purchase the property, and after such withdrawal the vendor ratified the authority of his agent to enter into the contract in question. It was held that the ratification by the vendor related back to the time of the acceptance of the offer of purchase, and that therefore the withdrawal by the purchaser was inoperative and the vendor was entitled to specific performance of the contract. If this were not a decision of the Court of Appeal one would be tempted to say that it is an extraordinary case. The case has since been followed by the same Court (*l*).

This doctrine relating to mutuality has no application to contracts in connection with which the plaintiff has fully performed all the obligations imposed upon him, and it is applicable to executory contracts only. Chancellor Boyd says:—"In the case of executory contracts, by the doctrine of mutuality a party seeking specific performance cannot get that mode of relief unless the Court is able to deal with the whole contract and has jurisdiction specifically to enforce what the plaintiff has to do or to give as the consideration. But if the plaintiff has fully performed his part, then if the Court can enforce in specie the part which remains to be done by the defendant, why should it not so decree (*m*)?"

Defence by Purchaser of Want of Title.—In an action for specific performance where a reference as to title has

(*k*) 41 Ch. D. 295.

(*l*) *In re Portugese Consolidated Copper Mines*, 45 Ch. D. 16. For an adverse criticism see 3 Harv. L. Rev. 91, and Fry on Sp. Per. (3rd Ed.) 711; and for a discussion of this and cognate subjects, see 5 Law Quart. Rev. 440, and 23 Am. L. Rev. 74.

(*m*) *Roberts* v. *Hall*, 1 O. R. at 401.

been made to the Master, the vendor may make title to the purchaser by acquiring title at any time before the Master reports on title, and in some cases he has been allowed to perfect his title even after an adverse report by the Master and before judgment on further directions (*n*).

Those cases may be said to set forth the older doctrine of the Court which was extremely favourable to the vendor with regard to making title.

The tendency of the more modern decisions is against the practice of compelling a purchaser to take an estate of which the title is not made out until after the time fixed by the contract, provided that the purchaser upon discovering the defect in the vendor's title, or the want of title in the vendor, has promptly repudiated the contract upon that ground.

When dealing with "want of mutuality" we have already referred to *Hoggart* v. *Scott* (*o*), and *Wylson* v. *Dunn* (*p*), and other cases, which show that such repudiation by the purchaser must be made before the vendor brings his action for specific performance.

In *Forrer* v. *Nash* (*q*), the Master of the Rolls says :— "Where a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it'" (*r*).

This statement of the law is approved of by Mr. Justice Fry in *Brewer* v. *Broadwood* (*s*), and by Mr. Justice Kekewich in *Wylson* v. *Dunn* (*t*).

(*n*) *Sidebotham* v. *Barrington*, 4 Beav. 110; *Chamberlain* v. *Lee*, 10 Sim. 444; *Eyston* v. *Simonds*, 1 Y. & C. C. C. 608; *Coffin* v. *Cooper*, 14 Ves. 205; *Mortlock* v. *Buller*, 10 Ves. at pp. 315-6.

(*o*) 1 R. & My. 293.

(*p*) 34 Ch. D. 569.

(*q*) 35 Beav. 171.

(*r*) See *Bellamy* v. *Debenham*, L. R. (1891) 1 Ch. 412.

(*s*) 22 Ch. D. at p. 109.

(*t*) 34 Ch. D. at p. 577.

and afterwards becomes possessed of property answering the description of the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which the Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained" (*b*).

A. H. MARSH.

(*b*) Per Lord Westbury, L. C., in *Holroyd* v. *Marshall*, 10 H. L. C. at p. 211.

STEVENS v. GROUT.

McDERMOTT v. GROUT.

16 P. R. 210, 215.

"The facts of the case (*McDermott* v. *Grout*) were precisely the same as those of the preceding case, *Stevens* v. *Grout*. This action, however, was in the Common Pleas Division."—Report of case.

McDermott and Stevens brought suits against Grout,
The law is uncertain, Sing Hey!
In the Practice Reports their fates are set out,
Come read me this riddle, I pray.

The twelve honest men made an honest mistake,
The law is uncertain, Sing Hey!
And the Judge refused straight any judgment to make,
Come read me this riddle, I pray.

Now what in the world are the parties to do,
The law is uncertain, Sing Hey!
To untangle this snarl and get started anew,
Come read me this riddle, I pray.

With a notice of trial both plaintiffs were fain,
The law is uncertain, Sing Hey!
To fly at the throat of defendant again,
Come read me this riddle, I pray.

Said the "Pleas" to McDermott, "Your practice was right,"
The law is uncertain, Sing Hey!
"To have moved us *in banc* were nonsensical quite."
Come read me this riddle, I pray.

But the "Bench" said to Stevens, "To help you, you know,"
The law is uncertain, Sing Hey!
"Takes three of us sitting here, all in a row,"
Come read me this riddle, I pray.

Thus McDermott is merry and Stevens is sad,
The law is uncertain, Sing Hey!
And Grout now is sorry and now he is glad.
Come read me this riddle, I pray.

And one thing we learn from these cases of Grout,
The law is uncertain, Sing Hey!
While some lawyers are *in* that some judges are *out*,
Come read me this riddle, I pray.

ANONYMOUS.

EDITORIAL REVIEW.

The Privy Council Decisions.

The Canada Law Journal seems not to tire in its defence of the Judicial Committee of the Privy Council; but has again returned to the question of the conflicting decisions on the constitution of Canada. We are quite content to remain in the class of "critics unable to appreciate the reasoning whereby the Judicial Committee have reconciled their supposed conflicting opinions," as long as it requires three and a half pages of the *Canada Law Journal* to explain the harmony which the Judicial Committee brought about by their own process of "reconciling" *Russell* v. *Reginam* and *Hodge* v. *Reginam*; but we decidedly object to be charged with "captious or malicious" criticism, or disrespect for the Board. It does not advance the controversy, nor clear up the inconsistencies, nor "reconcile" one to the views propounded by our critics. It may also be that the writer of the criticisms is not one of that large, or perhaps small, class of "most sensible people" who see "no foundation whatever for the criticism." But if so, he has the satisfaction of knowing that he is in company with some distinguished persons who cannot interpret the British North America Act, after three decisions by the Privy Council on the subject of liquor legislation, with sufficient clearness to show what legislature has the right to prohibit the sale of intoxicants. If there was absolutely no foundation for the criticism; if the matter had been so completely elucidated by the Privy Council, that one could easily understand the principle of interpretation, without (a) the dictum of the Privy Council "reconciling" *Russell* v. *Reginam* and *Hodge* v. *Reginam*, and (b) three and a half pages of the *Canada Law Journal* explaining the dictum

which explained the cases; if there was really nothing left to be explained, why has the controversy arisen as to where lies the power to prohibit? Why did the Attorney-General of Ontario find it necessary to submit a case for the decision of the Courts, and why does the Supreme Court reserve its judgment, after exhaustive arguments on the subject? The Attorney-General of Ontario, the Judges of the Court of Appeal and the Supreme Court, and the counsel engaged in the case submitted and now *sub judice*, are all sensible people; and we are quite content to be with them in trying to ascertain the exact limits of jurisdiction on this much debated subject.

We still think that the decisions are inconsistent. The excuse, if excuse were needed, made by the *Canada Law Journal* that the Privy Council is a "fluctuating body," and it would not therefore be surprising if it did occasionally give inconsistent decisions, is disposed of, a page or two on, in the same article, where it is stated that three members of the Board who sat in *Russell* v. *Reginam* also sat in *Hodge* v. *Reginam*. There was no need either, for our contemporary to introduce the personal element of the Judges or the *personnel* of the Court, as it expressly condemns that mode of discussion on the next page. So we may agree to pass that.

To turn to the explanation given. It is said to be this —that for one purpose and in one aspect a subject matter may be within the jurisdiction of the Dominion, while for another purpose or in another aspect it may be within Provincial jurisdiction. Granted. But it does not explain these cases. The proposition may be applicable to some cases, for instance, the dealing with an insolvent's estate, which well exemplifies it. The Dominion may pass an insolvent law, and as incident thereto—or for the purpose of making it effectual, in the aspect of dealing with insolvency—may, incidentally pass laws affecting procedure, etc. But the Province may, in dealing with property and civil rights and civil procedure, pass laws respecting them which do not lose their efficacy because the person affected

may happen to be insolvent. That is to say, for different purposes or by different approaches each may deal with the property and civil rights of an insolvent.

This is not true of the sale of intoxicants. If we restrict the purpose of the province, we must hold them to licensing *for the purpose of raising a revenue only.* But the decision goes further than that. It gives the power to regulate the traffic by direct intervention; to license, which implies the power to withhold a license; which is only another way of saying that they may reduce the licenses to a small number or withdraw them altogether—which is prohibition. This, it is to be noticed, is an *exclusive* power. The purpose or aspect of the matter is not to raise a revenue, or any other purpose or aspect than to regulate and restrict the sale of intoxicants.

On the other hand, the same body decides that the Dominion may restrict the sale, except in quantities of five gallons or over, or for certain purposes only, and by certain licensed persons only. This implies the power to withhold licenses altogether, to grant them in large or small numbers for large or small quantities, and to prohibit altogether. Now, the purpose here is identical, and the aspect the same as in Provincial legislation—to regulate and restrict the sale of intoxicants—both with the same ultimate object in view, viz., the promotion of good order in the community. In addition to these decisions there is the decision on the McCarthy Act, which was a high license Act passed by the Dominion, and which the Privy Council held invalid without giving reasons. It is impossible to say that there is no foundation for criticism, no foundation for another case to define the jurisdiction. If the Canada Temperance Act was valid, why not the McCarthy Act, which was passed for the peace, order and good government of Canada and to regulate a trade common to the whole Dominion?

With regard to *Tennant* v. *The Union Bank* and *Citizens Insurance Co.* v. *Parsons*, the *Canada Law Journal* in declaring that they are "perfectly consistent" is not

happy in finding the solution to be in "agreement with the principles adopted in *Russell* v. *The Queen* and *Hodge* v. *The Queen*." Until we can make these cases agree, they will not help us as to the others. The inconsistency is this; in *Citizens* v. *Parsons* it was held that a corporation foreign to the Province coming into the Province to do business must shape its contracts according to the local law. In *Tennant* v. *Union Bank* it was held that a bank could come into a Province and bring a law with it for its dealings with warehousemen. Surely, when we find that for private individuals there is one law as to warehouse receipts, and for banks another, there is a little inconsistency. Why may not the Dominion Parliament now proceed to say that if a bank takes a chattel mortgage or bill of sale it shall be valid without registration or filing? The principle is precisely the same.

Finally, our contemporary accuses us of destructive criticism, and asks us to give the correct solution. That challenge cannot affect the value of the criticism. We asserted simply that there were inconsistencies, and we think that we have established it. We do not profess to have arrived at a position which enables or entitles us to assert, "as most sensible people, that there is no foundation" for any doubt as to the meaning of the Act.

It may be quite true also that the Act is not to be approached and interpreted as a mere case lawyer would interpret it, though we know of no other way of doing it than following the decisions of the Privy Council. In fact, if it is not to be interpreted by cases, then we land in more inconsistencies. For the Privy Council has constantly adhered to the course of deciding each case as it arises for itself only, and refusing to lay down any general principle which will be a guide in the future. If any such principles could be extracted from the decisions, save that of the "purpose and aspect" one, then one would be able to interpret the Act as a "lawyer and a statesman," provided that he had the other qualifications—which we

assume are possessed by those who lay down that mode of interpretation as the true one.

The Barrister.

We have received the first number of a new monthly periodical entitled *The Barrister*, published in Toronto, which is intended to carry out a very large programme. We should not like to speak in an unkindly way of the new effort, as the recollection of the difficulties of a beginner in that way are ever fresh with us. But we might suggest something more practical than the ancient laws of Japan for the future. If *The Barrister* carries out its whole programme faithfully it will, indeed, be a valuable addition to legal literature.

BOOK REVIEWS.

The Principles of Equity, intended for the use of students and the profession. By EDMUND H. T. SNELL, of the Middle Temple, Esquire, Barrister-at-Law. Eleventh edition. By ARCHIBALD BROWN, M.A., Edin. and Oxon., and B.C.L. Oxon., of the Middle Temple, Esquire, Barrister-ter-at-Law. London: Stevens & Haynes. 1894.

The issue of a new edition of this standard works occurs so regularly that it might safely be classed as a periodical. It is so well known that it needs no words of recommendation, though it well deserves them for the manner in which the text is kept up to date.

The Canadian Almanac, and Miscellanous Directory, for the year 1895. Toronto: The Copp. Clark Co. (Ltd).

We have received this well known almanac for 1895. Each year it contains a mass of interesting matter not easily accessible elsewhere. In this it goes beyond the limits of a directory, to the great entertainment of them who choose to look into it. To lawyers it is chiefly useful for its very full law list of the Province of Ontario, its lists of Division Courts and their clerks and other information relating to the Courts.

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THE

CANADIAN LAW TIMES

NOTES OF CASES

AND

INDEX-DIGEST FOR 1894.

Edited by

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C. P. D.] [22ND DECEMBER, 1893.

SEARS v. MEYERS.

Writ of summons—Service out of jurisdiction—Rule 271—Objection to allowance of service—Waiver—Appearance—Leave to appeal.

Upon a motion by the defendant for leave to appeal from the decision of the Common Pleas Divisional Court, 18 Occ. N. 362; 15 P. R. 381:—

Held, that the defendant by appearing had submitted to the jurisdiction, and the justice of the case consisted in allowing him to remain in the position in which he had placed himself; and there was no reason for giving leave to appeal.

H. M. Mowat, for the defendant.

TREBILCOCK v. WALSH.

Wager—Illegality—Stakeholder—R. S. C. c. 159, s. 9.

R. S. C. c. 159, s. 9, is aimed at the suppression of the *business* of betting and pool selling, and does not apply to bets between individuals, whether stakes are or are not deposited in the hands of a third person. And while a bet between individuals as to the result of a parliamentary election is illegal, it is not a misdemeanour to make such a bet, and either party may, before the money has been paid over by the stakeholder, recover back from him the amount deposited by that party.

Regina v. *Dillon*, 10 P. R. 352, approved.

Judgment of the Common Pleas Division affirmed; BOYD, C., dissenting.

W. R. Meredith, Q.C., for the appellant.

Aylesworth, Q.C., and *J. B. McKillop*, for the respondent.

BOYD, C.]

ROBERTS v. DONOVAN.

Attachment—Contempt of Court—Disobedience to judgment—Payment of money—R. S. O. c. 67, s. 6—Debtor and creditor—Service of judgment—Notice of penalty.

Section 6 of R. S. O. c. 67, which abolishes process of contempt for non-payment of any sum of money payable by a judgment or order, refers to payments of money as between debtor and creditor; and where defendants are ordered to procure the discharge of an incumbrance wrongfully placed by them on the plaintiff's lands, they may be attached for failure to comply with the order, although payment of money is in effect what is required.

Male v. *Bouchier*, 1 Ch. Chamb. R. 359; 2 Ch. Chamb. R. 254, overruled.

But where the order directs the act to be done within a limited time, the defendants cannot be attached unless the order, with the proper notice of the penalty for default, has been served upon them in time to give them a reasonable

opportunity of complying with its terms before the expiration of the prescribed period; MEREDITH, J., dissenting on this point.

Judgment of BOYD, C., 21 O. R. 585, affirmed on other grounds.

Moss, Q.C., and *Hoyles*, Q.C., for the appellants.

J. A. Donovan and *A. C. Macdonell*, for the respondents.

ARMOUR, C.J.]

GUINANE v. SUNNYSIDE BOATING CLUB.

Company—Club—Expulsion of member—Evidence—Notice.

The directors of a club in exercising disciplinary jurisdiction under a by-law providing that "any member guilty of conduct which in the opinion of the board merits such a course, may be expelled," are not bound by legal rules of evidence, and their decision, arrived at after a fair investigation of the facts, will not be interfered with because they have admitted as part of the evidence in proof of the charge the informally sworn statement of one of the persons concerned in the transaction.

Where the charge has been made, discussed, and replied to in the public prints, it is not necessary to give to the accused person, when calling upon him to show cause against his proposed expulsion, specific particulars of the accusation. A general statement is sufficient.

Judgment of ARMOUR, C.J., affirmed.

W. Cassels, Q.C., for the appellant.

John MacGregor and *H. M. East*, for the respondents.

C. C. WELLINGTON.]

REGINA v. HALLIDAY.

Constitutional law—Liquor License Act—R. S. C. c. 194, ss. 51 (2) and 61—Warehouse.

Section 51 (2) of the Liquor License Act, R. S. O. c. 194, which requires brewers licensed by the Government of Canada to take out licenses under that Act, is *intra vires*.

Regina v. *Severn*, 2 S. C. R. 70, has been in effect overruled by more recent decisions of the Judicial Committee.

A cellar where beer is stored is a "warehouse" within the meaning of s. 61 of the Act.

Judgment of the County Court of Wellington reversed.

J. R. Cartwright, Q.C., for the appellant.

E. F. B. Johnston, Q.C., for the respondent.

C. C. SIMCOE.]

FLEMING v. RYAN.

Bills of sale and chattel mortgages—Renewal—Assignment for the benefit of creditors—R. S. O. c. 124, s. 12—R. S. O. c. 125, ss. 11, 15.

An assignee for the benefit of creditors under an assignment made and registered pursuant to the Assignments and Preferences Act, R. S. O. c. 124, may renew a chattel mortgage made in favour of his assignor, without the execution and registration of a specific assignment of that mortgage. A renewal statement, in itself in proper form, alleging title through the assignment for the benefit of creditors, is sufficient.

Judgment of the County Court of Simcoe affirmed.

Hislop, for the appellants.

J. R. Roaf, for the respondent.

C. C. HURON.]

ROE v. VILLAGE OF LUCKNOW.

Negligence—Highway—Horse.

The mere fact that a horse being driven along the highway has been frightened by the whistle of a steam engine, used by the defendants for the purposes of their lawfully operated waterworks, is not sufficient to make the defendants responsible for damages resulting from the horse having run away. Some

positive evidence of negligence in the use of the whistle must be given, or at least some evidence that the use of the whistle might reasonably be expected to cause such an accident.

Judgment of the County Court of Huron reversed; MACLENNAN, J.A., dissenting.

Garrow, Q.C., for the appellants.

Aylesworth, Q.C., for the respondent.

C. C. PRINCE EDWARD.]

McKIBBON v. FEEGAN.

Life insurance—Husband and wife—Will—R. S. O. c. 136, s. 5.

A bequest of life insurance to the testator's wife is a valid declaration of trust within the meaning of R. S. O. c. 136, s. 5, so as to cut out creditors.

Re Lynn, Lynn v. *Toronto General Trusts Company*, 20 O. R. 475, and *Beam* v. *Beam*, 24 O. R. 189, approved.

Judgment of the County Court of Prince Edward affirmed; OSLER, J.A., dissenting.

C. H. Widdifield, for the appellant.

Hoyles, Q.C., for the respondent,

IN CHAMBERS.

[MACLENNAN, J.A., 27TH NOVEMBER, 1893.

In re CHARLES STARK COMPANY.

Appeal—Cross-appeal—Enforcement of order appealed against—Waiver.

A respondent who desires to vary the decision appealed against is in the same position as if he were an appellant, and whatever would be an answer to his contention if he had brought an independent appeal, would also be an answer to the same contention when urged by way of cross-appeal.

And where, before the hearing of an appeal, the respondent moved in Chambers for an order allowing him to enforce the order appealed against without prejudice to his cross-appeal:—

Held, that it was not for a Judge in Chambers, in advance of the appeal, to determine a question which might arise on the appeal itself, viz., whether the enforcement of the order would be an answer to the cross-appeal.

Arnoldi, Q.C., for the American Watch Case Co.

C. J. Holman, for the liquidators of the Charles Stark Co.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 7th December, 1893.

ST. DENNIS v. HIGGINS.

Specific performance—Contract for exchange of lands—Title not in plaintiff—Knowledge of defendant.

Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—

Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff, having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner.

Dictum of Kekewich, J., in *Wylson* v. *Dunn*, 34 Ch. D. 569, not followed.

G. H. Stephenson, for the plaintiff.

Waldron, for the defendant.

[ROSE, J., 9TH NOVEMBER, 1898.

CITY OF TORONTO v. LORSCH.

Municipal corporations—Public highway—Obstruction by private person—Declaratory judgment—Injunction.

A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway.

Fenelon Falls v. *Victoria R. W. Co.*, 29 Gr. 4, followed.

Gooderham v. *City of Toronto*, 21 O. R. 120; 19 A. R. 641, applied and followed.

Shepley, Q.C., for the defendant.

Biggar, Q.C., for the plaintiffs.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 15TH DECEMBER, 1898.

SCOTT v. NIAGARA NAVIGATION CO.

Infants—Next friend—Foreigner—Security for costs.

The defendants appealed from the order and decision of BOYD, C., reported *ante* p. 406; 15 P. R. 409, and their appeal was argued before a Divisional Court composed of FERGUSON and MEREDITH, JJ., on the 15th December, 1898.

Foy, Q.C., for the defendants,

W. J. Elliott, for the plaintiffs and the next friend, was not called on.

The Court dismissed the appeal and affirmed the judgment of the Chancellor.

[FERGUSON, J., 12TH DECEMBER, 1893.

NORRIS v. CITY OF TORONTO.

Municipal corporations—Assessment and taxes—Distress on goods left with auctioneer for sale—55 V. c. 48, s. 124.

Certain premises in a city were assessed against Dickson & Townsend as occupants, and John Catto as owner. In the early part of 1893 Dickson & Townsend vacated the premises, and Oliver, Coate & Company, auctioneers, became the occupants. The defendants distrained upon the premises, for the taxes for 1893, certain goods of the plaintiff which had been left by him with Oliver, Coate & Company to be sold and disposed of in the ordinary course of their business as auctioneers.

Held, that by virtue of s. 124 of the Consolidated Assessment Act, 1892, 55 V. c. 48, the distress was valid; and a motion for an injunction to restrain the sale of the goods seized was dismissed without costs.

D. H. Watt and *W. C. McKay*, for the plaintiff.

Caswell, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 25TH NOVEMBER, 1893.

ALLEN v. ALLEN.

Writ of summons—Service out of jurisdiction—Rule 271—Action for alimony—Domicil.

In an action for alimony the writ of summons was served upon the defendant out of the jurisdiction, and upon a motion to set aside the service it appeared that the plaintiff and defendant were married in Ontario in 1889; that the defendant had resided in Ontario for forty years prior to 1886; that in 1886 he had been appointed to a permanent position in the North-West Territories, and had then sold his dwelling-house in Ontario and gone to reside in the North-West, where his daughter and her husband and children lived, and where he had ever since

remained, only visiting Ontario on a few occasions. He swore that he had no intention of returning to Ontario to live. It also appeared that the plaintiff shortly after the marriage accompanied the defendant to his home in the North-West and lived with him for about nine months, when she left him and proceeded to Ontario for business purposes; that she never returned to the defendant, and had since resided chiefly in the United States of America, and since the commencement of this action had stated on oath, in another cause, that she resided in the United States.

Held, that the defendant had acquired a domicil in the North-West Territories, and that the plaintiff had not acquired a distinct domicil in Ontario since she left her husband; and therefore it was not a case in which service of the writ of summons out of the jurisdiction was permissible under Rule 271 (*c*) or (*e*).

Mikel, for the plaintiff.

D. W. Saunders, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 1ST DECEMBER, 1893.

GIBBONS v. CHADWICK.

Judgment signed on orders for payment of costs—Application to set aside.

Appeal from decision of BAIN, J., *ante* p. 323.

Appeal dismissed with costs.

[2ND DECEMBER, 1893.

LEACOCK v. McLAREN.

Solicitor and client—Charging order—Preservation of fund by solicitor—Jurisdiction of Judge in Chambers.

Appeal from decision of DUBUC, J., in Chambers, *ante* p. 288.

Held, that the Judge in Chambers had no jurisdiction to make the order, and it was set aside, without prejudice to the solicitor applying in Court, or as he might be advised, for an order. No costs allowed.

If the case has been heard, the application may and should properly be made to the Judge who tried it, but the Court has jurisdiction to make an order. It would seem to be only since the passing of the Judicature Act that a Judge in Chambers in England can make an order. That, apparently, is by s. 39 of the Act and a Rule of Court made in 1880.

[20TH DECEMBER, 1893.

WILSON v. SMITH.

Attachment—Setting aside for irregularity—Imposing term that no action should be brought.

The plaintiffs sued out a writ of attachment against the defendant, which was afterwards set aside by the Referee in Chambers, and his order was affirmed on appeal by KILLAM, J. They then appealed to the full Court, contending that they were entitled to the writ, or that if it should be set aside, they should be protected against any action being brought against them by the defendants. Upon the argument it appeared that the affidavit for the order under which the writ issued did not, as required by s. 7 of the Attachment Act, state whether or not the defendant was a corporation; it was therefore impossible to support the writ, and counsel were directed to confine their argument to the question whether the plaintiffs should be protected from an action. The question was whether the Court had jurisdiction to impose the condition that no action should be brought.

Held, that the appeal must be dismissed. The Court could not interfere with the disposition of the costs made by the learned Judge on the appeal from the referee, but the Court could dismiss this appeal without costs unless the defendant consented to the Court imposing the term that no action should be brought. Where the defendant comes to the Court *ex debito justitiæ*, terms cannot be imposed without his consent, although he may be deprived of costs if he does not consent.

Ewart, Q.C., for the plaintiffs.

Culver, Q.C., for the defendant.

CANADA PERMANENT LOAN AND SAVINGS COMPANY v. SCHOOL DISTRICT OF EAST SELKIRK.

Attachment of debts—Amount due for taxes—Non-liability to garnishment—Judgment debtor.

An appeal from the decision of KILLAM, J., *ante* p. 351, was dismissed with costs.

There being a specific remedy for the collection of school taxes, it should be held on principles of public policy that they are not attachable under the provisions of the Garnishment Act.

Per TAYLOR, C.J.—Leaving entirely untouched the question whether arrears of taxes are a debt, obligation, or liability which may be garnished in the hands of a ratepayer, the appeal must be dismissed with costs.

The plaintiffs cannot maintain their garnishing order. They began their action on 17th October, 1891, and judgment was entered on 30th October. The garnishing order was issued on the day the action was begun and was served two days afterwards. Any rights the plaintiffs have must depend upon the provisions of the various School Acts from 44 V. c. 4, down to and including 52 V. c. 5 and c. 21, or some of them. All these were entirely and absolutely repealed by the Public School Act 53 V. c. 38, s. 182. In that Act there was no reservation to

the trustees of school districts, of taxes then due, or in arrears, or any provision made by which they can collect any such arrears. The only provisions for raising money for school purposes in that Act were contained in ss. 89 to 96, now R. S. M. s. 127, ss. 114 to 127. It is the duty of municipal councils to levy and collect money required for school purposes.

No steps seem to have been taken under the old law by the trustees of this district to collect arrears of taxes; but, even if they had been taken, they could not be continued under the new law, because they would be inconsistent with it and its provisions for the collection of money for school purposes by municipal councils.

Ewart, Q.C., for the plaintiffs.

Mathers, for the defendants.

RUDDELL v. GEORGESON.

Crown lands—Sale of, for taxes, before patent issued—Subsequent issue of patent to assignee of original purchaser from the Crown.

Demurrer to the plaintiff's amended bill. The original bill was demurred to and the demurrer allowed on the ground that the plaintiff could not ask that the defendant be ordered to convey the legal estate to him unless and until he had paid or tendered to the defendant the amount that he had paid to acquire the legal estate.

The plaintiff amended his bill to cover the point, alleging that he was ready and willing and offered to pay to the defendant the money so paid by him to the Crown to complete the purchase of the lands; and he prayed: (1) that it might be declared that the defendant held the legal estate in the lands as trustee for the plaintiff; (2) that it might be declared that the plaintiff had a right to a conveyance of the lands upon payment of the moneys paid by the defendant to the Crown; (3) that the defendant might be ordered to convey the lands to the plaintiff.

The lands, which were originally Crown lands, were in October, 1881, purchased by one Beech, who paid a portion of the purchase money and acquired an estate and interest therein. By divers *mesne* conveyances the title and interest of Beech in the lands became vested in the defendant, who in October, 1891, paid the balance of the purchase money and obtained a Crown patent for the same.

The lands were assessed by the municipality in which they were situate, and, taxes being due, they were sold, and purchased by the plaintiff, in July, 1887, and in July, 1889, he obtained a tax deed.

The plaintiff claimed that the interest acquired by Beech was an interest given or parted with by the Crown, and that such interest became taxable and liable to be sold for non-payment of taxes.

Held, that the land in question were not liable to be assessed and to be sold for taxes at the time they were purchased by the plaintiff. When the lands were assessed and sold for taxes Beech had paid only a portion of the purchase money, he had no right to a patent, the lands were not wholly alienated from the Crown, the estate and interest acquired by Beech was not a specific and complete interest, it was a contingent interest dependent upon the performance of an unfulfilled condition. By making such a contract of sale the Crown conferred no interest or estate in the lands.

The Confederation Act positively exempts from taxation all property of the Dominion Government. However strongly a purchaser can rely on the performance by the Crown of its agreement to sell Dominion lands, the Court cannot treat the certainty, if there be such, that the contract will be performed as transferring in the meantime from the Dominion to the individual an interest which thus ceases to be the property of the Dominion and which becomes subject to taxation by provincial authority.

Howell, Q.C., for the plaintiff.

Tupper, Q.C., and *Phippen*, for the defendant.

CANADA SETTLERS CO. v. FULLERTON.

Writ of summons—Special indorsement—Sufficiency of—Action on covenant in mortgage—C. L. P. Act.

The plaintiffs began this action by a writ of summons indorsed as follows :—

1893, October 3. To amount due under a covenant contained in a mortgage made between J. F. Fullerton, the defendant, and Canada Settlers Loan and Trust Co., the plaintiffs, dated 22nd day of July, 1892, whereby the defendant covenanted to pay to the plaintiffs at the office of the company in the city of Winnipeg, $3,150 with interest at eight per cent. per annum, the said principal sum to be repaid on the 1st day of August, 1895, and the interest at the rate aforesaid on the 1st day of August in each year, the first payment of interest to be made on the 1st day of August, 1893, which said mortgage is made pursuant to the Act respecting Short Forms of Indentures, and which contains a clause that, in default in payment of the interest secured thereby, the principal secured thereby shall be payable, and under which mortgage default has been made in and still continues in the payment of such interest... $3150.00.

To interest on $3,150 at eight per cent. per annum from 22nd July, 1892, to 3rd October, 1893, due under covenant in said mortgage..... ..... $249.30.

To amount paid by the plaintiffs to insure the buildings on the said land in accordance with a covenant contained in the said mortgage, which insurance money the defendant by the said mortgage covenanted to repay to the plaintiffs, with interest thereon at eight per cent. per annum until paid ..... $45.00.

And the plaintiffs claim interest on $3,444.30, the amount due as aforesaid, from 3rd October, 1893, until judgment, at eight per cent. per annum.

The defendant appeared and an order was made by the referee allowing the plaintiffs to sign final judgment against the defendant. On an appeal to a Judge the order of the referee was affirmed.

An appeal was then taken to the full Court, the defendant contending that the writ was not specially indorsed within the

meaning of R. S. M. c. 1; that the sum of $249.80 claimed by the writ and appearing upon the indorsement did not appear by such indorsement to be due under any covenant to pay.

Held, that the special indorsement was quite sufficient in form to warrant the order allowing judgment. It conveyed to the defendant all the information he required in order to know correctly what was claimed from him in the action, and the different items appeared to be described as fully and minutely as those of similar nature given in the forms annexed to the C. L. P. Act.

Per KILLAM, J.—*Wyld* v. *Livingstone*, 9 Man. L. R. 109; 18 Occ. N. 350, was based upon a case decided under the English Judicature Act, and without a distinction being drawn between the forms authorized by the C. L. P. Act and those required by the Judicature Acts. Here it is sufficient to follow the forms given by the C. L. P. Act and to act by analogy to these when the claim is one for which no form is there given. Under that Act it appears unnecessary to show, as is considered to be required under the Judicature Act, performance of conditions precedent.

It appears to be also unnecessary to show by the indorsement that a claim for interest arises under a contract, express or implied: *Rodway* v. *Lucas*, 24 L. J. Ex. 155.

The form of the indorsement being unobjectionable, there was jurisdiction to make the order for judgment.

Appeal dismissed with costs.

Phippen, for the plaintiffs.

Wilson, for the defendant.

[TAYLOR, C.J., 6TH DECEMBER, 1898.

CANADA PERMANENT LOAN AND SAVINGS CO. v. DONALDSON.

Mortgage—Application to extend time to redeem—Efforts to effect a sale—Value of property.

This was a suit to foreclose a mortgage, in which the 15th November, 1898, was the day appointed for payment of the

amount due to the plaintiffs. On that day the defendants served a notice of motion, returnable on the 16th, asking to have the time for payment extended for three months. Default having been made in payment of instalments falling due, the plaintiffs went into possession in April, 1885. The bill to foreclose was filed in February, 1889. Delays were caused by the deaths of parties and reviving the suit. The Master by his report dated 15th May, 1893, reported the amount due as $50,000, and fixed the 15th November as the day for redemption.

The motion to extend the time was opposed by the plaintiffs. A number of affidavits as to the value of the property were filed on both sides. Probably the true value lay between the varying estimates, and was somewhere from $60,000 to $65,000, leaving sufficient margin to admit of relief being given if other circumstances warranted it. It was argued for the plaintiffs that the conduct of the defendants had been such as to disentitle them to any indulgence. Their great delay; the want of any efforts on their part to raise the money; and that it was only by a sale of the property that they even professed to have any hope of getting money with which to pay, were all urged against them.

Since the making of the report the solicitor for the defendants had been making efforts to sell the property, but negotiations had fallen through owing to the stringency of the money market. The solicitor further swore that there were two persons who assured him that, if they were given sixty days in which to make arrangements, they would pay $55,000 for the property, and he had every hope of obtaining a larger price before the end of two months.

Held, that the time should be extended for three months, until the 15th February, 1894, the defendants paying interest up to that date upon the whole amount which was payable on the 15th November, calculated at seven and a half per cent., the amount originally reserved by the mortgage, and paying the costs of the present motion on the 21st December. The costs to be taxed before the order drawn up; the payment of them to be a condition precedent to any further extension of the time. As the plaintiffs might receive rents during the further time given, these should be credited against the amount

due, and the order might provide for notice of the amount to be credited being given one week before the time fixed for payment.

Culver, Q.C., for the plaintiffs.

Kennedy, Q.C., for the defendants.

[DUBUC, J., 29TH NOVEMBER, 1893.

SIMPSON v. STEWART.

Evidence—Ejectment—Action by executors—Proof necessary—Evidence of identity of deceased with patentee—Tax sale—Evidence necessary by purchaser.

This was an action of ejectment brought by the executors and trustees of the estate of Alexander Smith, in his lifetime of Glasgow, Scotland.

The defendant denied the title of the plaintiffs, and asserted title in himself.

The evidence adduced in support of the plaintiff's case was:—1. Ancillary letters probate of the trust, disposition, and settlement, and two codicils of the deceased issued out of the Surrogate Court of the Central Judicial District of the Province of Manitoba, where the lands in question were situate.

2. Exemplification of letters patent from the Crown for the lands, issued to the deceased, and dated 10th February, 1874, the exemplification being dated 7th April, 1883.

3. Depositions of Agnes S. Bell and Robert Bell, taken under commission at Ottawa, Ontario, with the affidavit of W. E. Perdue stating that Agnes S. Bell and Robert Bell were not within this Province.

On behalf of the defendant were produced a number of the Manitoba *Gazette*, dated 18th March, 1876, showing the establishment of Adelaide school district, and a tax sale deed from the trustees of that district to the defendant dated 23rd March, 1881.

At the close of the plaintiffs' case, the defendant's counsel moved for a non-suit on the ground that the original will should have been produced, and not the letters probate; that the plaintiffs had not been identified as the executors and trustees under the will; and that Alexander Smith, the testator, had not been identified as the patentee of the lands in question.

Agnes S. Bell was a daughter of deceased; she proved in her depositions the purchase of the land by her father, and his decease.

Held, that the probate should be received and considered sufficient evidence of the will.

As to the objection that the plaintiffs had not been identified as the executors and trustees named in the will, in the absence of proof to the contrary, the identity of names might be considered as a reasonable and sufficient presumption that they were the same persons. The identity of names, together with the evidence of A. S. Bell and R. Bell, was sufficient evidence to identify the plaintiffs as the executors and trustees named in the will. The same might be said as to the identification of the testator with the patentee of the lands in question. The death of the testator was also sufficiently proven by the production of the letters probate and the evidence of the witnesses. By producing the exemplification of patent the plaintiffs made a *prima facie* case and the motion for non-suit should be refused.

The holder of a tax sale deed, in order to establish his title, is bound to show that there were some taxes due and in arrear at the time of the tax sale. This the defendant failed to show in this case.

Verdict for plaintiffs.

Ewart, Q.C., and *Perdue*, for the plaintiffs.

Cameron and *James*, for the defendant.

[7TH DECEMBER, 1898.

LONDON AND CANADIAN L. AND A. CO. v. RURAL MUNICIPALITY OF MORRIS.

Mandamus—Application to compel collector to produce assessment rolls to sheriff—Clerical error in writ—Statement of sheriff's fees—Proceedings against officer of corporation—Change of boundaries—Inability to obey mandamus.

Application for mandamus. On 6th August, 1890, the plaintiffs recovered judgment against the defendants for $15,873. Execution was issued and placed in the sheriff's hands on 29th August, 1890.

Under the provisions of the Municipal Act, R. S. M. c. 100, s. 663, the sheriff, on 12th June, 1893, caused a copy of the writ of execution to be served on Whitworth, secretary-treasurer and collector of taxes for the defendants, and on 25th July, 1893, the sheriff called personally on Whitworth and demanded the production of the assessment rolls of the defendants for the purpose of striking a rate sufficient on the dollar to cover the amount due on the execution, which demand was refused. On 27th October, 1893, the sheriff called again on Whitworth and reiterated his demand for the production of the assessment rolls, and he was again met with a refusal. On 31st October the sheriff obtained a rule *nisi* calling upon Whitworth as secretary-treasurer and collector of taxes of the defendants to show cause why a mandamus should not issue against him commanding him to produce to the sheriff the assessment rolls of the defendants, and permit the sheriff to examine the same for the purpose of striking a rate sufficient in the dollar to cover the amount due on the execution with interest and costs, and to permit the sheriff to do all things necessary to be done under the execution. Several objections were raised by the defendants' counsel:—

1. That there was no proper copy of the writ of execution served on the defendants' treasurer, as required by s-s. (*a*) of s. 663 of the Municipal Act, the paper purporting to be a copy of such writ having wrong dates. The copy referred to the judgment as having been recovered on 6th August, 1893, and the *teste* was dated 29th August, 1893, while the correct year should have been 1890. The *teste* concluded thus, "this twenty-ninth

day of August, A.D. 1893, in the fifty-fourth year of our reign." August, 1890, would correspond with the fifty-fourth year of Her Majesty's reign, while August, 1893, would be in the fifty-seventh year of Her reign. At the bottom of the copy was written, "Renewed for two years from 27th August, A.D. 1892."

Held, that the copy served was a substantial copy of the writ, and the objection must be overruled.

2. That there was no proper statement of the sheriff's fees served with the writ, because the statement left with Whitworth had not all the itemized particulars which appear in the form given in Atkinson on Sheriffs, p. 199. The statement was composed of four items: the principal, the interest, the costs of writ of renewal, and the sheriff's fees.

Held, that the objection must be overruled. While the fees might properly have been stated in a detailed form, the objection was not a serious one.

3. That the application should have been made by the plaintiffs themselves and not by the sheriff, who had no beneficial interest in the money.

Held, that, as the sheriff was an officer of the Court, he should be empowered to ask the assistance of the Court in order to be able to perform the duties: *Grant* v. *Hamilton*, 2 U. C. L. J. N. S. 262.

4. That the proceedings taken should have been directed against the municipal council, and not against their officer, the secretary-treasurer and tax collector. It is declared by s. 664 of the Municipal Act that the clerks, assessors, and collectors of the corporation shall, for all purposes connected with the duties of the sheriff in such matters, be deemed to be officers of the Court out of which the writ issued, and, as such, amenable to the Court, and may be proceeded against by attachment, mandamus, or otherwise, to compel them to perform the duties imposed upon them.

Held, that, as Whitworth was the collector of taxes, and, as such, was supposed to have in his possession the assessment rolls, if he refused to produce them to the sheriff, as required by the statute, he was the proper party to be proceeded against for such refusal.

5. That the Rural Municipality of Morris had boundaries different from what they were in August, 1890, when the judgment was recovered.

Held, that this was a matter with which the Court had nothing to do on an application like the present one. Section 88 of the Municipal Act provides for the adjustment by the municipal commissioner of the assets and liabilities of municipalities when the boundaries are altered. Sub-section (*l*) takes away altogether the jurisdiction of the Court and its power to interfere in any manner with any order or decision of the municipal commissioner in such matters. The sheriff was bound to enforce the execution placed in his hands, and if complications arose as to the adjustment of the liabilities of the municipality in respect of territory added to it since the judgment was recovered, this was a matter for the municipal commissioner to decide.

6. That the application was made too late, as the assessment rolls had already been made up and completed, the tax notices sent, and some taxes had already been received.

Prior to 27th July, when the first demand was made for the production of the assessment rolls, the by-law levying the rates for the current year had already been passed by the council, and the tax notices had been mailed, and prior to 27th October, when the second demand for the assessment rolls was made, many of the ratepayers had paid their taxes for the year. It was not denied, however, that, on 12th June, when the writ of execution and statement of the sheriff were served on the secretary-treasurer, no by-law had been passed, no tax notices sent, and nothing done to inform the ratepayers what amount of taxes would have to be paid for the then current year.

Held, that the service of the writ and statement were the initiatory proceedings to enforce the judgment, and the secretary-treasurer and council were bound to take notice of them and to govern themselves accordingly. The first demand was made by the sheriff before any taxes were received. If the secretary-treasurer or the council, after notification of the action of the sheriff, chose to ignore the notification and go on with the collection of the taxes, without regard to the proceedings taken against them, they could not now claim that the sheriff did not act promptly enough. It was clear that what was immediately

and primarily sought for by the mandamus, viz., the production of the assessment rolls, could be accomplished without any difficulty whatever.

No sufficient ground of inability to obey the mandamus had been shown. The writ of execution and statement of the sheriff were served upon the defendants at the proper time. They knew perfectly well what was required from them by the service, and it was their duty to govern themselves accordingly. There was no valid reason why Whitworth should not be ordered to produce the assessment rolls for the examination of the sheriff as required by the statute, and why a writ of mandamas should not issue commanding him to do so.

Rule made absolute with costs.

Culver, Q.C., and *Perdue*, for the sheriff.

Ewart, Q.C., and *Crawford*, for the defendants.

[Bain, J., 7th December, 1893.

McKAY v. GRANT.

Interpleader—Claim by mortgagee for rent under attornment clause in mortgage—Actual tenancy—Burden of proof—Parties to interpleader issue—Who should be plaintiff.

The plaintiff was a judgment creditor of one Robert Grant; under his execution the sheriff seized certain wheat, barley, and oats on the lands of the defendant, occupied by him. Two claims were put in, one by John Grant, for one year's rent, amounting to $451, under the attornment clause in a mortgage from the defendant to him, the other by John R. Grant, as owner of a portion of the land. John Grant and the defendant Robert Grant were brothers; John lived in Ontario; on 5th November, 1889, Robert executed a mortgage to John on certain lands, including those on which the goods were seized, to secure the payment of $6,445 with interest at seven per cent., payable yearly. In the mortgage the mortgagor attorned as tenant to the mortgagee for the lands at a yearly rental of the annual interest payable under the mortgage, and the mortgagee was

given full power to make a distress in default of payment of any part of the principal or interest at any time appointed therefor. The attornment, the mortgage recited, was "for the purpose of better securing the payment of the interest" of the principal money secured. The whole principal with interest since the date of the mortgage was due and unpaid. By the terms of the mortgage the principal money secured became payable two years after its date. The tenancy, however, created by the attornment clause was not for a term of two years, but it would be implied that a tenancy from year to year was intended.

Held, that it is competent for the parties to a mortgage to agree that, as regards the mortgaged premises, they should stand to one another as landlord and tenant, and that such an agreement would prevail against third persons, provided that it was made *bona fide* and honestly. But such an agreement could not be held to have been made *bona fide*, unless it appeared that it was really the intention of the parties to create a tenancy at the rental which was reserved, and not merely under colour and pretence of a lease to give the mortgagor additional security, not incidental to his character of mortgagee: *Hobbs* v. *Ontario Loan and Debenture Co.*, 18 S. C. R. 483.

From the claimant's own evidence it appeared clear that the agreement was not a *bona fide* one and it was never really intended that there was to be an actual and *bona fide* demise of the land at a *bona fide* rent.

The claim for what is called rent cannot be asserted against the execution creditor. If there is no real tenancy, there can be no real rent, and it is only to arrears of rent that the statute gives priority over writs of execution. When a claimant himself shows that he can have no right, there can be no object in directing an issue.

Order made that the claimant be barred with costs.

As to the second claim, the claimant swore that he was absolute and sole owner of the wheat seized on the east half of the section. He was the son of the judgment debtor, eighteen years old, unmarried, and lived with his father; his examination showed that his title to the goods was by no means as clear and and certain as might be supposed from his emphatic statement in the affidavit.

Issue directed, and as the *onus* was upon the claimant to prove that the goods belonged to him, he must be the plaintiff in the issue.

Baker, for the execution creditor.

Vivian, for the claimant.

Machray, for the sheriff.

[8TH DECEMBER, 1893.

COWAN v. DRUMMOND.

Depositions—Application to suppress—Irregularities.

Application on behalf of one of the defendants to suppress depositions taken in Montreal, on the ground that the return had not been properly made. Some of the exhibits used on the examination had been detached from the depositions and used for other purposes, although they had been subsequently re-attached to the depositions before they were filed.

The plaintiff asked that the examination be allowed to stand, on the examiner making an affidavit identifying the exhibits on the files of the Court as those used on the examination.

Held, that where no injustice has been done, nor would result from non-compliance with the directions of an order to examine, these directions may be treated as merely directory; though there had been grave irregularities in regard to the exhibits and the manner in which the examination was returned, yet there was no object in putting the plaintiff to the great expense of having the examination taken again, when the position would be exactly the same. No injustice could be done in this case by treating the directions of the order to examine as directory in this instance, and if the special examiner would make an affidavit identifying the exhibits and showing they were all now in Court, the examination should be confirmed.

The defendant to have the costs of the application.

Mulock, Q.C., for the defendant.

C. P. Wilson, for the plaintiff.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[ROULEAU, J., 14TH NOVEMBER, 1898.

REGINA v. FULMER.

Way—Rocky Mountain Park Regulations, s. 11 (c)—Conviction for obstructing sidewalks—Rights of abutter—"Street"—"Property."

The defendant was the occupant of a lot at Banff and in the habit of driving his cart over and unloading goods on the sidewalk. For this he was convicted as for a breach of the Rocky Mountain Park regulations, by a justice of the peace at Banff. He appealed from the conviction.

P. McCarthy, Q.C., for the appellant.

J. R. Costigan, Q.C., for the respondents.

ROULEAU, J.—The contention on the part of the defendant is that a man holding a lot in the Rocky Mountain Park, either by lease or otherwise, has all the common law rights of a man in possession, unless such common law right be suspended by his deed of lease or other deed, or done away with by statutory law.

The term "street," in ordinary legal signification, includes all parts of the way, the roadway, the gutters, and the sidewalks: Elliott 17. It is a settled principle that abutters secure rights in the highway which constitute property, and of which the legislature cannot deprive them without compensation: Elliott 114; so an abutter has a special interest in a highway giving him the right of access to his premises, and may maintain an action for an obstruction which cuts off this right of access: *ib.* 474. Before going any further, I think it is important that I should give the definition of "property" as I find it at

page 686 of Dillon on Municipal Corporations. "Property is that congeries of rights secured by law in and over land or other thing, which in the aggregate constitute the owner's title thereto, his ownership, his right of use and enjoyment, and his right of disposition against competing claims on the part of others. For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. The same may be predicated of other easements or rights annexed to the ownership of the lot itself. When he is deprived of such right of access or of any other easement connected with the use and enjoyment of his property, he is deprived of his property." At page 886 of the same author I find the following language: "The right of an abutting owner to access to and from the street is a private right, in the sense that it is something different from the right which the members of the public have to use the street for public purposes. It is an easement in favour of the abutter's lot in the legal sense of the term, and as such is property or a property right, protected by the constitution against legislative appropriation without compensation." For the purpose of this appeal, I treat the defendant as the owner of the lots in question.

In view of the above general principles of law, how should I interpret s-s. (*c*) of s. 11 of the Rocky Mountain Park Regulations of Canada? That regulation is not intended, and never was meant, to interfere with the private rights of any property holders, because if it were so, it would be *ultra vires* of the Governor-General in Council. The Rocky Mountain Park Act never authorized such regulation *quoad* lot holders in the park as to their private rights. This regulation is intended, no doubt, to warn the public against any trespass either by riding or driving across or on any sidewalk. There is nothing in that regulation that deprives any possessor of a lot of his right of access to and egress from his property. If the superintendent of the park chooses to give a restricted meaning to that regulation which I am sure is wrong, he must bear the consequence of his wrong interpretation.

Appeal allowed and conviction quashed.

Exchequer Court of Canada.

[BURBIDGE, J., 9TH JANUARY, 1894.

REGINA v. LA FORCE.

Patent of invention—Sci. fa. to repeal Canadian patent—Prior foreign invention unknown to Canadian inventor.

The pneumatic tire as applied to bicycles came into use in 1890. It consisted of an inflatable rubber tube with an outer covering or sheath, which was cemented to the under surface of a *U*-shaped rim similar to that which had been used for the solid and cushion rubber tires which preceded it. This tube was liable, in use, to be punctured, and as the sheath was cemented to the rim of the wheel it was not readily removable for the purpose of being repaired. La Force's invention met that difficulty by providing for the use of a rim with the edges turned inward so as to form on each side a lip or flange, and of an outer covering or sheath, to the edges of which were attached strips made of rubber or other suitable material, which fitted under such lips or flanges, and filled up the recess between them. When the rubber tube is not inflated, this tire may readily be attached to or removed from the rim of the wheel, but when inflated the covering or sheath is expanded and the outer edges of the strips attached thereto are forced under the flanges of the rim, and the whole securely held in position by the pressure of the inflated tube upon such strips.

The defendant's assignor hit upon this idea in April, 1891, and, in company with his brother, made a section of a rim and tire on this principle in May following. On the 3rd August in the same year he applied for a patent therefor in Canada and on the 2nd December following obtained it. In March, 1891, Jeffery, at Chicago, in the United States, conceived substantially the same device, and confidentially communicated the nature thereof to his partner and patent solicitor. On the 27th July he applied for a United States patent, and on the 12th January,

1892, such patent was granted to him. On the 5th February, 1892, he applied for a Canadian patent, which was granted to him on the 1st June in the same year.

When, in May, 1891, La Force's conception of the invention was well defined, there had been no use of the invention anywhere, and the public had not anywhere any knowledge or means of knowledge thereof.

Held, that the fact that prior to the invention by an independent Canadian inventor, to whom a patent therefor was subsequently granted in Canada, a foreign inventor had conceived the same thing, but had not used it or in any way disclosed it to the public, was not sufficient under the patent laws of Canada to defeat the Canadian patent.

Baxter v. *Howland*, 26 Gr. 185, and *Smith* v. *Goldie*, 9 S. C. R. 46, followed.

2. That the drawings annexed to a patent may be looked at by the Court to explain or illustrate the specification.

Smith v. *Ball*, 21 U. C. R. 122, followed.

W. Cassels, Q.C., and *Gormully*, Q.C., for the relator.

Ritchie, Q.C., and *Ross*, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, J.] [9TH JANUARY, 1894.

In re HESS MANUFACTURING COMPANY.

SLOAN'S CASE.

Company—Promoter—Trust—Sale of land—Stock—Contributory—Winding-up.

To make an alleged promoter of a company liable for the amount of paid-up shares allotted to him in consideration of

the transfer by him to the company of property standing in his name, it must be shown that, at the time of its acquisition by him, he stood in such a relation to the intended company that he could not claim to have bought the property for himself, and therefore that there was no consideration for the allotment; and the Court, HAGARTY, C.J.O., dissenting, having on the evidence come to the conclusion that this was not shown, reversed the judgment of MEREDITH, J., 23 O. R. 182.

Moss, Q.C., and *Haverson*, for the appellant.

Hellmuth and *Raney*, for the respondent.

IN CHAMBERS.

[MACLENNAN, J.A., 22nd JANUARY, 1894.

McMASTER v. RADFORD.

Appeal to Privy Council—R. S. O. c. 41—Security, effect of—Stay of proceedings—Execution—Payment out of Court—Jurisdiction of Judge of Court of Appeal—Correction of order—Mistake or inadvertence—Settlement of order—Consent order.

A Judge may always correct anything in an order which has been inserted by mistake or inadvertence; and an order will be corrected even after the lapse of a year.

And where the plaintiffs were appealing to the Privy Council from a judgment of the Court of Appeal dismissing with costs an appeal from the judgment of the Queen's Bench Division in favour of the defendants with costs, and had given security in $2,000, as required by s. 2 of R. S. O. c. 41:—

Held, that the order of a Judge of the Court of Appeal, under s. 5, allowing the security, should not have stayed the proceedings in the action, and so much of the order as related to the stay should be rescinded.

Held, also, that the plaintiffs not having given security to stay execution for the costs in the Courts below, and the stay being removed, if they now desired to have execution for such costs stayed, they should give security therefor as provided by Rule 804, which is made applicable by s. 4 of the Act.

Held, also, that if an order for payment out of the High Court of money therein awaiting the result of the litigation, was "execution" within the meaning of s. 8, it was stayed by the allowance of the security, and required no order; if it was not execution, a Judge of the Court of Appeal had no jurisdiction to stay proceedings in the Court below; and it was for the High Court to determine whether such an order was "execution," and if not, whether the money should be paid out.

Held, lastly, that after an order has been pronounced, the initialling of it, as drawn up, by the solicitor for the party opposed to the party having the carriage of it, does not make it a consent order, but merely assents to it as being the understanding of the party of what was ordered by the Judge.

George Bell, for the plaintiffs.

George Kerr, for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 29TH DECEMBER, 1893.

BELLAMY v. BADGEROW.

Reformation of deed—Mortgage—Omission of bar of dower—Voluntary deed—Consideration.

A voluntary deed will not be reformed against the grantor.

And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently, after his death, paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiff to bar her dower.

E. D. Armour, Q.C., and *W. H. Grant*, for the plaintiffs.

Lash, Q.C., for the defendant.

BRISTOL AND WEST OF ENGLAND LAND, MORTGAGE, AND INVESTMENT CO. v. TAYLOR.

Principal and surety—Novation—Extension of time—Increase in rate of interest—Reservation of rights against surety.

A new agreement between debtor and creditor, extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And whatever effect a provision in such agreement reserving the rights of the creditor against the surety may have on the extension of time, it is idle as regards the stipulation for an increased rate of interest.

Lash, Q.C., for the plaintiffs.

Maclaren, Q.C., and *Shepley*, Q.C., for the defendant.

JONES v. MILLER.

Company—Shareholders—Paid-up stock—Moneys of company in hands of shareholders—Action by execution creditor to recover—Parties—Addition of—Rules 324, 326—Service on added parties.

Where the defendants agreed to take stock in a company about to be incorporated, and arranged that their interest in certain land acquired from them by the company should be applied in payment of their stock, and although it appeared that the company took the land over at a price considerably beyond that at which it was acquired by the defendants, yet no fraud being shown, it was:—

Held, that the shares of stock issued to the defendants, pursuant to the arrangement, upon the incorporation of the company, as fully paid-up shares, must be treated as such in an action by an execution creditor of the company seeking to make the defendants liable upon their shares for the amount unpaid thereon.

The law upon that subject is the same in this province as that of England prior to the Companies' Act, 30 & 31 V. c. 131.

The plaintiff sought also to recover from the defendants moneys shown to be in their hands which were really the property of the company.

Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys; but the company were necessary parties to the action; and their consent to being added as plaintiffs not having been filed, as required by Rule 324 (b), they should be added as defendants.

Held, also, a proper case under Rules 324 (c) and 326, for dispensing with service upon the company, as the defendants already before the Court were directors and the principal share holders in the company.

W. R. Smyth, for the plaintiff.

W. R. Riddell, for the defendants.

In re PARKE v. CLARKE.

Prohibition—Division Court—Notice disputing jurisdiction—Payment of clerk's fee.

It is provided by s. 176 of the Division Courts Act, R. S. O. c. 51, that in all cases where a defendant intends to dispute the jurisdiction of the Court to hear and determine a case, he shall, within the time named, leave with the clerk a notice to the effect that he disputes the jurisdiction of the Court, and that the clerk shall give notice to the plaintiff, and that, in default of such notice, prohibition shall not lie.

In the tariff of fees to be taken by clerks of Division Courts, to be found in Sinclair's Division Court Acts, ed. of 1888, p. 395, a fee of fifteen cents is made payable to the clerk upon "every notice required to be given by the clerk to any party to a cause or proceeding, and mailing."

By s. 54 of the Act, the clerk is entitled to his fees before being required to take any proceeding.

Where, therefore, the defendants wrote a letter to the clerk of the Division Court in which they were sued, disputing the jurisdiction, but did not send with it the necessary fees, and the clerk took no notice of it:—

Held, that there was no notice disputing the jurisdiction, and prohibition could not be granted.

Langton, Q.C., for the plaintiff.

W. H. P. Clement, for the defendants.

[ROSE, J., 14TH DECEMBER, 1893.

BLONG v. FITZGERALD.

Parties—Mortgage—Foreclosure—Wife of mortgagor—Right to redeem—Inchoate right of dower.

The wife of a mortgagor, who has joined in the mortgage for the purpose of barring her dower, to the extent of the mortgage only, has the right to redeem during her husband's lifetime, and is a necessary party to an action of foreclosure in the first instance.

And where she was not so made a party, and judgment of foreclosure was recovered in her absence, she was after judgment and report added as a defendant upon her own petition and permitted to redeem or pay off and obtain an assignment of the mortgage.

John Greer, for the petitioner and plaintiff.

J. A. Mills, for the defendants the Union Bank of Canada.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 22ND JANUARY, 1894.

McGILLIVRAY v. TOWN OF LINDSAY.

Costs—Order of trial Judge as to, under Rule 1170—Amending Rule, application of, to cases already tried—Discretion of Court.

In an action of tort, tried before the passing of the Rule of 4th November, 1893, amending Rule 1170, the jury assessed the

plaintiff's damages at $200, and the trial Judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale.

An appeal from this order was dismissed by a Divisional Court.

Per BOYD, C.—The amendment of the Rule was to be regarded by the trial Judge while the application of the plaintiff for full costs was before him, and while the action was still pending. Changes in the law as to costs since the Judicature Act are matters of procedure, and, as such, act retrospectively or with reference to current and uncompleted proceedings. But even if Rule 1170 in its unamended form applied, the Divisional Court had under it an alternative power over the costs, not limited by the condition as to good cause, and, as this was not a case in which the costs of the plaintiff should be diminished by taxation on a lower scale, or by the allowance of a set-off, the jurisdiction should be exercised in accordance with the view of the trial Judge.

MEREDITH, J., *dubitante*, considered himself bound by the decision of the Common Pleas Division in *Island* v. *Township of Amaranth*, *post*, p. 44 to arrive at the same conclusion.

D. R. Anderson, for the plaintiff.

G. H. Hopkins, for the defendants.

KNICKERBOCKER CO. v. RATZ.

Costs—Settlement of action—Motion for costs—Power of Master or Judge in Chambers to dispose of costs—Principle of decision—Circumstances of case—Appeal to Divisional Court—Jurisdiction.

The plaintiffs were manufacturers of a machine for which they had a patent of invention. The defendants were millers, and had in their possession a machine which the plaintiffs deemed to be an infringement of their patent. This action was brought to restrain the defendants from infringing and for damages. Before action the plaintiffs sent the defendants a letter of warning. The answer to this was simply a denial of infringement. After service of the writ of summons, the solicitor

for the defendants wrote a letter to the plaintiffs stating that his clients had a machine which might be, though it was not admitted to be, an infringement; that it had not been used for two years; that the defendants did not intend to make any further use of it; and asking for discontinuance of the action. The plaintiffs delivered their statement of claim, and the defendants their defence, in which they offered a covenant not to use any machine in contravention of the plaintiffs' patent, and with which they brought $10 into Court. The plaintiffs accepted this in settlement of the action, but, not being able to agree with the defendants as to who should pay the costs, made a motion for an order for payment by the defendants.

Upon this motion the Master in Chambers ordered that the defendants should pay the costs; but ROBERTSON, J., upon appeal, ordered that each party should pay their own costs up to the time of the motion (which the defendants had offered before the motion), and that the plaintiffs should pay the costs of the motion and appeal.

Upon further appeal to a Divisional Court composed of BOYD, C., and MEREDITH, J., there was a division of opinion, and the appeal was dismissed without costs.

Per BOYD, C.—The plaintiffs, believing the machine to be an invasion of their rights, were not obliged to rest upon the mere intention of the defendants not to use it. All that the plaintiffs claimed before action was conceded by the settlement after action, and the litigation was provoked by the response of the defendants to the letter before action. The plaintiffs having given notice of their demand before action, there was nothing to take the case out of the ordinary rule that the person in the wrong should answer in costs. If the main question in dispute is settled, leaving only costs to be determined, the proper course is for the parties to agree to leave them on affidavits to the Judge or Master in Chambers, whose judgment is subject to appeal to the same extent as in other cases of costs.

Per MEREDITH, J.—The Master in Chambers had no power to try and determine the question of costs, unless as an arbitrator chosen by the parties; nor had the Judge in Chambers any such power; and the Court could not properly entertain the appeal.

Mabee, for the plaintiffs.

W. H. P. Clement, for the defendants.

BUNTIN v. WILLIAMS.

Attachment—Absconding debtor—Property in hands of third person—Delivery to sheriff—Order for.

Where an attachment has issued against the property of an absconding debtor, an order may be made upon a third person for delivery to the sheriff of property of the debtor in the hands of such person.

And where the debtor's solicitor was shewn by an affidavit of the plaintiff to have in his hands for collection certain promissory notes, the property of the debtor, and the solicitor did not deny the fact, such an order was affirmed.

R. McKay, for the plaintiffs.

Shilton, for the defendant.

NOXON v. PATTERSON.

Particulars—Statement of defence—Patent action—Excision of pleading—Exclusion of evidence—Discretion.

In making an order for particulars of the defence in a patent action, the better practice is to provide merely for exclusion of evidence in case of no particulars or insufficient particulars being delivered, and not to order the excision of the defence, if good *per se*.

And where both excision of the pleading and exclusion of evidence were provided for in an order :—

Held, that the discretion of a Judge in Chambers in striking out the provision for excision was rightly exercised.

Arnoldi, Q.C., for the plaintiffs.

W. H. Blake, for the defendants.

[BOYD, C., 18th JANUARY, 1898.

In re CHARLES STARK COMPANY.

Company—Winding-up—Appointment of solicitor to liquidators.

In a proceeding for the winding-up of a company a solicitor who is acting for claimants whose claims must be contested by

the liquidators, cannot obtain the sanction of the Court to his action also as solicitor for the liquidators. Nor will the Court sanction the appointment of a special solicitor to act for the liquidators in the matter of the contested claim. The winding-up must be prosecuted by one disinterested solicitor, whose services will not be divided by the assertion of antagonistic claims.

Hoyles, Q.C., for creditors.

Lash, Q.C., for the liquidators and solicitors.

[29th DECEMBER, 1893.

DYER v. TOWN OF TRENTON.

Assessment and taxes—Municipal corporations—Consolidated Assessment Act, 1892, s. 52.

Held, that the intention of the "special provisions" in reference to assessment in cities, towns, and incorporated villages, contained in s. 52 of the Consolidated Assessment Act, 1892, is not that the rate of such assessment made under that provision may be levied for the current year. The function of the assessment under that section is defined only with reference to future years, and what is said is that this assessment so taken at the end of the year may be adopted by the council of the following year as the assessment on which the rate of taxation for that year may be levied.

O'Rourke, for the plaintiff.

Marsh, Q.C., and *Delaney*, for the defendants.

[FERGUSON, J., 23rd JANUARY, 1894.

FORD v. MASON.

Solicitor and client—Taxation of costs—Retaining fee—R. S. O. c. 147, s. 51—Appeal—Report—Confirmation—Rules 848, 849, 1226 (d).

The report or certificate of an officer upon the taxation of the costs of a solicitor as against his client falls under the provision

of Rule 1226 (*d*) as to its confirmation, and is, for the purposes of an appeal, a report within the meaning of Rules 848 and 849.

The solicitor during the progress of the action in respect of which the costs in question were incurred, made a contract in writing with his clients for the payment to him of a retaining fee of $100, explaining fully to them the effect of the bargain, and that, in case of their success in the action and costs being awarded to them, they would not be able to tax against or claim from the opposite party the amount of this fee. The officer allowed the retaining fee on taxation, and reported that the contract was a fair and reasonable one.

Held, on appeal, that the contract could not be enforced against the clients.

Section 51 of the Act respecting solicitors, R. S. O. c. 147, relates to matters of conveyancing, etc., and not to the conduct of an action in the ordinary way.

C. J. Holman, for the plaintiffs.

W. H. P. Clement, for the solicitor.

[STREET, J., 22ND DECEMBER, 1893.

SMITH v. FORT WILLIAM SCHOOL BOARD.

Public schools—Municipal corporations—Ultra vires—Contract of school board—54 V. c. 55, s. 116.

Held, that the board of school trustees of a city, town, or incorporated village have no power or authority to enter into any contract for the building of a school house until the necessary funds have been provided, under 54 V. c. 55, s. 116, and that if a certain sum has been provided under that section for the purpose of building a school house, they cannot be allowed to enter into any contract or undertake any work involving the expenditure of any greater sum; and therefore the plaintiff, a freeholder, ratepayer, and elector of the town of Fort William, and a supporter of the public schools therein, suing on behalf of himself and all other ratepayers, was entitled to an injunction to restrain the public school board of that town, certain

individuals members of the board, and the contractors for the building of a school house, from proceeding with the erection thereof in a case where the contract price exceeded the amount provided under s. 116, and to an order compelling the repayment to the school corporation of certain sums paid by individual members of the school board to the contractors for a certain portion of the work already performed.

Osler, Q.C., and *F. H. Keefer*, for the plaintiff.

Aylesworth, Q.C., and *Gorham*, for the defendants.

[MEREDITH, J., 26th OCTOBER, 1893.

GRAHAM v. CANADAIGUA LODGE OF INDEPENDENT ORDER OF ODDFELLOWS OF NEW YORK.

Will—Devise to foreign association—Validity of—Power to take—Foreign law—Domicil.

The law of a foreign state where a testator has his domicil must generally govern, even when his will was made and his property situate in this province, and in the absence of evidence as to what that law is, it must be taken to be the same as that of this province.

The parties setting up the law of a foreign state to invalidate certain bequests in a will, on the ground of the incapacity of the legatees to take, must prove that law, and that the legatees come within its scope.

The construction of a will is a question to be dealt with according to the law of the domicil of the testator.

A devise to "the C. O. Lodge 236, State of N. Y.," a body not incorporated in that state and not qualified to take and hold property:—

Held, following *Walker* v. *Murray*, 5 O. R. 638, a valid bequest to the members of that association.

J. H. Macdonald, Q.C., for the plaintiffs.

Moss, Q.C., for the defendants.

[9TH JANUARY, 1894.

In re POTTER AND CENTRAL COUNTIES R. W. CO.

Appeal—Award—Railway Act, 51 V. c. 29, s. 161 (D.)—Time—Courts—Divisional Court—Single Judge.

An appeal under s. 161 of the Railway Act, 51 V. c. 29 (D.), from an award need not be brought on for hearing within a month from notice of the award; an effective notice of appeal, given in good faith, within the month, is sufficient.

Such an appeal should be brought on for hearing before a single Judge in Court, not before a Divisional Court.

McCarthy, Q.C., for the railway company.

Moss, Q.C., for the land-owner.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 30TH DECEMBER, 1893.

REGINA v. CHARLES.

Liquor License Act—Having liquor for sale without a license—Club—Locality of.

A company was incorporated under the Joint Stock Companies Letters Patent Act, R. S. O. c. 157, for establishing a driving park to improve the breed of horses, etc., and for such purposes to acquire the Dufferin Park property, being 161 acres of land on Dufferin street in the city of Toronto, on which were erected houses, a grand stand, stables, etc., and with power to erect a club-house, and, subject to the Liquor License Act, to maintain and rent or lease the same, if desirable, for social purposes, to charge fees for persons using any of the privileges or property of the company, and generally to do all things incidental or conducive to the objects aforesaid. The subscribed stock amounted to $5,800; $5,000 was taken up by the defendant, and the remainder by three other persons.

Held, that the charter did not authorize the company to have a club-house at any other place than that specified in the charter; and where, therefore, the defendant was found in possession of intoxicating liquor at a place called the Occident Hall, on Queen street, in the same city, though contended to be a club constituted under the charter, and of which the defendant claimed to be the secretary, he was properly convicted under s. 50 of the Liquor License Act, R. S. O. c. 194, for unlawfully keeping liquor for sale, barter, or traffic, without a license.

A. G. McLean, for the defendant.

J. R. Cartwright, Q.C., and *Biggar*, Q.C., contra.

REGINA v. REDMOND.

Public Health Act—By-law prohibiting unloading manure on railway premises—Summary conviction.

Held, that the unloading of manure from a car on a certain part of a railway premises into waggons to be carried away, came within the terms of a municipal by-law, amending the by-law in the form appended to the Public Health Act, R. S. O. c. 205, prohibiting the unloading of manure on such part of the premises; that the use of the word "manure" was not of itself objectionable; and that it was not essential to show that it might endanger the public health.

A summary conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed.

Aylesworth, Q.C., for the defendant.

H. E. Irwin, contra.

REGINA v. JUSTIN,

Bicycle—Riding on sidewalk—Summary conviction—Municipal Act, 1892, s. 496, s-s. 27.

By s-s. 27 of s. 496 of the Consolidated Municipal Act, 1892, a municipal council is authorized to pass by-laws for regulating or preventing the incumbering by animals, vehicles, vessels, or other means, of any road, street, alley, lane, bridge, or other communication.

Held, that a bicycle is a vehicle within the meaning of the sub-section, and of a by-law of the municipality passed under it, so as to support a conviction for riding a bicycle on the sidewalk.

Regina v. *Plummer*, 30 U. C. R. 41, approved.

The defendant in person.

No one shewed cause.

[THE DIVISIONAL COURT, 30TH DECEMBER, 1893.

BEATON v. GLOBE PRINTING CO.

Discovery—Libel—Justification—Examination of plaintiff before delivery of defence—Rule 566—Discretion.

In an action for libel against the publishers of a newspaper, the managing editor of the defendants stated on affidavit that the article complained of was published by the defendants in good faith, in the public interest, not maliciously, nor with any intent to defame the plaintiff, but in the belief that the facts stated were substantially true, and such as should in the interests of justice be made public; that the article was, as it purported to be, copied from a New York newspaper, and was copied by a large number of other newspapers in Ontario; that it was material and necessary in the defendants' interest to have the plaintiff examined on oath before delivery of the statement of defence, in order to ascertain the facts necessary to enable them to determine what course to take in framing their defence, and they could not properly put in their defence without discovery from the plaintiff by such examination.

Held, that the defendants should be allowed to examine the plaintiff as asked.

Rule 566 should receive a large and liberal construction.

The granting of such an order is a matter of discretion, and where that discretion has been exercised in Chambers, it should not lightly be interfered with by the Court.

Per ROSE, J.—If a defendant is seeking discovery from the plaintiff in good faith to enable himself or his counsel to determine whether it would be proper to plead justification, to refuse him permission to examine before statement of defence, would be to compel him to plead and then withdraw his plea,

and pay a penalty by way of increased damages, in order to have such defence on the record as he may reasonably hope to sustain.

Lynch-Staunton, for the plaintiff.

Osler, Q.C., for the defendants.

In re DAGENAIS AND TOWN OF TRENTON.

Ditches and Watercourses Act, R. S. O. c. 220, s. 5—52 V. c. 49, s. 2—Default of officer under—Mandamus against municipal corporation.

An owner of lands in the town of Trenton, desiring to construct a drain on his land and continue it through an adjoining owner's, served the latter with the notice provided by the Ditches and Watercourses Act, R. S. O. c. 220, s. 5, as amended by 52 V. c. 49, s. 2, to settle the proportions to be constructed by each, and, on their failing to agree, served the municipal clerk with the notice provided for by such Act for the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who failed to attend.

Held, that a *mandamus* would not lie against the municipal corporation to compel their engineer to act in the premises.

Clute, Q.C., and *O'Rourke*, for the plaintiff.

Marsh, Q.C., for the defendants.

In re CLEVELAND PRESS ASSOCIATION v. FLEMING.

Prohibition—Division Court—Amount beyond jurisdiction—Right of Judge to amend by striking off excess.

Where a claim for an advertising account beyond the jurisdiction of the Division Court, namely $143.20, is brought in that Court, the Judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction of the Court.

W. N. Miller, Q.C., for the plaintiffs.

W. R. Smyth, for the defendant.

[6TH JANUARY, 1894.

ISLAND v. TOWNSHIP OF AMARANTH.

Costs—Order of trial Judge as to, under Rule 1170—Amending Rule, application of, to cases already tried—Discretion of Court.

The Rule of the Supreme Court of Judicature for Ontario, passed on 4th November, 1893, amending Rule 1170 by providing that where an action is tried by jury, the costs shall follow the event, unless, upon application made at the trial, the trial Judge, in his discretion, otherwise orders, does not apply to actions tried before it was passed.

And where the jury, in an action of tort, tried before the passing of the new Rule, assessed the plaintiff's damages at $100, and the trial Judge did not give judgment till after the passing of the new Rule, and then ordered that the plaintiff should have costs on the High Court scale :—

Held, that he had no power to so order, unless "for good cause shewn" within the meaning of Rule 1170 as it stood at the date of the trial.

The right to costs or to set off costs is a substantial right and not a mere matter of procedure.

But, under Rule 1170, the Court has the power to make such order as to costs as may seem just, irrespective of good cause; and, as in this case the awarding of so small a sum as $100 assuming the plaintiff's right to recover, was almost perverse, and the plaintiff had a right to expect an award well beyond the jurisdiction of the County Court, the Divisional Court affirmed the trial Judge's disposition of the costs.

Stratford v. *Sherwood*, 5 O. S. 169, at pp. 570-571, followed.

Aylesworth, Q.C., and *W. L. Walsh*, for the plaintiff.

E. Myers, for the defendants.

[BOYD, C., 30th DECEMBER, 1893.

McNAMEE v. CITY OF TORONTO.

Work and labour—Contract—Superintendent of work named as arbitrator in case of dispute—Validity.

By a contract between the plaintiff and the corporation of the city of Toronto for laying a conduit pipe across the Toronto bay,

it was provided that all differences, etc., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work.

Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator.

Bain, Q.C., and *Bedford-Jones*, for the plaintiff.

Biggar, Q.C., and *Shepley*, Q.C., for the defendants.

[ROBERTSON, J., 15TH DECEMBER, 1893.

BURNHAM v. BOSWELL.

Will—Residuary devisee—Power of disposal—Disposal by deed—Sufficiency of.

The residuary clause of a will was: "I give and bequeath to my sister M. all the rest and residue of my personal estate," etc., "and what shall remain undisposed of I give and bequeath to my brother H. to and for the use of himself and his children." M. executed a deed of trust whereby she conveyed the residuary personal estate, with other moneys, to E. B. upon certain trusts. Afterwards, by her will, she disposed of the estate, etc., in a way somewhat different from that declared by the deed of trust.

Held, that by the deed of trust there was a sufficient disposal of the personal estate under the terms of the devise to M., and therefore M.'s subsequent will was inoperative.

Farewell, Q.C., and *Yarnold*, for the plaintiff.

J. Hampden Burnham, for the defendant.

[MACMAHON, J., 4TH SEPTEMBER, 1893.

ORGAN v. CITY OF TORONTO.

Municipal corporations—Ice on sidewalk—Liability of owner, but not of tenant, of adjacent building.

In an action against the corporation of the city of Toronto for damages resulting from an accident caused by the plaintiff

slipping on a patch of ice on the sidewalk, caused by water, brought from the roof of an adjacent building, being allowed to flow over the sidewalk and freeze, the owner of the building and the tenant thereof were at the instance of the corporation made party defendants.

Held, that the owner, but not the tenant, was liable over to the corporation for the damages sustained by the plaintiff.

H. E. Irwin, for the plaintiff.

Biggar, Q.C., for the city of Toronto.

J. D. Montgomery, for the defendant O'Grady.

D. O. Cameron, for the defendant O'Donohoe.

[17TH NOVEMBER, 1893.

SELDON v. BUCHANAN.

Landlord and tenant—Surrender at law—Whether of whole or part of lands demised.

A lease to the defendant, dated 1st April, 1885, for ten years, at an annual rent of $120, payable quarterly on the 1st January, July, October, and April, in each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before 1st January in any year. The defendant for his own business only occupied part of the premises, and sublet the remainder. In November, 1891, the part sublet by the defendant being unoccupied, the defendant verbally notified the lessor that unless the premises were repaired he would have to surrender. The lessor treated this as a valid notice under the lease, and, after negotiations with the defendant, it was agreed that the defendant should have the portion of the premises occupied by him at $24 a year, to take effect on 1st April following, but with a right to the lessor, should he sell, to cancel the same.

Held, that what took place in November, 1891, was a surrender in law of the whole of the premises, and not merely of the part not occupied by the defendant.

Osler, Q.C., and *J. B. Jackson*, for the plaintiff.

T. Wells, for the defendant.

[6TH DECEMBER, 1893.

ATTORNEY-GENERAL FOR ONTARIO v. BRUNSDEN.

Illegitimacy—Evidence of—Sufficiency.

In answer to a claim of heirship to one S., a witness, who had known S. in England as a boy, before he came to Canada, said that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, whose name was H., not S. Another witness said that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune.

Held, sufficient evidence of illegitimacy to displace the claim of heirship.

James Scott, for the plaintiff.

Garrow, Q.C., for the defendant.

Holt, for the alleged heirs and heiresses.

IN CHAMBERS.

[BOYD, C., 15TH JANUARY, 1894.

JACOBS v. ROBINSON.

Mechanics' liens—Summary procedure—53 V. c. 37—County Court—Jurisdiction of local Master—Amendment—High Court—Costs.

A Master of the Supreme Court of Judicature has no jurisdiction as such to entertain a summary proceeding under 53 V. c. 37 to enforce a mechanic's lien, launched in a County Court.

Secord v. *Trumm*, 20 O. R. 174, followed.

Nor can he confer jurisdiction upon himself by subsequently directing an amendment of the affidavits and papers filed by substituting the High Court for the County Court.

An appeal from an order so amending was allowed, but without costs, because the objection should have been taken *in limine*.

L. G. McCarthy, for the plaintiff.

J. M. Clark, for the defendant.

[FERGUSON, J., 22ND DECEMBER, 1893.

In re COWAN v. AFFIE.

Mandamus—Division Court—Trial—Right to jury—Counter-claim—Res judicata.

Affie brought action against Cowan in a Division Court for $45 for the price of certain hogs. Cowan counter-claimed for $5 for ten days' keep and feed of the hogs. The Judge non-suited the plaintiff without saying anything about the counter-claim. Cowan then brought an action in the same Court against Affie, claiming $82 for eighty days' keep of the hogs, inclusive of the ten days in respect of which he previously claimed the $5, and he demanded a jury. Affie disputed the claim and set up that it was *res judicata* in the former action. This latter action came on for trial, and when the jury was about to be called, the defendant objected on the above ground, and the Judge upheld the objection and refused to allow the trial to go on, and entered judgment of non-suit against Cowan, saying that he had intended in the former action to dispose finally of both claim and counter-claim, and was willing, if necessary, to amend his judgment to that effect so far as he had power to do so.

Held, on a motion for a *mandamus* to compel the Judge to proceed with the hearing of the second action above mentioned, that the issue whether there had been a former adjudication of the matter in dispute was one to be determined by the jury and not by the Judge, the case being one in which the plaintiff was entitled to a trial by jury, the learned Judge having and exercising the same powers as those possessed by a Judge sitting at *nisi prius* in cases tried and that must be tried by a jury, and the

judgment of a non-suit having been pronounced without jurisdiction, the case was still pending, and the order for a *mandamus* must be granted.

Aylesworth, Q.C., for the motion.

Watson, Q.C., contra.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 1ST NOVEMBER, 1898.

WEST v. ELKINS.

Mechanics' liens—"Owner"—Agreement for erection of buildings—Advance of money—R. S. O. c. 126, s. 2, s-s. 3—Registration of lien—Absence of statement of residence of owners.

This was a summary proceeding in the Master's office to enforce a mechanic's lien for $333.25, a balance due for materials supplied to the defendant Elkins for use in the building of dwelling-houses upon certain lands.

The defendant Frederick L. Lee, being the owner of the equity of redemption in the lands in question, and the defendants Lancelot Bolster and Frank P. Lee, being second mortgagees, made an agreement in writing with the defendant Elkins for the sale to him of the land in question. In this agreement there was a clause whereby the defendant Elkins agreed to erect on the land four semi-detached brick and stone dwelling-houses. The defendant Elkins proceeded to erect the houses, and it was in the erection of them that the materials supplied by the plaintiff were used. The defendants the Lees and Bolster advanced to the defendant Elkins $900 on account of these houses.

The plaintiff charged that the defendants the Lees and Bolster were the owners of the land, and claimed priority for his lien over the amount advanced by them.

D. Macdonald, for the plaintiff.

P. H. Drayton and *F. J. Dunbar*, for the defendants the Lees and Bolster.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY.—The defendants the Lees and Bolster have advanced $900 on account of the buildings placed on this property by Elkins; and this fact, in connection with the offer and agreement whereby "four semi-detached brick and stone dwellings" were agreed to be erected on the property, brings this case, I think, within the cases of *Summers* v. *Jarvis* and *Jackson* v. *Walker*, which are to be found in the 84th volume of the printed cases in the Supreme Court of Canada. There it was shown that Jarvis and Williams had agreed to sell a property to Hayes, on which Hayes proceeded to erect certain houses, and in doing so had incurred liabilities to mechanics, who registered liens against the property: see pp. 14 and 15 of *Jackson* v. *Walker*. Jarvis and Williams subsequently sold their interest to one Keep. And in giving judgment in the Court of Appeal, Osler, J.A., said, p. 32: "The mechanics' liens were duly registered; and my present opinion is that Jarvis and Williams, who sold to Keep, were 'owners' within the meaning of s. 2, s-s. 3, of the Mechanics' Lien Act, so that their interests would be affected by the liens. There may be room for argument as to Williams, but the terms of Jarvis's agreement with Hayes bring him within the language of the sub-section as a person, with whose permit and consent the work was done."

Following this decision, I must, therefore, hold that the agreement which the defendants the Lees and Bolster signed, and under which "four semi-detached brick and stone dwellings" were to be erected on the property in question, and the payment by them of $900 towards the cost of erecting such dwellings, brings them within the language of the sub-section referred to as persons with whose privity or consent the work was done, and that they, therefore, come within the definition of "owner" within the meaning of the Mechanics' Lien Act, R. S. O. c. 126.

The objection that no residence of the owners of the property is given in the lien as registered is disposed of in the judgment of Boyd, C., on p. 18 of the appeal book in *Jackson* v. *Walker*.

NEW BRUNSWICK.

In the Supreme Court.

[19TH DECEMBER, 1898.

Ex parte FITZPATRICK.

Canada Temperance Act—Summary conviction—Fine—Distress—Seizure and sale of intoxicating liquors—Return to distress warrant.

Application upon the return of a *habeas corpus* for an order for the discharge of the applicant from custody under a warrant of commitment issued pursuant to a summary conviction of the applicant for an offence against the Canada Temperance Act. By the conviction the applicant was ordered to pay a fine of $50 and the costs of the conviction, etc., and, in default of payment, his goods were to be distrained, and, in default of distress, he was to be imprisoned. The fine not being paid, a distress warrant was issued to a constable, to whom the applicant pointed out, on his premises, a cask of whisky worth $150, as a sufficient distress. The constable refused to levy upon the whisky, and returned the distress warrant with the indorsement that he had searched for goods and chattels of the defendant but could not find sufficient whereon to levy the fine of $50 and costs. The magistrate thereupon issued a warrant of commitment, under which the defendant was imprisoned.

The application for his discharge was referred to the Court by a Judge in Chambers.

A. I. Trueman, for the applicant, urged that the magistrate had no jurisdiction to issue the warrant of commitment, there being sufficient distress upon the defendant's premises.

L. A. Currey, for the informant shewed cause and contended that the constable was not bound to levy on the whisky, as the sale of it by him under the distress warrant would of itself be an

offence against the Canada Temperance Act; and also that the truth of the return to the distress warrant could not be tried on affidavits.

THE COURT held, TUCK, J., dissenting, that the whisky was property that could properly be taken under the distress warrant, and there was nothing in the Canada Temperance Act to prevent the sale thereof for judicial purposes; and the defendant was therefore wrongfully in custody and should be discharged.

Ex parte KAYE.

Canada Temperance Act—Fines and penalties—Municipal corporations—Delegation of power to expend money.

This was an application for a writ of *certiorari* to remove a resolution of the municipal council of the county of King's, with a view of quashing the same. The resolution was as follows:

"Resolved, that the council authorize the secretary-treasurer to pay over to the Rev. E. J. Grant any fines collected under the Scott Act prosecutions within the parish of Sussex, between sessions of the council, up to the point of meeting expenses certified by the Rev. E. J. Grant." Under an order in council of the Dominion all penalties paid on convictions under the Canada Temperance Act are to be handed over to the municipalities within which the prosecutions are had for the purposes of the Act. The objections to this resolution were: (1) that the council improperly delegated to an individual the right to determine when and for what purpose the moneys should be used; (2) that the council only should determine as to the sufficiency of the evidence of the money being properly expended; and (3) that the payment out of the moneys must be controlled by the by-laws of the municipality which regulate the appropriating of all moneys belonging to the municipality.

Held, that the municipality had no power to delegate to Mr. Grant the right to determine for what purposes the money should be used.

Rule absolute for *certiorari*.

F. W. Stockton, for the applicant.

White, S.-G., contra.

DOHERTY v. CREIGHTON.

Canada Temperance Act—Search warrant—Replevin—Goods in custody of the law.

This was an application to set aside a writ of replevin issued to recover a quantity of intoxicating liquors seized by virtue of a search warrant under the Canada Temperance Act, on the ground that the liquors were in the custody of the law, and therefore replevin would not lie. The warrant directed the constable to search the house and premises of the plaintiff, and the liquor seized was found in his barn.

Held, that the direction to the constable to search the house and premises of the plaintiff was sufficient, and therefore the seizure in the barn of the plaintiff was legal, and the liquors being in the custody of the law could not be replevied.

Held, per PALMER, J., that this was a matter which should not be tried on a summary application, but the parties should be left to their common law remedy.

F. A. McCully, for the defendant.

A. I. Trueman, for the plaintiff.

DOHERTY v. HAYES.

Canada Temperance Act—Search warrant—Replevin—Goods not in custody of the law.

The facts in this were similar to those in the preceding, except that by the search warrant the constable was directed to search the shops and premises occupied by one McM. It appeared that the liquors seized were in a warehouse in the possession of the plaintiff and not in the occupation of McM.

Held, that the liquors were illegally seized, and that the application to set aside the writ of replevin should be refused.

F. A. McCully, for the defendant.

A. I. Trueman, for the plaintiff.

REGINA v. SMITH.

Assault—School-master—Reasonable chastisement.

This was an application to quash a summary conviction of a school-master for an assault upon one of his pupils. A number of objections were raised to the conviction.

Held, that from the evidence it was clear that the pupil had been too severely chastised, and therefore the rule to quash the conviction should be discharged.

George F. Gregory, Q.C., for the applicant.

L. A. Currey, contra.

GRANT v. McLAREN.

Trusts and trustees—Probate Court—Jurisdiction of Supreme Court in equity to review.

This was an appeal from the decision of the Judge in equity. The principal question was whether or not certain charges in connection with the management of the Nicholson estate, made by the trustees of the estate, and passed and allowed in the Probate Court, were conclusive so as to preclude the Referee in equity from afterwards revising them. The disputed charges amounted to about $4,700.

Held, per FRASER and TUCK, JJ., that the appeal should be allowed, and the exceptions to the Referee's report overruled with costs.

Held, per HANNINGTON, J., that the decision of the Probate Court was conclusive, and that the Referee had no right to disallow the charges.

Appeal allowed.

E. McLeod, Q.C., for the plaintiffs.

J. D. Hazen, for the defendants.

LANE v. O'SHAUGHNESSY.

Pleading—False representations—Demurrer to declaration.

This was an action for breach of contract brought against a warehouseman. The first count of the declaration stated that the defendant, by falsely and fraudulently representing in writing that he had received from the Standard Trading and Manufacturing Company and had stored in his warehouse a quantity of corn, which was then separate and would be kept separate from the other goods, and would be delivered to the order of the plaintiffs, induced the plaintiffs to advance a large sum of money and give credit in a large sum of money to the company, whereas the defendant, as he well knew, had not at the time of making such representation or even afterwards, the corn then separate, and did not keep the same separate from other goods, and did not deliver the corn when called upon so to do to the plaintiffs. The second count was in similar words, except that it alleged that the plaintiffs had advanced money to the company and had lost it. The third and fourth counts were substantially the same as the first and second, setting out the warehouse receipt.

The defendant demurred to the several counts of the declaration on the following grounds: (1) that they did not allege that the defendant made the statements with intent to induce the plaintiffs to advance money; (2) that they did not allege that the statements made by the defendant were untrue, or that the defendant did not have or receive the corn; (3) that they did not allege that the amount advanced was due and unpaid; (4) that there was no actual fraud alleged; (5) that the advance to the company was not alleged to have been made upon any representation made by the defendant concerning or relating to his ability, trade, or dealing; (6) that there was no allegation in the third and fourth counts that the plaintiffs accepted the warehouse receipt, or that it had been assigned to them by the company for any advance or as security.

Judgment was given for the plaintiffs on the demurrer to the first and third counts and for the defendant as to the second and fourth counts, and twenty days were allowed to each party to amend.

J. R. Armstrong, for the plaintiffs.

W. B. Wallace, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 20TH DECEMBER, 1898.

In re CONFEDERATION LIFE ASSOCIATION AND BEALL.

Real Property Act — Reference — Devise to beneficial owner, subject to a charge of debts—Mortgage by devisee and executrix for private purposes —Subsequent sale and mortgage—Correction of certificate of title.

Appeal from decision of TAYLOR, C.J., 12 Occ. N. 428.

The certificate of title stated that Emma Moore, married woman, sole surviving executrix and devisee under the will of William Beall, deceased, was seised of an estate in fee simple in the described lands, subject to certain incumbrances, which were as follows:—

1. A mortgage from William Beall to the Confederation Life Association.

2. A lien or charge in favour of M. W. H. Beall for $5,000 under the will of William Beall.

3. A mortgage from Emma Beall to the Confederation Life Association upon the interest of Emma Moore, formerly Beall, as such devisee only.

4. A writ of *fieri facias de terris* in favour of the Confederation Life Association against Emma Beall, attaching upon the interest of said Emma Moore as such devisee only.

Held, that upon the principles of the decision of the case of *Confederation Life Association* v. *Moore*, 6 Man. L. R. 162; 9 Occ. N. 357, the will must be construed as effecting a charge of the debts upon the realty. It was clear that in such case,

where the real estate is devised to the executors, they have a power of sale for the purpose of paying debts, and the purchaser is not bound to inquire as to the existence of debts or to see to the application of the purchase money. *Corser* v. *Cartwright*, L. R. 7 H. L. 781, shows that this power can be exercised by one of several executors where the devise is to such one separately. At the death of William Beall, he could sell only the equity of redemption. His executors or devisees, immediately after his death, could do no more. But when the mortgage fell due it was quite competent for Mrs. Moore, then the devisee and sole surviving executrix, to make such sale and to compel the mortgagee to take the mortgage money and discharge the first mortgage. W. Beall had covenanted to pay the mortgage money, which then formed one of his debts, to pay which, as well as the legacy and the charge for maintenance and education, the power could properly be exercised.

The district registrar assumed to go behind the certificate and find that Mrs. Moore had a power of sale as executrix which enabled her to sell the property for the purpose of paying debts and legacies, and thus to cut out the two latter incumbrances.

The district registrar's finding in the registered owner such a power was inconsistent with two of the incumbrances named, and seemed wholly opposed to the principles of the Real Property Act, as that Act makes a certificate of title final at each stage. It was true that the two incumbrances were shown to affect only the interest of Mrs. Moore as devisee, but it was not shown that she had any estate or power inconsistent with that interest, or enabling her to override these incumbrances. She was described as executrix and devisee, but such a description did not show a power to nullify the incumbrances stated to exist.

It was argued that, in this view, the certificate was erroneous and might be corrected by the district registrar, and that his action was, in effect, such a correction; but, without considering the question of the power to correct under such circumstances, it will not be treated as having been exercised. That power was in the district registrar and was not one which the Court could exercise on this appeal.

The order of the Chief Justice should be reversed and the appeal from the decision of the district registrar allowed. No costs allowed to any of the parties.

The minutes of the order drawn up were as follows:—

Order that the order of the Chief Justice dismissing the petition by way of appeal from the district registrar be discharged.

Declare that the holders of the transfer from Emma Moore to Arthur Curzon, the purchaser, of a portion of the lands mentioned in the petition of the Confederation Life Association, and the mortgage from Emma Moore to the executors of the late Sir John A. Macdonald of the remaining portion of said lands, which said transfer and mortgage are referred to in said petition, are not entitled to have the same registered, except as subject to the mortgage from Emma Beall to the Confederation Life Association and to the writ of *fieri facias* against the lands of Emma Beall referred to in the certificate of title, and order the same accordingly.

Declare that the foregoing declaration and order are made without prejudice to the power of the district registrar, the Court, or a Judge, to correct or cancel the certificate of title.

Howell, Q.C., and *Dawson*, for the Confederation Life Association.

Wilson, for the district registrar.

Cameron, for the purchaser.

Phippen, for the mortgagees.

[TAYLOR, C.J., 2ND JANUARY, 1894.

LONDON & CANADIAN LOAN AND AGENCY CO. v. RURAL MUNICIPALITY OF MORRIS.

Attachment of debts—Moneys in hands of treasurer of municipality, judgment debtors.

The plaintiffs, as judgment creditors, having obtained a garnishing order against Whitworth, the treasurer of the municipality, the judgment debtors, applied for payment over by him of moneys claimed to be in his hands, or, in the alternative, for an issue to determine what funds were in his hands

liable to be garnished. No claim was made that Whitworth was indebted to the municipality as an individual, or otherwise than in his official character of treasurer. The judgment debtors opposed the motion. They contended that taxes cannot be garnished, and relied upon *Canada Permanent L. & S. Co.* v. *School District of East Selkirk*, 18 Occ. N. 351.

Held, that the treasurer of a municipality is not, as such, a third person indebted or liable to the municipality within the meaning of s. 8 of the Garnishment Act, R. S. M. c. 64. His possession of funds of the municipality was simply the possession of the municipality itself. He was not in any sense a debtor to the municipality; he was only the custodian of its funds. The corporation can hold its funds in no other way than by having them in the possession or under the control of its treasurer.

Motion dismissed with costs to be set off *pro tanto* against the amount due to the plaintiffs.

Perdue, for the plaintiffs.

Crawford, for the municipality.

[15TH JANUARY, 1894.

MARTIN v. MORDEN.

Real Property Act—Description of land in caveat—Dismissal of petition.

Petition under the Real Property Act presented by the caveators. The caveatee appeared and filed a duly verified copy of the document lodged as a caveat with the district registrar. He took the objection that no caveat had been lodged, because the document contained no description of the land in question. The caveators contended that the land was sufficiently described, and that in any event, it was fully described in the affidavit which supported the caveat and which was annexed to it. Section 135 of the Act permits any per-

son claiming any estate or interest in land described in an application to bring the same under the new system, lodging a caveat "in the form in schedule O. to this Act." The form in schedule O. is a notice to the district registrar that the person lodging the caveat, giving his name and addition, claims a particular estate or interest which must be set out "in the land described as (description of land) in the application of," etc. The document in this case was headed "Application No. 8071," and stated that the caveators, naming and describing them properly, "claim to have an interest in the lands described in the application of James Alfred Morden, under and by virtue," etc. It contained, in itself, nothing to show what these lands were.

Held, that the caveat was defective and the defect was not cured by a description of the land appearing in the affidavit. The statute is explicit in requiring a description of the land to be given. In such a matter as a caveat accuracy in the description of the land is most important, and the direction of the statute in regard to it is imperative: *Jones* v. *Simpson*, 8 Man. L. R. 124; *McKay* v. *Nanton*, 7 Man. L. R. 250. If the caveat is defective, it is so for more than an informality or technical irregularities; and if it is defective, there is no jurisdiction to entertain the petition. The filing of a caveat which complies with the directions of a statute is a condition precedent to the Court having any jurisdiction in the matter: *McArthur* v. *Glass*, 6 Man. L. R. 224.

Petition dismissed with costs.

J. Martin, for the caveators.

Culver, Q.C., for the caveatee.

VILLENEUVE v. NANTON.

Real Property Act—Issue—Who should be plaintiff—Tax sale.

This was a petition under the Real Property Act, and the parties were prepared to take an issue, the question who should

be plaintiff being the only matter in dispute. The caveatee, who derived his title under a tax sale deed, contended that as he had, in the event of failure to uphold the tax deed, a lien on the land for taxes which he had paid, the caveators should be plaintiffs unless they admitted this lien.

Held, that no question as to this lien could take the case out of the principle laid down by the full Court in *Howell* v. *Montgomery*, 8 Man. L. R. 499. If the caveatee failed in upholding the tax deed and had properly paid taxes due upon the land, then he had, by statute, a lien for what he had so paid.

Order made for the trial of an issue in which the caveatee to be plaintiff, and reserving all further questions and the question of costs until after the trial of the issue.

Coutlee, for the caveator.

C. P. Wilson, for the caveatee.

[BAIN, J., 21ST DECEMBER, 1898.

In re BRANDON PROVINCIAL ELECTION.

Election petition—Preliminary objections—Status of petitioner—Right to present petition.

On a petition filed against the return of the respondent several preliminary objections were taken, but the only one that was pressed was the following: "that the petitioners were not and are not electors who had a right to vote at the election, or persons who have a right to present the petition."

For the respondent it was contended that the petitioners' right to vote depended upon their names having been in the lists of electors furnished by the returning officer to the deputy returning officers for use at the polls in the polling divisions where they should vote, and that these lists must be produced and proved. The petitioners contended that proof of their *status* was complete when they showed that their names were on the list of electors finally revised and returned by the revising officer to the clerk of the executive council as the voters' list for the electoral division.

By the evidence of the clerk of the executive council it was shown that the names of the two petitioners appeared on the list for the division as it was finally revised and returned to him by the revising officer; it was also shown that the lists he sent to the returning officer for use at the election in question were duly certified copies of this revised list. The name of one of the petitioners appeared on the list for polling division No. 2, and the others for polling division No. 5, and each of them swore that he was the person thus named and that he had a right to vote and did vote at the election.

Held, that the legislature gave the right to file a petition to all whose names appear on the finally revised list of electors for the electoral division, except those who by the Election Act would be disqualified from voting. No better evidence that the petitioners were qualified to file the petition could be given under the statutes than to show that their names appeared on the list of electors returned by the revising officer to the clerk of the executive council, as the voters' list for the electoral division.

The petitioners had proved that they had a right to vote at the election to which their petition related, and, consequently, they had a right to present the petition.

Objection overruled with costs.

Aikins, Q.C., and *C. H. Campbell*, for the petitioners.

Ewart, Q.C., and *C. P. Wilson*, for the respondent.

[KILLAM J., 16TH JANUARY, 1894.

In re CAREY AND CITY OF WINNIPEG.

Assessment and taxes—Tax sale—Payment of surplus moneys in hands of treasurer—Claim by municipality—Interpretation of Assessment Act, R. S. M. c. 101, s. 193—Computation of time.

This was an application for payment out of Court of moneys paid in by order of a district registrar, being the surplus proceeds of a sale of the applicant's lands for taxes. The lands were situated in Winnipeg, and the moneys were claimed by the

city corporation to be forfeited to it as having "remained in the hands of the treasurer for six years from the day of sale of the land of which it formed part of the purchase money:" R. S. M. c. 101, s. 193.

The lands were put up for sale and knocked down to a purchaser on 27th June, 1887; the time for redemption expired on 27th June 1889; and subsequently thereto the surplus moneys were paid by the purchaser, and the deed issued to him by the officers of the municipality. Counsel for the city contended that the day of the auction was to be considered as the day of sale, and the six years must be computed from that day: R. S. M. c. 101, ss. 167, 167, 170, 175, 180, and 183.

The applicant contended that the "day of sale" must be deemed to be the day of conveyance or of completion of the purchase by payment of the purchase money, and he relied strongly upon the use of the word "remained."

Held, that the moneys should be paid to the applicant. The owner of the land becomes entitled to the surplus only from the time when it reaches the hands of the treasurer, and to count the six years from that time is to proceed by analogy to the Statute of Limitations, which was most probably intended by the legislature.

O. H. Clark, for the applicant.

I. Campell, Q.C., for the city of Winnipeg.

SMITH v. SMYTH.

County Court appeal—Application to County Court Judge to reverse judgment of former Judge—R. S. M. c. 33, s. 308.

This was an appeal from a decision of Judge CUMBERLAND, of the County Court of Brandon, dismissing an application to reverse a judgment of WALKER, formerly Judge of the same Court.

The action was brought for commission on a sale of land for the defendant, and the Judge gave judgment for the plaintiff. An application was then made for a new trial or for a reversal

of the verdict. This motion came before CUMBERLAND, J., who had in the meantime become Judge of the County Courts for the district, in the place of WALKER, J. CUMBERLAND, J., proceeded upon the principle that he should not reverse the verdict unless it appeared to him unreasonable and unjust, or unless, from a perusal of the evidence, it appeared to him beyond all doubt that the trial Judge could only have arrived at his verdict by omitting, through oversight, to consider some undisputed fact, or that some undisputed fact or some plain principle of law applicable to the facts and favourable to the defendant could not have been brought to his attention.

The application was made under s. 308 of the County Courts Act, R. S. M. c. 33, which provides that "A new trial or rehearing may be granted or a judgment reversed or varied in any action or suit, or in any matter or proceeding, upon sufficient cause being shown for that purpose."

Held, that under this clause, where a verdict has been entered for a plaintiff by a Judge of a County Court, upon evidence insufficient to be submitted to a jury, it should be reversed, but where the question is only one of the weight of evidence, or of the inferences to be drawn from the evidence, the principle adopted was applicable. The verdict of the Judge of the County Court was in no way unreasonable or unjust, and there was nothing to suggest that it was given through any oversight or misconception of the evidence. It was reasonably open to a jury to find as he did upon the evidence, and it did not appear that CUMBERLAND, J., could have acted otherwise than he did upon the application before him.

Appeal dismissed with costs.

Culver, Q.C., for the plaintiff.

Ewart, Q.C., for the defendant.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[The Justices in Banc, 7th December, 1893.

NEWSON v. MACLEAN.

Contract—Sale of goods at invoice prices—Conflicting evidence—Consensus ad idem—Mistake—Question for jury.

Action to recover $1,095.92, the price of a stock of goods sold by the plaintiff to the defendant, the plaintiff claiming that the goods were sold at his invoice prices.

The defences were that the sale, if made at all, was at the defendant's invoice prices, which were lower; that the contract had been rescinded; and that the parties in contracting were not *ad idem*, the plaintiff believing that he was selling at his invoice prices, and the defendant believing he was purchasing at his invoice prices.

At the trial before Rouleau, J., the plaintiff swore that the sale was made at his invoice prices, and the defendant swore that it was at his invoice prices.

Counsel for the defendant asked the Judge to submit certain questions to the jury as to whether there was a mistake between the parties as to whose invoices were to govern, whether there was ever a *consensus ad idem*, etc.

The Judge left these questions to the jury, charging them to weigh all the circumstances connected with the subject-matter of the case, but telling them that they were at liberty to give a general verdict if they chose.

The jury did not answer the questions, but returned a general verdict for the plaintiff for $1,015.92.

The defendant moved for a new trial, on the ground that the verdict was against the weight of evidence, and for misdirection.

C. C. McCaul, Q.C., for the defendant.

J. A. Lougheed, Q.C., for the plaintiff, was not called upon.

WETMORE, J.— * * * The whole question was one of credibility, whether the jury would believe the plaintiff or the defendant, and the jury have seen fit to believe the plaintiff.

A good deal of authority was cited upon the contracting minds of the parties, to shew that there was not a *consensus ad idem*. I do not think that question arises here. Taking the evidence of either party, there were consenting minds, their minds came to the one thing. The plaintiff swears distinctly that the bargain was that the goods were to be sold at his invoice prices, and that was the agreement—not that he *understood that it was*, but that it *was* the agreement. He must be taken to have been satisfied that that was the proposition, and that it was accepted. On the other hand, the defendant swears that the prices were to be according to his invoices. He does not say that that *was his understanding of it*, but that it *was* the agreement. How could the learned Judge have left to the jury the question whether there was a *consensus ad idem?* He must have told the jury that, whichever evidence they believed, there was a *consensus ad idem*.

So, again, there is no evidence of mistake in this matter. The plaintiff and defendant each state positively what the agreement was. There could only be the same question left to the jury, that of the credibility of the witnesses.

The jury have heard the testimony of the parties and have seen the manner in which they have testified, and were in a position to draw their own conclusions, and I am not prepared to say that those conclusions are so utterly at variance with reason and common sense that we should interfere with them; and, besides, the learned Judge has informed me that he was satisfied with the verdict, and that puts the question beyond doubt in my mind. I therefore think that the application should be dismissed with costs.

MCGUIRE, J.—I concur. I may say that I think there is no ambiguity here. Neither side alleges mistake. Each is in fact clear; with each one the terms of the bargain are distinctly and emphatically sworn to; and it comes down to this, simply the question, which of the parties did the jury believe, and that was the real question left to the jury.

On the question of *consensus ad idem*, while I think it questionable whether it should have been left to the jury at all, still it does not appear to have confused them, and it was distinctly in favour of the defendant's contention that it was so left, and he, at all events, should not complain. I think if there was a motion made here to-day on the ground of non-direction because the Judge had not submitted that question, I should have to say that he was right. But he did submit it, so I think there is still less reason for the defendant asking that the verdict should be disturbed.

As to the conflict of evidence, if I were called upon to weigh the evidence of the parties, I should hesitate very long before making up my mind as to which of them is right, and therefore I concur in the observations of my brother Wetmore, and in thinking that the application should be refused with costs.

RICHARDSON, J.—I concur also, and I put my concurrence on the law as laid down by this Court in a case decided here not long ago, *MacDonnell* v. *Robertson*, based upon *Brown* v. *The Commissioners of Railways*, 15 App. Cas. 240; and the principles there stated which guide the Court in similar applications is re-affirmed by a case, *Ferrand* v. *Bingley*, 9 Times L. R. 70. Those principles are that the verdict of a jury should not be disturbed where there is evidence both ways, unless it is a verdict which the jury could not reasonably and properly find.

Application refused with costs.

[9TH DECEMBER, 1893.

DAVIS v. PATRICK.

Pleading—Judicature Ordinance, s. 103—Partnership—Injunction—Chattel mortgages—Priorities—Preference—Estoppel.

The statement of claim alleged (1) that the plaintiff Davis and the defendant Patrick were in partnership as ranchers up to the 2nd June, 1893, when the partnership was dissolved; (2)

that the plaintiff Cowen was a creditor of the firm, holding as security for his debt a chattel mortgage dated 25th August, 1892, on all the horses of the partnership; (3) that the defendants Cowdry Bros. were creditors of the plaintiff Davis, but not of the partnership, and held a chattel mortgage on the plaintiff's interest in the horses of the partnership; (4) that there were other creditors of the partnership, the affairs of which had never been wound up; (5) that the defendants Cowdry Bros. had seized and taken possession of all the horses and threatened and intended to remove and sell them to satisfy the indebtedness of the plaintiff Davis to them. The plaintiffs prayed: (1) that the partnership might be wound up; (2) an injunction restraining the defendants Cowdry Bros. from remaining in possession of and from removing or selling the horses; (3) judgment for the plaintiff Cowen for the amount of his mortgage against the plaintiff Davis and the defendant Patrick and a declaration that that mortgage was prior to that of Cowdry Bros.

By the second paragraph of the statement of defence of Cowdry Bros., they alleged that, whatever relationship existed between the plaintiff Davis and the defendant Patrick as to the ownership of the horses, it was put an end to, and the entire ownership of the whole of the horses, except thirteen, was vested in the plaintiff Davis, after the 2nd June, 1893, and the horses seized were the horses only that were so vested in Davis.

Held, that this was embarrassing and calculated to prejudice the fair trial of the action, inasmuch as it did not state the nature of the relationship which was put an end to, nor the manner in which the horses became vested in Davis.

The third paragraph stated that the alleged partnership was dissolved on the 2nd June, 1893, and by the agreement of dissolution, if such partnership did exist, the plaintiff Davis covenanted and agreed that he would satisfy all the liabilities of the firm and save Patrick harmless therefrom.

Held, unobjectionable, and a material matter to bring before the Court in relation to the claim to have the partnership wound up.

The fourth and fifth paragraphs alleged that the horses were not partnership property, but the sole property of Davis, in which Patrick was to be entitled to a share in case he paid off certain liabilities, and that Patrick, in joining with Davis in executing

the mortgage to Cowen, did so merely by leave and with the permission of Davis.

Held, *dubitante*, that these were not objectionable. The reasonable intendment was an allegation that the property never was partnership property. It was urged that there should have been an allegation that Patrick did not pay off the liabilities, but that was a matter within Davis' knowledge, and he could reply.

The seventh paragraph alleged that even if the giving of the mortgage by Davis and Patrick constituted a partnership liability to Cowen, they (Cowdry Bros.) had a separate claim against Davis before Cowen acquired any such partnership liability (*sic*).

Held, bad, because it did not allege that the separate claim which Cowdry Bros. had against Davis was the claim which the chattel mortgage was given to secure. If it were not that claim, the allegation was immaterial. If it were that claim, it should have been so alleged.

The eighth paragraph alleged, in answer to the second paragraph of the statement of claim, that the chattel mortgage therein alleged was wholly void and did not comply with c. 18 of the Ordinances of the North-West Territories, 1889, and that there was no affidavit of *bona fides*, as required by the Ordinance.

Held, embarrassing, because it left the opposite party in doubt whether the objection was simply to the want of an affidavit of *bona fides*, or also to other defects.

The ninth and tenth paragraphs alleged that by an indenture of 24th March, 1898, between Davis and Cowdry Bros., the former mortgaged to the latter a band of horses, therein described, to secure a debt then owed by Davis, and that in and by that indenture Davis agreed to warrant and defend that property to Cowdry Bros. (setting out the warranty); that the mortgage was overdue and unpaid, and pursuant to its terms, they had entered into possession of the horses; and they submitted that, even if Davis had no right when the mortgage was executed to mortgage the property, he was estopped from disputing its validity, he being now the sole owner of the property.

Held, that these allegations were unobjectionable and contained matter proper to bring under the notice of the Court.

The eleventh and twelfth paragraphs alleged that the giving of the mortgage by Davis was, as to his interest, fraudulent and void as against Cowdry Bros., and contrary to 13 Eliz. c. 5, and gave and had the effect of giving Cowen a preference over other creditors of Davis.

Held, not embarrassing, for they could not mislead nor be misunderstood. If not good in law, the question should be raised in the proper way under s. 128 of the Judicature Ordinance.

The thirteenth paragraph alleged that Cowen had made out no cause of action against Cowdry Bros. for an injunction; without his mortgage he had no cause of action, and the mortgage was void as before stated, and, even with the mortgage in force, there was no cause of action for an injunction.

Held, that this was a question of law which these defendants had a right to raise, and the way of raising it was unobjectionable.

The second, seventh, and eighth paragraphs were ordered to be struck out, with leave to amend.

Held, with regard to the pleading generally, that if a defendant in his statement of defence sets forth "such facts as may be deemed sufficient to entitle him to defend," although it may not be clear that there is a defence, the pleading ought not to be struck out under s. 108 of the Judicature Ordinance, unless it is so framed as to tend to prejudice or embarrass.

McEwen v. *The North-West Coal and Navigation Co.*, 1 N.W.T. Reps., part 2, p. 15, applied and followed.

C. C. McCaul, Q.C., for the plaintiffs.

H. M. Howell, Q.C., and *C. F. Harris*, for the defendants Cowdry Bros.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 17th JUNE, 1893.

LAFFERTY v. KERFOOT.

Examination—Conduct money—Mileage—Civil Justice Ordinance, s. 188—Ordinance No. 21 of 1889, s. 4.

The defendant having made an affidavit on a pending motion, an order was made for his cross-examination before the clerk of

the Court, and a copy of this order, together with an appointment and subpœna, were served upon him, and he was paid $2. The defendant ordinarily resided about forty miles from the clerk's office, but when served was stopping temporarily at an hotel in Calgary, within half a mile of the office.

The defendant neglected to attend, and the plaintiffs moved to commit him.

Held, that the defendant should have attended in obedience to the subpœna, and if the witness fees paid him were not sufficient to reimburse him his neccessary expenses occasioned by his detention, he could refuse to be cross-examined until paid such amount as the clerk should deem reasonable, but that he was not entitled to mileage from his ordinary domicil; and an order was made that the defendant should attend at his own expense without further notice than service of an appointment of two clear days on his advocates, but that the plaintiffs should pay to the defendant before proceeding with the examination such amount as he would have been entitled to, and the clerk deem reasonable, under the above ruling, as if he had attended on the first appointment.

C. C. McCaul, Q.C., for the plaintiffs.

G. S. McCarter, for the defendant.

[18th September, 1893.

CREAGH v. WORDEN.

Partnership—Registration of—Penalty—Abolition of office of registrar of deeds.

Action to recover a penalty of $200 from the defendants for not having filed with the registrar of deeds a declaration of their partnership within the time prescribed by the Ordinance respecting the same.

The defendants, among other defences to this claim, took the objections in law that there was no registrar of deeds with whom the required declaration could have been filed; the Territories Real Property Act having, since the passing of the Ordinance in question, abolished that office and established a new system, by which the duties under the Act were to be discharged by an officer known as the registrar of titles; that the Act in question expressly prohibited the registrar from transacting any business in his office other than his duties as such registrar; and that, as the registrar of titles was an officer appointed by and under the sole control of the Dominion Government, so much of the Ordinance as imposed any duties upon him was *ultra vires* of the Legislative Assembly of the Territories, and void.

As these objections in law, if decided in favour of the defendants, would put an end to the action, an order was made directing the same to be set down for hearing, and on the 23rd June, 1898, they were argued before ROULEAU, J.

G. S. McCarter, for the plaintiff.

Muir, Q.C., for the defendants.

ROULEAU, J.—At the time the Ordinance was passed, the North-West Council had the power to pass Ordinances concerning the registration of deeds, and, although the registrars then were appointed by the Dominion Government, still they were considered provincial officers as far as their duties were concerned. But since that time, the Dominion Parliament have changed the whole system and repealed the law of registration of deeds. The registrars of deeds have been replaced by the registrars of titles; and their duties are prescribed by the Parliament of Canada, and not by the Lieutenant-Governor with the advice of the Legislative Assembly. The Territories Real Property Act of 1886, s. 140, repeals all other Acts and Ordinances inconsistent with the said Act or not specially retained by the same.

So that all the provisions concerning the registration of partnerships in the Ordinances of 1888, and included in c. 46 of the Revised Ordinances, are ineffective. There is no such official under the jurisdiction of the Legislative Assembly known as the registrar of deeds. Until the Legislative Assembly provides for registration of partnerships by any of their officials, there is no possibility for a man to comply with the enactments of the Ordinance respecting partnership *quoad* registration of the same.

I therefore find the objection properly taken, and the action is dismissed with costs.

[At the last session of the Legislative Assembly for the Territories, an Ordinance was passed directing all declaration of partnerships to be filed with the clerk of the Court, and all those who have been registered under the former provision are given until the 1st January, 1894, to file fresh declarations with such clerk.]

[19TH DECEMBER, 1893.

O'BRIEN v. SAGE.

Interpleader—Affidavit not made by claimant personally—Examination of claimant—Order for—Varying order.

Goods seized by the sheriff under execution were claimed by one C. M. S. as his property. The sheriff issued and served the usual interpleader summons. The claimant filed an affidavit of his father, the execution debtor, alleging that the goods were partnership property, the partnership consisting of the father and son. The affidavit further set out facts going to show that the sheriff was not entitled to interplead.

The execution creditors applied for and obtained an order that the claimant should appear before the clerk of the Court for examination, and that the execution creditors might use such depositions as evidence in the proceedings and on any issue that might be directed, and served the order with an appointment and subpœna.

The claimant moved to set aside this order and appointment, on the grounds, among others, that it was improperly made *ex parte;* that, no issue having been directed, the execution creditors could not at this stage call witnesses; and that examination for discovery could not be ordered in an interpleader matter, at any rate prior to the issue.

Held, that the clauses of the order providing for the examination of the claimant should be struck out; but as there appeared no good reason why the affidavit in support of the claimant's claim should not have been made by himself, the order should be varied by directing the claimant to file his own affidavit within a limited time, or show cause why he should not do so, and in default that he should be barred.

No costs of either order to the sheriff or either party.

McCaul, Q.C., for the claimant.

P. McCarthy, Q.C., for the execution creditors.

Muir, Q.C., for the sheriff.

[21ST DECEMBER, 1893.

In re HODDER.

Territories Real Property Act, s. 91—Executors and administrators—Production of letters probate—Registration of—Consolidation of certificates of ownership—Registrar's fees.

Upon a reference by the registrar of the South Alberta land registration district with regard to fees payable on a transmission under s. 91 of the Territories Real Property Act:—

Held, that it is not necessary that letters probate, letters of administration, an order of the Court, or an office copy thereof, referred to in s. 91 of the Territories Real Property Act, be left with the registrar for registration, nor is the registrar entitled to require a copy thereof to be left in his office.

2. That in a case in which an executor or administrator produces probate, letters of administration, an order of the Court, or an office copy thereof, and more than one certificate of ownership of the deceased, for the purpose of being registered as owner by transmission of the lands comprised in such certificate of ownership of the deceased, the executor or administrator is entitled to receive from the registrar one consolidated certificate of ownership in his own name, as such executor or administrator; and

the registrar's fees payable for such certificate of ownership shall be $2.00 and no more, except in cases where it is necessary to indorse a memorial on such certificate.

3. The registrar is not entitled to charge for the registration or entry in the day-book of the written application under s. 91 of the executor or administrator.

J. P. J. Jephson, for the applicant.

The registrar, in person.

[4TH JANUARY, 1894.

IMPERIAL BANK v. DAVIS.

Third party notice—Service out of the jurisdiction—Judicature Ordinance, s. 29, s-s. 27; ss. 46, 47.

Action in the nature of *scire facias* against certain shareholders of the C. E. L. Co.

K., one of the defendants, issued a third party notice against one B., claiming indemnity on the ground that one moiety of the stock standing in K.'s name belonged to B., and that B. was liable to contribute equally with K. to all calls, etc. B. residing in Ontario, K. obtained an order for service, and served the third party notice on B. out of the jurisdiction.

B. moved to set aside the order and service.

Muir, Q.C., for the motion.

E. Cave, contra.

ROULEAU, J.—By ss. 46 and 47 of the Judicature Ordinance, the Judge is given the power to give leave to serve third party notices for the reasons therein mentioned, but I cannot find any provision for service of such notice out of the jurisdiction. True that the Judge may direct such notice to be given in *such manner, at such time, and to such person*, as may be thought proper, but the Rule does not go any further.

Suppose the above Rule gave me the same power to order the service of this notice in the same manner as a writ of summons, I could only order service out of the jurisdiction in the cases provided for by s. 29, s-s. 7, of the Judicature Ordinance. That sub-section is an exact copy of s-s. (g) of English Marginal Rule 94. The case of *Dubout & Co.* v. *Macpherson*, 23 Q. B. D. 341, settles the question; there it was held that this sub-section did not apply to third party notices.

As s-s. 7 of s. 27 is the only clause in our Judicature Ordinance which would permit service out of the jurisdiction of this notice, supposing s. 47 was broad enough to give me the power to order such service, I have therefore to set aside my order dated 27th September, 1893, with costs.

O'BRIEN v. SAGE.

Interpleader—Claimant's affidavit—Necessity of—Attacking regularity of sheriff's seizure — Affidavit by other person than claimant — Barring claimant.

An interpleader summons issued by the sheriff called upon C. M. S., who had served a notice of his claim to goods seized in execution as his property, to show cause why he should not appear and state the nature and particulars of his claim, etc. The claimant filed an affidavit made by his father, L. M. S., the execution debtor, setting out that the goods seized were the property of a partnership consisting of the father and son, attacking the legality of the sheriff's seizure, and alleging an abandonment. After various abortive efforts on the part of the execution creditors to obtain an examination of the claimant, an order was made that C. M. S. should on the 30th December appear and file his affidavit of claim, or show cause why he should not, or be barred.

McCaul, Q.C., for the claimant, showed cause by asking to have the sheriff's application summarily dismissed, on the grounds of insufficiency of the sheriff's original affidavit; that the goods, though seized by the sheriff, were never legally seized; that the sheriff had abandoned prior to his application; and that a claim of partnership was not the subject of interpleader, reading the cross-examination of the sheriff, and the affidavit of L. M. S.

Muir, Q.C., for the sheriff, objected that C. M. S. had no *locus standi*, unless and until he had "pledged his oath to the *bona fides* of his claim," and even then could not be heard to attack the legality of the seizure, etc., arguing that this was a question between the sheriff, the execution creditors, and execution debtor only; and that the affidavit of the execution debtor could not be read in proof of the alleged partnership.

ROULEAU, J.—Under s. 350 of the Judicature Ordinance, if a claimant appears in pursuance of a summons, and neglects or refuses to comply with any order made after his appearance, the Court or Judge may make an order declaring him forever barred against the applicant, etc.

The question to be decided in this case is this:—Has the claimant, after he has appeared by counsel, the right to take exception to the proceedings of the sheriff, before he has filed his claim legally? There is no doubt that the claimant for good reasons may show cause why he is not ready to file his claim, but he cannot appear by counsel and raise all sorts of objections to the proceedings taken by the sheriff, before he is legally made a party before the Court. I think the case of *Powell* v. *Lock*, 8 A. & E. 315, is very much *ad rem*. In that case it was decided that "a third party called upon by an interpleader to appear and state the nature and particulars of his claim to property seized by the sheriff, must make such statement by affidavit. It is not sufficient that he appears by counsel, and that upon affidavits put in by other parties, it appears that he has given formal notice of his claim to the sheriff."

Cababé, p. 54, says that when claimants to an interpleader summons appear, "then they must be prepared to support their claims by affidavit."

All the objections in this case may be properly raised by the execution debtor, in another proceeding, because the sheriff does not claim any indemnity against him. But it exceeds my comprehension to think that a claimant may contest the right of the sheriff to ask indemnity against him, when he is not properly before the Court, and the Judge has no opportunity to know whether his claim is *bona fide* or not.

As I think the claimant in this case has neglected and refused to comply with my order, I therefore bar him forever against the applicant; and the sheriff can proceed with the sale of goods and chattels claimed by C. M. S.

Supreme Court of Canada.

ONTARIO.] [20TH NOVEMBER, 1893.

TOWN OF THOROLD v. NEELON.

Company—Stock in—Payment by holders of shares—Appropriation by directors—Formal resolution.

N., a director and shareholder of a railway company, agreed to lend $100,000 to the company, taking as security, among other things, 168 shares of their stock held by B., who owned altogether 188 shares of $50 each, and had paid thereon $3,750, or about forty per cent. of their value. Before the agreement was consummated, it was found that B. was unable to pay the balance due on the 188 shares, and at a meeting of the directors of the company it was proposed and decided to appropriate the sum paid by B. to 75 of his 188 shares, making that number paid up, and offer them to N. in lieu of the 168. N. agreed to this, and B. signed a transfer to N. of 75 paid up shares, and retained the balance as stock on which nothing was paid. There was no formal resolution of the board of directors authorizing this appropriation of B.'s payment.

Judgment creditors of the railway company issued writs of execution on their judgment, which were returned *nulla bona*. They then brought an action against N. for the amount due on their executions, claiming that the $3,750 paid by B. could not legally be appropriated as it was by the directors, but was paid on the whole 188 shares, and N., therefore, held the 75 shares as stock on which only forty per cent. was paid, and the remaining sixty per cent. was still due to the company.

The trial Judge found as facts that N. took the 75 shares believing that they were fully paid up, and relying on the representations of the proper officer of the company to that effect; that if he had had any doubt about it, he would not have received them nor advanced his money; and that he had a general knowledge of what had taken place at the meeting of the board of directors. A judgment in favour of N. was affirmed by the Divisional Court of the Chancery Division, 10 Occ. N. 362; 20 O. R. 86; but reversed by the Court of Appeal, on the ground that the want of a formal resolution authorizing the appropriation made the action of the board invalid: 12 Occ. N. 14; 18 A. R. 658.

Held, reversing the decision of the Court of Appeal, and restoring that of the Divisional Court, that, as it appeared from the books of the company that the sum paid by B. was not paid on, nor appropriated to, any particular shares, the directors could, with B.'s consent, re-appropriate it to the 75 shares; that the rights of creditors were not prejudiced, as B. was still liable on the residue of his stock; that the matter was not one between the whole body of shareholders and the directors, but only between N. and the company; that the want of a formal resolution by the directors authorizing the re-appropriation was a mere irregularity which could not affect the rights of a third party contracting with the company; and that it made no difference that such third party was himself a director of the company and had knowledge of all that had been done.

W. Cassels, Q.C., and *R. G. Cox*, for the appellant.

H. H. Collier, for the respondents.

UNION BANK OF CANADA v. O'GARA.

Principal and surety—Interference with rights of surety—Discharge.

The bank agreed to discount the paper of A. S. & Co., railway contractors, indorsed by O'G. as surety, to enable them to carry on a railway contract. O'G. indorsed the notes on an understanding or agreement with the contractors and the bank that all moneys to be earned under the contract should be paid

directly to the bank, and not to the contractors; and an irrevocable assignment of all such moneys by the contractors to the bank was in consequence executed. After several sums had been thus paid to the bank, it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts and made large payments directly to the creditors of the contractors other than the bank for moneys subsequently earned by the contractors. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque for $15,000, accepted by the bank and held by the company as security for due performance of the contract, and signed a release to the railway company "for all payments heretofore made by the company, for labour employed on said contract, and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, &c., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, &c., due by the contractors, and which was done without the assent of O'G.

Held, that the payments for supplies and provisions made by the company for which the bank signed a release without O'G.'s assent, were not authorized by the contract, and were such a variation of the rights of O'G. as surety as to discharge him; TASCHEREAU and GWYNNE, JJ., dissenting.

Judgment of the Court of Appeal reversed.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the appellant.

W. R. Meredith, Q.C., and *Chrysler*, Q.C., for the respondents.

MARSH v. WEBB.

Title to land—Crown grant—Conveyance by grantee out of possession—Disseisin—Statute of Maintenance, 32 H. VIII. c. 9—Conveyance to wife of person in possession—Assent by husband—Statute of Limitations—Estoppel.

In 1828 land in Upper Canada was granted by the Crown to King's College. In 1841 King's College conveyed to G. In 1849 G. conveyed to the wife of M., who had been in possession

of the land for some years before the deed to G. in 1841. In an action by the successors in title of M.'s wife to recover possession, the defendants, claiming through M., alleged that the deed from King's College to G. in 1841 was void under the Statute of Maintenance, being made by a person not in possession of the land, and that G. had therefore nothing to convey to M.'s wife in 1849. They also pleaded the Statute of Limitations, claiming that M. in 1849 had been in possession more than twenty years.

Held, affirming the decision of the Court of Appeal, 12 Occ. N. 348; 19 A. R. 564, and of the Divisional Court of the Queen's Bench Division, 11 Occ. N. 240; 21 O. R. 281, that the defendants had failed to prove continuous possession by M. for twenty years prior to the conveyance to his wife in 1849; that if he had entered before the grant from the Crown, the Statute of Maintenance would not have avoided the conveyance by the grantee; that for that statute to operate, disseisin of the grantor must be established, and the Crown could not be disseised, so, the original entry not having been tortious, it would not become so against the grantee from the Crown without a new entry; that, though N. entered while the title was in King's College, and was in possession when the college conveyed to G., such conveyance was not absolutely void, but at the most was only void as against M., and that M. having executed the conveyance to his wife must be taken to have assented thereto, and such assent and M.'s subsequent acts created an estoppel against him and took the case out of the Statute of Maintenance.

W. R. Riddell and *F. L. Webb*, for the appellants.

J. R. Roaf, for the respondents.

QUEBEC.] [23RD OCTOBER, 1893.

KINGHORN v. LARUE.

Appeal—Right of—Amount in dispute—R. S. C. c. 135, s. 29—54 & 55 V. c. 25, s. 3—Opposition dfin de conserver, on proceeds of a judgment for $1,129.

The plaintiff contested an *opposition dfin de conserver* for $24,000 filed by the defendant on the proceeds of a sale of

property upon the execution by the plaintiff against H. & Co. of a judgment obtained by the plaintiff against H. & Co. for $1,129. The Superior Court dismissed the defendant's *opposition*, but on appeal the Court of Queen's Bench maintained the *opposition*, and ordered that the defendant should be collocated *au marc la livre* on the sum of $930, being the amount of the proceeds of the sale.

Held, that the pecuniary interest of the plaintiff appealing from the judgment of the Court of Queen's Bench being under $2,000, the case was not appealable under R. S. C. c. 135, s. 29.

Gendron v. *McDougall*, Cassels' Dig., 2nd ed., 429, followed.

Held, also, that s. 3 of 54 & 55 V. c. 25, providing for an appeal where the amount demanded is $2,000 or over, had no application to the present case.

The appeal was quashed with costs.

Belcourt, for the appellant.

G. Stuart, Q.C., for the respondent.

NOVA SCOTIA.] [20TH NOVEMBER, 1893.

BROOKFIELD v. BROWN.

Parties—Mortgagees out of possession—Owner of equity of redemption—Effect of transfer of interest—Trespass.

The first mortgagee of land, on which there were two other mortgages, foreclosed. Two days before the sale under foreclosure, B., the second mortgagee, with an agent's assistance, entered the mortgaged premises and removed the personal property therefrom and certain fixtures attached to the freehold. The sale took place and realized enough to pay off the first two mortgages. On the same day the purchaser at the sale received a deed from the sheriff, an assignment of the third mortgage, and a conveyance of the equity of redemption. Some little time after, an action was brought against B. and his agent for trespass and injury to the mortgaged property, in which action the first and third mortgagees, the original owner of the equity of redemption, and the purchaser at the sale, were joined as plaintiffs.

Held, affirming the decision of the Supreme Court of Nova Scotia, 24 N. S. Reps. 476, GWYNNE, J., dissenting, that the owner of the equity at the time of the trespass was the only one of the plaintiffs who could maintain the action; that the first mortgagee could not, after his mortgage had been satisfied by the proceeds of the sale; that the third mortgagee had no *locus standi*, having parted with his interest before action brought; and that the purchaser at the sale, who was also assignee of the third mortgage and equity of redemption, could not sue, having had no interest when the trespass was committed.

Per GWYNNE, J.—That the third mortgagee, who was in actual possession when the tort was committed, was the only person damnified; that he was not estopped by having consented to the sale under chattel mortgage of the personal property on the mortgaged premises to B., one of the trespassers; and that the tort-feasors could not claim such estoppel, even though the amount recovered from them, added to the sum received on assignment of his interest, should exceed his mortgage debt.

Ross, Q.C., for the appellants.

Borden, Q.C., for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 9TH FEBRUARY, 1894.

CARROLL v. BOOTH.

New trial—Condition—Payment of costs—Default—Necessity for motion—Rule 794.

Upon the defendant's motion for a new trial, made on the 8th December, 1893, the Court ordered: "Upon payment by the defendant to the plaintiff of the costs of the trial of this

action on the 16th November, 1893, and all the costs subsequent thereto, including the costs of the motion to re-open the judgment made on the 17th November, 1893, etc., within ten days after taxation thereof, the defendant be entitled to a new trial of the action; but, in default thereof, this motion be dismissed with costs, including the costs of the motion to remove the stay of proceedings under the judgment."

On 22nd December, 1893, the costs under this order were taxed at $151.64.

The plaintiff now moved, upon an affidavit of non-payment of these costs, for an order dismissing the original motion.

Rule 794 provides that "when a new trial is granted to a party on condition of payment of costs, or other condition, no order shall be made on default in performing such condition unless a motion is made therefor upon notice."

J. H. Moss, for the plaintiff, relied on this Rule.

W. R. Smyth, for the defendant, shewed no cause, but objected that the motion was unnecessary, and asked that the plaintiff should have no costs of it.

THE COURT held that the plaintiff was properly in Court, and made the order as asked with costs.

[15TH FEBRUARY, 1894.

MERCHANTS NATIONAL BANK OF CHICAGO v. ONTARIO COAL CO.

Summary judgment—Rule 739—Promissory note—Incorporated company—Accommodation note—Presumption of value—Conditional leave to defend—Payment into Court.

In an action upon a promissory note the only fact shown by the defendants, an incorporated company, as the basis of a defence, was that they made the note for the accommodation of one of their directors. They did not show that the plaintiffs were not holders for value in due course without notice; while the plaintiffs swore that the note was discounted before maturity in the usual course of their banking business; and it was admitted

that one of the trustees for the defendants, who were insolvent, had offered to the plaintiffs the compromise of fifty cents on the dollar which the undoubted creditors were accepting.

Held, upon a motion for summary judgment under Rule 739, that the defence alleged was not founded upon any known facts, but was mere guess work, and unless the defendants paid into Court a substantial portion of the plaintiffs' claim as a condition of being allowed to defend, the motion should be granted.

The presumption that value has been given may be done away with in the case of notes which have had their origin in actual fraud, but not in the mere case of notes made for the accommodation of others; and even where accommodation notes are made by an incorporated company, the onus of shewing value is not shifted over to the plaintiffs.

Re Peru R. W. Co., L. R. 2 Ch. 617, followed.

Millard v. *Baddeley*, W. N. 1884, p. 98, and *Fuller* v. *Alexander*, 47 L. T. N. S. 443, distinguished.

Arnoldi, Q.C., for the plaintiffs.

A. H. Marsh, Q.C., for the defendants.

[16TH FEBRUARY, 1894.

BRESSE v. GRIFFITH.

Partnership—Sale of goods to—Dissolution of—Agreement to look to remaining partner for price—Evidence of.

Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up in an action for the price of the goods that the plaintiffs had agreed to discharge him and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only.

Held, insufficient to show an agreement such as was set up; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity.

Clute, Q.C., and *N. McCrimmon*, for the plaintiffs.

Moss, Q.C., for the defendant Henry Griffith.

[ARMOUR, C.J., 13TH FEBRUARY, 1894.

In re HUMPHRIES AND TOWNSHIP OF ASPHODEL.

Municipal corporations—By-law altering school sections—Time for passing —55 V. c. 35, s. 81. s-s. 3—"Year," meaning of.

Motion to quash a by-law of the township council transferring certain lots in the township from one school section to another.

The Public Schools Act, 55 V. c. 55, s. 81, s-s. 3, provides that "any such by-law shall not be passed later than the 1st day of May in any year, and shall not take effect before the 25th day of December next thereafter."

The by-law in question was passed on the 25th September, 1893.

Held, that the word "year" in the provision quoted means the calendar year—the year commencing on the 1st day of January and ending on the 31st day of December; and this by-law was therefore within the prohibition, and should be quashed.

E. B. Edwards, for the applicants.

Aylesworth, Q.C., for the township corporation.

[FERGUSON, J., 16TH NOVEMBER, 1894.

TENUTE v. WALSH.

Devolution of Estates Act—R. S. O. c. 108, s. 9—54 V. c. 18, s. 2—Power of executor—Exchange of lands—Contract—Specific performance—Costs.

An executor or administrator cannot, having regard to R. S. O. c. 108, s. 9, and 54 V. c. 18, s. 2, make the lands of the

testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

And the Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shown that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

Costs withheld from the defendant because he had misled the plaintiff as to his power to make the exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove.

T. W. Howard, for the plaintiff.

A. W. Burk, for the defendant.

[STREET, J., 5TH FEBRUARY, 1894.

CRAM v. RYAN.

Negligence—Fire by sparks from tug—Reasonable precautions—Liability for acts of master of tug—River—Navigable waters—Grant of land to shore—Waters covering land granted—Rights of licensee—Rights of public.

Land granted by the Crown was described in the patent as extending to the shore of a certain river, which was shown to be navigable by large vessels. The patent reserved free access to the shore of the land granted for all vessels, boats, and persons, and also the free use, passage, and enjoyment of and over all navigable waters that should be found on or under or be flowing through or upon any part of the land granted. The defendants had a license from successors in title of the patentee to take sand from the land so granted. In 1892 they took so much sand as to materially change the shore line and form a deep bay, the waters of which covered a portion of the land so granted.

In 1893 the plaintiff, without any authority, placed a scow used as a boarding house upon the waters of this bay, and moored it to the shore, and when it had been there some weeks, a tug, having in tow a sand scow of the defendants, was moored to the shore alongside the plaintiff's scow, and began using her furnace

and boiler to supply steam to work a sand pump on the tow. The men in the tug had pushed the soot from the flues of the boiler into the back of the furnace before the engine was set working. A fresh breeze was blowing across the bow of the boarding scow, and there was a strong draught through the furnace, which carried burning soot from the back of it, through the smoke-stack, to the roof of the boarding scow, setting it on fire and completely destroying it.

The tug was not owned by the defendants, but was hired by them to draw their sand and to furnish steam to work their sand pump. The defendants supplied the fuel for the tug, and the master hired and paid the men employed in working her. The defendants had a foreman on their scow, under whose directions the master of the tug acted. Upon the day in question the foreman ordered the master to lay the tug alongside the boarding scow just as she was laid.

Held, that, though the plaintiff had a right to use the waters for the purpose of navigation, and the shore as a landing place, it was not a proper user of either to occupy them as a permanent resting place for the boarding scow, to the prejudice of other persons claiming under the owner of the soil and shore, and the plaintiff had no right to have his scow there; while the defendants' scow and tug were lawfully there, for the defendants, in addition to the public rights of navigation and landing, had the right to use the shore and the bay for any purpose which did not interfere with those public rights.

2. But, while the defendants were entitled to proceed with their work, they were bound to omit no reasonable precautions to avoid injuring the plaintiff's property; and the evidence showed that they did not do all that they might have done for the plaintiff's protection, and the fire was the result of negligence on their part.

Davies v. *Mann*, 10 M. & W. 546, applied and followed.

3. That the acts which caused the fire were the laying of the tug and the working of her furnace and boiler in dangerous proximity to the boarding scow, and, as this was done by the master of the tug in accordance with the express order of the defendant's foreman, the defendants were liable for the results.

M. McFadden and *C. F. Farwell*, for the plaintiff.

Lount, Q.C., and *W. H. Hearst*, for the defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 22ND JANUARY, 1894.

MISENER v. MICHIGAN CENTRAL RAILWAY CO.

Railways—Filling frogs with packing—Keeping filled—51 V. c. 29, s. 262, s-s. 3 (D).

It is the duty of a railway company under 51 V. c. 29, s. 262, s-s. 8 (D.), not only to fill with packing the spaces behind and in front of every railway frog, but to keep the same filled.

In an action by the widow and administratrix of a railway employee, who had been run over by a train and killed by reason of his foot being caught in a frog, which had been filled, but the packing of which had worn away, in which action the railway company contended that, having once filled the frog, they were not bound to keep it filled :—

Held, that the plaintiff was entitled to recover.

W. M. German, for the plaintiff.

D. W. Saunders, for the defendants.

ENTNER v. BENNEWEIS.

Seduction—During invalid father's lifetime—Action by mother—Service—Evidence.

In an action of seduction brought by a mother, evidence to show that the daughter was servant to her mother during the lifetime of the father, on account of his being helpless from age or infirmity, and that the mother was really the head and support of the family, should not be admitted unless it can be further proved that the mother has separate estate in which was the common abode, or that by some transaction apart from the husband there was a condition of real service between her and her daughter. The common law right to the service is given to the father as the head of the family, and that relation is not

changed because of his personal infirmity, as it is a legal result flowing from the family status. There is no divided right or co-ordinate power of control during the joint lives; all is in the father.

J. P. Mabee, for the plaintiff.

G. G. McPherson, for the defendant.

MOYLE v. EDMUNDS.

Guaranty—Construction of—Amount of.

A guaranty in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate . . . up to $400," was given at a time when the debt due by F. E. to H. M. was $280.85.

Held, affirming the judgment of ARMOUR, C.J., that the guaranty covered the amount then due and a further sum sufficient to make it up to $400.

Chalmers v. *Victors*, 18 L. T. N. S. 481, followed.

Allnutt v. *Ashenden*, 5 M. & G. 892, commented on.

Biggs, Q.C., for the defendant.

George Lindsey, for the plaintiff.

In re DOMINION PROVIDENT, BENEVOLENT, AND ENDOWMENT ASSOCIATION.

Company—Winding-up—55 V. c. 39, s. 54 (O.)—Security by officer of company—Interim receiver—Default in furnishing security—Contempt of Court—Imprisonment.

A Master has no authority under the provisions of 55 V. c. 39 (O.) to direct security to be given by a person as an officer of an association or company in course of winding-up under that Act. Sub-ss. 5 and 7 of s. 54 merely provide for the giving of

security by an interim receiver, which may be made a condition of being retained in that office, but default therein would not seem to be appropriately punished by imprisonment.

J. P. Mabee and *L. G. McCarthy*, for the appellant.

G. G. McPherson and *W. H. Blake*, contra.

In re BAJUS.

Insurance—Life—Benevolent society—Insurance money claimed by different persons—Payment into Court—Judicature Act, R. S. O. c. 44, s. 53, s-s. 5.

On an application by a benevolent society for leave to pay into Court insurance moneys claimed by different persons:—

Held, that s-s. 5 of s. 53 of the Judicature Act, R. S. O. c. 44, extended the benefit of the Acts for the Relief of Trustees to such cases, and that the society was entitled to pay the money in.

Decision of FERGUSON, J., reversed on other grounds.

Totten, Q.C., for the society.

G. M. Macdonnell, Q.C., for a claimant.

[THE DIVISIONAL COURT, 15th FEBRUARY, 1894.

ATWOOD v. ATWOOD.

Husband and wife—Interim alimony and disbursements—Separation deed—Agreement not to sue for alimony—Merits.

An appeal from the decision of BOYD, C., 15 P. R. 425; 18 Occ. N. 439, was dismissed by reason of a division of opinion of the Judges composing a Divisional Court.

Per FERGUSON, J.—The order of the Chancellor was right.

Per MEREDITH, J.—The marriage being admitted, and need and refusal of support being proved, the plaintiff is *prima facie* entitled to interim alimony and disbursements; upon a motion therefor there ought not be any adjudication upon any of the

issues or questions to be tried between the parties; and if the motions cannot be refused without determining such issues or questions, or without prejudicing a trial of them, the order should be made, unless the action is frivolous or vexatious.

J. P. Mabee, for the plaintiff.

W. H. Blake, for the defendant.

In re CENTRAL BANK OF CANADA.

WATSON'S CASE.

Judgment debtor—Re-examination of—Rule 926—Special grounds.

The order and decision of BOYD, C., 15 P. R. 427; 18 Occ. N. 489, affirmed on appeal.

W. R. Riddell, for the appellant.

Pattullo, for the respondent.

BENNETT v. EMPIRE PRINTING AND PUBLISHING CO.

Security for costs—Libel—Newspaper—R. S. O. c. 57, s. 9—Criminal charge—Discretion—Appeal.

The legislation in R. S. O. c. 57, s. 9, as to security for costs in actions for libel contained in newspapers, is unique, and the intention is to protect newspapers reasonably well conducted, with a view to the information of the public.

In a newspaper article published by the defendants the plaintiff was referred to as an "unmitigated scoundrel" and it was stated that he had endeavoured to ruin his wife by inciting another person to commit adultery with her.

Held, that this did not involve a criminal charge within the meaning of s. 9 (*a*).

The defendants did not contend that the grounds for action were trivial or frivolous; and it was conceded by the plaintiff that he had not sufficient property to answer the costs of the action.

The manager of the defendants swore to a belief in the substantial truth of what was published, and that it was so published in good faith and without malice or ill-will towards the plaintiff.

Held, that, under these circumstances, an appeal from the discretion of a Judge in Chambers in reversing a referee's decision and ordering security for costs, should not prevail.

W. Stewart, for the plaintiff.

H. Cassels, for the defendants.

WINNETT v. APPELBE.

Particulars—Slander—Names, times, and places.

In an action for slander the statement of claim alleged that the defendant on a specified day spoke to C. and others the slanderous words alleged. In answer to a demand for particulars, the plaintiff's solicitor wrote to the defendant's solicitor stating that he had given all the information the plaintiff had, the names of "the others" to whom the words were spoken not being known to him, and the plaintiff, when a motion for particulars was made, deposed on affidavit to the same facts.

An order of a Master requiring the plaintiff to furnish particulars of all the persons within his knowledge to whom, the places where, and the times when, the words were spoken, was affirmed by a Judge in Chambers, but reversed by a Divisional Court.

Held, that the plaintiff having given all the information in his possession, and the defendant not having sworn that she could not plead without further particulars, or that she was ignorant of what occasion was complained of, it was useless and unnecessary to order the particulars.

Thornton v. *Capstock*, 9 P. R. 585, approved.

William Stewart, for the plaintiff.

A. H. Marsh, Q.C., for the defendants.

PARKER v. ODETTE.

Attachment of debts—Rule 935—Garnishee "within Ontario"—Foreign corporation—Debt due to two persons jointly.

A foreign corporation incorporated under the laws of one of the United States, and not shown to carry on one of the principal parts of its business in this province, is not "within Ontario," within the meaning of Rule 935, and moneys in its possession cannot be attached to answer a judgment.

Canada Cotton Co. v. *Parmalee*, 18 P. R. 308, followed.

County of Wentworth v. *Smith*, 15 P. R. 372, distinguished.

A debt due to a judgment debtor jointly with another person cannot be attached.

Macdonald v. *Tacquah Gold Mines Co.*, 18 Q. B. D. 535, followed.

W. H. P. Clement, for the judgment creditor.

Hoyles, Q.C., for the judgment debtor.

L. G. McCarthy, for the garnishees.

[23RD FEBRUARY, 1894.

LAUDER v. DIDMON.

Jury notice—Striking out—Discretion—Judicature Act, R. S. O. c. 44, s. 80—Convenience—Exclusive jurisdiction of Court of Chancery—Injunction—Nuisance—Time for giving notice.

Since the passing of the Rules of 4th January, 1894, providing for the holding of separate jury and non-jury sittings for the trial of actions, it is desirable to have the question whether an action is to be tried with or without a jury settled at as early a stage as possible.

A Judge in Chambers has full discretion under s. 80 of the Judicature Act, R. S. O. c. 44, to order that an action shall be tried without a jury, and that discretion is not lightly to be interfered with.

And where a Judge in Chambers reversed an order of a local Judge and struck out a jury notice in an action for an injunction to abate a nuisance and for damages, his order was affirmed on appeal.

Held, per ROBERTSON, J., in Chambers, that the action was one within the exclusive jurisdiction of the Court of Chancery before the Administration of Justice Act, 1878, and could also be more conveniently tried without a jury.

Quære, also *per* ROBERTSON, J., whether a defendant can properly give a jury notice before delivery of his statement of defence.

C. D. Scott, for the plaintiff.

James Bicknell, for the defendant.

[BOYD, C., 27TH OCTOBER, 1898.

OSTROM v. ALFORD.

Will—Bequest to trustees of a church—Object of—Mixed fund—Failure of gift as to realty—Application of fund.

A testator by his will bequeathed $500 to the trustees of a church "to be used in the payment of any indebtedness on said church and for such other purposes as they may deem wise."

Held, that that meant outlay in connection with the church, such as repair and maintenance or any obligation incurred for which the land was not liable; and, following *Bunting* v. *Marriott*, 19 Beav. 168, that the bequest was good.

But the will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty.

Held, so far as the real estate was concerned, that the gift failed; and a direction was given as to how the fund was to be applied.

E. G. Porter, for the plaintiffs.

W. B. Northrup, for the residuary devisee.

F. S. Wallbridge, for the trustees.

[14TH NOVEMBER, 1893.

In re ONTARIO EXPRESS AND TRANSPORTATION CO. KIRK'S AND MARLING'S CASES.

Company—Shares—Assignment—Surrender—54 & 55 V. c. 110, s. 4 (D.)

By 54 & 55 V. c. 110, s. 4 (D.), power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time.

A shareholder desiring to surrender his stock transferred it within the time, by an ordinary assignment, to the president in trust, both intending the transfer to operate as a surrender.

Held, a valid surrender.

J. B. Clarke, Q.C., for the president.

J. M. Clark, for the shareholder.

Hoyles, Q.C., for the liquidator.

[27TH JANUARY, 1894.

NOXON v. NOXON.

Patent for invention—License—Part owner—Right to revoke agreement of license.

The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented article, to the end of the term of the letters patent. Subsequently the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth interest in the patent.

Held, that the defendants were entitled so to do.

If an interest in a patent is transferred, then it requires the consent of both parties to put an end to the transfer; but if the

transaction is merely permission to manufacture, on certain terms, then the licensee may at his option renounce the license and make the patented article at his peril.

W. Cassels, Q.C., and *A. W. Anglin*, for the plaintiff.

Osler, Q.C., and *Arnoldi*, Q.C., for the defendants.

[29TH JANUARY, 1894.

In re STEPHENSON, KINNEE v. MALLOY.

Executors—Surviving executor's executor—Blended fund—Transmission of interest—Vendor and purchaser.

When a testator directs a sale of both real and personal property and a division of the proceeds, thus causing a blending of both for the purposes of sale and distribution, and names two executors, the death of one of them does not disqualify the survivor, in whom the whole executorial character vests; and the survivor can transmit the power to his executor and thus preserve the chain of representation.

Quære, in the case of land *simpliciter*.

W. Cook, for the purchasers.

R. Hodge, for the vendor.

[FERGUSON, J., 26TH JANUARY, 1894.

PEIRCE v. CANADA PERMANENT L. & S. CO.

Mortgage—Priorities—Registry Act—Building loan—Further advances.

One Wilson entered into an agreement for the purchase of certain lands, which provided that $2,000 of the purchase money was to be secured by a mortgage on the land, which was to be subsequent to a building loan not exceeding $12,000. The plaintiff succeeded to the rights of the vendor under the above agreement. After the agreement Wilson executed a mortgage to the defendants for $11,500, to be advanced as the building

progressed, in the manner of a building loan. The defendants at once registered their mortgage, and advanced certain portions of the $11,500 in removing prior incumbrances. The mortgage for $11,500 contained a clause that neither the execution nor the registration of it nor the advance of part of the money should bind the mortgagees to advance any further portion of it. After the registration of the above mortgage for $11,500, and before all the money thereby purported to be secured had been advanced, the plaintiff registered her mortgage for $2,000, and claimed priority over any subsequent advances made by the defendants after that date. The defendants had no actual notice of the plaintiff's mortgage, nor of the terms of the agreement of sale to Wilson.

Held, that the plaintiff was entitled to priority as claimed.

In such cases each new advance, whether in pursuance of a previous agreement or not, is a new dealing with the land, the acquisition of a new interest therein, and so comes within the provisions of the Registry Act, and, under that Act, the defendants were affected with notice of the registration of the plaintiff's mortgage.

George Bell, for the plaintiff.

Beverley Jones, for the defendants the Canada Permanent L. & S. Co.

W. E. L. Hunter, for the defendant Parsons.

[STREET, J., 5TH FEBRUARY, 1894.

MULCAHY v. COLLINS.

Married woman—Separate estate—Contract respecting.

A married woman, having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death, before she had seen the will, and some weeks before it was proved.

The will gave her a vested interest in the property bequeathed.

Held, that she had sufficient knowledge of the existence of her interest to enable the Court to decide that she contracted with respect to it.

William Macdonald, for the plaintiff.

W. H. Blake, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 8TH FEBRUARY, 1894.

HOGABOOM v. GRUNDY.

Parties—Interpleader issue—Who should be plaintiff.

Where husband and wife live together in the same house, the husband being owner or tenant, and the sheriff, under an execution against the husband, seizes the household furniture, which is claimed by the wife as her own, the *onus* is on her, and she must be plaintiff in the issue directed where the sheriff interpleads.

A. D. Cartwright, for the claimant.

Charles Millar, for the execution creditor.

[FERGUSON, J., 8TH JANUARY, 1894.

SCARTH v. ONTARIO POWER AND FLAT CO.

Landlord and tenant—Fixtures—Machinery—Removal of—Provisions of lease—Chattels—Forfeiture of term—Action to recover possession of goods—Evidence of detention.

Where a trade fixture is attached to the freehold, it becomes part of the freehold, subject to the right of the tenant to remove it if he does so in proper time; in the meantime it remains part of the freehold.

Meux v. *Jacobs*, L. R. 7 H. L. at pp. 490, 491, followed.

But where the parties have made a special contract, they have defined and made a law for themselves on the subject.

Davey v. *Lewis*, 18 U. C. R. at p. 80, followed.

In a lease dated in July, 1890, there was a provision that the lessees might during the term erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit under a clause in the lease, but they permitted M. G., a purchaser of the machinery from the lessees' assignee, to remain in posession, paying rent, until December, 1892, when she ceased, leaving the machinery on the premises. The defendan s became the purchasers of the freehold, by virtue of a sale under the power in a mortgage, in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M. G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession.

Held, that the machinery was, owing to the provision in the lease, chattels and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to M. G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property, nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it.

The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title.

Held, that a wrongful detention of the goods was shewn, and this action therefore lay.

Moss, Q.C., and *A. W. Anglin*, for the plaintiffs.

McCarthy, Q.C., and *H. S. Osler*, for the defendants.

IN CHAMBERS.

[ARMOUR, C.J., 5TH FEBRUARY, 1894.

In re PARKER, PARKER v. PARKER.

Mortgage—Interest—R. S. C. c. 127, s. 7—Mortgage to secure part o, purchase money—Special contract.

William John Moore, the purchaser of the lands in question in this administration proceeding, made a mortgage upon such lands to the accountant of the Supreme Court of Judicature for Ontario, dated 14th April, 1886, to secure the sum of $3,600, a part of his purchase money. The mortgage was for the benefit of the infant defendants. The mortgage deed provided for payment of interest and for payment of the principal by yearly instalments of $300 until the whole should be paid, the payments thus extending over a period of twelve years.

By s. 7 of R. S. C. c. 127, an Act respecting interest, it is provided as follows:—

"Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the four sections next preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage."

The mortgagor, taking advantage of this provision, at a time when the mortgage had still more than four years to run, paid into Court all principal and interest due under the mortgage, together with three months' interest in advance, and moved for an order directing the accountant to discharge the mortgage.

The Master in Chambers referred the motion to a Judge, and it was argued before ARMOUR, C.J., in Chambers, on the 5th February, 1894.

James Kerr, for the applicant.

F. W. Harcourt, for the official guardian representing the infant defendants, contended that, as the mortgage was for part of the purchase money and was made in pursuance of a special agreement, which was to the advantage of the mortgagor, the section above quoted did not apply.

ARMOUR, C.J.—There is no such distinction in the statute as that sought to be drawn, and the applicant is entitled to have the mortgage discharged. The applicant must pay his own costs and those of the guardian.

[18TH FEBRUARY, 1894.

JONES v. MILLER.

Costs—Demurrer—Powers of Master in Chambers—Trial Judge—Judge in Court.

Where a demurrer has been left to be disposed of by the trial Judge and has not been so disposed of by him when giving judgment in the action, nor by a Divisional Court on appeal, he has still power to dispose of the costs of it, and any application for that purpose should be made to him; but if to another Judge, it must be a Judge in Court.

The Master in Chambers, having no jurisdiction to decide the demurrer, has none to determine the costs of it.

W. R. Smyth, for the plaintiff.

W. R. Riddell, for the defendants.

[FERGUSON, J., 27TH JANUARY, 1894.

In re KERR v. SMITH.

Prohibition—Division Court—Action upon order in High Court for payment of costs—Judgment—Rules 866, 934.

Prohibition granted to restrain the enforcement of a judgment in a Division Court in an action brought upon an order of

a Judge made in an action in the High Court ordering the defendant in the Division Court action to pay certain costs of an interlocutory motion.

Notwithstanding the broad provisions of Rule 934, an order of the Court or of a Judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order.

E. D. Armour, Q.C., for the plaintiff.

W. H. Blake, for the defendant.

[STREET, J., 23RD FEBRUARY, 1894.

BANK OF BRITISH NORTH AMERICA v. HUGHES.

Writ of summons—Amendment—Time for appearance—Service—Judgment for default—Irregularity.

A writ of summons issued for service out of the jurisdiction required an appearance thereto to be entered within eight weeks after service, inclusive of the day of service. The plaintiffs obtained an order shortening the time for appearance to ten days, not specifying whether inclusive or exclusive of the day of service, and amended the writ under the order by merely substituting "ten days" for "eight weeks." The writ as amended was served and the order with it, on the 27th January. On the 6th February following, judgment was signed for default of appearance.

Held, that the judgment was irregular; for the writ was not amended in accordance with the order, and the latter must govern; and according to its terms, having regard to Rule 474, the ten days were to be reckoned exclusively of the day of service and the defendants had the whole of the 6th February to appear.

I. G. McCarthy, for the plaintiffs.

D. W. Saunders, for the defendant Atkinson.

NEW BRUNSWICK.

In the Supreme Court.

[9TH FEBRUARY, 1894.

BURCHILL v. FLETT.

Judgment debtor—C. S. N. B. c. 38—Intention to defraud creditors—Motion to commit—Judge in Chambers.

This was a motion to review an order made by TUCK, J., in Chambers, under C. S. N. B. c. 88, dismissing a motion to commit the defendant, a judgment debtor, for transferring property with intent to defraud his creditors. After hearing the evidence, the Judge decided that the defendant was not guilty of transferring his property with intention to defraud his creditors within the meaning of the statute.

Held, that this was a question over which a Judge sitting in Chambers had jurisdiction by the statute, and that the Court would not disturb his finding on a question of fact.

Pugsley, Q.C., for the plaintiff.

Ex parte DOHERTY.

Canada Temperance Act—Summary conviction—Constable may serve process in any part of the county.

This was a motion for a *certiorari* to remove a summary conviction for violation of the Canada Temperance Act, on the ground that the constable who served the summons was not a

resident of and had not been appointed a constable for the parish in which the defendant resided, and where the service had been effected.

Held, that a constable appointed for a parish had power to serve a summary conviction process in any parish of the same county, provided such process was properly directed.

J. A. VanWart, Q.C., for the applicant.

F. A. McCully, contra.

Ex parte FLEMING.

Canada Temperance Act—Summary conviction—Service of summons at abode—Defendant out of Province—Jurisdiction of justice of the peace.

The defendant was summarily convicted for violation of the Canada Temperance Act. The summons was served on the wife of the defendant at his last place of abode, as directed by the Criminal Code, s. 562. The rule for a *certiorari* was granted on an affidavit of the defendant, which showed that from a date before the date of the information until after the hearing he had been continuously out of the Province, in the State of Maine.

Held, that the convicting justice could not acquire any jurisdiction over the person of the defendant while he was out of the Province, and therefore the service was void, and the conviction must be removed.

J. A. VanWart, Q.C., for the applicant.

J. W. McCready, contra.

Ex parte WILLIAM KELLY.

Ex parte ELLEN KELLY.

Canada Temperance Act—Summary conviction—Husband and wife convicted severally for same offence.

Husband and wife were severally convicted for the same offence against the provisions of the Canada Temperance Act.

It was objected that both could not be convicted for the same offence, but that when the information was laid, the informant should have elected against which he would proceed.

Held, PALMER, J., dissenting, that, under s. 100 of the Act, when the offence is committed by the agent or servant, both the principal and the agent or servant may be convicted.

A. I. Trueman, for the applicant.

Ex parte WHALEN.

Canada Temperance Act—Summary conviction—Jurisdiction of justice of the peace—Certificate of dismissal no bar to conviction for later offence.

W. was summarily convicted under the Canada Temperance Act. The objections to the conviction were: (1) That a justice of the peace can try a summary conviction case only in the parish where he resides; and (2) that a certificate of dismissal for a similar offence covering the period charged was a bar to the second information. In this case the information was for selling liquor on the 8th July, and at the hearing the defendant put in evidence a certificate of dismissal of an information for a like offence "within three months last past, to wit, on the 7th July."

Held, that a justice of the peace can hear a summary conviction case in any part of the county for which he is a justice, and that a certificate of dismissal covering three months is no bar to a subsequent information for a like offence under the Canada Temperance Act, committed during that period, unless it is shown that the information is for the same offence.

A. I. Trueman, for the applicant.

A. S. White, S.-G., contra.

COUNTY OF CHARLOTTE v. TOWN OF ST. STEPHEN.

Canada Temperance Act—Fines—County and town.

Held, PALMER, J., dissenting, that the town of St. Stephen is liable to pay to the county of Charlotte the balance of the

fines collected in the town under the Canada Temperance Act, which has not been expended by the town in connection with the enforcement of the Act.

DUNCAN v. BANK OF NOVA SCOTIA.

Promissory notes—Discount—Bill against bank for an account—Lost note—Evidence—Trial—Recalling witnesses after case closed.

The decision of PALMER, J., 18 Occ. N. 254, affirmed on appeal.

Weldon, Q.C., *Skinner*, Q.C., and *J. G. Forbes*, Q.C., for the plaintiff.

George G. Gilbert, Q.C., and *C. A. Palmer*, Q.C., for the defendants.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 5TH FEBRUARY, 1894.

NUNN v. DOBBIE.

Sale of goods—Conditional sale—Hire agreement—Construction of.

A County Court appeal. The action was brought to recover $85 in connection with the hiring or sale of a piano by the plaintiff to the defendant. The agreement between the parties

was headed "Lease and Contract;" it was dated 23rd July, 1892, and was in two parts. By the first, the defendant acknowledged that he had received from the plaintiff a piano on hire at $10 a month, payable in advance, the piano being valued at $375, which sum he agreed to pay in the event of its being injured, destroyed, or not returned on demand, free of expense, in good order, reasonable wear excepted. By the second part it was agreed that the defendant might purchase the piano for $375, with interest at eight per cent., by payment of $25 on 23rd August, 1892, and $10 on the 23rd day of each following month, until the whole sum had been fully paid, and that until the whole purchase money was paid, the piano was to remain the property of the plaintiff.

At the time the agreement was made the defendant gave the plaintiff a promissory note for $375 as collateral security. The date when the piano was delivered to the defendant was uncertain. In the first part of the agreement no time was stated at which the payments of $10 each were to begin. It was in the second part that the 23rd August was named as the day on which $25, the first payment on the purchase price, was to be made. On 24th August the defendant paid $15.

The County Court Judge directed that upon the plaintiff amending so as to show that the verdict was for purchase money a verdict should be entered for the plaintiff for $85 without costs.

An appeal by the defendant was dismissed by BAIN, J., and from his decision an appeal was taken to the full Court.

The County Court Judge was of opinion that the purchase of the piano was what was originally intended by the agreement, and that the first part of it was not intended to have any particular meaning or effect; or that, in any event, the defendant exercised his option and became a purchaser, paying the $15 on account of the piano.

Held, that the Judge of the County Court came to a correct conclusion as to the meaning of the agreement.

Reading the agreement in the light of the conduct of the parties under it, it was an agreement for the purchase of the piano by the defendant. The payment of $15 on 24th August was a payment on account of the instalment of purchase money

payable the day before. It was not attributable to any payment of rent under the first part of the agreement. It amounted to an election by the defendant to carry out the purchase under the agreement, and to a promise to make the future payments under it.

Wilson, for the plaintiff.

Mathers, for the defendant.

VULCAN IRON WORKS CO. v. RAPID CITY FARMERS ELEVATOR CO.

Sale of goods—Machinery—Fixtures—Trover—Demand—Mechanic's lien—Suit to enforce, abandoned—Estoppel—Decree for payment of value.

The defendants, a company incorporated on 7th November, 1891, under the laws of Manitoba, before incorporation, and on 7th October, 1891, entered into a contract with one Moberley for building an elevator with which to carry on business. This contract was assigned by Moberley to the firm of J. Williams & Co., by whom the work was done. In October, 1891, Williams & Co. bought from the plaintiffs an engine and other machinery for the working of an elevator, for $1,383. By the terms of the purchase, payment was to be cash on delivery; the property was not to pass until payment in full; and in case of default in payment Williams & Co. agreed that the plaintiffs should be "at liberty without process of law to enter upon our premises and take down and remove the said machinery." The machinery was placed in the defendants' elevator and was still there. Williams & Co. did not pay the plaintiffs, and in September, 1892, a demand for the return of the machinery was served upon the president of the defendants. In the December following the present suit was begun by filing a bill which prayed that the defendants might be ordered to deliver up to the plaintiffs the machinery and to permit the plaintiffs to enter the elevator and take down the machinery and remove the same. A decree was made which ordered the defendants to deliver up the machinery to the plaintiffs, who were to be at liberty to

enter upon the premises and remove the machinery; it provided that the expenses of removal of the machinery and pulling down so much of the elevator as might be necessary for such removal and placing the same in as good condition as before, were to be borne by the plaintiffs; the defendants to have the option of retaining the machinery by paying the actual value thereof, to be ascertained by the Master. The decree was re-heard at the instance of the defendants.

The objection was raised that the plaintiffs could not bring an action of detinue or trover for the machinery, because there was no evidence of demand and refusal. It was admitted that a demand was served. There was no evidence of a refusal, but the defendants' answer alleged that the machinery was built into and formed a part of the elevator, and it would be impossible to remove it without doing great damage.

Held, that that seemed to be an assertion of a claim to the machinery and a denial of the plaintiffs' right to it, such as was held in *Blackley* v. *Dooley*, 18 O. R. 881, to be evidence of a conversion before action. The evidence also showed a possession and using of the machinery by the defendants in a manner inconsistent with the plaintiffs' rights as owners.

It was objected that trover could not be brought for the machinery, because it was a fixture.

Held, doubtful if the defendants could set this up, as they had given no evidence that they owned the freehold.

The plaintiffs could maintain an action of detinue, and, by the Administration of Justice Act, s. 16, the Court has jurisdiction to entertain the suit, even although brought on its equity side.

The machinery in question was the property of the plaintiffs. Williams & Co. affixed it to what was alleged to be the freehold of the defendants. The plaintiffs should then have the right to remove it, if this could be done without serious damage.

It was argued that as the plaintiffs had registered a mechanic's lien, and begun a suit to enforce that lien, they had elected to treat the machinery as having become the property of Williams & Co. or of the defendants, and were thereby estopped from bringing this suit. The bill upon the lien was never proceeded with; it was filed, served, and then dismissed by the plaintiffs themselves.

Held, that the plaintiffs were not estopped by what was done from bringing this suit. It is not the act of beginning a suit which estops a party from bringing another; it is the suing to judgment in the first suit that has that result.

Upon the question whether the machinery could be removed without doing serious damage to the freehold, the evidence for the plaintiffs was that it could, and this was not contradicted by the defendants.

As to the form of the decree which had been made, counsel for the plaintiffs admitted that it perhaps went too far, in ordering that the plaintiffs should have leave to enter the defendants' premises and remove the machinery. As counsel expressed his willingness to take a decree for payment of the value of the machinery, to be ascertained by a reference to the Master, the decree which had been made might be varied and modified accordingly. The defendants to pay the costs of the re-hearing, as they had failed in what they contended for.

Culver, Q.C., and *Perdue*, for the plaintiffs.

Ewart, Q.C., and *Wilson*, for the defendants.

[TAYLOR, C.J., 5TH FEBRUARY, 1894.

In re CURSITER.

Executors and trustees—Allowance for services—R. S. M. c. 146, s. 40.

The executors and trustees of the will of the late David Cursiter applied under the Manitoba Trustee Act, R. S. M. c. 146, s. 40, to have a fair and reasonable allowance made to them for their care and trouble and time expended in and about the trust estate.

The testator died in November, 1892, and the estate had ever since been managed by them. It appeared that a period of about nine years must elapse before the trusts of the will could all be fulfilled. The value of the estate which had come to the hands of the executors and trustees was $39,848, and they had properly paid out and disbursed $21,814, leaving in their

hands and under their control $17,584. There was no evidence of anything special in the management of the estate. The executors had had the assistance of a bookkeeper, who kept the accounts for them, a small sum being charged annually in the accounts for this.

Held, that the allowance to be made should be four per cent. on the $21,814 received and paid out, and two per cent. on $17,584 still in the hands of the executors. When they should reach the end of their labours and be prepared to close the trusts, they were at liberty to apply for a further allowance in respect of their management during the time after this date.

Machray, for the applicants.

[DUBUC, J., 29TH JANUARY, 1894.

FERRIS v. CANADIAN PACIFIC R. W. CO.

Railway company—Broken gate—Liability for horses killed on line—Negligence.

An appeal from a County Court. The plaintiff sued to recover damages for the value of three horses killed on the railway line of the defendants by one of their trains. The action was tried with a jury and a verdict was entered for $250 in favour of the plaintiff. The defendants appealed.

According to the evidence, a band of horses frightened by a dog ran over a gate on to the railway track. The gate was broken some time in November or December, 1892, and remained in a state of insufficient repair for several months, until the plaintiff's horses were killed on 25th March, 1893. Joseph Hyde, section foreman of the defendants, made some repairs to the gate after it was broken, but did not put it in proper repair. The gate was erected at the farm crossing of Matthew Ferris, who owned land on both sides of the railway. The plaintiff's land was half a mile north of the railway line,

and three-quarters of a mile west of the crossing where the gate stood. The plaintiff was the son of Matthew Ferris, and had his father's permission to allow his stock to run on his land at any time.

After the gate was first broken in November, 1892, it was kept closed for a time, until some cattle got on the track and broke it down worse than before. The gate was repaired as well as it could be, but the cattle got on the track again and broke the gate so badly that it could not be repaired. It was then left open and was open when the plaintiff's horses were killed. It was left open because it was useless and would not turn an animal, or keep cattle out.

It was contended that negligence should be imputed to Matthew Ferris for allowing on his land the man Fraser whose dog frightened the horses which broke the gate, and for not keeping the gate closed.

Held, that the appeal must be dismissed with costs. A man must be permitted to allow a neighbour or a friend to come on his land and pass through his gate without being charged with negligence. As the permission given to Fraser to pass over the property had nothing wrongful in itself, the barking of the dog was merely an accident, and could not have the effect of making the permission an act of negligence. As to the non-closing of the gate, it would be difficult to say, on the facts disclosed in the evidence relating to the condition of the gate after its being broken, that the adjoining owner was guilty of negligence in not closing such a gate, and that such negligence contributed to the accident.

The defendants had ample time to know, and knew by their servant, that the gate had been broken, and it was allowed to remain in that condition for several months. The jury found that the accident occurred through the negligence of the defendants, and, as there was evidence to support their finding, the verdict should not be set aside.

J. Martin, for the plaintiff.

Aikins, Q.C., for the defendants.

[KILLAM, J., 29TH JANUARY, 1894.

MERCHANTS BANK v. DUNLOP.

Promissory note—Price of machinery—Condition—Consideration.

Appeal from a County Court. The plaintiffs sued as indorsees of two promissory notes made by the defendant, and obtained judgment. The only question raised on the appeal was whether the instruments were negotiable promissory notes. The first ran as follows:—

"$65. Winnipeg, 22nd Oct., 1889.

On the 1st of January, 1891, I promise to pay the Watson Manufacturing Co., Limited, or order, at their office in Winnipeg, Man., the sum of sixty-five dollars, for value received. Given for 6 foot binder.

The title, ownership, and right to the possession of the property for which this note is given shall remain in Watson Manufacturing Co., Limited, until this note or any renewal thereof is fully paid. The Watson Manufacturing Co. shall provide all repairs required for this binder, also any improvements that may be added to their binders before the date the accompanying notes are payable.

(Signed) Adam Dunlop."

The other instrument differed from this only in being payable on 1st January, 1892.

It was argued for the defendant that the memorandum at the end should be construed as attaching a condition to the absolute promise at the beginning of each instrument, or that it showed the consideration for the promise to be partly executory, which, it was contended, rendered the instrument non-negotiable.

Held, that the argument was untenable. The clause at the end should not be construed as a promise on the part of the company, but as completing the statement of the consideration for the promise to pay. The clause, "given for 6 foot binder," would suggest a sale of the binder as constituting the consideration.

Clearly, before the Bills of Exchange Act, 53 V. c. 33, a bill or note was not the less a negotiable instrument, because the consideration for which it was given was stated in it.

In the present case it might well be inferred that there was a collateral promise of the payee constituting the consideration for the promise of the defendant, and that there was nothing in the instrument showing that such was not the true consideration, or that the liability to pay was uncertain.

Appeal dismissed with costs.

Pitblado, for the plaintiffs.

W. A. Macdonald, for the defendant.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 3rd March, 1894.

In re SOLICITORS.

Costs—Solicitor and client taxation—Interlocutory costs—Set-off —Discretion.

Decisions of the Master in Chambers and Rose, J., 13 Occ. N. 240; 15 P. R. 269, refusing to order a set-off of certain interlocutory costs against the amount alleged to be due to the solicitor upon bills in course of taxation, affirmed on appeal.

Held, that, as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to the set-off.

If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation would not have prevented their being ordered to be set off; but it raised an inference that it was not intended that they should be set off.

Whether the costs in question should be set off or not, was in the Master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the Court, it could not be said that an improper discretion had been exercised.

S. R. Clarke, for the solicitors.

G. G. Mills, for the client.

McALLISTER v. COLE.

Venue—Change of—County Court action—Rule 1260—Appeal from Master in Chambers—Judge in Chambers—Divisional Court.

Where an application is made to the Master in Chambers, under Rule 1260, to change the place of trial in a County Court action, no appeal lies from his order thereon to a Judge in Chambers; and consequently no appeal lies from the decision of a Judge in Chambers to a Divisional Court.

Aylesworth, Q.C., for the plaintiff.

C. Millar, for the defendant.

HOGABOOM v. GILLIES.

Interpleader—Sheriff—Security for goods seized—Failure of—Barring claimant.

The wife of an execution debtor had in her possession certain goods which were seized by the sheriff under the execution against her husband and claimed by her. Upon the sheriff's application an interpleader order was made in the usual terms, and the claimant having given security thereunder by an approved bond for the forthcoming of the goods, the sheriff withdrew from possession. Before the interpleader issue came to trial, the goods were sold for taxes and the surety on the claimant's bond became insolvent.

Held, that the security had nothing to do with the determination of the claimant's rights, but only with the preservation of the property pending the litigation; and the Court had no right to make an order barring her claim in default of her giving fresh security.

J. A. Macdonald, for the claimant.

W. R. Riddell, for the execution creditor.

CAIRNS v. AIRTH.

Writ of summons—Extending time for service—Rule 238 (a)—Ex parte order—Motion to set aside—Time—Rule 536—Material on motion—Merits—Statute of Limitations.

An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October, 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the *ex parte* application of the plaintiff, under Rule 238 (*a*) that service should be good if made within twelve months. The writ together with this order and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant who had been served moved before the local Judge who made the order of the 28th October, 1893, to set it aside, which he refused to do.

Held, reversing the decision of GALT, C.J., in Chambers, that the local Judge was right; for the time for moving under Rule 536 had expired and had not been extended; and certain correspondence relied on as shewing an agreement to extend the time, had not that effect.

The validity of the *ex parte* order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it; the motion to set it aside was a substantive motion supported by affidavits; and the plaintiff was at liberty to answer the motion by shewing new matter in support of the original order.

And upon the material before the local Judge his refusal to set aside his order was right upon the merits.

W. H. P. Clement, for the plaintiff.

Cavell, for the defendant Eliza Airth.

TINNING v. BINGHAM.

Parties—Adding new plaintiffs—Rule 445—"Action commenced"—"Real matter in dispute"—New cause of action.

The original plaintiff was a daughter of a deceased insured, the defendants were another daughter and two insurance com-

panies, and the writ of summons was indorsed with a claim to have the assignment of two policies by the deceased to the defendant daughter set aside. After appearance by the defendant daughter, the administrator of the estate of the deceased was added as a plaintiff, as such administrator, by an *ex parte* order obtained by the original plaintiff upon no other material than the administrator's consent. The plaintiffs then delivered a statement of claim alleging fraud and undue influence in the obtaining of the assignment, and also alleging that at the time of the assignment the deceased was largely indebted and unable to pay his creditors in full, and that the assignment was a fraud upon his creditors; and the plaintiff daughter claimed to have the assignment set aside as being obtained by fraud, and the plaintiff administrator to have it set aside as being a fraud on the creditors.

After the action had been entered for trial the plaintiffs applied under Rule 445 for an order to add certain creditors of the deceased as plaintiffs, upon an affidavit of the plaintiffs' solicitor which stated that the plaintiff administrator was appointed at the request of the creditors and was prosecuting the action on their behalf, and that the deponent had thought up to that time that the administrator had a sufficient status to maintain the claim to set aside the assignment as a fraud on creditors, but now believed it was necessary that creditors should be added as plaintiffs; and upon the consent in writing of certain creditors to their being so added.

Held, that the administrator was a necessary party to the action so commenced; if it was intended to join him as a plaintiff for the purpose of proceeding with a new action, he was improperly added as a plaintiff; but it must be assumed that he was properly added, and if so, he was added only as a party to the "action commenced."

The allegation in the statement of claim that the deceased was insolvent and the assignment a fraud on his creditors was immaterial and irrelevant to the "action commenced," and was not maintainable by either of the plaintiffs, neither being a creditor.

The plaintiffs sought by the application to introduce new plaintiffs not necessary "for the determination of the real matter in dispute," which words in Rule 445 mean the real matter in

dispute in the "action commenced," and a new action altogether distinct from the "action commenced," and one which the plaintiffs to the "action commenced" could not maintain.

And therefore the application should be dismissed.

Worrell, Q.C., for the plaintiffs.

C. Millar, for the defendant Bingham.

SANGSTER v. EATON.

Negligence—Injury to buyer in shop—Invitation—Child of tender years—Accident—Active interference—Contributory negligence.

A woman went with a child two and a half years old to the defendants' shop to buy clothing for both. While there, a mirror fell on the child and injured him.

Held, in an action for negligence, that it was a question for the jury whether the mirror fell without any active interference on the child's part or not; if it fell without such interference, that in itself was evidence of negligence; but if it fell by reason of such interference, the question for the jury would be whether the defendants were guilty of negligence in having the mirror so insecurely placed that it could be overturned by a child; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury on himself.

Hughes v. *Macfie*, 2 H. & C. 744; *Mangan* v. *Atherton*, 4 H. & C. 388; and *Bailey* v. *Neal*, 5 Times L. R. 20, commented on and distinguished.

Semble, that the doctrine of contributory negligence is not applicable to a child of tender years.

Gardner v. *Grace*, 1 F. & F. 359, followed.

Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child.

Pedley, for the plaintiffs.

Shepley, Q.C., for the defendants.

[Rose, J., 29th January, 1894.

In re CHRISTIE AND TOWN OF TORONTO JUNCTION.

Arbitration and award—Interest of arbitrator—Employment as counsel—Bias—Disqualification.

Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's Counsel, was disqualified by reason of interest. It appeared that, for some years prior the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation.

Held, that there was no such relation between him and the corporation as might give rise to bias or show an interest which would invalidate the award.

Vineberg v. *Guardian Fire and Life Assurance Co.*, 19 A. R. 293, distinguished.

Wallace Nesbitt and *A. C. Gibson*, for the claimant.

Going, for the corporation.

[Street, J., 4th January, 1894.

RAY v. ISBISTER.

Partnership—Promissory notes—Action against indorser—Action against same person, as maker—Res judicata—Judgment against firm—Action upon judgment against members—Conduct—Election—Estoppel.

The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others as a

partner in the firm who were the makers of the notes, along with the other partner.

Held, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Nor were the plaintiffs debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

Clark v. *Cullen*, 9 Q. B. D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner.

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing showing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made.

Aylesworth, Q.C., and *W. K. Cameron*, for the plaintiffs.

Osler, Q.C., and *R. C. Code*, for the defendant James Isbister.

[8TH JANUARY, 1894.

McDONELL v. McDONELL.

Will—Devise—Life estate—Remainder—Vested estate—Period of vesting—Trust—Conversion into personalty—"Pay or apply."

Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as may remain undisposed of to trustees to stand seised and possessed of for the benefit of testator's children, in equal shares, and *to pay to*

each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to *pay or apply his share* to and among the survivors.

Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work, a conversion of realty into personalty.

Wallace Nesbitt and *R. McKay*, for the plaintiff.

Moss, Q.C., and *H. J. Wright*, for the defendant McWilliams.

Osler, Q.C., and *J. Hoskin*, Q.C., for the infant defendant.

Watson Q.C., and *Masten*, for the defendant McDonell.

C. C. Robinson and *T. H. Lennox*, for the defendant Robinson.

H. T. Beck, for the defendant Harrison.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 22ND JANUARY, 1894.

HAIGHT v. WORTMAN AND WARD MFG. CO.

Master and servant—Workmen's Compensation for Injuries Act, 55 V. c. 30—Danger—Knowledge.

To disentitle a workman to recover under the Workmen's Compensation for Injuries Act, 55 V. c. 30, he must not only have a knowledge of the danger he incurs, but a thorough comprehension or appreciation of the risk he runs.

Judgment of FALCONBRIDGE, J., affirmed.

Hellmuth, for the appeal.

E. R. Cameron, contra.

[15TH FEBRUARY, 1894.

SOUTHWICK v. HARE.

Trespass—Arrest and imprisonment before indorsement of warrant—Detention—Subsequent indorsement—Damages—Measure of.

A warrant for the arrest of the plaintiff, who had made default in paying a fine under a summary conviction for an

offence against the Liquor License Act, was sent from the county of Oxford to be executed in the city of Toronto. The plaintiff was arrested and imprisoned, professedly under the warrant, by peace officers of the city of Toronto, before it was indorsed by a magistrate for the city. Some hours after the arrest the warrant was indorsed. In an action for trespass, false arrest, etc., MacMahon, J., charged the jury that the only damages they could take into consideration were for the time between the arrest and the indorsement of the warrant, and that the subsequent detention was legal.

Held, that the officers who arrested the plaintiff were liable in trespass down to the time when the warrant was indorsed, and the damages were rightly limited according to the charge.

DuVernet, for the plaintiff.

H. M. Mowat, for the defendants.

MOORE v. KANE.

Vendor and purchaser—Mining lands—Consideration—Cancellation of debt—Purchaser for value—Notice, actual or constructive—Equitable interest.

M., having arranged with K. that K. should try to sell some mining property for him, conveyed it to him for that purpose by deed, for the expressed consideration of $750. K., being indebted to E., conveyed the property to him, the consideration being $25 credited by E. on the indebtedness.

In an action by M. to set aside both conveyances:—

Held, reversing the decision of Falconbridge, J., that the debt of $25 was a sufficient valuable consideration, although no money passed.

Johnston v. *Reid*, 29 Gr. 293, followed.

The property being mining land, not proved to be of any substantial value at the date of the impeached transaction, and conveyances of property of that kind not always showing the true consideration, and E. having relied upon the deeds as showing the dealing with the land:—

Held, that, in the absence of fraud, or such gross negligence as a court of justice would treat as evidence of fraud on the part

of the purchaser, notice to him, if not shown, should not be imputed.

Held, also, that the fact that the interest dealt with is an equitable one, the fee being still in the Crown, is not such a circumstance as lets in "all the equities" as regards a purchaser for value without notice.

E. Taylour English, for the plaintiff.

Rowell, for the defendants.

[15TH FEBRUARY, 1894.

In re HUNTER'S LICENSE.

Liquor License Act—Application for shop license—Certificate of electors—Default in filing—Revocation of license—R. S. O. c. 194, s. 11, s-s. 14—53 V. c. 56, s. 10.

Held, reversing the decision of MEREDITH, J., 13 Occ. N. 440; 24 O. R. 153, that on an application for a shop license under s-s. 14 of s. 11 of the Liquor License Act, R. S. O. c. 194, as amended by 53 V. c. 56, s. 1, the petition must be accompanied by a properly signed certificate of the electors, and the Act does not authorize the granting of a license contrary to the provisions of that sub-section.

E. F. B. Johnston, Q.C., for the licensee.

J. J. Maclaren, Q.C., contra.

[22ND FEBRUARY, 1894.

EMPEY v. CARSCALLEN.

Trial—Jury—Right of challenge—Mistrial—R. S. O. c. 52, s. 110—Waiver—New Trial.

The defendants delivered separate defences and were separately represented at the trial and claimed to be entitled under the Jurors Act, R. S. O. c. 52, s. 110, to four peremptory challenges each, which right was conceded by the Judge,

and they challenged six jurors between them, in spite of the remonstrances of the plaintiff's counsel, and the trial proceeded resulting in a verdict for the defendants.

Held, upon a motion by the plaintiff, that there had been a mistrial, and the plaintiff was entitled to a new trial.

Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not by proceeding with the trial waived his right to complain.

Aylesworth, Q.C., for the plaintiff.

Clute, Q.C., for the defendants.

MEHR v. McNAB.

Negligence—Landlord and tenant—Fall of verandah—Injury to daughter of lessee—Covenant to repair.

Where one had leased premises and had covenanted with the lessor to keep them in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—

Held, that the daughter had no right of action for damages, on account of the accident, against the lessor, nor could she be considered as standing in the position of a stranger.

E. F. B. Johnston, Q.C., for the plaintiff.

E. T. English, for the defendant.

[FERGUSON, J., 26TH JANUARY, 1894.

WORTHINGTON v. PECK.

Principal and surety—Extension of time--Renewal of promissory note by some of the sureties—Payment—Right to contribution.

Three out of four sureties on a promissory note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution.

Held, that they could not recover.

Beck, for the plaintiffs.

Marsh, Q.C., for the defendant.

[14TH FEBRUARY, 1894.

CONFEDERATION LIFE ASSOCIATION v. CITY OF TORONTO.

Assessment and taxes—Insurance company—Reserve fund—Interest on investment of—55 V. c. 48, s. 34; s. 2, s-s. 10—Res judicata—Court of Revision—County Court Judge.

Where the County Court Judge of the county of York had decided, as reported 29 C. L. J..151, on appeal from the Court of Revision, that the plaintiffs were liable, under s. 34 and s. 2, s-s. 10, of the Consolidated Assessment Act, 55 V. c. 48, to be assessed upon the interest arising upon investments of their reserve fund, although such interest was always added to the reserve fund and re-invested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal :—

Held, that the Judge of the County Court had full jurisdiction, and the matter was, therefore, *res judicata*.

Semble, that the County Court Judge's decision was right. Although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but the necessary increase might be made with any money whatever.

S. H. Blake, Q.C., and *Russell Snow*, for the plaintiffs.

Biggar, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 24TH JUNE, 1898.

NUNN v. BRANTON.

Libel—Defendant claiming privilege for fear of incriminating himself—Evidence of publication—Inference from refusal to answer—Misdirection.

In an action for libel it was claimed that the defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery, the defendant, while admitting he was a correspondent at T., could not say whether he was the only one; said that he did not remember sending any of the items; but might possibly have sent some; did not think he had sent the one complained of; that he had had, since the publication, an interview with the editor with reference thereto, but refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he said he had since ascertained that there were other correspondents at T.; and on being pressed as to the item complained of, after some hesitation, said he did not furnish it.

Held, that this did not constitute any evidence of publication to go to the jury.

The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery and to his reason therefor, told the jury that they might draw the inference as to what the true answer would have been.

Held, mis-direction, and that no inference adverse to the defendant should have been drawn from his refusal to answer.

Watson, Q.C., for the plaintiff.

Wallace Nesbitt and *R. McKay*, for the defendant.

[8TH DECEMBER, 1898.

HOGABOOM v. GRUNDY.

Interpleader—Order entitled in two actions—Appeal—Divisions of High Court.

Where an interpleader order is entitled in two actions, in different Divisions of the High Court, there being two execu-

tions in the sheriff's hands, an appeal from the order may be entertained in either Division, although one of the execution creditors has been barred by the order, and there is no appeal on that ground.

A. D. Cartwright, for the claimant.

C. Millar, for the plaintiff.

[30TH DECEMBER, 1893.

WILSON v. FLEMING.

Covenants—Dependent or independent—Mortgage.

The proviso for payment in a mortgage made by the defendant was that the mortgage was to be void on payment of $3,250 and interest. Then followed the usual printed covenant for payment, to which was added in writing the words, "but before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and the mortgagor shall then be liable only to the amount of $600 or such lesser sum as will, with the net proceeds from the lands, make the $3,250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed $600."

Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result shewed a deficiency, and then only to the extent of $600.

E. D. Armour, Q.C., for the plaintiff.

W. Douglas, Q.C., for the defendant.

SOLMES v. STAFFORD.

Foreign judgment—Action on—Motion for judgment under Rule 739—Variation of judgment in foreign tribunal after motion—Right to act upon judgment as varied—Judgment entered under Rule 757—Interest—Liquidated damages—Defending action in foreign Court—Effect of.

After a motion was made to enter judgment under Rule 739, in an action on a judgment recovered in British Columbia for

a breach of covenant to convey certain lands, the indorsement on the right of summons claiming the amount found to be due by the judgment and interest from the date of the finding, an appeal against the judgment was made to the full Court in British Columbia and the judgment varied by reducing the damages, giving some additional costs, and directing the land to be reconveyed on payment of the judgment, judgment in accordance therewith being entered in the British Columbia Court. The Master, who had stayed the motion pending the appeal, thereupon made an order directing judgment to be entered for the plaintiff for the amount of the judgment as varied, and interest from the date of the commencement of the action here, which was affirmed on appeal by a Judge in Chambers.

Held, on appeal to the Divisional Court, that the order to enter judgment could not be supported, because it was an order to enter judgment for a debt not claimed by the indorsement no the writ; but, as no defence was shown, the Court permitted the application to be turned into a motion for judgment under Rule 757, and directed judgment to be entered for the plaintiff.

The right to claim interest as liquidated damages considered.

An objection raised that the defendant was not bound by the proceedings in the British Columbia Court was overruled, it appearing that the defendant had entered an appearance there and defended the action.

Aylesworth, Q.C., for the plaintiff.

Allan Cassels, for the defendant.

[3RD MARCH, 1894.

DAVIS v. NATIONAL ASSURANCE COMPANY OF IRELAND.

Pleading—Rule 423—Denial of liability—Tender and payment into Court—Prejudice—Costs—Rules 632-640.

In an action upon an insurance policy the defendants pleaded denying their liability and also tender before action and

payment into Court. The plaintiff replied that there was due to him a larger sum than that paid in. Upon a motion to strike out the defences in denial :—

Held, that they did not tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of Rule 423.

Discussion as to the effect of the defences of tender and payment into the Court upon the question of costs and otherwise.

Rules 632-640 considered.

W. H. P. Clement, for the plaintiff.

Aylesworth, Q.C., for the defendants.

[THE JUSTICES IN BANC, 9TH FEBRUARY, 1894.

REGINA v. LATHAM.

Municipal corporations—Licensing express waggons—Alteration of rates—By-law—Ultra vires—55 V. c. 42, s. 436—Summary conviction.

A by-law passed under s. 436 of the Municipal Act, 55 V. c. 42, for licensing express waggons, authorized the alteration by agreement of the rates fixed thereby.

Held, beyond the powers conferred by the statute, and a summary conviction under the by-law was therefore invalid and must be quashed.

DuVernet, for the defendant.

No one contra.

[10TH FEBRUARY, 1894.

REGINA v. HOWARTH.

Practising medicine—"Apothecary"—R. S. O. c. 148, s. 45—R. S. O. c. 151—Summary conviction.

A person went into a druggist's shop, and stating he was ill, described his complaint, which the druggist said he understood

to be diarrhœa. The druggist told him to live on milk diet, and gave him a bottle of medicine, for which he charged fifty cents. The druggist said he had several kinds of diarrhœa mixture, and sometimes had to inquire in order to decide what mixture to give.

Held, that this was practising medicine for gain within s. 45 of the Medical Act, R. S. O. c. 148.

Held, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. c. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practising of medicine.

The meaning of the word "apothecary" considered.

Rule *nisi* to quash summary conviction discharged.

Allan Cassels, for the defendant.

Osler, Q.C., for the private prosecutors.

[12TH FEBRUARY, 1894.

REGINA v. WHITAKER.

Summary conviction—Municipal by-law prohibiting exhibitions—55 V. c. 42, s. 489, s-s. 25—Certiorari—Notice of application for—Time—Waiver of objection.

A city by-law passed under s-s. 25 of s. 489 of the Municipal Act, 55 V. c. 42, prohibited exhibitions of wax works, menageries, circus riding, and other such like shows, usually exhibited by showmen.

Held, that this would not support a summary conviction for exhibiting a machine called a merry-go-round, which was no offence under the by-law or statute.

A preliminary objection that the magistrate had not six full days' notice of the application for the writ of *certiorari*, taken on the return of the motion to make absolute the rule *nisi* to quash the conviction, was overruled, it being held that the magistrate on the facts appearing in the case waived the objection.

Treemeear and *N. McDonald*, for the defendant.

Glenn, for the magistrate.

REGINA v. ROBINET.

Recognizance—Sufficiency of—Motion for certiorari—Criminal Code, s. 892.

Where a recognizance filed on a motion for a *certiorari* to remove a conviction did not negative the fact of the sureties being sureties in any other matter, and omitted to state that the sureties were worth $100 over and above any amount for which they might be liable as sureties, it was held insufficient.

The Rule in force as to recognizances prior to the passing of the Criminal Code, is still in force, and therefore there is no necessity for passing a Rule under s. 892 of the Code.

Aylesworth, Q.C., for the defendant.

[MacMahon, J., 2nd March, 1894.

NEILSON v. TRUSTS CORPORATION OF ONTARIO.

Life insurance—Benefit certificate—Change of direction as to payment—Trust—Revocation—Will—Executors—R. S. O. c. 136—51 V. c. 22—53 V. c. 39.

In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will dated in July, 1888, he left all his estate to his children in equal shares.

Held, that under the powers conferred by R. S. O. c. 136, even as amended by 51 V. c. 22, the insured had only a limited authority to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife.

Mingeaud v. *Packer*, 21 O. R. 267; 19 A. R. 290, followed.

By virtue of 53 V. c. 39, s. 6, he might, when he made the indorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, deprive his children of all benefit in it, and so render the Act nugatory.

Northrup, for the plaintiff.

Hoyles, Q.C., and *N. F. Davidson*, for the defendants.

IN CHAMBERS.

[MacMahon, J., 29th November, 1894.

McALLISTER v. COLE.

Venue—Change of—County Court—Cause of action—Convenience—Witnesses.

County Court action for damages for breach of contract. The breach was at Pembroke, which the plaintiff named as the place of trial. The defendant moved to change it to Toronto.

Held, that the action could be more conveniently tried at Pembroke, and the plaintiff should be allowed to retain the venue there, although the defendant swore that he had a much larger number of witnesses there than the plaintiff had at Pembroke.

J. H. Moss, for the plaintiff.

C. Millar, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

EATON v. CURRY.

Action—Trial—Position of cause on docket—Other actions involving same points.

Motion to remove cause from printed docket and re-enter it, subsequent to other causes involving the same points, refused, because it was not shown that the cause in respect of which the motion was made would necessarily be disposed of by the others.

McFATRIDGE v. WILLISTON.

Promissory notes—Promise to pay after dishonour—Notice—Knowledge—Waiver—Inference contrary to finding.

A promise to pay, made by the indorser of promissory notes, after presentment and dishonour, but without full knowledge of the facts, does not operate as a waiver of notice.

Notice of presentment cannot be inferred where it is found, as a matter of fact, that no notice was given.

In re BALTIMORE.

Arrest—53 V. c. 17, s. 2—Imprisonment for debt—Defect in order for imprisonment—Examination where debtor resides—Discharge—Costs.

It is provided by s. 2 of c. 17 of the Acts of 1890, relating to imprisonment for debt, that "all examinations under this Act shall take place in the county in which the debtor resides."

Where the order for imprisonment did not show on its face that the examination took place in the county where the debtor resided :—

Held, that this was a fatal defect, and the prisoner must be discharged.

No costs were allowed.

KING v. DRYSDALE.

Appeal to Privy Council—Time for appealing—Delivery of judgment—Issue of order.

The time for appealing runs from the time when judgment is delivered, and not from the time when the order is signed. Judgment was delivered on the 18th April, 1892, but the final order was not taken until the 7th January, 1893. Leave to appeal to the Privy Council from the final order was moved for on the 14th January, 1893.

Held, that an application for leave to appeal from the judgment of the Court would be too late, but as the correctness of of the order taken was challenged, on the ground that it did not correctly represent the judgment of the Court, the appeal from the order should be allowed.

PALGRAVE MINING CO. v. McMILLAN.

Interim injunction—Matter on which plaintiff's right depends, sub judice—Right to open shaft under mining lease.

Held, that an interim injunction was rightly refused where the award under which the plaintiff claimed to restrain the defendants from pumping out of a shaft and tunnel, and preventing the plaintiff's access to it, had been attacked and was still *sub judice*.

Held, further, that a lease of beds, veins, and seams of gold and silver, gold bearing and silver bearing quartz, and other

gold bearing rocks and silver bearing rocks and minerals, and gold and silver bearing earth, and all gold and silver whether in in quartz, grain, or otherwise in, situated, or being within the limits of the said tract, and within, under, or upon the same, did not give the right to open a shaft or tunnel, or use the shaft or tunnel already opened.

SMITH v. BEATON.

Parties—Action to establish charge on land—Will— Reference.

A testator left a will in these terms: "4. I give to my son half the homestead lot, but if he sells and moves away, it must be, under direction of my executors, to some of my family connections, who will be accountable for maintenance of my wife as hereinafter mentioned; 5. I give my son-in-law the remaining half of the homestead lot, &c.; 6. I give to my wife the use of the whole house during her life, My wife is to have three cows kept on the farm for her own use, and to be found with all needful comforts, &c. The above sums are to be paid by yearly instalments as my executors direct."

Held, that the son was a necessary party to a suit for a declaration that the widow's interest was a charge on the farm.

Held, further, that the question whether the son-in-law's moiety was chargeable could not be referred to a Master, but must be determined by the Court.

WALLACE v. MUTTON.

Contract—Consideration—Condition precedent.

In consideration of T. J. W. assigning to the defendant a judgment which he held against V. B., on which there was due $150 or thereabouts, the defendant guaranteed $142 to T. J. W., to be paid in yearly instalments of $20 each. T. J. W. sued on this agreement, claiming the $142. The defence was that the judgment had not been assigned.

Held, *per* MEAGHER and TOWNSHEND, JJ., reversing the decision of the County Court Judge for District No. 1, and ordering a new trial, that the plaintiff was entitled to recover without proving that the judgment had been assigned to the defendant.

Held, also, that the contract was not bad for want of mutuality.

GRAHAM, E.J., concurred in the case going back for a new trial.

WEATHERBE, J., dissented.

HOLMES v. McLEOD.

Assault—Justification—Recovery of property—Unnecessary violence.

The plaintiff lent a sum of money to the father of E. M., and took from the latter a deed of a piece of land as security. At the same time he gave a bond to E. M. to reconvey the land to him or his heirs, on payment of the sum borrowed with interest. Some considerable time after the loan fell due, the bond and a sum of money were handed to the defendant, with instructions to pay the money to the plaintiff, and obtain a re-conveyance of the land. The plaintiff asked to be allowed to read the bond, and it was handed to him for that purpose. After reading the bond, the plaintiff declined to give the deed. The defendant thereupon demanded the return of the bond, and the plaintiff having refused to deliver it up, after repeated demands, the defendant recovered possession of it by force, and, in doing so, assaulted the plaintiff.

Held, that the assault was justified.

WEATHERBE, J., and GRAHAM, E.J., dissented on the ground that unnecessary and unjustifiable violence was used.

ANDERSON v. ALLEN.

Principal and agent—Liability of principal for acts of agent—Assignment for benefit of creditors—Continuance of business by assignor as agent of assignee—Liability of assignee for goods purchased.

In January, 1886, A., doing business as J. A. & Son, made a deed to H. in trust for the benefit of his creditors, containing,

among other things, a clause authorizing the employment of the assignor, or some other person, in carrying out the trusts, and in carrying on the trade, if thought expedient. On the day following the making of the assignment, H., the trustee, made and executed a power of attorney to A., authorizing him to collect moneys, prosecute suits, draw, make, and indorse cheques, bills, notes, &c., in the name of the trustee, and, generally, to make, do, execute, and perform all acts and deeds in relation to the estate as fully as the trustee might do. Under this power of attorney A. went into possession and continued the business, and bought and sold goods. The goods which were the subject of the action were purchased from the plaintiffs in 1889, while A. was still carrying on the business, and were paid for by a promissory note signed by A. as J. A. & Son, and by H. H., *per* J. A., attorney.

Held, per McDONALD, C.J., RITCHIE and MEAGHER, JJ., GARHAM, E.J., dissenting, that A. in carrying on the business was acting as agent of H., and that H. was accountable to the plaintiffs for the goods bought from them.

FRASER v. KAYE.

Mesne profits—Mode of estimating—Annual value of lands—Referee's report—Motion to confirm—Notice to vary or set aside—Costs—Unnecessary printing.

In an action to recover possession of certain lands the trial Judge, being of the opinion that the plaintiffs were entitled to possession of the lands defended for, made an order appointing a referee to make inquiries and take accounts relating to the rents and profits issuing out of the lands during the time the defendants withheld possession. The referee heard evidence, and reported that the plaintiffs were entitled to recover $7,000 for mense profits. In arriving at this sum he took the original cost of the property, $3,500, and allowed ten per cent. on that sum, or $350, as the yearly rental value for the period of twenty years during which the alleged occupation by the defendants lasted.

Held, that, on the motion to confirm the report, it was competent for the defendants to appear and oppose the motion, although they had not given notice of motion to vary or set aside the report.

That the "annual value" of the property was what it could probably have been rented for, or what might reasonably have been derived from it for use and occupation during the period of the defendants' wrongful withholding, and that, in the absence of special or particular circumstances, the referee was not justified in allowing more than the fair rental, or use and occupation value, of the property.

A prior application, on behalf of the plaintiffs, to confirm the report, was dismissed with costs, on the ground that the application should have been to the Court, the fact that the cause had been adjourned for further hearing being overlooked or forgotten. The plaintiffs' appeal was allowed and costs reserved.

Held, that the plaintiffs should have the costs of that appeal, less unnecessary costs incurred in printing.

BEDFORD v. CITY OF HALIFAX.

Municipal corporations—Excavation adjoining sidewalk—Liability of city for accident due to—Defective fence—Notice—Findings of jury—Contributory negligence.

J. B., while passing along a sidewalk on a street in the city of Halifax, stumbled over a defective hatch in the sidewalk, and fell into a cellar or excavation adjoining the sidewalk, and received injuries which resulted in his death. In an action by the administrator claiming damages, in reply to questions submitted to them by the Judge at the trial, the jury found that the deceased had knowledge of the dangerous condition of the sidewalk before and at the time of the accident; and that, on the occasion of the accident, he did not exercise ordinary care.

Ten days' notice in writing was not given to the defendants, as required by the Acts of 1890, c. 60, s. 35.

Held, *per* TOWNSHEND, RITCHIE, and WEATHERBE, JJ., that the defendants were not liable for non-repair, in the absence of the notice required by the Act.

Per TOWNSHEND, J., that the plaintiff was also precluded from recovering by the contributory negligence of the deceased.

Also, that c. 23, s. 2, Acts of 1887, in reference to the opening and laying out of streets, applies to the city of Halifax, and that the street where the accident occurred was, therefore, one which the defendants were, *prima facie*, bound to keep in repair.

Per MEAGHER, J., that the duty of the defendants to repair was not absolute but relative.

That before the plaintiff could recover, there must be affirmative findings on the points: (*a*) that the defendants knew or had notice of the existence of the cellar behind the fence; (*b*) that the defendants knew the hatchway was defective; (*c*) that it was negligence on the part of the defendants to leave the sidewalk without a fence, assuming that the fence there was unsafe; (*d*) that the defects alleged had existed for such a length of time that a reasonable vigilance would have given the defendants notice.

That in the absence of statutory authority, the defendants could not enter upon private property and erect a fence.

McDONALD, C.J., dissented.

CAHOON v. PARKS.

Trespass to lands—Disseisin—Conveyance by party disseised gives no title as against the disseisor—Occupation by an infant with his father, not a sufficient re-entry—Adverse possession—Notice—Statute of Limitations, R. S. N. S., 5th series, c. 112.

In an action of trespass for entering the plaintiff's lands, the defendant justified as heir of L. C., whose title was derived under a deed of the locus from J. R., in 1856, and a deed from

E. M. in 1866. Some time previous to the making of the former deed, J. R. was in possession of the locus, but left, and B. C. immediately took possession, under circumstances not explained. B. C. continued in possession, working and cultivating the land as his own, down to the time of his death, in 1885. While B. C. was so in possesion the deed from J. R. to E. M. was made. E. M., who never was in possession under his deed, conveyed the locus to L. C., the son of B. C., who was then living on the locus with his father. L. C. made a conveyance of two-thirds of his interest to his mother. Both the deed from E. M. to L. C. and the deed from L. C. to his mother were recorded out of the county where the lands lay, and it was not proved that B. C. had any notice of them. The defendant claimed the locus as heir of the mother, under the deed from L. C., as against the plaintiff, who claimed under a deed from B. C., made in October, 1881, to W. S., the father of the plaintiff, and a conveyance by W. S. to the plaintiff, in the following year.

Held, per TOWNSHEND, J., MCDONALD, C.J., concurring as to adverse possession, that, in the absence of knowledge, the right or title of B. C. was not affected by the deed to his son, nor by the deed from the son to his mother; that the occupation by the son could not be regarded as adverse to that of the father; that no deed to the son could convey title while the father was in possession, occupying the land, and working and cultivating it as his own; that under the Statute of Limitations of this province, R. S., 5th series, c. 112, it is enough that a party is in possession, using property as his own, and if he continue to do this for twenty years, he acquires title.

Per GRAHAM, E.J., that E. M. was a disseisee when the deed to L. C. was given; that the fact that L. C., the grantee, was in possession as an infant with his father would not constitute such a re-entry as would regain the seisin; and that the deed of a disseisee, during the continuance of the disseisin, is inoperative in this province to convey title as against the disseisor.

MEAGHER, J., dissented.

MANITOBA.

In the Queen's Bench.

[Bain, J., 14th February, 1894.

COMMERCIAL BANK v. ROKEBY.

Promissory note—Equitable pleas—Duress—Demurrer.

This action was brought to recover the amount due on a promissory note made by the defendant to the plaintiffs.

The defendant pleaded two pleas on equitable grounds. The fourth plea asked that it should be declared, for the reasons therein alleged, that the promissory note sued on and two agreements made between the defendant and the plaintiffs should be declared fraudulent and void as against the defendant. The fifth plea was by way of counter-claim and cross-relief, and the defendant asked that the plaintiffs should be ordered to repay him the amount which he had paid the plaintiffs under the two agreements mentioned. These pleas alleged that the defendant was induced to sign the two agreements and the note by threats of prosecution for a criminal offence, and that he signed them believing that he was personally liable for the indebtedness for which they were given, without legal advice, and alleged he was in no way liable to the plaintiffs for the debt in question, and that there was no value or consideration for the note sued on.

The plaintiffs demurred to the pleas on the ground that they did not disclose any just ground of fear, as the threatened prosecution would not have been unlawful.

Held, that the pleas were pleaded on equitable grounds, and must be looked at not merely as pleas of duress, but rather as if they were bills in equity; and they were not demurrable unless it was apparent on the face of them that the defendant was not entitled to any relief in equity.

The question to be decided was whether the party seeking to be relieved from his contract was a free and voluntary agent when he entered into it. Before a Court can decide such a question, it must have before it evidence of all the surrounding circumstances, of the age and capacity of the person asking relief, of his relation to the other parties in the transaction, and all such matters. The pleadings showed that the defendant was of sufficient age and capacity to have acted for some time as manager of the plaintiffs' bank in Winnipeg, but still it was not impossible to suppose that the pressure which was put upon him to induce him to sign the agreements and note was such as would amount in equity to undue influence. It could not be said that the pleas failed to disclose any equity entitling the defendant to relief, and the demurrer must, therefore, be overruled.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Howell, Q.C., for the defendants.

In re WESTERN GRAIN AND PRODUCE CO.

Company—Winding-up—Solicitor's lien on books and papers.

The petitioner was a creditor of the company for professional services rendered as their solicitor, and in his petition he asked that his claim might be declared to be a first charge on the assets of the company, and that it might be declared that he was entitled to a solicitor's lien upon all the books and papers of the company in the hands of the liquidator, and that the liquidator might be ordered to hold the books and papers as subject to his

lien. At the time the order for winding-up was made, the petitioner had in his possession in his own office what he described as the books and papers of the company, but he specially mentioned the letters patent incorporating the company, the subscription and stock books, the by-laws, resolutions, minutes, proceedings of the company, and the day book and ledger. After the winding-up order had been made, all these books and papers were taken from his office without his knowledge or consent by the manager of the company, who gave them to the liquidator, who then had them.

Held, that the petitioner was entitled to a solicitor's lien on the letters patent and the ledger and day book in the hands of the liquidator, for the amount of his bill of costs; no lien that he could have on the books and papers of the company would in itself entitle him to priority over the other creditors of the company in the payment of his account; it was clear if he was entitled to a lien on these books and papers when they were in his possession, he had not lost his lien by their having been taken away from him without his knowledge or consent.

Under the Manitoba Joint Stock Companies' Act, the subscription and stock book is one that every company incorporated under the Act is required to keep for the inspection of shareholders and creditors; and this is a book that should not have been allowed out of the possession of the officers of the company at their head office. The books containing the by-laws, resolutions, minutes, and proceedings of the company should also be kept at the company's office and should not have been allowed out of the company's possession: *Re Central Fire Insurance Association*, 24 Ch. D. 408.

The order to be without costs to or against the petitioner, but the liquidator to have the costs of opposing the petition out of the estate.

Haggart, the petitioner, in person.

Machray, for the liquidator.

[26TH FEBRUARY, 1894.

ROBINSON v. TAYLOR.

Sale of goods—Liability of husband for wife's purchases where she has left him—Necessaries—Proof of.

A County Court appeal. The plaintiffs sued to recover $137 for goods supplied to the wife of the defendant, a farmer. The bill included the following articles: 1 set of furs, $14; 1 coat, $10; 1 fur lined coat, $13.50; and a long list of garments and materials for herself and baby.

At the time the goods were ordered by the wife she was living apart from her husband. The evidence showed that she left her husband without his consent, and the separation could not be said to have taken place by mutual consent. The evidence also failed to justify the contention that it was on account of the defendant's neglect to provide for his wife that she was compelled to leave him.

At the trial the County Court Judge entered a verdict for the plaintiffs, from which the defendant appealed.

Held, that the wife had no implied authority from the defendant to pledge his credit for even necessaries; and even if she had authority to purchase necessaries for herself, the plaintiffs had failed to prove the goods were necessaries; they were bound to prove this affirmatively: *Phillipson* v. *Hayter*, L. R. 6 C. P. 38. It was open to question if a man in the defendant's position could be held liable for such a purchase by his wife, even if she were living with him; and living apart from his wife, as he was, it was incumbent on the plaintiffs to prove by unquestionable evidence, before they could charge him for the goods, that he had authorized his wife to get them. The circumstances under which the wife went to the plaintiffs and the fact of her ordering so large a bill of goods should have made the plaintiffs cautious and put them upon inquiry, but they seemed to have given her the goods without any inquiry, and the first intimation the defendant had of his having been charged with them was by the service of the writ in the action for the price.

Haggart, Q.C., for the plaintiffs.

Machray, for the defendant.

[7TH MARCH, 1894.

In re WESTERN GRAIN AND PRODUCE COMPANY.

CLEGHORN'S CASE.

Company—Winding-up—Contributories—Personal liability, notwithstanding name on list as "in trust."

This was an application to settle Cleghorn's name on the list of contributories as the holder of ten shares of the company's stock, on which there was a balance unpaid of $350. The objection was taken that Cleghorn held these shares as a trustee, and that, therefore, he was exempt from personal liability under s. 46 of the Manitoba Joint Stock Companies' Act, under which the company was incorporated. In the list of shareholders the words "in trust" appeared after Cleghorn's name, but there was nothing else to show the nature of the trust or who was the beneficiary. Cleghorn stated that he subscribed the stock in trust for Bathgate, the manager of the company, and that he did not intend to make himself personally liable; Bathgate gave a different account of the matter. Cleghorn was a director of the company, and he acted as such from the organization until it was put into liquidation. Section 26 of the Companies' Act provides that no one shall be elected or appointed a director, unless he is a shareholder owning stock absolutely in his own right; and the by-laws of the company declared that no shareholder should be eligible as a director unless he held stock to the extent of ten shares.

Held, that Cleghorn's name must be settled on the list of contributories, and he must pay the liquidator's costs of the application. Although the words "in trust" were placed after Cleghorn's name in the list of shareholders, he did not in fact hold these shares in trust, and the relationship of trustee and beneficiary did not exist between him and Bathgate. If he was not the owner of the shares in his own right, he had no right to act as a director of the company. By acting as a director he held out that he was qualified to act, and now that the company was being wound up he should not be allowed to evade personal

liability unless he could shew by unquestionable evidence that he held the shares in a *bona fide* representative capacity.

Howell, Q.C., and *Machray*, for the liquidator.

Elliott, for Cleghorn.

In re MARTIN AND MORDEN.

Real Property Act—Claim under execution against lands—Tax sale—Parties to issue—Who should be plaintiff.

Application under the Real Property Act. The caveators by their petition claimed to have a charge on the land for which the caveatee had applied, by virtue of a writ of execution against the lands of one Andrew Morden, who, they asserted, was the owner of this land when the writ was placed in the sheriff's hands. The caveatee showed cause, in the first place by setting up title and possession under a tax sale deed, and then he alleged in his affidavit that the land was the homestead of Andrew Morden, and was the exemption of 160 acres allowed him under the statute in force in Manitoba, and also that he was advised that the caveator's writ of execution had not been kept renewed and that it was not in force.

Held, that, in the absence of proof to the contrary, it must be assumed that the caveators had the charge they asserted, and on account of having which they were served with notice of the application. The caveatee was entitled to a certificate of title as against Morden and those claiming under his title, only if the sale of the land to him for arrears of taxes was valid, and it was for him to show that the sale was valid.

The caveatee should, therefore, be the plaintiff in the issue.

Martin, for the caveators.

Culver, Q.C., for the caveatee.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[THE JUSTICES IN BANC, 11TH JANUARY, 1894.

BONIN v. ROBERTSON.

Chattel mortgage—Sale of mortgaged chattels by mortgagor to innocent purchaser—Title to chattels—Foreign mortgage—Notice—Ordinances of 1889, No. 18, s. 3—Filing of mortgages—Comity of nations.

Action for conversion of a team of horses. One Elizabeth Mallette, who resided in the state of Minnesota, was the owner of the horses, and, they being then in that state, made a chattel mortgage thereon to a bank there, in the form and under the conditions required by the laws of Minnesota to constitute a valid mortgage not only against her but against subsequent mortgagees and purchasers from her. Subsequently she brought the horses to South Edmonton, in the North-West Territories, whether with or without the consent of the bank did not appear, and several months later sold them to the plaintiff, who was a *bona fide* purchaser for value, without actual notice of the mortgage. The defendant subsequently seized the horses under the authority of the mortgage, whereupon the plaintiff brought this action. The mortgage was under seal, and by it the mortgagor granted, bargained, sold, and mortgaged the horses to the bank, to have and to hold, etc., forever, provided always, etc., to be void on compliance with the conditions stated as to payment. The mortgage was in default at the time of the sale to the plaintiff. There was no filing of it or a copy in the Territories.

The action was tried before ROULEAU, J., who held that the mortgage was void as against the plaintiff, and gave judgment in his favour.

The defendant appealed, and his appeal was argued at the December sittings of the full Court, 1893.

S. S. Taylor, for the plaintiff.

D. L. Scott, Q.C., for the defendant.

On the 11th January, 1894; the judgment of the Court was delivered by

MCGUIRE, J.—The North-West Territories Ordinance No. 18 of 1889, s. 3, is expressly limited to mortgages "made in the Territories." Moreover, there is no provision in it by which the mortgagees could file their mortgage here or file a copy. It was contended for the plaintiff that the mortgagees were not without remedy, as they could have taken possession of the chattels under the condition against removing them, but, instead of doing so, they allowed the mortgagor to have them in possession here for several months as if they were her own property, thereby enabling her to sell to the plaintiff. It was not suggested that the mortgagees knowingly permitted this, but merely that they did not promptly pursue the horses and take possession. We do not think that any presumption of laches arises here, in the absence of any evidence that the mortgagees slept upon their rights for an unmeasurable time after knowledge of the removal. There is no evidence as to when they became aware of it.

It was urged for the plaintiff that the mortgage can be enforced here only by virtue of the comity of nations, and that that does not extend so far as to favour foreigners more than our own citizens; that the latter are compelled to comply with the Bills of Sale Ordinance, and the policy of our law is that unless the provisions of that Ordinance are complied with, subsequent purchasers in good faith are not affected by the mortgage; that our Courts have a discretion as to how far they will give effect to foreign laws, and they ought not to exercise that discretion so as to work injustice to our own citizens. * * * * We do not agree that the laws of Minnesota in this behalf are such that it would be inequitable and unjust to treat this mortgage here as valid and effective. It was not contended that this mortgage was not perfectly good as between the parties to it, even here.

If so, up to the moment of the completion of the sale to the plaintiff, it is conceded that the bank was the owner of the horses. What law of the Territories, then, did the mortgagees omit to comply with which exposed them to a loss of their property by the sale to the plaintiff? They could not have filed their mortgage under the provisions of the Ordinance, for it declares, by s. 9, that the proper registration officer for such instruments shall be the clerk of the registration district in which, at the time of the execution of the instrument, the property was. Clearly there was no such officer in the Territories. Nor could they have filed a copy of such mortgage in the clerk's office at Edmonton upon the horses being brought there, under s. 19.

To say, then, that the only remedy that the mortgagees had was to seize the horses before the mortgagor could effect a sale or dispose of them would be to place foreigners at a very great disadvantage. * * * *

[The learned Judge then referred to the state of the law on this subject in the states of Louisiana, Pennsylvania, Michigan, and others, as stated in the American and English Encyclopædia of Law, Vol. III. at p. 109; and to *Liverpool Marine Credit Co.* v. *Hunter*, L. R. 3 Ch. at p. 488, *per* Lord Chelmsford; Savigny's Conflict of Laws, pp. 183, 185; *Cammell* v. *Sewell*, 5 H. & N. 738; *River Stave Co.* v. *Sill*, 12 O. R. at p. 570; *Clarke* v. *Torbell*, 58 N. H. 88; and proceeded—]

Without uselessly heaping up authorities, it may be said that the overwhelming weight of judicial opinion, as well as of the most eminent jurists, is to the effect that in such a case as this the property duly passed from the mortgagor to the mortgagees, and that the removal of the horses to Canada did not impair in any way the mortgagees' title. * * * *

I fail to see what title the purchaser from the mortgagor could acquire greater than she had. Our Ordinance only regulates transfers of chattels by the owners of them; it does not presume to authorize a person who has no title to pass a good title to even an innocent person. * * * *

Again, at common law * * * no instrument in writing would be necessary to the transfer of personal property, and of course no filing of such an instrument, if the transaction were

reduced to writing. The bank would have had a good title, and the purchaser from the mortgagor could not seriously have attempted to rely on his purchase. If such a purchase can now give him a good title, it must be by virtue of some provision of the Ordinance in question. But I cannot find anything there saying that a person with no title or a limited title can, because in visible possession of a chattel, pass a good title to it to a purchaser.

It is a curious fact that s. 8 of the Ordinance does not in terms prescribe that a mortgage shall be in writing, but merely says that every mortgage, etc., shall be registered, etc. A verbal mortgage could not be registered, and it may be that what cannot be done is not required to be done, and that it applies only to instruments capable of being registered. Section 5 is not open to this observation, for it says: "Every sale, etc., shall be in writing." I merely draw attention in passing to this peculiarity of s. 8, a peculiarity which exists in the corresponding Acts in Ontario and Manitoba.

It is, however, a fact that there is no provision permitting a person, by any form of instrument or by any dealing therewith, to pass a title to a chattel which he does not own, even to an innocent purchaser.

In this view of the case, it is possibly unnecessary to invoke here the comity of nations or to consider how far our Courts will extend that comity; for, if we once recognize the mortgagees as entitled to the property at any time after it was brought here, it would be confiscation to deny to them all the consequences of their title * * * (referring to *Warrender* v. *Warrender*, Bli. at p. 110, per Lord Brougham).

But even placing the rights of the mortgagees on no higher or other ground than the comity of nations, it is no stretch of comity to recognize that a citizen of a neighbouring friendly state, whose property is brought by some one else into this country, should be treated as still the owner. * * * For a mortgagor, in defiance of a solemn agreement entered into by him that he will not remove property or dispose of it in fraud of the mortgagee, to remove and, so far as he can, dispose of that property, may not yet in this country bring him in conflict with our criminal laws, but is he not morally just as much a thief as

the more vulgar criminal who furtively deprives his neighbour of his property?

Are we then to help him to convert this property so as to complete his attempt to deprive the mortgagees of their rights by selling it to a purchaser here—innocent or otherwise? I humbly submit not. If the contention of the plaintiff here is to prevail, then, once chattels came across our boundary, it is only a question of speed between the mortgagee in his pursuit after the fly-by-night mortgagor, and this usually alert individual in finding an innocent purchaser obligingly ready to purchase, without too much inquiry or too many troublesome questions, the property the mortgagor has brought with him in his flight.

I think this appeal should be allowed and the judgment of the trial Judge reversed with costs.

Supreme Court of Canada.

EXCHEQUER COURT.] [20TH FEBRUARY, 1894.

REGINA v. FARWELL.

Information of intrusion—Subsequent action—Res judicata—Jurisdiction of Exchequer Court—Powers of Parliament of Canada—B. N. A. Act, s. 101.

In a former action by information of intrusion to recover possession of land in British Columbia, the title to such land was directly in issue and determined: see 14 S. C. R. 392. On an information of the Attorney-General for the Dominion of Canada praying for an order of the Court directing the defendant to execute to the Queen, in right of Canada, a surrender or conveyance of the same land, the defendant, in answer to the information, set up the provincial grant relied on in the first action, and contended, further, that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction.

Held, affirming the judgment of the Court below, 13 Occ. N. 174; 3 Ex. C. R. 271, that there was *res judicata* as to the title sought to be relied on by the defendant.

Attorney-General for British Columbia v. *Attorney-General for Canada*, 14 App. Cas. 295, distinguished.

Held, also, that the Parliament of Canada had power to give jurisdiction to the Exchequer Court of Canada in all actions and suits of a civil nature at common law or equity in which the Crown, in right of the Dominion, is plaintiff or defendant: B. N. A. Act, s. 101; TASCHEREAU, J., dubitante.

D. McCarthy, Q.C. for the appellant.

Hogg, Q.C., for the respondent.

REGINA v. DEMERS.

Federal and Provincial rights—Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record prior to statutory conveyance to Dominion Government—British Columbia Lands Acts of 1875 and 1879—47 V. c. 6 (D.).

On the 10th September, 1888, D. *et al.* obtained a certificate of pre-emption under the British Columbia Lands Act, 1875, and Lands Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the Canadian Pacific Railway reserved on the 29th November, 1888, under an agreement between the Governments of the Dominion and of the Province of British Columbia, and which was ratified by 47 V. c. 14 (B.C.). On the 29th August, 1885, this certificate was cancelled, and on the same day a like certificate was issued to the respondents, and on the 31st July, 1889, letters patent under the Great Seal of British Columbia were issued to the respondents. By the agreement, ratified by 47 V. c. 6 (D.), it was also agreed that three and a half millions additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant.

On an information by the Attorney-General for Canada to recover possession of the 640 acres :—

Held, affirming the judgment of the Exchequer Court, 13 Occ. N. 173; 3 Ex. C. R. 293, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that, upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the Crown in right of the Province, and not in right of the Dominion.

Hogg, Q.C., for the appellant.

D. McCarthy, Q.C., for the respondents.

REGINA v. THE OSCAR AND HATTIE.

Maritime law—Seal Fishery Act, 54 & 55 V. c. 19, s. 1, s-s. 5 (Imp.)—Presence in Bering sea of British ship equipped for sealing—Lawful intention—Burden of proof—Evidence.

On the 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb harbour in Bering Sea while taking in a supply of water.

Held, affirming the judgment of the Court below, 3 Ex. C. R. 241, that when a British ship is found in the prohibited waters of Bering Sea, the burden of proof is upon the owner or master to show by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery Act, 54 & 55 V. c. 19, s. 1, s-s. 5 (Imp).

Held, also, reversing the judgment of the Court below, that there was positive and clear evidence that the "Oscar and Hattie" had entered the prohibited waters at Gotzleb harbour for the sole purpose of getting a supply of water on her return trip from Copper island to Vancouver island, and that she was not used or employed at the time of her seizure in contravention of the enactment referred to.

The appeal was allowed with costs.

McCarthy, Q.C., and *Eberts*, for the appellants.

Hogg, Q.C., for the respondent.

ONTARIO.]

HOLLIDAY v. HOGAN.

Principal and surety—Indorser of note—Release of maker—Reservation of rights—Satisfaction of principal debt—Release of debtor—Release of surety.

The plaintiff H. and the defendants J. and H. were creditors of the other defendant, a hotel keeper. The debtor borrowed $600 from H., giving a note indorsed by J. and H., who also assigned to H., to the extent of $600, a chattel mortgage on the debtor's property. The debtor, not being

able to pay the claim against him, sold out his business to a third party, who was accepted by both creditors as their debtor, and an agreement was entered into between the plaintiff and the new debtor by which time was given to the latter to pay his debt, but in all the negotiations that took place no mention was made of the $600 note. An action was brought against both maker and indorser of the note, which on the trial was dismissed as against the maker, but the trial Judge, holding that the plaintiff had reserved his rights as against the indorser, gave judgment against him. This decision against the indorser was affirmed by a Divisional Court, 22 O. R. 235, but reversed by the Court of Appeal, 18 Occ. N. 135; 20 A. R. 298.

Held, affirming the judgment of the Court of Appeal, that the indorser was relieved from liability by the release of the maker.

E. F. B. Johnston, Q.C., for the appellant.

Moss, Q.C., for the respondent.

BEAVER v. GRAND TRUNK R. W. CO.

Railway company—Purchase of ticket by passenger—Refusal to deliver to conductor—Refusal to pay fare—Ejection from train—Contract between passenger and company—Railway Act, 51 V. c. 29, s. 248 (D.).

By s. 248 of the Railway Act, 51 V. c. 29 (D.), any person travelling on a railway who refuses to pay his fare to a conductor on demand may be put off the train. B. purchased a ticket to travel on the defendants' railway from Caledonia to Detroit, but had mislaid it when the conductor took up the fares, and was put off the train for refusal to pay the fare in money or produce the ticket.

Held, reversing the decision of the Court of Appeal, 18 Occ. N. 223; 20 A. R. 476, which affirmed the judgment of a Divisional Court, 18 Occ. N. 40; 22 O. R. 667, that the contract between a purchaser of a railway ticket and the company implies that the ticket will be delivered up when demanded by the conductor, and that B. could not maintain an action for being ejected on refusal to so deliver.

McCarthy, Q.C., and *Wallace Nesbitt*, for the appellants.

DuVernet, for the respondent.

HAGAR v. O'NEILL.

Contract—Illegal or immoral consideration—Transfer of property—Intention of transfer—Knowledge of intended use—Pleading—Mortgage—Foreclosure.

H. sold a house to a person who had occupied it as a house of ill-fame, taking a mortgage for part of the purchase money. The equity of the redemption was assigned to C., and to an action of foreclosure C. set up the defence that the price paid for the house was in excess of its value and a part of it was for the good-will of the premises as a brothel. On the trial it was found as a fact that H., when selling, knew the character of the buyer and the kind of place she had been keeping, but that the house was not sold for the purpose of being used as a place of prostitution. Judgment was given against C. in all the Courts below.

Held, affirming the decision of the Court of Appeal, 13 Occ. N. 76; 20 A. R. 198; TASCHEREAU, J., dissenting; that the particular facts relied on as constituting the illegal or immoral consideration should have been set out in the statement of defence; that if the house had been sold by H. with the intention that it should be used for an immoral or illegal purpose, the contract of sale would have been void and incapable of being enforced, but mere knowledge of the buyer's intentions so to use it would not avoid the contract.

S. R. Clarke, the appellant, in person.

E. D. Armour, Q.C., for the respondent.

VIGEON v. NORTHCOTE.

Specific performance—Agreement to convey land—Defect of title—Will—Devise of fee with restriction against selling—Special legislation—Compliance with provisions of.

Land was devised to N. with a provision in the will that he should not sell or mortgage it during his life but might devise it to his children. N. agreed, in writing, to sell the land to V., who, not being satisfied of N.'s power to give a good title,

petitioned, under the Vendor and Purchaser Act, for a declaration of the Court thereon. The Court held that the will gave N. the land in fee with a valid restriction against selling. N. then asked V. to wait until he could apply for special legislation to enable him to sell, to which V. agreed, and thenceforth paid to N. interest on the proposed purchase money. N. applied for a special Act, which was passed, giving him power, notwithstanding the restriction in the will, to sell the land, and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act, N., in order to obtain a loan on the land, had leased it to a third party, and the lease was mortgaged, and N. afterwards assigned his reversion in the land.

In an action by V. for specific performance of the contract to sell the land the defendant set up that the contract was at an end when the judgment on the petition was given; that he could give no title under the will; and that if performance were decreed the amount received on the sale of the land should be paid to him, and only the balance to the trust company.

Held, affirming the decision of the Court of Appeal, that the contract was kept alive by N. after the judgment as to title; that V. was entitled to her decree for performance; and that the whole purchase money must be paid to the trust company.

Marsh, Q.C., and *J. R. Roaf*, for the appellant.

W. D. McPherson and *J. M. Clark*, for the respondent.

QUEBEC.]

HARBOUR COMMISSIONERS OF MONTREAL v. GUARANTEE COMPANY OF NORTH AMERICA.

Guaranty—Provisions of contract—Master and servant—Notice to grantor of defalcation—Diligence.

By the conditions of a guarantee policy insuring the honesty of W., an employee, it was stipulated that the policy was granted upon the express conditions: 1. that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept

and that they would be so kept; and 2. that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers, and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts; the employers exercised no supervision over W.'s books, as they represented they would; and when the guarantors were notified, more than a week after the employers had full knowledge of the defalcation, W. had left the country.

Held, affirming the judgment of the Court below, that, as the employers had not exercised the stipulated supervision over W. and had not given immediate notice of the defalcation, they were not entitled to recover under the policy.

H. Abbott, Q.C., for the appellants.

Cross, Q.C., and *Geoffrion*, Q.C., for the respondents.

BRITISH COLUMBIA.] [20TH FEBRUARY, 1894.

CANADIAN PACIFIC R. W. CO. v. CITY OF VANCOUVER.

Crown lands—44 V. c. 1, s. 18—51 V. c. 6, s. 5 (D.)—Powers of railway company to take and use foreshore—49 V. c. 32 (B.C.)—Municipal corporation—Right to extend streets to deep water—Crossing of railway—Jus publicum—Interference with—Injunction.

By 44 V. c. 1, s. 18 (D.) the Canadian Pacific Railway Company "have the right to take, use, and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf, or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

By 51 V. c. 6, s. 5 (D.) the location of the company's line of railway on the foreshore of Burrard Inlet, at the foot of Gore avenue, Vancouver City, was ratified and confirmed.

The Act of incorporation of the city of Vancouver, 49 V. c. 32 (B.C.), vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from

the foot of Gore avenue, with the avowed object of crossing the railway track at a level and obtaining access to the harbour at deep water.

On an application for an injunction to restrain the city corporation from proceeding with their work of construction and crossing the railway :—

Held, affirming the judgment of the Court below, 2 Brit. Col. L. R. 306, that the *jus publicum* of every riparian owner to get access to and from the water at his land was subordinate to the rights given to the railway company by statute on the foreshore in question, and therefore the injunction was properly granted.

Per KING, J.—When any public right of navigation is interfered with, it should be maintained and protected by the Attorney-General for the Crown.

D. McCarthy, Q.C., and *Hamersley*, for the appellant.

Robinson, Q.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 19TH FEBRUARY, 1894.

DE KUYPER v. VAN DULKEN.

Trade-mark—Registered and unregistered mark—Jurisdiction of Court to restrain infringement—Exactness of description of device or mark—Use of same by trade before registration—Effect of—Rectification of register.

The Exchequer Court has no jurisdiction to restrain one person from selling his goods as those of another, or to give damages in such a case, or to prevent him from adopting the trade label or device of another, notwithstanding the fact that he may thereby deceive or mislead the public, unless the use of such label or device constitutes an infringement of a registered trade-mark.

2. In such a case the question is not whether there has been an infringment of a mark which the plaintiff has used in

his business, but whether there has been an infringment of a mark as actually registered.

3. When any one comes to register a trade-mark as his own, and to say to the rest of the world "here is something that you may not use," he ought to make clear to everyone what the thing is that may not be used.

4. In the certificate of registration the plaintiffs' trade-mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K. & Z.,' or the words 'John De Kuyper & Son, Rotterdam, &c.,' as *per* the annexed drawings and application." In the application the trade-mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the let ters "J. D. K. & Z.", or the words "John De Kuyper & Son, Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by the plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac simile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z." and the words "John De Kuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The plaintiffs had for a number of years prior to registering their trade-mark used this white heart-shaped label on bottles containing geneva sold by them in Canada, and they claimed that by such use and registration they had acquired the exclusive right to use the same.

Held, that the shape of the label did not form an essential feature of the trade-mark as registered.

5. The defendants' trade-mark was described in the certificate of registration as "consisting of an eagle having at the feet V. D. W. & Co., above the eagle being written the words 'Finest Hollands Geneva;' on each side are the two faces of a medal; underneath on a scroll the name of the firm 'VanDulken, Wieland, & Co.," and the word 'Schiedam,' and lastly, at the bottom the two faces of a third medal, the whole

on a label in the shape of a heart (*le tout sur une etiquette en forme de coeur*)." The colour of the label was white.

Held, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, and the allegation by the defendants in their pleadings that the use of a heart-shaped label was common to the trade prior to the plaintiffs' registration of their trade-mark, that the defendants had no exclusive right to the use of the label, and that the entry of registration of their trade-mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade-mark.

H. Abbott, Q.C., and *Campbell*, for the plaintiffs.

A. Ferguson, Q.C., and *Duhamel*, Q.C., for the defendants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [26th FEBRUARY, 1894.

KENNY v. CALDWELL.

Evidence—Survey—Plan—Description.

The description of a lot prepared for and used by the Crown Lands Department in framing the patent is admissible evidence to explain the metes and bounds of that lot.

The plan of survey of record in and adopted by the Crown Lands Department governs on a question of location of a road when the surveyor's field notes do not conflict with the plan and no road has been laid out on the ground.

Judgment of the Common Pleas Division reversed.

McCarthy, Q.C., and *Pepler*, Q.C., for the appellant.

Lount, Q,C., and *Hewson*, for the respondent.

GALT, C.J.]

BRYCE v. LOUTIT.

Drainage—Municipal corporations—Construction of culvert—Discharge of water on lands.

One who dams up surface water upon his own land is responsible for damages caused by the breaking of the dam and the consequent escape of the water.

But where a municipal corporation had built under a highway a culvert for the drainage of surface water in ordinary course:—

Held, that they were not liable for damage to lands on the other side of the highway by reason of the water when suddenly discharged rushing through the culvert.

Judgment of GALT, C.J., reversed.

Garrow, Q.C., for the appellant.

Aylesworth, Q.C., for the respondent Loutit.

W. Cassels, Q.C., and *Holt*, for the other respondents.

C. C. MIDDLESEX].

HANLEY v. CANADIAN PACKING COMPANY.

Sale of goods—Quantity—Description—"Car-load".

The defendants agreed to buy from the plaintiff a "car load of hogs" at a rate per pound, live weight. The plaintiff shipped a "double-decked" car-load and the defendants refused to accept this, contending that a "single-decked" car-load should have been shipped. There was conflicting evidence as to the meaning given in the trade to the term "car-load of hogs," and it was shown that the hogs were shipped sometimes in one way and sometimes in the other.

Held, HAGARTY, C.J.O., dissenting, that the plaintiff had the option of loading the car in any way in which a car might be ordinarily or usually loaded, and that, he having elected to ship a double-decked car-load, the defendants were bound to accept.

Judgment of the County Court of Middlesex reversed.

Hellmuth and *W. C. Fitzgerald*, for the appellant.

H. Elliott, for the respondents.

MUSKOKA MILL AND LUMBER COMPANY v. McDERMOTT.

Timber—License—Trespass—Crown Lands Department—R. S. O. c. 28.

The legal right of a licensee of timber limits under a license issued by the Ontario Crown Lands Department ceases, except as to the matters specially excepted by the Act, at the expiration of the license, and there is no equitable right of renewal capable of being enforced against the Crown, or sufficient to uphold a right of action for trespass committed after the expiration of the license and before the issue of a renewal.

The insertion in an expired license of a lot omitted by error does not confer upon the licensee such a title as enables him to maintain an action for trespass committed on the omitted lot.

Judgment of the District Court of Muskoka reversed.

Moss, Q.C., for the appellants.

R. S. Cassels, for the respondents.

High Court of Justice.

CHANCERY DIVISION.

[The Divisional Court, 16th September, 1892.

TIFFANY v. McNEE.

METCALF v. McNEE.

Trial—Jury—Improper conduct of defendant—No objection taken at trial—Motion for new trial.

During the trial of an action for libel the defendant published in his newspaper a sensational article in reference to the trial. The plaintiff's solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action in respect thereto, and proceeded with the trial to its close. The jury brought in a verdict for the defendant.

Upon a motion by the plaintiff to the Divisional Court for a new trial on the ground of improper conduct towards and the undue influence upon the jury :—

Held, that it was too late to take the objection, which should have been made at the trial.

Osler, Q.C., for the motion.

G. T. Blackstock, contra.

[15TH FEBRUARY, 1894.

McMULLEN v. VANNATTO.

Landlord and tenant—Notice of forfeiture—R. S. O. c. 142, s. 11, s-s. 1—Distress after ejectment brought—Effect of.

A notice of forfeiture under R. S. O. c. 142, s. 11, s-s. 1, given in the words, "You have broken the covenants as to cutting timber," in a lease, and claiming compensation :—

Held, a sufficient notice.

After action of ejectment brought for the forfeiture of the lease, the plaintiff, the landlord, distrained for and received rent subsequently coming due.

Held, that such course did not, *per se*, set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence of a new tenancy on the same terms from year to year, a question proper to be submitted to the jury.

F. E. Hodgins, for the plaintiff.

W. R. Riddell, for the defendants.

[FERGUSON, J., 12TH JANUARY, 1894.

MILNE v. MOORE.

Administration—Domestic and foreign creditors—Right to rank pari passu—Jurisdiction of Master over claims of foreign creditors.

A testator, resident and domiciled up to the time of his death in the United States, was possessed of personal property there

as well as in Ontario. Probate was granted to his executrix in the United States, as well as in Ontario; and there were creditors in both countries.

In an administration proceeding in Ontario :—

Held, that the foreign creditors were entitled to rank *pari passu* with the creditors in Ontario.

Re Kloebe, 28 Ch. D. 175, followed.

It was urged that only claims for which an action could be maintained were provable in the administration proceeding; and that *Re Kloebe* was distinguishable because since it was decided the right of foreign creditors to maintain actions was restricted to lands.

Held, that the maintenance of actions by foreigners depended on the rules of procedure with regard to service, which were not applicable here; and, even if they were, that the contention raised could not prevail, for the parties were all before the Master without any objection being taken to his jurisdiction.

W. R. Riddell, for the appeal.

McBrayne, contra.

[FALCONBRIDGE, J., 13TH FEBRUARY, 1894.

SUMMERS v. BEARD.

Mechanics' lien—Registration of lien—Time for—Alterations to work subsequent to completion.

Appeal from the certificate of the Master in Ordinary in a mechanics' lien proceeding.

In this case a lien was claimed for certain steel work done on a building which had been completed by 30th June, 1893, excepting that, it being found that certain bolts projected out of the walls too far, these were required to be cut down, which was done between 17th October and 25th October, 1893. The lien was registered on 17th November, 1893.

Held, upon the authority of *Neill* v. *Carroll*, incorrectly reported 28 Gr. 339, that the lien was registered too late, since the time should have been computed from 30th June.

Hoyles, Q.C., for the appellant.

Mulvey, for the claimant.

[21st February, 1894.

WARD v. ARCHER.

Execution—Fi. fa. lands—What may be sold under—Equitable interest in lands—Agreement to purchase—R. S. O. c. 64, s. 25.

Action for specific performance of a contract for the sale and purchase of certain land for $400 made by the defendant, as vendor, with one F. W. Archer, as purchaser.

The statement of claim alleged that the agreement was assigned by F. W. Archer to one McDonald; that subsequently a new agreement was made between the defendant and McDonald for the sale and purchase of the lot at the same price, in accordance with which McDonald paid the defendant $200 on account; that subsequently this agreement was assigned by McDonald to one Salisbury, at a time when there was $200 and interest due to the defendant; and that the plaintiff purchased Salisbury's interest in the land at a sale under execution upon a judgment recovered in an action against Salisbury.

The defendant demurred on the ground that the statement of claim shewed that Salisbury had no interest or estate in the land that could be seized or sold under execution.

Held, that R. S. O. c. 64, s. 25, is wide enough to cover a case of an interest in land such as that possessed by Salisbury.

In re Prittie and Crawford, 9 Occ. N. 45, was not well decided, or not well reported, and therefore not followed.

Pepler, Q.C., for the plaintiff.

Strathy, Q.C., for the defendant.

[Street, J., 3rd March, 1894.

McMYLOR v. LYNCH.

Will—Devise—Direction to sell land—Names or descriptions of devisees—Purpose — Trust — Charitable use—Mortmain—Augmentation of particular fund or residuary estate — Interest on legacies — Powers of executor—Dower—Election—Costs.

A testator by his will provided as follows:—"I do order and direct that my executor sell the real estate owned by me, such

sale to be made within three years from the date of my decease; and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto $500, to the Bishop of the Diocese of Hamilton $500, to be applied for the education of young men for the priesthood, and the balance invested by my executor in the proportion of $15 for my wife Alice Lynch and $8 for my mother Mary Lynch. At my mother's death I order that her proportion . . . be divided . . . between (five nieces). I order and direct that on my wife's death her proportion . . be divided between (nephews and nieces). All the residue of my estate not hereinbefore disposed of I give, devise, and bequeath unto my wife Alice Lynch."

Held, that, as the corporate name of the Archbishop of the Diocese of Toronto in communion with the Church of Rome is "The Roman Catholic Episcopal Corporation of the Diocese for Toronto in Canada," and as the corporate name of the Bishop of Hamilton is "The Roman Catholic Episcopal Corporation of the Diocese of Hamilton in Ontario," and as the bequests were to "The Archbishop of the Diocese of Toronto" and to "The Bishop of the Diocese of Hamilton," the names being essentially different from the corporations they respectively compose and represent, the bequests must be treated as intended for the individuals described in the will; that the bequests were subject to a trust that the money should be applied for the education of young men for the priesthood; that the purpose for which the legacies were given was a charitable use; and, the money being derived from the sale of land, the legacies failed.

That the money directed to be applied to these legacies went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

That as the testator directed the land to be sold within three years from his death, the legacies should bear interest from the date when the lands should have been sold.

That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, Alice Lynch, under the general residuary gift to her of all the estate not otherwise disposed of, and the executor had no power to lease, because he had no estate in it.

That the widow was not bound to elect between her dower and the benefits conferred by the will.

And that, as the litigation was connected with the provisions of the will relating to the land, the costs should come out of the proceeds of its sale.

E. D. Armour, Q.C., for the plaintiff.

J. Hoskin, Q.C., for the infants and others in same interest.

F. A. Anglin, for the Archbishop and the Roman Catholic Episcopal Corporation of the Diocese of Toronto, Mary Lynch, and Mary Egan.

E. Furlong, for the Bishop and the Roman Catholic Episcopal Corporation of the Diocese of Hamilton.

C. E. Hewson, for Alice Lynch.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 6TH JANUARY, 1894.

CALDWELL v. MILLS.

Master and servant—Workmen's Compensation for Injuries Act, R. S. O. c. 141, s. 3, s-s. 1—Negligence—Defect in "way"—Superintendent—Use of plank for purpose not intended.

The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, about eleven feet long by eight inches wide and three inches thick, which the evidence showed had a knot in it two inches wide, and was cross grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer, carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way besides the plank.

Held, that the plank was a "way" within the meaning of s-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act,

R. S. O. c. 141, and that the knot and cross grain were defects in it for which the defendant was responsible.

J. W. Nesbitt, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

[ROSE, J., 12TH MARCH, 1894.

CUTHBERT v. NORTH AMERICAN LIFE ASSURANCE COMPANY.

Annuity—Apportionment—R. S. O. c. 143, ss. 2, 5—Construction of contract—Annuity bond—Policy of assurance.

In consideration of $12,000 paid by M. to the defendants, they, by an instrument in writing, agreed to pay him $1,800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void."

Held, in an action by the executors of M., that the instrument was not a policy of assurance within the exception in R. S. O. c. 143, s. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within s. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of M.

D. D. Grierson, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

REGINA *ex rel.* MOORE v. NAGLE.

Quo warranto—Information—High school trustee—Civil proceeding—Courts—Single Judge—Motion—Notice.

A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a high school trustee.

Askew v. *Manning*, 38 U. C. R. 345, 361, followed.

Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in Court, by way of motion, upon notice.

W. R. Riddell, for the relator.

Aylesworth, Q.C., for the respondent.

IN CHAMBERS.

[STREET, J., 2ND MARCH, 1894.

In re WALLACE v. VIRTUE.

Prohibition—Division Court—Jurisdiction—Amount ascertained by signature —R. S. O. c. 51, s. 70, s-s. (c).

The defendant covenanted in a lease to pay the plaintiff $210 on a certain date as rent reserved in the lease. That amount having been reduced by a payment, the plaintiff brought his action in a Division Court for $180, principal and interest, and the defendant moved for prohibition, upon the ground that the amount was not within the jurisdiction of the Division Court.

Held, that the $210 was an amount ascertained by the signature of the defendant within R. S. O. c. 51, s. 70, s-s. (*c*); and the motion was dismissed.

McDermid v. *McDermid*, 15 A. R. 287, and *Robb* v. *Murray*, 16 A. R. 503, referred to and considered.

C. J. Holman, for the defendant.

Douglas Armour, for the plaintiff.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. LONAR.

Criminal law—Speedy Trials Act—Trial and acquittal—Preferring new charge—Construction of 52 V. c. 47, s. 12—Jurisdiction of County Court Judge.

The defendant was committed for trial on a charge of larceny and elected to be tried under the Speedy Trials Act, before the Count Court Judge for the district of Halifax. He was tried and acquitted.

After the acquittal, and while the defendant was still in custody, the prosecuting attorney applied for leave to prefer another charge, under s. 12 of the Act. Leave was given, and the prosecuting attorney preferred a charge upon which the defendant had not been committed. The defendant consented to be tried on the second charge, and was tried and convicted. A case was reserved for the opinion of the Court as to whether s. 12 covered the case, and whether the Judge of the County Court was justified in allowing the second charge to be preferred.

Held, that inasmuch as the prisoner was tried and acquitted on the only charge on which he was committed, and inasmuch as that matter was completely disposed of, the Judge had no further jurisdiction, and the defendant was entitled to his discharge.

REGINA v. SMITH.

Criminal law—Speedy Trials Act—Jurisdiction of County Court Judge over offence for which prisoner is not committed—Construction of 52 V. c. 47, s. 12.

The defendant was committed for trial by the stipendiary magistrate for the city of Halifax charged with an assault upon LeP. He elected to be tried under the Speedy Trials Act by

the County Court Judge for the district of Halifax, and was tried and acquitted. The prosecuting attorney thereupon, under s. 12 of the Act, preferred a charge of an assault upon M. Objection was taken to the jurisdiction of the Court to try the defendant upon this charge, but the objection having been overruled, the defendant consented to be tried, and was tried and convicted.

Held, following *Regina* v. *Lonar*, *ante*, that the Judge had no jurisdiction to try the defendant for the offence for which he was convicted.

REGINA v. LESLIE.

Summary conviction—Rescue of impounded cattle—R. S. N. S. c. 67, s. 16—Penalty—Criminal proceeding—Appeal—County Court Judge—Supreme Court—R. S. N. S. c. 103, s. 66.

The defendant was convicted by a justice of the peace, and adjudged to pay the sum of $4 for having, contrary to the provisions of R. S. N. S. c. 67, s. 16, rescued certain cattle from S., who was driving them to pound.

An appeal was taken to a County Court Judge under R. S. N. S. c. 103, s. 66, and the conviction was affirmed. On appeal :—

Held, that the proceeding for the collection of the penalty was a criminal one.

(2) That the penalty imposed was not in the nature of compensation to the party aggrieved, but was of a punitive character.

(3) That the jurisdiction conferred upon the Judge of the County Court under s. 66 was a new jurisdiction, and that there was no appeal from his decision, none having been expressly given.

MANTLEY v. GRIFFIN.

Pleading—Summary cause in County Court—Technical objections—Amendment.

In a summary cause in a County Court the plaintiff replied to two paragraphs of the defence that they were " not sufficient

in law." The Judge sustained the objection and struck out the pleadings.

Held, that, in such causes, objections of a technical character to pleadings should not be entertained. The Judge should make such amendments as are necessary, and dispose of the case on the merits.

ROBERTS v. WARD.

Pleading—Motion to set aside grounds of defence—Appeal—Costs.

A motion at Chambers to set aside grounds of defence, on the grounds that they were filed too late, were false, and were bad in law, was refused with costs. The plaintiff appealed. The defence was served before motion to set aside, and the grounds raised were proper and reasonable.

The appeal was dismissed, costs to be costs in the cause, and the order below was varied as to costs in the same way.

RYAN v. TERMINAL CITY CO.

Promissory note—Principal and agent—Incorporated company—Estoppel.

The defendants by their charter, 51 V. c. 45, were given power to carry on a general mercantile business and to buy, sell, and otherwise deal in real and personal property. S., acting as their agent, purchased a piece of land from the plaintiff for $2,400. He paid $100 on account and gave a "mortgage note," or a mortgage secured by note, for the balance. The defendants were notified of the transaction within a week after the giving of the note and mortgage, and took no steps to repudiate it. They entered into possession of the land, dealt with it as their own, and received the rents and profits. In an action on the note:—

Held, that they were bound by the act of their agent.

PERRY v. GREENWOOD.

Municipal election—Return set aside—Nomination—Petition—Time for filing.

The return of the respondent as a municipal councillor was petitioned against, on the ground that the presiding officer refused to receive the nomination paper of the petitioner, which was duly signed and tendered within the proper time. The Judge of the County Court having dismissed the petition, the petitioner appealed. The appeal was allowed.

On the argument the objection was taken that the petition was not filed within the proper time.

Held, that that point was not before the Court.

Quære, whether the objection should not have been taken by application to dismiss the petition.

RITCHIE v. MALCOM.

Solicitor and client—Claim for costs—Counter-claim for detaining cheque—Contractual relation.

The plaintiff acted as solicitor for the defendant in a suit in the Exchequer Court, and had a claim for professional services over and above the amount of his taxed costs. After the termination of the suit a cheque was forwarded to the plaintiff, as agent of the government, payable to the plaintiff's order, to be delivered to the defendant upon his executing a release which was forwarded with the cheque. The plaintiff required payment of the amount due him for costs as a condition of indorsing and paying over the cheque. The defendant refused to pay the costs, and also refused to execute the release unless the plaintiff indorsed and paid over the cheque. The plaintiff finally did so, and sued the defendant for the amount claimed for costs. The defendant counter-claimed for damages for the time during which the cheque was detained.

Held, that there was no contractual relation between the plaintiff and defendant in relation to the cheque which would enable the latter to support his claim for damages for the detention.

MURDOCH v. WEST.

Contract—Promise to make provision for grandson—Declarations of intention by person standing in loco parentis—Consideration—Services rendered—Excessive damages.

The plaintiff sued, as administrator of M., to recover an amount claimed as compensation for services rendered by deceased to his grandfather, W., in the lifetime of the latter. For eight or ten years previous to the death of W., M. lived with him and attended to his business, and there was evidence that W. repeatedly declared his intention of making provision for M., provided M. continued to do so. The jury found for the plaintiff and assessed the damages at $2,700. On appeal:—

Held, per WEATHERBE, RITCHIE, and TOWNSHEND, JJ.; Graham, E.J., dissenting; that the services were not of a character to rebut the presumption arising from relationship that they were rendered gratuitously.

McGugan v. *Smith*, 21 S. C. R. 263, distinguished.

Per MEAGHER, J., that the damages were excessive.

DRAKE v. TOWN OF DARTMOUTH.

Negligence—Accident—Ferry steamer—Defective connection with landing stage—Liability—Contributory negligence—Passenger only required to exercise ordinary care—Damages.

The defendant corporation owned and operated a public ferry between Halifax and Dartmouth. The plaintiff was a resident of Dartmouth, and in returning to her home, after dark, by one of the defendants' boats, in attempting to land from the boat on the Dartmouth side, fell into a gap between the boat and the float or landing stage, and was severely injured. The steamer was wound up close to the float on the south side, but on the north side there was a gap caused by wind and tide. The plaintiff was near-sighted, and mistook this for a difference in level between the deck of the steamer and the float. There was a bar on the steamer to prevent passengers from leaving before the boat was properly secured. This had been removed and the other passengers had gone on shore before the plaintiff attempted to leave the steamer.

Held, affirming the finding of the trial Judge, that the defendants were guilty of negligence in not taking greater precautions for the safety of passengers on the occasion when the accident in question occurred.

Held, reversing the finding of the trial Judge, that the plaintiff was not guilty of contributory negligence.

Also, that she was not obliged to use more than ordinary care.

The trial Judge, in the event of the plaintiff being held entitled to recover, assessed the damages at $600.

Held, that there was no ground for interfering with the amount as fixed.

HALEY v. HALIFAX STREET RAILWAY CO.

Street Railway Company—Foreclosure of mortgage—Failure to pay interest to bondholders—Appointment of receiver—Transfer of road to new company and purchase of new rolling stock—Protecting the interests of all parties—Notice to subsequent mortgagees—Parties.

The plaintiff, as trustee for bondholders, applied on affidavits to foreclose two mortgages made by the Halifax Street Railway Company, and for the appointment of a receiver. The mortgages under which the application was made provided that, in default of payment of interest on the bonds, the principal should become due, and thereupon the trustee was authorized to commence proceedings for the collection of the amount, and it was provided that upon the commencement of such proceedings the trustee should be entitled to have a receiver appointed of the income, &c., pending such proceedings. The affidavits showed that default had been made in the payment of the interest; that the whole amount, in accordance with the provisions in the mortgages, had become due; and that it was doubtful whether the property mortgaged was of sufficient value to pay the amount of the bonds in full.

After the making of the mortgages, under the authority of 53 V. c. 193, the road was transferred to the Nova Scotia Power Company, who constructed a branch line, built new cars, purchased a number of new horses, and an entirely new outfit of

harness, and, in order to raise funds for these and other purposes, issued bonds, and executed a mortgage to a trustee to secure the bondholders.

The application for the appointment of a receiver was resisted on the grounds, among others: (1) That the properties incumbered by the plaintiffs' mortgages were so mixed up with those not incumbered that it was impossible to separate the income derived from the plaintiffs' properties from that derived from the rest of the road; (2) That the first mortgage conveyed only an equitable title, of which the defendants had no actual notice, and that the second mortgage, confirming the first, was not filed in compliance with the Bills of Sale Act, being a mortgage to secure future advances, and not having the statutory affidavit required by R. S. N. S. c. 92.

The order for a receiver was granted.

On appeal:—

Held, *per* RITCHIE, J.; TOWNSHEND and MEAGHER, JJ., concurring generally:—

(1) That, under the facts set out, the case was one where, in the interests of all parties legally entitled to the property, a receiver should be at once appointed.

(2) That the property was taken by the Nova Scotia Power Company subject to all the legal and equitable claims of the plaintiffs under the first two mortgages, and, even if there was some doubt on this point, that it was a proper exercise of his discretion on the part of the Judge who granted the order appealed from to make the order for the protection of the property, and not allow it to remain in the uncontrolled possession of the defendants.

(3) That the fact that a portion of the road operated by the Nova Scotia Power Company, as well as a portion of the equipment, was not covered by the mortgages, was no ground for preventing the appointment of a receiver; that the addition by the purchasers of the property of new rolling stock, horses, &c., could not affect the rights of the original mortgagees in such a way as to prevent them from obtaining protection for their property to which they would otherwise be entitled.

(4) That the subsequent mortgagees having been notified of the bringing of the action before the making of the order

appealed from, and having failed to make application to be joined as parties, it was not open to the defendants to raise the objection of their non-joinder.

Per GRAHAM, E.J., *inter alia*, that the trustee for the bondholders of the Nova Scotia Power Company should be joined as a party, but that the non-joinder of such a party was not sufficient ground for displacing the order for the appointment of a receiver.

WEATHERBE, J., dissented.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 10TH MARCH, 1894.

FERRIS v. CANADIAN PACIFIC RAILWAY Co.

Railway company—Broken gate—Liability for horses killed on railway—Negligence—Owner of horses not owner of adjoining land—Horses on land without permission.

Appeal by the defendants from the decision of DUBUC, J., *ante*, p. 113.

From the evidence given it was clear that the plaintiff from time to time obtained permission from his father to pasture stock on the land of the latter. But that permission was only temporary, not permanent. The plaintiff stated he had had stock at his father's the previous winters by arrangement, showing that any permission was temporary and just renewed from time to time. There was not a tittle of evidence to warrant the finding of the jury that the animals were on the land of Matthew Ferris by his permission. Unless they were so, the plaintiff could not recover against the defendants.

It was not enough for the plaintiff, to entitle him to claim the benefit of s-s. 3 of s. 194 of the Railway Act, 51 V. c. 99, as amended by 53 V. c. 28, s. 2, to show merely that the owner of the adjoining land from which his animals got upon the track would not have objected to their being on his land, and would not have treated them as trespassing, had he known they were there. He must go further than this. He must adduce evidence from which it can be reasonably found or inferred that the animals were on the adjoining land with the prior leave and consent of the owner, and under such circumstances that the owner could not say they were there unlawfully and trespassing.

It was very doubtful whether the Court could under the County Courts Act, R. S. M. c. 33, s. 325, enter a verdict for the defendants, the case having been tried by a jury.

As there was not any evidence upon which a jury as reasonable men might find a verdict for the plaintiff, a non-suit should be entered.

J. Martin, for the plaintiff.

Aikins, Q.C., for the defendants.

CLIFFORD v. LOGAN.

Chattel mortgage—Growing crops—Priority between chattel mortgage and execution—Interpleader.

An appeal from the decision of DUBUC, J., 13 Occ. N. 470, upon an interpleader issue between the plaintiff claiming under a chattel mortgage of crops and the defendant under his execution against the mortgagor. The mortgage was not executed until seven months after the sheriff received the writ.

Held, that a mortgage of a growing crop or of a crop to be grown does not come within the provisions of the Bills of Sale Act, R. S. M. c. 10.

Grass v. *Austin*, 7 A. R. 511, considered.

At most the plaintiff got, under his mortgage, an equitable interest in the crop to be sown; but before he could take

possession of the crop, before even it came into existence, there was the writ of execution in the sheriff's hands. A writ of execution against goods and chattels, at and from the time of its delivery to the sheriff, binds all the goods and chattels, or any interest therein, of the judgment debtor, within the bailiwick of the sheriff. It binds, not merely the goods and chattels which the debtor has at the time it is placed in the sheriff's hands, but all the goods and chattels he acquires and has while the writ is current and unsatisfied. When the crop here came into existence, the property in it, the legal title to it, was in the debtor. The mortgage passed no property in the crop—at most a right to it in equity. It gave the plaintiff an equitable right to enter and take the crop, should it come into existence. But the moment it came into existence, the property in it, and the legal title to it, became bound by the execution. The property must go to the mortgagee subject to the execution: R. S. M. c. 58, s. 20.

W. J. James, for the plaintiff.

Howell, Q.C., and *D. A. Macdonald*, for the defendant.

LEACOCK v. McLAREN.

SHIELDS v. McLAREN.

In re KENNEDY.

Solicitor and client—Charging order—Preservation of fund—Change of solicitor— Subsequent interest acquired by third parties.

Appeal by J. Shields, W. Shields, and M. E. Shields, against an order obtained by a solicitor under 23 & 24 V. c. 127 (Imp.) charging moneys in Court in the suit of *Shields* v. *McLaren*, to which they or some of them were entitled, with costs due him in these suits.

The bill in *Leacock* v. *McLaren* was filed in May, 1884; a decree made in June, 1885; this was re-heard in July, 1887; and the case was then carried to the Supreme Court of Canada, where a decree was made in April, 1889. In June, 1889, there

was an order changing the solicitor, and the solicitor who got the charging order ceased to be the solicitor for J. Shields. From the judgment of the Supreme Court an appeal was taken to the Judicial Committee of the Privy Council, but before it was heard a settlement was effected between the parties. To this the solicitor was not a party. To carry out the settlement then come to, the suit of *Shields* v. *McLaren* was instituted in August, 1892, and a decree was made in September following, under which the timber limit in question was sold and the purchase money was paid into Court. In November, 1884, J. Shields was married to M. E. Shields, and a marrriage settlement was executed which covered his interest in the subject matter of these suits, A. Shields being the trustee. He having died, W. Shields was in June, 1892, appointed trustee in his place. The retainer of the solicitor was by J. Shields, before the marriage settlement, and the solicitor had no notice or knowledge of that until August, 1892, long after he had ceased to be the solicitor. The question was whether any property was recovered or preserved within the meaning of the statute so as to entitle the solicitor to a charging order. The appellants insisted there was not. The interest of J. Shields in the timber limit, the proceeds of the sale of which was in Court, was, they contended, never in question in the suit.

In the case of *Leacock* v. *McLaren* a bill was filed for the appointment of a receiver and the taking of the partnership accounts; under the decree made, the defendants Leacock and Shields would have been liable to pay all the debts which had been incurred. On an appeal to the Supreme Court by Shields, the decree was changed into an ordinary decree for taking the accounts and winding up the affairs of a partnership; the decree gave Shields all the relief he claimed. After an appeal had been taken to the Privy Council, a settlement was arrived at, which was worked out in the suit of *Shields* v. *McLaren*, and there was in Court in that suit a considerable sum of money, the proceeds of the sale of the timber limits, in which Shields, or his assignee, the trustee under the marriage settlement, was entitled to share.

Held, that even if no property had been recovered by the proceedings, the exertions of the solicitor in carrying on successfully the appeal to the Supreme Court had preserved property

within the meaning of the Act. But for his exertions the fund in Court would not be there, with a right in J. Shields, or his assignee, to share in it.

The solicitor was retained by J. Shields before the marriage settlement was executed and the parties interested under that settlement benefitted by his exertions.

There was no delay on the part of the solicitor to disentitle him to the order. He appeared to have moved as soon as there was any fund against which he could get a charge.

That the solicitor had recovered a judgment for his costs was no answer to an application for a charging order.

The order made should be affirmed with costs.

Hough, Q.C., for the petitioner.

Mulock, Q.C., for the appellants.

MONTGOMERY v. HELLYER.

Illegal distress—Removal of goods—Justification—Estoppel.

This was an action of trespass and trover, tried at the western District Assizes by KILLAM, J., without a jury, when the plaintiff had a verdict for $215. The defendants moved to set this verdict aside, and to enter a verdict for them, or for a nonsuit or for a new trial.

The plaintiff's wife was tenant of certain premises under a lease from one Johnson, dated 1st May, 1893, for a term of one year, the rent to be payable on the first day of each month in advance. On these premises she carried on business as John A. Montgomery & Co. The rent for September was unpaid. It was alleged that, although by the terms of the lease the rent was payable in advance, there was an agreement that it should not be paid until the first of the next month. On the morning of 25th September it was found that everything had been removed from the premises, and on the same day the defendant Hellyer, as agent of the landlord, signed a distress warrant addressed to his co-defendant Aylesworth, directing him to distrain the goods of Mrs. Montgomery upon the premises in

her possession or where removed to, for rent due. Aylesworth seized a large quantity of chattels and effects then in the rear of a shop occupied by a firm of Gray & Davidson. From there the goods were removed to auction rooms on an adjoining street. There was also rent due in respect of the Gray & Davidson premises in which the goods where when they were seized. Some of the goods seized were proved not to belong to Mrs. Montgomery, but to her husband, the plaintiff. At the trial the defendants attempted to justify under another lease in which Hellyer and another were lessors and Gray & Davidson were lessees. Hellyer was made aware that some of the goods seized belonged to the plaintiff, and he adopted the act of his bailiff in the seizure of the goods.

The defendants contended that the plaintiff was estopped from claiming the goods as his, or from claiming damages for their value, because by his own words and acts he did not make known to the bailiff or Hellyer that the goods in question belonged to him, but, on the contrary, led them to believe that his wife was the owner thereof.

Held, that the defendants could not justify under the least made by Hellyer and another to Gray & Davidson, and under which they subsequently issued a distress warrant. The evidence failed to show that the goods were seized upon any part of the premises comprised in that lease. It was merely shown that they were seized in rear of the shop of Gray & Davidson, and what property was demised by the lease to that firm was left quite uncertain.

The plaintiff was in no way estopped from asserting the claim he made; he positively forbade the bailiff to seize the goods when he was first about to do so, and Hellyer was informed of this. He was under no obligation to state then the nature or ground of his objection to the seizure. The defendants were not, by the plaintiff's silence at first, as to the reason for his objecting to the seizure, or afterwards, induced to do or misled into doing anything. When the bailiff was about to seize, the plaintiff objected to his doing so, yet, apparently without any inquiry, the seizure and then the sale were proceeded with.

There was nothing on the evidence to show that the defendants were induced to do anything, or to abstain from doing anything, by reason of what the plaintiff said or did or omitted

to say or do. Unless that was proved he could not be estopped from averring the truth or asserting a demand.

The verdict entered for the plaintiff should stand and the motion to set it aside be dismissed with costs.

Ewart, Q.C., and *Wilson*, for the plaintiff.

Sifton, A.-G., and *Clark*, for the defendants.

In re BRANDON PROVINCIAL ELECTION.

Election petition—Preliminary objections—Status of petitioner—Right to present petition.

Decision of BAIN, J., *ante*, p. 61, affirmed and appeal therefrom dismissed with costs; TAYLOR, C.J., dissenting.

[TAYLOR, C.J., 20TH MARCH, 1894.

RAE v. GARBUTT.

Married woman—Carrying on farm business—Evidence—Suspicious circumstances—Interpleader.

A County Court appeal in an interpleader issue. The plaintiff, Mary Rae, claimed a crop seized by the sheriff. The defendant was an execution creditor of Matthew Rae, the husband of Mary Rae. The County Court Judge entered a verdict for the defendant. The plaintiff appealed. She claimed the land on which the crop was grown with the stock and implements on the farm; the stock and horses were bought with money got from her father or the proceeds of grain raised on her land; she stated she carried on the farming operations, hired the men and paid them, and that her husband did not work on the farm because he was suffering from heart disease, and had since 1888 been unable to do anything. The defendant was a man who worked on the farm for three months in 1892, and his judgment was for money lent to the husband. The defendant swore that, while he was on the farm in 1892, the

husband carried on the farming operations, ploughing, sowing, and harvesting. In the spring of 1893 the defendant worked for the owner of the adjoining land, and saw the husband working; in the autumn he was driving the binder and stacking grain.

The evidence of the wife was far from satisfactory and her ownership of the property suspicious. One quarter section was patented to her husband, who conveyed it to his brother, who two years afterwards conveyed it to her. She declined to answer as to where she got the alleged consideration of $1,000 from, or where she got the money for the purchase of the stock and implements. The husband's inability to work from heart disease was disproved from her own evidence.

Held, that the onus was on her to prove that the farming business was hers; that her evidence was most unsatisfactory and left a decided impression that the property being hers and the carrying on of the farming operations by her were all pretences; and therefore the appeal should be dismissed.

Clark, for the plaintiff.

Coldwell, Q.C., for the defendant.

CRUMBIE v. McEWAN.

Master and servant—Contract abandoned—Suit on quantum meruit—Joint action on separate causes of action—Non-suit.

An action for wages brought by Robert Crumbie and his wife. The particulars of claim were thus stated: "To amount of wages due to plaintiffs for working for defendant from 18th Nov., 1892, to 6th Oct., 1893, less . . . lost time, ten months and two and a half days, at $425 for twelve months as agreed, $357.05." Three items of credit were given and a balance claimed of $168.15, for which the plaintiffs recovered a verdict in the County Court. The defendant appealed.

According to the evidence of Robert Crumbie, the hiring was under a written agreement, but it was not produced. He said he was to work for the defendant for $425 a year from 17th November, 1892, to 17th November, 1893. "He was to pay me $20 a month as we went along. . . . The contract

was with me for the services of myself and wife. . . . She did the work in defendant's house. I worked on the farm. . . . . I was to do the farm work, my wife the house work."

The plaintiffs were dismissed, as they claimed wrongfully, on 6th October, 1898.

On the argument of the appeal the question was raised whether the action was brought upon the contract or not, and thereupon counsel for the plaintiffs stated that they were suing upon a *quantum meruit*.

Held, that the plaintiffs must treat the contract as at an end, for while a special contract is in existence and open they cannot sue on a *quantum meruit*: *Planché* v. *Colburn*, 8 Bing. 14. The onus of showing that their dismissal was wrongful was on the plaintiffs. Suing on a *quantum meruit* they must show that they were not taking advantage of their wrongful act in insisting that the contract was at an end. There were apparently good grounds for dismissal. It did not appear that the plaintiffs could maintain the present action.

According to the husband's evidence, the contract was with him for the services of himself and his wife, and any action on that contract could have been brought by him. However, they did not sue on that contract. There were, then, two separate and distinct causes of action, and they could not be joined in one. It was quite open to the defendant to take the objection that the plaintiffs could not sue jointly. There was no evidence as to the value of the respective services, even if one action could be brought for both.

Appeal allowed and non-suit entered.

Clark, for the plaintiffs.

Bradshaw, for the defendant.

BANK OF MONTREAL v. BLACK.

Fraudulent conveyance—Bill to set aside—Parties—Possession of property other than that in question.

The plaintiffs, by their bill filed against George Black and James Black, alleged that they had recovered a judgment against George Black and Edward Condon; that an execution against

goods had been returned *nulla bona*; that the judgment had been registered; that G. Black was the owner of land described; that after the action was begun, but before judgment, G. Black, with intent of defeating the plaintiffs and his other creditors, conveyed the land to the defendant J. Black, his son; that no valuable consideration was given for the conveyance; and the bill prayed that the plaintiffs might be paid the amount of their judgment; in default that the lands might be sold; and the conveyance to J. Black declared fraudulent and void.

The defendant G. Black demurred for want of equity.

The first objection to the bill was that it contained no allegation that G. Black had no other property. It was argued that the mere allegation that an execution had been returned *nulla bona* was not sufficient, as the defendant might have ample property in another district, and if he had other property the Court would not set aside the deed.

Held, that it lay on the defendant to prove what his circumstances were at the time of making the deed, as he might be supposed to know them much better than the plaintiff.

Taylor v. *Jones*, 2 Atk. 603; *Brown* v. *Davidson*, 9 Gr. 489; *Leacock* v. *Chambers*, 3 Man. L. R. 645; *Osborne* v. *Carey*, 5 Man. L. R. 237, referred to.

Held, however, that G. Black was not a necessary or proper party.

Commercial Bank v. *Cooke*, 9 Gr. 524; *Scott* v. *Burnham*, 19 Gr. 234; *Weise* v. *Wardle*, L. R. 19 Eq. 171, followed.

Demurrer allowed with leave to amend.

J. Martin, for the plaintiffs.

Howell, Q.C., and *Machray*, for the defendant G. Black.

In re RAPID CITY FARMERS' ELEVATOR CO.

Company—Winding up—Insolvency—Strict compliance with statute necessary.

Petition by a creditor for an order to wind up the company. There was evidence of several demands for payment having been made without success. It was not shown that any of these

were written demands served upon the company in the manner in which process might legally be served, nor that sixty days had elapsed during which the company had neglected to pay or secure or compound the debt to the satisfaction of the creditor. It was argued that this was not necessary; that s. 6 of the Dominion Winding-up Act was only an enlarging provision; and that the creditor might show in any way he chose that the company was unable to pay its debts as they became due. There was no evidence that the company had permitted an execution under which a seizure had been made to remain unsatisfied till within four days of the time fixed for a sale thereunder or for fifteen days after the seizure, but it was sworn that an execution had been returned *nulla bona* by a County Court bailiff.

It was contended that the affidavits showed the company to be insolvent under both clause (*a*) and clause (*h*) of s. 5 of the Winding-up Act.

Held, that for the petitioner to succeed he must bring himself strictly within the terms of the statute. He had failed to do so, and the petition must be dismissed with costs.

Re Qu'Appelle Valley Farming Co., 5 Man. L. R. 160, referred to.

Elliott, for the petitioner.

Clark, for the company.

FROST v. LUNDY.

Costs—Scale of—Interpleader issue tried in Queen's Bench—Execution from County Court.

The plaintiffs recovered a judgment in a County Court, of which a transcript was filed in the Court of Queen's Bench, and an execution issued. Under this the sheriff seized a quantity of grain, and this being claimed by the defendant's wife, applied for and obtained an interpleader order.

The sheriff's application was properly made in the Court out of which the process had issued, and the issue which was ordered could not be sent for trial in the County Court, because

over $300 was the sworn value of the property seized. The issue, when tried, was decided in favour of the plaintiffs, the execution creditors. They then applied to have the question of costs, reserved by the interpleader order, disposed of.

The claimant contended that no costs should be allowed, or, if any, that they should be on the lower scale.

Held, that Queen's Bench costs must be allowed. If the issue be one which cannot be tried in a County Court, then *prima facie* the costs should be Queen's Bench costs. If the issue be one which could be tried in a County Court, but neither party asks to have it so tried, Queen's Bench costs should be given: *Christie* v. *Conway*, 9 P. R. 529.

The following cases were also referred to: *Beaty* v. *Bryce*, 9 P. R. 320; *Arkell* v. *Geiger*, *ib.* 523; *Bellhouse* v. *Guin*, 20 U. C. R. 555.

Mathers, for the execution creditors.

Huggard, for the claimant.

[21st March, 1894.

HOWLAND v. CODD.

Summary judgment—Sufficiency of affidavit—Foreign judgment—Pendency of appeals in original action—Power of attorney—Sufficiency of.

Appeal by the defendant from an order made by the referee striking out the appearance and allowing the plaintiff to sign final judgment for the amount claimed.

The plaintiffs sued as assignee of a judgment for costs recovered against the defendant in an action brought against him and others by the Great North-West Central Railway Company in the High Court of Justice for Ontario, and also as assignees of another judgment and several orders for costs in an action in the same Court, against the same defendants, brought by the company and one Delap.

The affidavit upon which the summons to strike out the appearance and sign judgment was obtained was objected to as

insufficient, because it did not, it was said, show the indebtedness of the defendant.

The defendant appeared to a writ specially indorsed, or with which a statement was served showing fully the nature and amount of the claim sued for, such as is required in a special indorsement.

Held, that where a defendant appears to such a writ, all that is necessary to obtain a summons to sign final judgment is an affidavit by the plaintiff, or any other person who can swear positively to the debt or cause of action, stating that in his belief there is no defence to the action. Here there was an affidavit by one of the plaintiffs, who swore to the judgments sued upon; to the assignments of them; that the moneys payable under them were justly and truly due to himself and his co-plaintiffs; and that in his belief there was no defence to the action. The affidavit fully complied with the requirements of the statute.

A further objection was that in the actions in which the judgments were recovered, appeals were pending. As to this the evidence was conflicting.

Held, that, even if appeals were pending, that was no reason why the plaintiffs should not be allowed to have judgment here. The pendency of an appeal may afford ground for the equitable interposition of the Court to prevent the possible abuse of its process, and, on proper terms, to stay execution, but it cannot be a bar to the action itself.

A further objection was that the assignment of the judgment and orders in the action by the company and Delap was invalid because the assignment was executed by Delap by his attorney, and the power under which the attorney acted gave him no power to assign a debt. But the power gave the attorneys named in it authority to sell and absolutely dispose of bonds, mortgages, and other securities for money, and in *Guardians of West Ham* v. *Ovens*, L. R. 8 Ex. 37, a judgment was held to be a security for money.

Appeal dismissed with costs.

Bradshaw, for the plaintiffs.

Mulock, Q.C., for the defendant.

[28TH MARCH, 1894.

BRAUN v. DAVIS.

Attachment of debts—Garnishee within the jurisdiction—Foreign corporation —Debt due to two persons jointly.

Appeal from an order of the referee dismissing a summons to set aside a garnishing order. The garnishees were the Northern Assurance Company and the United Fire Insurance Company, and the moneys garnished were payable on a loss by fire of property insured by them. Objections were taken, first, that the moneys were not payable to the defendant alone, but to him and another person; and, second, that the companies did not carry on business in this Province, and were not within the jurisdiction.

In the case of the Northern Assurance Company it appeared that the head office was in Montreal, and it had no office in this Province; persons here received applications for insurance, but they were all sent to the head office, where they were accepted or rejected. The policy was issued at Montreal, the premiums payable there, and the amount insured payable there also. The policy recited that "Mrs. R. Davis and G. Davis, jointly and individually as their interests may appear, (hereinafter called the assured)" had paid a certain premium. The renewal receipt was for a premium paid by Mrs. R. Davis only. By the terms of the policy the company agreed with the assured to pay the amount insured in case of loss.

Held, that that was an agreement to pay them jointly, and a debt due to a defendant and another jointly cannot be attached.

Macdonald v. *Tacquah Gold Mines Co.*, 13 Q. B. D. 535, followed.

Held, also, that the company was not within the jurisdiction of the Court, and the garnishing order should be set aside.

As to the United Fire Insurance Company, the policy was issued in Winnipeg. To be valid, it must be countersigned by the agent of the company at Winnipeg, and it purported to be so. Then a condition indorsed spoke of notice to the company, in a certain event, being addressed to their principal office in Manitoba. The policy recited the payment of the premium by Mrs. R. Davis and G. Davis, and the agreement on the part of the company was that it should be liable to pay unto the insured, their executors or administrators, the amount insured.

Held, that the second objection could not be applied, but that the first objection must prevail in this case also. Before the plaintiff could hold, under a garnishing order, the moneys due from either of the companies, it should be shown that the defendant could for himself and individually enforce payment of them.

Section 21 of the Administration of Justice Act could not apply to the case of the Northern Assurance Company, for under the authority of such cases as *McArthur* v. *Macdonell*, 1 Man. L. R. 334; *Parker* v. *Odette*, *ante*, p. 95; *Munn* v. *London & North Western R. W. Co.*, 1 C. B. N. S.; and *Brown* v. *London & North Western R. W. Co.*, 4 B. & S. 326, that company was not transacting or carrying on business through any branch or agency within the Province.

Appeal allowed with costs, the order of the referee set aside with costs, and the garnishing order set aside with costs. These to be costs in the cause to the defendant in any event.

Hough, for the plaintiffs.

Perdue, for the defendant.

[DUBUC, J., 10TH MARCH, 1894.

STREIMER v. MERCHANTS BANK.

Married woman—Interpleader—Crop claimed by wife—Work done partly by husband with his implements.

Interpleader issue to determine whether certain grain seized under executions at the suit of the defendants against J. Streimer was the property of the plaintiff, Helena Streimer, or of her husband, J. Streimer.

In the autumn of 1892, J. Streimer had his crop seized and sold under executions for debts due by him, and his farm, which was mortgaged to a loan company, was taken from him for the mortgage debt. In April, 1893, the plaintiff purchased a quarter section of land on credit; she admitted she had no property except a calf, some chickens, and an old plough. She went on to crop the land, the seed grain being partly purchased with money obtained by the sale of an old threshing roller belonging to the husband, and money borrowed.

The work of cultivating the farm and harvesting the grain was done by the husband and children with assistance in stacking by the plaintiff herself; the husband was sickly and unable to do heavy work, but he directed the children and worked with them.

The bargains for the purchase of the land and the obtaining of seed grain were made by the wife, with her husband present, but taking no part in the transactions. The implements used on the farm, except an old plough claimed by the wife, were all the property of the husband. After harvest the crop was seized under an execution against the husband and was claimed by the wife as her own property.

Held, that the grain in question was not the separate property of the plaintiff, and a verdict should be entered for the defendants.

Parenteau v. *Harris*, 8 Man. L. R. 329; *Merchants Bank* v. *Carley*, 8 Man. L. R. 258; *Ady* v. *Harris*, 9 Man. L. R. 127; *Lett* v. *Commercial Bank* 24 U. C. R. 552; *Irwin* v. *Maughan*, 26 C. P. 455; *Harrison* v. *Douglass*, 40 U. C. R. 410; *Meakin* v. *Samson*, 28 C. P. 355, followed.

C. H. Campbell, Q.C., and *Crawford*, Q.C., for the plaintiff.

Andrews and *Pitblado*, for the defendants.

COMMERCIAL BANK OF MANITOBA v. ALLAN.

Promissory note—Notice of dishonour—Note payable "on demand months after date."

This action was brought to recover the amount of several promissory notes. The fourth count was on a note dated 1st November, 1890, made by D. McArthur to the order of the defendant, and indorsed by the latter, payable on demand at the Commercial Bank of Manitoba, Winnipeg.

The note was presented for payment on 14th October, 1893, the day of the issue of the writ of summons. The defendant set up that he had no notice of dishonour, while it was contended on behalf of the plaintiffs that service of the writ of summons with particulars attached was sufficient notice: Bills of Exchange Act, 1890, c. 33, s. 49, s-s. (*e*).

Held, that the writ, with particulars attached, was a sufficient notice of dishonour, as a notice.

Boulton v. *Welsh*, 3 Bing. N. C. 688; *Grugeon* v. *Smith*, 6 A. & E. 499; *Hedger* v. *Steavenson*, 2 M. & W. 798; and *Paul* v. *Joel*, 4 H. & N. 354, followed.

A further question raised was whether the notice was given too late or not, and whether it should have reached the defendant before action brought: Bills of Exchange Act, s. 49, s-ss. 4 and 5.

Held, that, as the defendant received notice of dishonour by the service of the writ on him within an hour or two after presentment of the note for payment, he could not be said to have been prejudiced by delay or otherwise, and, in the absence of any authority to the contrary and in view of the provisions of the statute, which provisions seemed to consider the notice of dishonour, in some circumstances at least, as a mere formality without much importance as to the fact that it may or may not reach the party to whom the notice is to be sent, the defendant must be held to have had sufficient notice of dishonour. The plaintiffs were, therefore, entitled to recover on the note in question.

A second note, dated 1st November, 1890, commenced thus, "On demand months after date I promise to pay," etc. The note was on a printed form; the words "on demand" and "I" were written, while the other words, "months after date," and "promise to pay," were printed. The note was made "with interest at ten per cent. payable half yearly on 30th April and 31st October." The defendant contended that the note was not negotiable, because of the uncertainty of the date of payment: *Mahoney* v. *Fitzpatrick*, 138 Mass. 151. It was presented for payment and protested on 4th July, 1893. The defendant contended that the note was not presented for payment within a reasonable time, as required by s. 85 of the Bills of Exchange Act, and that, as indorser, he was, therefore, discharged.

Held, that the note was clearly a note payable on demand some months after date, viz., two months at least after date. The fact that the interest was payable half yearly did not change the nature of the note. It being made with interest payable half yearly clearly indicated that the parties contemplated and

intended that the note was to remain unpaid for a considerable time and that it might not be paid for years. Such being the intention of the parties as indicated on the face of the note, it could not be said that the presentment was made at such an unreasonable time after the indorsement as to operate as a discharge of the defendant's liability on the note.

Verdict for the plaintiffs.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Howell, Q.C., and *Machray*, for the defendant.

[KILLAM, J., 19TH MARCH, 1894.

DOUGAN v. MITCHELL.

Demurrer—Multifariousness—Want of equity—Equitable relief in actions at law—Fraud not sufficiently shown.

Demurrer to a bill filed by twenty-three plaintiffs against two defendants asking to have a certain instrument styled a release, made by one defendant in favour of the other, set aside and declared fraudulent and void as against the plaintiffs, and also for payment of certain alleged claims of the several plaintiffs against the defendant Mitchell.

The bill alleged that the several plaintiffs and the defendant Sparks were employed by the defendant Mitchell, as labourers in respect of which he became indebted to them severally in various sums; that the plaintiffs assigned their claims to the defendant Sparks to enable him to sue Mitchell for the aggregate amount in one action; that Sparks brought an action against Mitchell on these claims, including one of his own; that Sparks took a bare trust in the several claims of the plaintiffs, and never had any beneficial interest in them; that Mitchell, with notice of such trust, and with intent to defeat the plaintiffs, colluded with Sparks and caused a release to be executed by Sparks, which was given over to Mitchell, and was being relied on by him and set up in the action at law as a binding release and settlement of the plaintiffs' several claims, in fraud of the plaintiffs' rights; that Sparks did not consult with his attorney in

the action as to the release, but the same was carried out between the defendants contrary to the wishes of the plaintiffs.

The demurrer was on the two grounds of want of equity and multifariousness.

Held, that the bill was not multifarious; that one kind of relief is asked against one defendant, and another as against both, is not multifarious.

Manners v. *Rowley*, 10 Sim. 470, followed.

Several objections were taken under the other ground of demurrer. It was argued that the plaintiffs had ample relief at law.

Held, unnecessary to determine the point, as there was jurisdiction in equity to set aside the release for fraud, even though the same relief could be obtained at law.

It was further argued that under the legislative provisions giving power to the Court to give equitable relief in actions at law, the plaintiffs were confined to seeking it there.

Held, untenable. The plaintiffs were not parties to the action at law, and could not put in a replication on equitable grounds to the plea of the release. It appeared doubtful if Sparks could set up his fraud upon his *cestuis que trustent* as an equitable answer to the plea.

Two other objections appeared to be fatal to the bill in its present form, viz., that the release was not alleged to have been under seal, and that fraud was not sufficiently alleged.

There was, to some extent, a charge of a fraudulent intent on the part of Mitchell, but even that was not explicit; it was alleged in the vaguest possible way. There was no direct charge or allegation of any fraud or breach of trust on the part of Sparks.

On these grounds the bill failed.

The plaintiff to have a week to amend, without costs; in default of amendment within that time, the demurrer to be allowed and the bill dismissed with costs.

Hagel, Q.C., for the plaintiffs.

Perdue, for the defendants.

McWILLIAMS v. BAILY.

Stop order—Application for payment out of Court.

The plaintiff and defendant were in partnership when a bill was filed and a decree made dissolving the partnership. The Master's report found that McWilliams was entitled to the assets of the concern, except a trifling amount,

Morrison and Smith, execution creditors of McWilliams, having obtained a stop order on the fund in Court, applied for payment out. The plaintiff also applied for payment out to him.

Held, that the application of the judgment creditor should be dismissed with costs to be set off against the judgment debt. The application of the plaintiff to be enlarged a week to enable the judgment creditor to apply for a charging order, or take such other step as he might deem proper; the stop order to continue.

The practice of charging moneys in the hands of the Accountant-General of the Court of Chancery, under 1 & 2 V. c. 110, and 3 & 4 V. c. 82, applies to moneys paid into this Court on its equity side.

Dawson v. *Moffatt*, 11 O. R. 484, not followed.

Martin, for the plaintiff.

Mathers, for the execution creditors.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 3rd March, 1894.

JOHNSON v. GRAND TRUNK R. W. CO.

Railways—Accident at crossing—Negligence—Findings of jury—Release of cause of action—Settlement pending action—Validity of—Trial of issue as to.

In an action to recover damages for the death of the plaintiff's husband, who was killed at a railway crossing by a train of the defendants, the jury found that the engine bell was not rung on approaching the highway nor kept ringing until the engine crossed it; that the deceased did not see the train approaching in time to avoid it; and that he had no warning of its approach; and assessed damages at $1,000.

Held, that the plaintiff was entitled to judgment upon these findings, notwithstanding that the jury, to a question whether the deceased, if he saw the train approaching, used proper care to avoid it, answered "we don't know."

After the action was at issue an agreement was made between the defendants and the plaintiff, the latter an ignorant person and without the advice of her solicitor or other competent advice, whereunder she received $500 from the defendants and executed a release under seal of the cause of action. She afterwards repudiated the agreement and paid back the $500 At the trial the defendants set up the release.

Held, upon the evidence, that the release was ineffectual.

Held, also, that it was not necessary that a separate action should be brought to try the validity of the release.

Emeris v. *Woodward*, 48 Ch. D. 185, distinguished.

S. Livingstone, for the plaintiff.

Osler, Q.C., for the defendants.

BALL v. TENNANT.

Assignments and preferences— R. S. O. c. 124, s. 4—Assignment for benefit of creditors—Several property of partners—Covenant of indemnity—Creditors—Execution of assignment by.

An assignment under R. S. O. c. 124, for the general benefit of creditors, made by the members of a trading partnership, in the words mentioned in s. 4, vests in the assignee all the properties of each of the partners, several as well as joint, including a covenant to indemnify one of the partners against a mortgage, which covenant vests under the term "property."

Where such an assignment has been acted upon by the creditors, it is not open to the objection, even if made by an execution creditor, that no creditor executed it.

Cooper v. *Dixon*, 10 A. R. 50, distinguished.

N. F. Davidson, for the plaintiffs.

R. U. Macpherson, for the defendant.

ROGERS v. DEVITT.

Sale of goods—Contract—Payment of price—Right of property—Right of possession—Trespass—Trover—Amendment—Account.

A chattel mortgage was made to the plaintiffs by a firm of traders, covering wood then on certain premises and thereafter to be brought thereon. Subsequently the mortgagors made two contracts with the defendant by which he was to get out wood for them and place it upon the premises at a specified price, fifty per cent. of which was to be paid every month on all wood got out during that month, and the balance in cash upon and

according to a measurement to be made by the mortgagor before a specified time. The defendants got out and delivered a a quantity of wood upon the premises, and, before the time specified, a measurement was made by himself and the respective agents of the plaintiffs and the mortgagors, and the wood measured was then marked with the plaintiffs' mark. On the following day he wrote to the mortgagors asking payment of the balance due to him according to the measurement. The mortgagors, three weeks later, made an assignment for the benefit of creditors, and just before they did so gave the defendant a written acknowledgment of a debt due him on account of the wood, "which it is agreed and understood he is to hold the wood measured by us for, until it is paid for." Subsequently the defendant took away portions of the wood so marked and measured, and the plaintiffs brought this action, alleging a wrongful seizure and conversion of the wood and claiming the value of it.

Held, that there was an appropriation to the contracts, by the assent of the defendant and the mortgagors, of the wood measured and marked, the property in which thereupon became vested in the mortgagors, and through them in the plaintiffs; but the vesting of the property did not vest the right of possession without payment of the price; and therefore the plaintiffs could not maintain trespass or trover for the wood taken; but were entitled, upon amendment of the pleadings, to a decree declaring them entitled to the property in the wood and to possession upon payment of the amount due to the defendant, and to make the defendant account for so much of the wood as was not received by them.

Shepley, Q.C., for the plaintiffs.

J. T. Sproul, for the defendant.

McDONALD v. DICKENSON.

Municipal corporations—Re-building of culvert—Obstructions in highway—Negligence—Accident—Liability of servants of corporation—Municipal councillors—Officers fulfilling public duty—R. S. O. c. 73—Notice of action—Pathmaster.

Two of the defendants, being members of a township council, were appointed by resolution of the council a committee to

re-build a culvert, and they personally superintended the work and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them and did the work. The plaintiff met with an accident on the highway near the culvert, owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries.

Held, that the defendants were not fulfilling a public duty and were not entitled to notice of action under R. S. O. c. 73.

Held, also, that that statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it, when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and therefore not to actions for negligence in the doing of the act.

Held, lastly, that one of the defendants, who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster, because he was not employed as such in doing this work, but as a day labourer.

J. A. Robinson and *Tremeear*, for the plaintiff.

J. M. Glenn and *James A. McLean*, for the defendants Brower, Luton, and Dickenson.

C. F. Maxwell, for the defendants the Tisdales.

HURD v. BOSTWICK.

Pleading—Rule 419—Reply—Inconsistency—Refusal of Judge to try action—Discretion—Costs—Divisional Court.

By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading.

Held, that the reply was a direct violation of Rule 419; and that the trial Judge was within his right in refusing, in his discretion, to try the action until the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by the plaintiffs.

No opinion expressed as to whether a Divisional Court had power to review such a ruling.

Du Vernet, for the plaintiffs.

Shepley, Q.C., for the defendant Bostwick.

ARTHUR v. GRAND TRUNK RAILWAY CO.

Water and watercourses—Diversion of watercourse by railway company—Remedy—Compensation—Arbitration clauses of Railway Act, 51 V. c. 29 (D.)—Plan—Riparian proprietors—Infringement of rights—Cause of action—Damages—Permanent injury—Definition of watercourse—Permanent source—Surface water—Misdirection—New trial.

By s. 90 (*h*) of the Railway Act of Canada, 51 V. c. 29, a railway company have power to divert any watercourse, subject to the provisions of the Act; but in order to entitle themselves to insist upon the arbitration clauses of the Act, they must, having regard to ss. 123, 144, 145, 146, and 147, show upon their registered plans their intention to do so.

Every proprietor on the banks of a natural stream has the right to use the water, provided he so uses it as not to work any material injury to the rights of other riparian proprietors; but so soon as he uses it in such a way as to diminish the quantity or quality of the water going on to the lower proprietors, or to retard or stop its flow, he exceeds his own rights and infringes upon theirs; and for every such infringement an action lies.

Sampson v. *Hoddinott*, 1 C. B. N. S. 590, and *Kensit* v. *Great Eastern R. W. Co.*, 27 Ch. D. 122, followed.

The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm.

Held, that it was the fact of the defendants having diverted the watercourse, not the fact of the plaintiff having sustained

damage from their doing so, that gave him his cause of action; and the proper mode of estimating the damages was to treat the diversion as permanent and to consider the effect upon the value of the farm that the permanent abstraction of the water would have.

McGillivray v. *Great Western R. W. Co.*, 25 U. C. R. 69, distinguished.

The alleged watercourse was a gully or depression created by the action of the water. The defendants disputed that any water ran along it, except melted snow from higher land, and rain water after heavy rains, flowing over the surface merely, and ceasing with the rain that produced it. The plaintiff contended that there was a constant stream of water, having its source in the higher land, and only, if ever, ceasing in the very dry summer weather.

The trial Judge read to the jury an extract from the judgment in *Beer* v. *Stroud*, 19 O. R. 10, as follows:—"It is not essential that the supply of water should be continuous and form a perennial, that is, a never ceasing, living source; it is enough if the flow arises periodically from natural causes, and reaches a plainly defined channel of a permanent character . . ." He also told the jury that a channel made by mere surface water and snow is not a watercourse unless there is ordinarily and most frequently a moving body of water flowing through it; and that the principles which are applicable to streams of running water do not extend to the flow of mere surface water spreading over the land.

Held, *per* STREET, J., that without a permanent source, which, however, need not necessarily be absolutely never failing, there cannot be a watercourse; and that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as the passage from the judgment in *Beer* v. *Stroud*, divorced from its context, might have misled the jury, there should be a new trial.

Per ARMOUR, C.J., that what the Judge told the jury could not be held to be misdirection without reversing the decision in *Beer* v. *Stroud*; and the objection to the charge was too vague and indefinite.

In the result, the motion to set aside the verdict for the plaintiff awarding him damages for the permanent diversion of the watercourse was dismissed, but the Court ordered that the judgment should not be enforced unless and until the plaintiff delivered to the defendants a release of any further claim in respect to the cause of action and for damages.

Clute, Q.C., and *J. W. Gordon*, for the plaintiff.

Osler, Q.C., and *Wallace Nesbitt*, for the defendants.

ANDERSON v. WILSON.

Arrest—Trespass to person—Malicious prosecution—Information—Uttering forged note—Disclosing offence—Warrant—Jurisdiction of justice of the peace.

The defendants laid an information against the plaintiff charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars purporting to be made against J. M. in favour of T. A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was under it apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted. He thereupon brought this action for malicious prosecution and trespass to the person.

The Attorney-General refused to grant a fiat for the production of the record, and so the action for the malicious prosecution had to be abandoned at the trial, but the plaintiff's counsel took the ground that no offence was charged in the information; that the warrant was void; and that the defendant was liable as a trespasser for the apprehension of the plaintiff under the void warrant, there being evidence of interference by the defendant in the apprehension.

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and the action of trespass was not maintainable.

Semble, that if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, the action of malicious prosecution would nevertheless lie.

M. G. Cameron, for the plaintiff.

Garrow, Q.C., for the defendant.

COFFEY v. SCANE.

Arrest—Order for- Discharge from custody under—Order not set aside—Action for malicious arrest—Reasonable and probable cause—Departure from Ontario—Inference of intent to defraud—Action for imposing on Judge by false affidavit—Material facts—Burden of proof—"Absconded," meaning of—Excessive damages—Misdirection.

The plaintiff brought this action for damages for his arrest under an order made in the former action of *Scane* v. *Coffey*, he having been discharged from custody thereunder by an order made therein, affirmed by a Divisional Court: 15 P. R. 112. The plaintiff recovered a verdict for $1,000. Upon motion to set it aside made before a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE, J.:—

Held, *per* ARMOUR, C.J., that so long as the order for arrest stood, an action for maliciously and without reasonable and probable cause arresting the plaintiff could not be maintained.

Erickson v. *Brand*, 14 A. R. 614, distinguished.

2. Where a creditor shows by affidavit such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud his creditors generally or such creditor in particular; for he is removing his body, which is subject to the jurisdiction of the Courts of Ontario and liable to be taken in execution, beyond the jurisdiction of such Courts and beyond the reach of their process.

Toothe v. *Frederick*, 14 P. R. 287, commented on and not followed.

Robertson v. *Coulton*, 9 P. R. 16, approved and followed.

3. The fact that the plaintiff, having numerous creditors, including the defendant, in and being a resident of Ontario, left it without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded not only reasonable and probable cause for his arrest, but fully justified it.

4. But if the action were viewed as one for imposing upon the Judge by some false statement in the affidavit to hold to bail and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the Judge to consider in granting the order, and the burden lay upon the plaintiff of showing that the Judge was imposed upon. But it did not appear that any material fact had been falsely stated or suppressed; and the Court should not, in the absence of the Judge's own evidence, draw the inference that he understood from the use of the word "absconded" that the plaintiff had gone away secretly, if that were material.

5. Moreover, the word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he would be properly described as an absconding debtor.

FALCONBRIDGE, J., adhering to the views expressed in *Scane* v. *Coffey*, 15 P. R. 112, was of opinion that the plaintiff had a cause of action; but thought there should be a new trial on the grounds of excessive damages and misdirection; and concurred *pro forma* in the decision of ARMOUR, C.J.

Osler, Q.C., and *M. Houston*, for the plaintiff.

M. Wilson, Q.C., for the defendant.

FOWELL v. CHOWN.

Patent for invention—R. S. C. c. 61, s. 46—Rights of prior manufacturer.

Section 46 of the Patent Act, R. S. C. c. 61, does not authorize one who has, with the full consent of the patentee,

manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue of the patent, but only to use and sell the articles manufactured prior to the issue of the patent.

E. G. Porter, for the plaintiff.

Osler, Q.C., and *Clute*, Q.C., for the defendant.

TRIMBLE v. LANKTREE.

Statute of Frauds—Contract not to be performed within a year—Executed contract.

The Statute of Frauds does not apply to a contract which has been entirely executed on one side within the year from the making so as to prevent an action being brought for the non-performance on the other side.

And therefore where the plaintiff delivered sheep to the defendant within a year from the making of a verbal contract with the defendant under which the defendant was to deliver double the number to the plaintiff at the expiration of three years :—

Held, that the contract was not within the statute.

W. L. Walsh, for the plaintiff.

A. A. Hughson, for the defendant.

BARNES v. DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION.

Fire insurance—Interim contract—Termination of—Notice—R. S. O. c. 167, s. 114, condition 19.

The plaintiff's testator applied to the defendants in writing for an insurance against loss by fire on certain property, and gave an undertaking in writing to hold himself liable to pay to the defendants such amounts as might be required, not to exceed $46.50, and signed a promissory note in favour of the defendants, for $15.25. The defendants' agent gave him a written provisional receipt for his undertaking for $46.50, "being the premium for an insurance," etc.

Held, that the application, undertaking, note, and receipt constituted a contract of fire insurance within the provisions of R. S. O. c. 167, which could be terminated only in the manner prescribed by the 19th of the conditions set forth in s. 114, that is, by notice; and as the only notice sent by the defendants did not reach the testator's post office until two days before the fire, and a seven days' notice is required when given by letter, the contract was still subsisting at the time of the fire.

W. R. Meredith, Q.C., for the plaintiff.

Aylesworth, Q.C., for the defendants.

CHANCERY DIVISION.

[ROBERTSON, J., 19TH MARCH, 1894.

In re HAWKINS.

Costs—Trusts and trustees—Discharge of trustee—Petition—Passing accounts—Inquiry as to liability of trustee.

Upon a petition by a surviving trustee under a will to be discharged from the trusteeship, it appeared that a trust fund created by the will had become impaired, and a reference was directed to take an account of the dealings of the trustees with the fund. The Master reported that a portion of the fund had been lost in the hands of the petitioner's deceased co-trustee, and that the estate of the latter was liable therefor. Upon appeal the report was sent back to be amended by charging the petitioner with the portion of the fund so lost by his co-trustee.

Held, that the inquiry as to the petitioner's liability having resulted unfavourably to him, he must bear the costs of it; but was entitled to receive out of the fund his costs of the petition and of bringing in his accounts; and, upon payment of the amount found due by him and of the costs awarded to be paid by him, to his discharge.

Hoyles, Q.C., for the petitioner.

Swabey, for the adult respondents.

A. J. Boyd, for the infant respondents.

[MEREDITH, J., 16TH MARCH, 1894.

TENNANT v. GALLOW.

Fraudulent preference—Voluntary transfer—Subsequent sale to innocent purchaser—Following proceeds.

An insolvent debtor, for the purpose of defeating the plaintiffs' claim against him, by voluntary deed conveyed the equity of redemption in certain lands to another creditor, who, as previously arranged with the grantor, sold the property to an innocent purchaser, and applied the proceeds in payment of all incumbrances on the property and all his own debts and those of certain other creditors of the grantor and of a commission to himself in respect to the sale, and paid over the final balance to the grantor.

Held, that the plaintiffs had no right of action against the fraudulent grantee to recover any part of the purchase money.

Masuret v. *Stewart*, 22 O. R. 290, and *Cornish* v. *Clark*, L. R. 14 Eq. 184, distinguished.

W. R. Riddell, for the plaintiffs.

W. N. Miller, Q.C., for the defendant Gallow.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 30TH DECEMBER, 1893.

GORDON v. DENISON.

Police magistrate—Jurisdiction—R. S. O. c. 174, s. 62—Warrant to compel attendance of witness—Examination and search of witness—Imprisonment—Police officer—R. S. O. c. 73, s. 1, s-s. 2—Jury—Questions—General verdict.

The plaintiff, a barrister, having been subpœnaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time named, but, on the case being adjourned, did not then attend, and the case was further

adjourned. The prosecutor forthwith laid an information on oath before the magistrate, that the plaintiff was a material witness and that it was probable he would not attend to give evidence; upon which the magistrate issued a warrant addressed to the chief constable or other police officer, &c., and to the keeper of the common gaol, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers and brought to the office of the defendant S., one of the police inspectors, and, on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property, consisting of a watch and chain, some money, and a private memorandum book, were taken from him, the latter being opened and read by the inspector. He was then taken to the cells, where he remained some twenty minutes, when he was brought before the magistrate, and on his giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and the police inspector for trespass and false arrest and imprisonment :—

Held, reversing the judgment of ROSE, J., at the trial, that the magistrate, having jurisdiction by virtue of s. 62 of R. S. O. c. 174, to issue the warrant, incurred no liability, even though he might have erred as to the sufficiency of the evidence before him and on which he acted.

The members of the Court disagreed as to the defendant S., MACMAHON, J., being of the opinion that the judgment ROSE, J., should be affirmed, namely, that S. had no authority to direct the examination and search of the witness and his commitment to the cells, and he was therefore liable; while GALT, C.J., was of opinion that he was protected under s-s. 2 of s. 1 of R. S. O. c. 73, as he was acting in the execution of his office, and no malice was shewn.

Held, also, that there was no necessity for setting aside the warrant before bringing the action.

Quære, whether s. 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness.

Quære, also, whether in an action of this kind questions can properly be submitted to the jury, or whether they should be directed to find a general verdict.

Osler, Q.C., for the plaintiff.

Delamere, Q.C., and *O. R. Macklem*, for the defendant Denison.

H. M. Mowat, for the defendant Stephen.

[6TH JANUARY, 1894.

ASHDOWN v. DEFOE.

BROWN v. DEFOE.

PAGE v. DEFOE.

Warehousemen—Collapse of warehouse through undiscovered defect—Dry rot —Liability.

A building, erected for a billard table manufactory and used as such for some nine years, was converted into a warehouse and used as such for about nine months, when it collapsed through the breaking of a beam supporting the ground floor, occasioned by there being dry rot in one of the beams, and goods stored therein were damaged. No negligence was shown in the construction of the building or in the selection of the material used therein or in not discovering the existence of the dry rot; and except therefor the building would have been capable of sustaining the weight put on it.

In actions for the damages sustained to the goods warehoused in the building:—

Held, that the defendant was not liable.

W. H. Blake, for the plaintiff Ashdown.

H. E. Irwin, for the plaintiff Brown.

A. C. Macdonell, for the plaintiff Page.

W. R. Meredith, Q.C., for the defendant.

[5TH FEBRUARY, 1894.

GRAHAM v. CANADA LIFE ASSURANCE COMPANY.

Life insurance—Married woman—Assignment of policy—Validity of.

A husband on the 24th December, 1878, and 16th May, 1880, effected two insurances on his life for the benefit of his wife, and died in 1892. On the 26th October, 1886, the wife assigned the policies to P. as collateral security for the payment of a note for $500 made on the same day by the husband in favour of P., and indorsed by the wife, but on the express agreement that certain of the husband's property should be returned to him.

Held, that P. was entitled to recover the amount due him by virtue of the assignment.

McKibbon v. *Feegan*, *ante* p. 5, commented on.

Darling v. *Rice*, 1 A. R. 43, distinguished.

W. R. Riddell, for the plaintiff.

Wallace Nesbitt and *Stratton*, for the defendants.

[3RD MARCH, 1894.

GRANT v. ARMOUR.

Hire of goods—Agreement to return—Contract—Liability for damage occasioned by unforeseen accident—Liability for rent while under repair.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for non-performance, although, in consequence of unforeseen causes, the performance of the contract has become unexpectedly burdensome or even impossible.

Where, therefore, the defendant had hired the plaintiff's scow and pile driver, &c., at a named price per day, and agreed to be responsible for damages thereto, excepting to the engine and ordinary wear and tear, until returned to the plaintiff, and while in the defendant's custody, by reason of a wind storm of unusual force, almost amounting to a hurricane they were driven from their moorings and damaged:—

Held, that the defendant was liable for the damage thus sustained, notwithstanding that it was occasioned by an unforeseen accident, and liable also for the rent while the scow, &c., were being repaired,

Taylor v. *Caldwell*, 3 B. & S. 826, followed.

Harvey v. *Murray*, 136 Mass. 377, approved.

D. Macdonald, for the plaintiff.

R. M. Macdonald, for the defendant

FRASER v. BUCHANNAN.

Provisional judicial district—Order of Master for trial of action therein—Subsequent judgment of High Court Judge—Jurisdiction of Master—Appeal to a Divisional Court.

In an action brought for damages to the plaintiff's house, situated in a provisional judicial district, an order was made by the Master in Chambers, assuming to act under the Unorganized Territories Act, R. S. O. c. 91, directing a reference of the issues of fact to the District Judge and reserving further directions and questions of law arising at the trial for the disposal of a Judge in single Court. Notice of trial was given for the District Court, and the case heard by the District Judge, who made certain findings of fact, assessed the damages, and directed judgment to be entered for the plaintiff. The plaintiff moved for judgment on such findings before a Judge in single Court, the defendant at the same time appealing from the judgment or report, whereupon the Judge disposed of both motions, directing judgment to be entered for the plaintiff for the amount found by the District Judge.

On motion to the Divisional Court to set aside the judgment on the ground that the whole trial and subsequent proceedings were *coram non judice*:—

Held, that, apart from the question of the jurisdiction of the Master to make the order, as the parties had treated it as valid and acquiesced in the procedure adopted, and

the subsequent order of the Judge in Single Court remained unreversed and unappealed against, the Court should not interfere.

E. T. English, for the plaintiff.

Aylesworth, Q.C., and *John Reeve*, for the defendant.

O'CONNOR v. HAMILTON BRIDGE COMPANY.

Master and servant—Workmen's Compensation for Injuries Act—Dangerous machinery—Absence of guard—Negligence—Factories Act.

A drilling machine manufactured by a well known manufacturing company, and the same as those used for many years, was put up by the company for the defendants in their factory. The plaintiff, acting under the orders of the defendants' foreman, was oiling the shaft on which the drill worked, when his clothes caught in a projecting screw, and he was injured. The machine was not in motion when the plaintiff received his orders, but at the time of the accident was working with great rapidity, having been put in motion without the foreman's knowledge by a fellow workman. The machine had only been in use a few days, and the defendants were not aware of its being in any way dangerous.

In an action for damages for the injuries received by the plaintiff the jury found that the accident was caused by the defendants' negligence, and without any negligence on the part of the plaintiff.

On appeal to a Divisional Court the Judges composing it were equally divided in opinion.

Per GALT, C.J.—There was no evidence of negligence to submit to the jury either at common law or under the Workmen's Compensation for Injuries Act, nor any liability under the Factories Act.

Per ROSE, J.—There was evidence of negligence both at common law and under the Workmen's Compensation for Injuries Act; the want of a guard as required by the Factories Act constituted such negligence at common law; and the absence of

such guard was also a defect in the condition or arrangement of the machinery within the Workmen's Compensation for Injuries Act.

Lynch-Staunton, for the plaintiff.

Osler, Q.C., and *W. F. Walker*, Q.C., for the defendants.

McLEOD v. WADLAND.

Mortgage—Payment off of prior mortgages in ignorance of a third mortgage—Right to be declared first mortgagee—Laches—Acquiescence.

The plaintiff paid off two prior mortgages on certain lands and procured their discharge, taking a new mortgage to himself for the amount of the advance, in ignorance of the fact of the existence of a third mortgage. Shortly afterwards he ascertained the fact of the existence of such third mortgage, when, believing the land to be sufficient to pay off both mortgages, he notified the defendant, the third mortgagee, that he would pay his off, and the defendant, relying thereon, took no steps to enforce his security. Subsequently, on the property becoming depreciated and the mortgagor insolvent, the plaintiff brought this action to have it declared that he was entitled to stand in the position of first mortgagee.

Held, that the plaintiff by his acts and conduct had precluded himself from asserting such right.

Brown v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, distinguished.

Aylesworth, Q.C., for the plaintiff.

Kappele and *A. Bicknell*, for the defendant.

[BOYD, C., 21ST OCTOBER, 1893.

SIMMONS v. SIMMONS.

Life insurance—Benevolent societies—Endowment certificate—Change of beneficiary—Evidence of.

An endowment certificate for $1,000 issued in 1889 by the Canadian Order of Foresters to a member, and payable on his

death, half each to his father and mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common.

Held, that this was not sufficient to displace the terms of the contract as manifested on the face of the certificate; and further, so far as the mother was concerned, she was amply protected; 53 V. c. 39, s. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

Clute, Q.C., and *John Williams*, for the plaintiff.

W. B. Northrup, for the defendants.

[ROSE, J., 20TH JANUARY, 1894.

In re ALEXANDER AND VILLAGE OF HUNTSVILLE.

Municipal corporations—By-law exempting manufactory—Right to repeal—R. S. O. c. 184, s. 366.

A by-law passed under s. 366 of R. S. O. c. 184, which authorizes the exemption of a manufacturing establishment for a period of not longer than ten years, exempted the lands, etc., used in the applicant's business for a period of ten years from the date at which the by-law came into effect.

Held, that the by-law was valid; that the words "manufacturing establishment" included land and everything necessary for the purposes of the business; and that the period of exemption was within the time limited by the statute; and also that during such limited time, and in the absence of any acts on the part of the persons in whose favour the by-law was passed justifying the repeal thereof, the repeal would be illegal.

A ground relied on for the repeal of the by-law was that the applicant had erected more than two dwelling-houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on

the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the original by-law; but, through inadvertence, this by-law was not sealed. The dwellings were subsequently assessed, and the taxes paid on them.

Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law.

A further ground of appeal was the erection of electric light poles and supplying electric light, but, under the circumstances set out in the case, this was also overruled.

W. R. Meredith, Q.C., and *J. B. Clarke*, Q.C., for the applicant.

F. E. Hodgins, for the corporation.

[MacMahon, J., 5th February, 1894.

MANGAN v. CORPORATION OF WINDSOR.

Municipal corporations—Contract for construction of sewer—Power to put on men to hasten the work—Construction of contract and specifications.

A contract for the construction of a sewer made between the corporation of a town and the plaintiff, provided for its construction within a limited time, afterwards extended by resolution of the council, and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred.

Held, that, under the contract, the power conferred could only be exercised during the time for the completion of the work

or its extension thereof, but, under the specifications, even after such time; and therefore, even if they could not avail themselves of the second extension as granted informally, the powers would be properly exercised under the specifications.

A claim by the plaintiff that the defendants caused the amount stipulated for the payment of the work to be exceeded by the employment of more men, etc., and the payment of larger wages than was necessary, was found against him.

Wallace Nesbitt and *T. Mercer Morton*, for the plaintiff.

W. H. P. Clement, for the defendants.

IN CHAMBERS.

[BOYD, C., 27TH MARCH, 1894.

MURRAY v. BROWN.

Discovery—Criminal conversation—Particulars—Affidavit of denial—Examination of plaintiff's wife—R. S. O. c. 61, s. 7.

In an action of criminal conversation, after pleading and examination of the plaintiff for discovery, particulars of the matters complained of should not be ordered except upon a full and satisfactory affidavit of the defendant showing his innocence and ignorance of the ground of complaint; and an affidavit merely stating, "I deny that I ever debauched, assaulted, or alienated the affections of the plaintiff's wife," is not sufficient.

Keenan v. *Pringle*, 28 L. R. Ir. 135, followed.

In such an action there is no power, having regard to R. S. O. c. 61, s. 7, to order the examination of the wife for discovery as to the alleged acts of adultery.

M. G. Cameron, for the plaintiff.

C. J. Holman, for the defendant.

SWAIN v. MAIL PRINTING CO.

Security for costs—Libel—R. S. O. c. 57, s. 9—Merits—Privilege—Defence.

On an application under R. S. O. c. 57, s. 9, for security for costs in an action of libel, the Judge is not to try the merits of the action; if it appears on the affidavits filed by the defendants that there is a *prima facie* case of justification or privilege, and that the plaintiff is not possessed of property sufficient to answer costs, the statute is satisfied, and security should be ordered; it is not for the Judge to pass upon disputed facts disclosed in conflicting affidavits filed against the application.

DuVernet, for the plaintiff.

Swabey, for the defendants.

MORROW v. McDOUGALD.

Evidence—Foreign commission—Material on application for—Staying trial.

Where an application for a foreign commission is made before issue joined, and it is not certain what the issues will be, the party applying must disclose the nature of the evidence to be given by the foreign witness, that the Court may gauge whether it is likely to be material and necessary.

Smith v. *Greey*, 10 P. R. 581, explained.

And where issue had been joined two months before the sittings for which the plaintiff gave notice of trial, and the defendant applied five days before the sittings for a commission to examine a foreign witness, upon an affidavit simply stating that the witness was necessary and material and he was advised and believed he could not safely proceed to trial without his evidence, and, while not explaining the delay, stating that the application was made in good faith and not for delay, a Judge in Chambers refused to interfere with a Master's order for a commission and a stay of the trial, except by directing that the trial should take place, on the return of the commission, in an adjoining county.

Shepley, Q.C. for the plaintiff.

Douglas Armour, for the defendant.

[ROSE, J., 29TH MARCH, 1894.

CASEY v. MORDEN.

Costs—Taxation—Fee paid on settling bond—Tariff B.

A disbursement charged in a bill of costs of $1 paid in stamps to an officer of the Court upon settling a bond was disallowed upon appeal from taxation.

Such a fee is not authorized by Tariff B. annexed to the Consolidated Rules under the item "Every reference, inquiry, examination, or other special matter."

Douglas Armour, for the plaintiff.

J. M. Clark, for the defendant.

NOVA SCOTIA.

In the Supreme Court.

GRANT v. BOOTH.

Malicious prosecution—Motive of defendant for instituting prosecution—Findings of jury—New trial.

In an action for malicious prosecution the jury found, in answer to questions submitted to them: (1) That the defendant, at the time of instituting the proceedings, entertained an honest belief in the guilt of the accused; (2) That such belief was not based upon reasonable grounds; (3) That the defendant did not take all such reasonable pains as a cautious and reasonable man would take to ascertain the true state of the case; (4) That there was implied malice.

On these findings judgment was entered for the plaintiff for the amount of damages assessed by the jury. An application

made by the defendant for a new trial having been refused, and an appeal taken :—

Held, allowing the appeal and ordering a new trial, that the last finding of the jury displaced the idea of malice or indirect motive, and was consistent with the first finding, that the defendant honestly believed in the guilt of the accused.

Per TOWNSHEND, J., following *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, that the Judge was wrong in submitting to the jury the question as to whether the defendant "took all such reasonable pains as a cautious and reasonable man would take to ascertain the true state of the case before issuing the summons."

REGINA v. INGLIS.

Criminal law—Speedy Trials Act—Charge of breaking and entering, and stealing and taking away—Word "feloniously" omitted—Written charge should be presented.

The defendant was arraigned, tried, and convicted on a charge set out in the warrant under which he was apprehended, as follows :

"For that he did feloniously break into and enter the factory of R. T., and did steal, take, and carry away, (goods described), of the value of twenty dollars."

Held, that the statement of the offence alleged was defective by reason of the absence of the word "feloniously" in the latter part of the charge, in connection with the stealing, taking, and carrying away of the goods.

Semble, *per* GRAHAM, E.J., MEAGHER and HENRY, JJ., that the practice of presenting a formal written charge should be followed on trials under the Speedy Trials Act.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 4TH APRIL, 1894.

SIMPSON v. STEWART.

Evidence—Ejectment—Action by executors—Proof necessary—Evidence of identity of deceased with patentee—Tax sale—Evidence necessary by purchaser.

Appeal from decision of DUBUC, J., *ante* p. 17, dismissed with costs.

SLINGERLAND v. MASSEY.

Married woman—Interpleader—Carrying on farm business—Crop claimed by wife—Work done partly by husband.

Interpleader issue to determine whether crops seized on lands rented by the plaintiff, a married woman, were her property as against the creditors of her husband. At the trial a verdict was entered in favour of the plaintiff, and the defendants appealed. The evidence showed that the plaintiff came from Ontario with her husband a little over four years ago; that her husband went into farming, but failed; that she had some money of her own, coming from land belonging to her in Ontario, and sold before leaving for Manitoba; that in 1892 she rented land for farming on her own account, as she did also in 1893. The work on the farm so rented was done by the husband, his children, and a hired man, the plaintiff herself giving a little assistance. After harvest the crops were seized by the defendants, who were execution creditors of the husband; the plaintiff claimed them as her property under the provisions of the Married Women's Act, R. S. M. c. 95. The trial Judge found that the leasing of the farm by the plaintiff was a *bona fide* transaction.

Held, that the verdict for the plaintiff should stand as to the hay, but be set aside and a verdict entered for the defendants as to the grain and other goods, without costs of the appeal. There did not appear to have been much difference between the working of the farm rented by the husband previous to 1892, and the working of the two farms rented by the plaintiff during the last two years. The farming operations could not be considered an occupation or trade carried on by the wife separately from her husband. The leasehold interests properly came within the protection of the Act, but the Act should be construed strictly. The issues and profits that are protected are such proceeds as are strictly and exclusively issues and profits of the land, and not those, plus the proceeds, in part, of the husband's labour. Unless the occupation of farming the land is carried on by the wife separately from her husband within the meaning of the 14th section of the Act, it must be regarded as the husband's business, and its proceeds must be his. The crops of grain were not the fruits of an occupation carried on by the wife separately from her husband, nor were they the mere issues and the profits of the land coming to her from possession of the land without more. On the other hand, the grass, while growing, was part of the land, and as such belonged to the wife. There was no evidence to show by whom it was cut. The *onus* was on the defendants to show that, when it became chattels personal, or subsequently, it ceased to be the wife's separate property and became subject to the executions, and this was not done.

Howell, Q.C., for the plaintiff.

Martin, for the defendants.

[TAYLOR, C.J., AND BAIN, J., 17TH APRIL, 1894.

In re BEAUTIFUL PLAINS PROVINCIAL ELECTION.

Elections—Corrupt practices—Bribery by sub-agent—Payments made by respondent—Saving clauses of Election Act.

Petition presented against the return of the member elected to the Legislative Assembly of Manitoba for the district of Beautiful Plains.

The Controverted Elections Act provides that an election may be voided for corrupt practices. Section 2 of that Act defines "corrupt practice" to mean any act declared such by any of the provisions of the Manitoba Election Act. Section 14 of the Manitoba Election Act declares a corrupt practice to be any offence punishable under s. 215 and ss. 220-227 of that Act. An election can only be voided for an offence punishable under some of these sections. Section 215 defines bribery, but inflicts no punishment for the offence, only providing that it shall be punished accordingly. This was an alteration of the old law, as prior to consolidation a specific punishment was imposed by the section which s. 215 replaces. The respondent contended that bribery not being an offence punishable under one of the named sections, it is not a corrupt practice and would not vitiate the election.

Held, that the objection must be overruled, as the words "shall be punished accordingly" in s. 215 must be taken to refer to the other provisions of the Act in which the punishment or penalty for bribery is defined, and the section should be read as if it said "shall be punished in the manner directed by the 219th section of this Act."

The only charge of corrupt practice against the respondent himself, that was pressed, was that a short time before the election he expended money to bring voters to Neepawa, and for their maintenance there. The only evidence of the payment of any money for this purpose was that after the election the respondent paid one Hamilton $70 for conveying persons to and from the Court of Revision, which was held at Neepawa on 6th July. Hamilton's charges were made from 4th to 8th July. At this time the respondent was a candidate for the approaching election, the writ for which had already been issued. The respondent himself considered that this payment was made with direct reference to the election, as he returned it as part of his election expenses.

Held, that there was nothing in the circumstances of this payment that would make it bribery under any of the sub-sections of s. 215 of the Manitoba Election Act, nor was it a payment that was prohibited by either s. 226 or 227. Such a payment is forbidden by s. 216, for it does not come within any of the payments that that section allows; but the mere fact that a

payment has been made that is not authorized by that section will not make it a corrupt practice. The petitioner had failed to prove any of the charges against the respondent of personal corrupt acts.

No attempt was made by the respondent to contradict the evidence of one Cathers, which was that on the day of polling Farrell and Wigmore each promised Cathers $10 if he would vote for the respondent; after he had voted Farrell paid him $2, and Dinwoody, to whom he was sent by both Farrell and Wigmore, paid him $18. That Cathers was thus bribed was clearly proved; the question was whether the respondent was affected by the corrupt acts of Farrell, Wigmore, and Dinwoody. The petitioner failed to show that either Farrell or Wigmore was an agent for the respondent directly.

Dinwoody was in the employ of Hamilton, a prominent member of the Conservative Association, who was on the committee acting for the respondent, and it was admitted he, Hamilton, was an agent for the respondent. When Hamilton was unable to attend committee meetings he sent Dinwoody to represent him. Dinwoody, himself, did considerable work connected with the election, and was sometimes found in charge of the respondent's committee-room, and of the books and papers there; he signed the respondent's nomination paper, and attended the Court of Revision with the respondent, where he took an active part in the proceedings.

Held, that the respondent was affected by the actions of Dinwoody in connection with the election. If the respondent were responsible for an illegal act committed by Hamilton, he was, to the same extent, responsible for what Hamilton's delegate, Dinwoody, did. Dinwoody was a sub-agent, and his agency must be held to have been as extensive as Hamilton's; as the respondent would have been responsible for this corrupt payment, had it been made by Hamilton, he was responsible for it when it was made by Dinwoody. An election agent by employing another to work under him may make the candidate liable for that other's acts. Employment will be inferred from subsequent ratification or adoption of a sub-agent's acts, either by the candidate or his agent, and Dinwoody, by adopting and carrying out Farrell and Wigmore's promise to pay Cathers for his vote, made these men also agents for the respondent.

Bribery by agents having been proved, the election must be held to be void, unless it came within the saving provisions of s. 248 of the Election Act, as amended by 55 V. c. 12, s. 11.

Held, that before that section could operate to save the election, not merely one but all the things stated therein must be found in favour of the respondent. No corrupt practice was committed by the respondent personally, but he did not take all reasonable means for preventing the commission of corrupt practices; and the offences committed were not of a trivial, unimportant, and limited character. The election of the respondent must be held void on account of bribery committed thereat by his agents: the respondent to pay to the petitioner the general costs of the petition, and the proceedings thereunder, less one-half of the amount that should be taxed for the costs of the trial at Neepawa.

Howell, Q.C., and *C. P. Wilson*, for the petitioner.

Hagel, Q.C., and *Phippen*, for the respondent.

[TAYLOR, C.J., 2nd APRIL, 1894.

In re BRANDON CITY PROVINCIAL ELECTION.

Elections—Manitoba Controverted Elections Act—Notice under s. 119 that respondent did not intend to oppose petition.

The petition prayed that it might be declared that the respondent was not duly elected, and that the election was void; also that it might be determined that the respondent had been guilty of corrupt and unlawful acts, whereby he was disqualified under s. 232 of the Manitoba Election Act.

By his answer the respondent abandoned any defence to the petition, in so far as the same sought to have his election declared void. He denied all charges of personal misconduct; and therefore, as to so much of the petition as sought to have him disqualified, he was still defending.

Held, that such an answer could not be regarded as, or as equivalent to, a notice that he did not intend to oppose the petition, given under s. 119 of the Manitoba Controverted Elections Act.

C. H. Campbell, Q.C., for the petitioners.

C. P. Wilson, for the respondent.

[9TH APRIL, 1894.

McMILLAN v. WILLIAMS.

County Court—Jurisdiction of—Title to land—Effect of dispute note—Statute of Frauds.

County Court appeal. The plaintiff claimed $117 due as the balance of purchase money and interest for a lot of land. At the trial the plaintiff had a verdict for the amount claimed, and the defendant appealed.

On the appeal the defendant contended, amongst other things, that the County Court had no jurisdiction, because the title to land came in question; and that there was no memorandum in writing under the Statute of Frauds:

Held, that where there are formal pleadings in the County Court, as there were at one time in England, and still are in Ontario, the jurisdiction of the Court seems to be at once ousted by a defendant filing a plea raising a question of title to land: *Lilley* v. *Harvey*, 12 Jur. 1026; *Powley* v. *Whitehead*, 16 U. C. R. 589; *Worman* v. *Brady*, 12 P. R. 618; but a dispute note filed under the practice in the County Courts in this province does not stand in the same position: *South Norfolk* v. *Warren*, 8 Man. L. R. 481.

If then the filing of a dispute note, or a mere suggestion, that the title to land is in question, does not at once oust the jurisdiction, the Judge must inquire into the circumstances. He must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point: *Lilley* v. *Harvey*, 12 Jur. 1026. The Judge must inquire into the matter, and ascertain whether the liability of the defendant is contingent upon the decision of a question of title upon which there is a real dispute: *Morton* v. *Grand Junction Canal Co.*, 6 W. R. 543.

By the dispute note the defendant set up that he was never indebted as alleged; so the defence of the Statute of Frauds was open to him: *Buttemere* v. *Hayes*, 5 M. & W. 456. As the defence of the Statute of Frauds was one which could be raised under the dispute note, and it could not be said it was not raised at the trial, the defendant should not be precluded from raising it on the appeal. The only agreement proved was a parol one,

but it became an executed contract, so far as anything was to be done on the part of the plaintiff. The defendant had received from him a deed, as was admitted at the trial. Could the plaintiff then sue for the balance of purchase money remaining unpaid? *Cocking* v. *Ward*, 1 C. B. 858, was a direct authority against his succeeding in the action.

Appeal allowed with costs, the verdict in the County Court set aside, and a nonsuit entered, with costs.

Haggart, Q.C., for the plaintiff.

Patterson, for the defendant.

[11TH APRIL, 1894.

WARK v. CURTIS.

Partnership—Contract under seal signed by one partner for himself and the other—Want of authority—Agency—Action on contract against one partner—Demurrer.

Demurrer to the declaration. The third count set out an agreement under seal between Martin & Curtis of the one part, and D. Wark of the other part, whereby Wark agreed to cut and saw certain timber and Martin & Curtis agreed to pay therefor. It then alleged that the defendant executed the agreement in the firm name of Martin & Curtis, of which firm he was a member, but had no authority from Martin to use his name in making and executing it, of which want of authority Wark had no knowledge, but the defendant acted therein on his own authority only; that Wark performed a large part of the work, and was always ready and willing to complete the contract, but the defendant had not paid for the work done, which he accepted, and without cause refused to allow Wark to continue the work, and discharged him. An assignment to the plaintiff of the agreement was then alleged.

The defendant demurred, alleging that the count showed no cause of action, as the remedy, under the circumstances, was not an action on the contract, but an action for deceit, or on an implied warranty that the defendant had the authority of Martin to make the contract; that Martin should be joined as a defendant to an action on the contract; and that he could not be joined in this suit, as the other counts did not affect him.

Held, that the demurrer should be allowed. An agent who has no authority, and who, nevertheless, represents that he is authorized to act as agent, is answerable to those who are deceived by him, in an action of deceit, where there has been fraud, or for the breach of an implied warranty, whether there has been fraud or not: *Lewis* v. *Nicholson*, 18 Q. B. 503; *Coventry's Case*, [1891] 1 Ch. 202. But he cannot be sued upon the contract itself, because he is not a contracting party. The present case was quite a different one. The defendant was a principal, and contracted for himself, although he also professed to contract for another, as principal, for whom he had no authority to act. The cases in which a partner who, without authority, has contracted on behalf of his firm, has been held personally liable on the contract, appeared to be cases of simple contract: *Federal Bank* v. *Northwood*, 7 O. R. 389; *Wilson* v. *Brown*, 6 A. R. 441. The agreement in question was one under seal, and on the face of it the partners in the firm of Martin & Curtis were bound jointly.

Hagel, Q.C., for the plaintiff.

J. Martin, for the defendant.

[DUBUC, J., 2ND APRIL, 1894.

HUGHES v. ROUTLEDGE.

Ejectment—Evidence as to possession—Sale under mortgage—Evidence of default.

Action of ejectment. The plaintiff claimed by conveyance from the patentee of the Crown. The defendant claimed title under a mortgage by the plaintiff, under which default had been made in payment; the mortgagees sold under the power of sale to one A. F. Eden in 1877; the defendant in 1891 purchased from Eden's successor in title; in June, 1892, he took possession and built a house on the lot. The plaintiff contended that any claim under the mortgage was barred by the Statute of Limitations. By the mortgage the plaintiff was to have quiet possession until default in payment. It was contended on his behalf that there was no evidence of default in payment,

and in the absence of such evidence it must be assumed that the plaintiff paid the mortgage debt; that he had always been and was still entitled to possession; and that the mortgagees had no right to exercise the power of sale. To show default in payment the defendant produced a notice of sale under the power contained in the mortgage, in the usual form, dated 20th November, 1876. The notice was proved by the person who wrote it; the signature was that of one of the solicitors for the mortgagees; on the back was a certificate showing service on the plaintiff by a County Court bailiff, since deceased; the same witness proved that entries in the solicitor's docket relating to the sale were in his handwriting. There was no evidence that the plaintiff had ever done anything to assert his title, or his right of possession, since the sale by the mortgagees, until he brought this action, after a period of over fifteen years. Since 1882 the taxes had been paid by some of the parties through whom the defendant claimed or by the defendant.

Held, that the defence by producing the notice of sale prepared at the time of its date, in 1876, and by giving some evidence of its service on the plaintiff, had made such a proof of default of payment as to make it incumbent on the plaintiff to show the contrary by evidence of actual payment. The defendant had established occupation and possession by himself and those through whom he claimed for upwards of eleven years. The plaintiff had failed to establish such a title in himself as would entitle him to succeed, and a nonsuit should be entered.

Hagel, Q.C., and *Cameron*, for the plaintiff.

Howell, Q.C., and *Machray*, for the defendant.

BURDETTE v. CANADIAN PACIFIC RAILWAY CO.

Railways—Carriage of goods—Special contract—Loss by fire—Negligence—Liability.

County Court appeal. Action brought to recover for loss of goods destroyed by fire. The car in which the goods were carried arrived at Emerson at noon on 30th June, 1893; it was placed near an elevator in the defendants' railway yard; during

the following night the elevator was burned, and the car with its contents of goods was also destroyed by fire. The defendants' agent stated it was customary for consignees to remove their freight the same day it arrived, in the afternoon; he notified a drayman to whom he had previously delivered goods for the plaintiff, that the goods in question had arrived; the plaintiff did not generally go up to the station himself inquiring for freight, and probably would not have gone up that day if he had been at home, which he was not.

The bill of lading contained the following condition: "Nor will the company be liable for damage occasioned by * * * fire." The plaintiff contended that the placing of the car near the elevator instead of leaving it at the freight shed was an act of negligence for which the defendants should be held liable.

The County Court Judge entered a verdict for the plaintiff, and the defendants appealed.

Held, that the condition indorsed on the bill of lading constituted a special contract, under which the defendants should be protected from liability against loss by fire. In any event, the vicinity of an elevator was not such a proximate danger of fire as to make it negligence to place a car there. Elevators are generally constructed at railway stations, and cars are constantly placed near them, as matters of convenience and necessity. What is necessarily done every day in the ordinary course of business cannot be held to constitute negligence. The burning of the car by being placed near the elevator could neither be foreseen nor contemplated; the defendants had a perfect right to place it there, and committed no breach of duty in so doing; the goods were destroyed by accident and not through any negligence on the part of the defendants, making them answerable for their loss.

Grand Trunk R. W. Co. v. *McMillan*, 16 S. C. R. 548; *Grand Trunk R. W. Co.* v. *Vogel*, 11 S. C. R. 612; *Smith* v. *Midland R. W. Co.*, 57 L. T. N. S. 818; *Shepherd* v. *Bristol, etc., R. W. Co.*, 87 L. J. Ex. 118, referred to.

Appeal allowed and action dismissed.

Forrester, for the plaintiff.

Aikins, Q.C., for the defendants.

[9TH APRIL, 1894.

CONBOY v. DOLL.

Damages—Measure of—Wrongful seizure of goods by sheriff at instance of defendant.

Action for damages for wrongful seizure of the plaintiff's goods.

The plaintiff, assisted by her husband, was carrying on a jewellery store; the defendant, who had an unsatisfied judgment against the husband, placed an execution in the sheriff's hands, and desired him to seize the stock in trade in the store. The sheriff, who was under the impression that the stock belonged to the plaintiff, had some hesitation in making the seizure, and communicated his views to the defendant. After discussing the matter with him and his attorney, both of whom insisted on his making the seizure, the sheriff seized. The plaintiff claimed the goods, and on an interpleader issue a verdict was entered in favour of her and of two other claimants who had executions against her in the sheriff's hands: 18 Occ. N. 218.

The plaintiff then brought this action.

Held, that the plaintiff was entitled to recover damages, limited to the injury to her business sustained during the two months intervening between the seizure and the date of the interpleader order, and for the injury to her credit, if it was thereby injured. In the absence of any specific date, the damages must be estimated in a general way as a jury would do, having regard to the particular facts of the case. The store was kept open, but the fact of the stock being under seizure and the store in the possession of the sheriff had the effect of causing injury to the business generally; it was about Christmas, the best season for the jewellery trade. A verdict was entered for the plaintiff for $200, with County Court costs, without the right to the defendant to set off Queen's Bench costs.

W. A. Macdonald, Q.C., for the plaintiff.

Aikins, Q.C., for the defendant.

DES FORGES v. COATSWORTH.

Demurrer—Allowance by lapse of time—G. O. 99—Multifariousness—Bill for dissolution of partnership and to set aside sale of interest.

Demurrer by the defendant Reeves to the bill of complaint. He submitted that it should be considered as admitted by lapse

of time. The demurrer was filed on the 21st January, 1893, and was set down for argument on the 9th March, 1894. Under the English Rule 14, a demurrer to the whole bill not set down for argument within twelve days from the filing, and a demurrer to part of the bill not set down within three weeks after filing, is to be held as sufficient, unless the plaintiff has taken steps to amend.

Held, that this Rule had been superseded by G. O. 99, and the objection must be overruled.

The grounds of demurrer were multifariousness and want of equity.

The bill alleged that there was a partnership at will existing between the plaintiff and the defendant Coatsworth; that on 31st October, 1892, the plaintiff gave notice to Coatsworth that the partnership would be dissolved from and after the 4th November, 1892, should Coatsworth purchase the plaintiff's interest; that on the 4th November, 1892, Coatsworth assumed the entire control of the business, in defiance of the plaintiff's protest, and had since made a sale to Reeves of the plaintiff's interest without his knowledge, authority, or consent, and refused to pay the plaintiff the value of his interest; that Reeves purchased with full knowledge of the plaintiff's rights. The bill prayed for a dissolution and account and that the sale to Reeves might be declared void as against the plaintiff.

Reeves contended that he had no interest in the dissolution of the partnership and taking the accounts, and that Coatsworth had no interest in setting aside the sale to him, and therefore, the interests of the two defendants in the suit being entirely different, the bill was bad for multifariousness.

Held, that the demurrer should be overruled with costs. The interests of the defendants were in some respects different, but in some other respects they related to the same matter, namely, the share and interest of the plaintiff in the partnership assets and business.

Hough, Q.C., for the plaintiff.

Crawford, Q.C., for the defendant Reeves.

[KILLAM, J., 25TH APRIL, 1894.

COMMERCIAL BANK v. BROWN.

Costs—Scale of—Unsettled account—Amount involved—Jurisdiction.

The plaintiffs sued in the Queen's Bench to recover the balance due by the defendant on an overdrawn account. The total amount of the sums drawn was $419.85; there were two credits amounting to $250, leaving a balance due of $169.85.

Held, that the subject matter to be investigated was an unsettled account, which, in the whole, exceeded $400, and the plaintiffs were entitled to a certificate for full costs.

In re The Judge of the County Court of Northumberland and Durham, 19 C. P. 299, and *In re Higginbotham* v. *Moore*, 21 U. C. R. 826, referred to.

W. J. Tupper, for the plaintiffs.

Elliott, for the defendant.

JOHNSTONE v. HALL.

Landlord and tenant—Farm lease—"Clean" farm—Fraudulent representations—Damages—Counter-claim for rent—Defence.

Action for damages for fraudulent representations, whereby the plaintiffs were induced to become lessees of a farm of the defendant. The representations were that it was a good farm and well ploughed, that it was dry and clear of noxious weeds, and that it was a "clean" farm.

Except for the weeds and a small wet spot, the farm was a good farm. It was not shown that it was not well ploughed. In the summer before the demise a great many weeds grew upon the premises, which the defendant was aware of.

Held, that the defendant made the alleged representations to the plaintiffs, and thereby induced them to become lessees of the farm at a very high rental.

The expression "clean farm" does not mean a farm absolutely free from weeds; it should be construed as describing a farm on which there were not weeds in such quantities as to be materially injurious to the crops. In any stricter sense the expression would seem to be one of those exaggerated statements which give no cause of action.

The representations as to the absence of noxious weeds and of the farm being clean went beyond mere exaggeration and were wrongfully and fraudulently made, in the sense required to enable the plaintiffs to maintain the action.

As to damages the question was whether the farm was worth the rental which the plaintiffs agreed to pay, and, if not, how much less it was worth. Damages allowed at $1 per acre for the cultivated land for each of the two years for which the plaintiffs took the land—making in all $496. Verdict for the plaintiffs for that amount. Verdict for the defendant for $160, on his plea of counter-claim for rent due.

The plea of fraud could not avail as a defence to the counter-claim, for the plaintiffs had had the use of the land and could not rescind the contract. On the contrary this very action for damages, was an affirmance of the contract.

Cooper, Q.C., for the plaintiffs.

Anderson, for the defendant.

[25TH APRIL, 1894.

ACHESON v. MUNICIPALITY OF PORTAGE LA PRAIRIE.

Municipal corporation—Action against, for damage to farm by overflow—Cause of action—Want of by-law—Work done by committee of council—Nonsuit.

Action against a rural municipality for damage to the plaintiff's land and crop by the construction of a drain in, as was alleged, a wrongful and negligent manner, bringing water, which otherwise flowed in another direction, upon the plaintiff's land. The declaration contained three counts, each of which alleged the construction by the municipal corporation of a ditch or drain, "at a place where they had authority to construct the same under the Municipal Act." It also alleged that the corporation so negligently constructed the ditch that it diverted the water from its natural course and brought it through the ditch, by which it escaped and spread over the plaintiff's land; that the ditch was left in an unfinished state and the water flowed back over the plaintiff's land; and that the ditch was excavated at such improper levels and with such insufficient banks, that the water was not carried off but spread over the plaintiff's land.

The defendants moved for a non-suit on the following among other grounds:—

1. That the declaration disclosed no sufficient cause of action.

Held, that the objection was not open to the defendants. Where that which is laid as the cause of action in the declaration is proved at the trial, the plaintiff cannot be non-suited upon the ground that the facts charged do not disclose a cause of action: *Lewis* v. *City of Toronto*, 39 U. C. R. 343; *Darby* v. *Township of Crowland*, 38 U. C. R. 38. But the plaintiff must be strictly held to complete proof of one or more of the counts of his declaration before a verdict can be entered for him.

2. That there was no evidence to connect the defendants with the work and they were not responsible for it; that a municipality could act only by by-law or resolution of its council, and none such was proved.

Apparently the council of the municipality never expressly authorized the construction of the drain. The municipality was divided into two wards, east and west; there was a committee for each ward, and these committees decided upon the expenditure of the appropriations for public works in their respective wards. There was no evidence of there having been any by-law, rule, or resolution of the council adopting such a course of procedure, except two resolutions authorizing the treasurer to pay out moneys from ward appropriations on the orders of the chairmen of the ward committees. The drain appeared to have been constructed wholly by authority of the committee for the west ward. Complaint was made to the council of the flooding of the plaintiff's land, and the council directed an engineer to examine the ditch and report upon the matter.

Two cheques were produced from the custody of the defendants, payable to the men who dug the ditch for the committee; they were given on the authority of the chairman of the committee only.

Held, that it did not appear that the council ever took any formal action, as a council, respecting the work, whether before or after its construction, or adopted it as a work of the corporation, or even that it was actually discussed in council; the cheques did not furnish any evidence of adoption of the work by the council. There was no express authority to the committee to perform the work; it was not shown that it was ever adopted

by the council as a corporate work, or that the action of the committee was in any way ratified.

Non-suit entered.

Cooper, Q.C., for the plaintiff.

Cameron and *James*, for the defendants.

NORTH-WEST TERRITORIES.

In the Supreme Court.

[ROULEAU, J., 1ST MARCH, 1894.

In re MALONEY.

Administration—Equitable mortgage—T. R. P. Act—Registration—Judgment creditors—Priorities.

In an administration suit, J. claimed priority as equitable mortgagee, under the following circumstances: The real estate of the intestate consisted of certain town lots held by her under agreement for sale with one J. B., the administrator, upon which there remained an instalment of $100 unpaid. The agreement for sale had not been registered, though the land was under the Territories Real Property Act. The intestate had deposited the agreement with J. to hold as security for his debt. No memorandum of mortgage was registered.

There were two judgment creditors and several simple contract creditors of the intestate, and it was urged on their behalf and on behalf of the administrator that the unregistered equitable mortgage of J. was not entitled to any priority, especially as to judgment creditors, and the report so found.

On appeal from the report:—

Held, that J. was equitable mortgagee, and as such entitled to priority as claimed by him, although the agreement was unregistered, and there was no memorial or notice of the mortgage.

C. C. McCaul, Q.C., for the appellant.

T. Ede, for the administrator.

W. L. Bernard, for the execution creditors.

Supreme Court of Canada.

ONTARIO.] [20TH FEBRUARY, 1894.

In re VIRGO AND CITY OF TORONTO.

Municipal corporation—By-law—Power to "license, regulate, and govern" trade—Partial prohibition—Discrimination—Repugnancy.

By a by-law of the city of Toronto, hawkers, petty chapmen, and other small traders were prohibited from pursuing their respective callings on certain streets comprising the principal business part of the city, and covering an area of about ten miles.

Held, that the authority given to municipal councils by s. 495 (8) of the Municipal Act to license, regulate, and govern trades, did not empower the city council to pass this by-law, which was, therefore, *ultra vires*.

Judgment of the Court of Appeal, 20 A. R. 435, reversed; FOURNIER and TASCHEREAU, JJ., dissenting.

A by-law of the city council provided that hawkers and peddlers of fish, etc., and small wares that could be carried in a hand basket, should not be required to take out a license.

Held, that a subsequent by-law fixing the license fee for hawkers and peddlers of fish was not void for repugnancy.

Judgment of the Court of Appeal affirmed; GWYNNE and SEDGEWICK, JJ., dissenting.

DuVernet, for the appellants.

H. M. Mowat, for the respondents.

QUEBEC.]

BAPTIST v. BAPTIST.

Will—Testamentary capacity—Senile dementia—Undue influence.

In 1889 an action was brought by G. H. H., in the capacity of curator to Mrs. B., an interdict, against A. B., in order to have certain deeds of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent, M. B., presented a petition for the continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885, (the same date as that of the transfer attacked by the original), whereby the late Mrs. B. bequeathed the residue of all of her property, etc., to her two sons. Upon the merits of the contestation as to the validity of the will of the 17th January, 1885:—

Held, affirming the judgment of the Court below, that upon the facts and evidence in the case (see also 21 S. C. R. 427), the will of the 17th January, 1885, was obtained by A. B. at a time when Mrs. B. was suffering from senile dementia and weakness of mind, and was under the undue influence of A. B., and should be set aside.

Stuart, Q.C., and *Olivier*, for the appellant.

Laflamme, Q.C., and *E. Lafleur*, for the respondent.

REGINA v. CIMON.

Contract—Final certificate of engineer—Extras—Pleading—Final certificate not pleaded in bar.

A contract entered into between Her Majesty the Queen, in right of the Province of Quebec, and F. X. Cimon, for the construction of three of the departmental buildings at Quebec, contained the usual clause providing that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered showing the total amount of

work done and the materials furnished and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works on matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of $31.36 was due upon the contract price, and $42.84 on extras.

The suppliants by their petition of right claimed, *inter alia*, $70,000 due on extras. The Crown pleaded general denial and payment.

The Superior Court granted the suppliants $74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Court of Queen's Bench for Lower Canada (appeal side) increased the amount to $13,198.77, with interest and costs.

Held, reversing the judgment of the Court below, and restoring the judgment of the Superior Court, that the suppliants were bound by the final certificate given by the engineer under the terms of the contract.

Guilbault v. *McGreevy*, 18 S. C. R. 609, followed.

Per FOURNIER and TASCHEREAU, JJ., dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action, and there was an admission of record by the Crown that the contractor was entitled to twenty per cent. commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of twenty per cent. was still due and unpaid on $65,887.09 of the extra work.

G. Stuart, Q.C., for the appellant.

G. Amyot, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [28TH MARCH, 1894.

STOVEL v. GREGORY.

Statute of Limitations—Possession—Trespass—Fencing—"State of nature"—R. S. O. c. 111. s. 5, s-s. 4.

The expression "state of nature" in s-s. 4 of s. 5 of R. S. O. c. 111 is used in contradistinction to the preceding expression, "residing upon or cultivating," and unless the patentee of wild lands, or some one claiming under him, has resided upon the land or has cultivated or improved it or actually used it, the twenty years' limitation applies. Clearing or cultivating by trespassers will not avail to shorten this limit.

Per BURTON and MACLENNAN, JJ.A.—Merely fencing in a lot without putting it to some actual, continuous use is not sufficient to make the statute run.

Judgment of the Queen's Bench Division affirmed.

H. J. Scott, Q.C., and *William Kingston*, Q.C., for the appellant.

W. R. Meredith, Q.C., and *H. Elliott*, for the respondent.

[16TH APRIL, 1894.

KERR ENGINE CO. v. FRENCH RIVER TUG CO.

Contract—Penalty—Damages—Time.

Where a contract provides that an engine shall be built and placed in position by a certain date, with a penalty of $20 for each day's delay, the time of commencement is of the essence

of the contract, and if, owing to the purchaser's fault, the contractor is delayed in commencing the work, the parties are at large so far as the penalty is concerned, the purchaser, if the work be not completed by the time fixed, being entitled only to such damages as he has actually suffered.

Holme v. *Guppy*, 3 M. & W. 387, followed.

Judgment of the Queen's Bench Division reversed.

McCarthy, Q.C., for the appellants.

Moss, Q.C., and *O. E. Fleming*, for the respondents.

SEGSWORTH v. ANDERSON.

Assignments and preferences—Sale of insolvent's estate—Secret profit by creditor—Inspector—Trusts.

The assets of an insolvent estate were sold by the assignee, at a price that was not complained of, to the insolvent's wife with the approval of the sole inspector of the estate, the inspector and another creditor becoming responsible for the payment of the purchase money, and, pursuant to a pre-existing undisclosed agreement, taking from the purchaser a chattel mortgage upon these assets as security not only for the amount of the purchase money but also for the amount of their claims against the debtor.

Held, per BURTON and MACLENNAN, JJ.A., that the inspector and the creditor could not be ordered to account for the profit, if any, made by them, that profit not having been made at the expense of the estate or by virtue of the office of trust filled by the inspector.

Per HAGARTY, C.J.O., that the transaction was legally speaking an improper one, but that, there being no evidence that any loss had been caused to the estate, no reference should be directed.

Per OSLER, J.A., that any profit must be accounted for and that a reference to ascertain the amount thereof should be directed.

In the result the judgment of the Queen's Bench Division, 23 O. R. 578, was reversed.

S. H. Blake, Q.C., and *E. F. Gunther*, for the appellants.

James Parkes and *L. F. Heyd*, for the respondents.

YORK v. TOWNSHIP OF OSGOODE.

Waters and watercourses—Ditches and Watercourses Act, R. S. O. c. 220—"Owner"—Tenant at will.

The word "owner" as used in the Ditches and Watercourses Act, R. S. O. c. 220, means the actual owner and not the assessed owner, and a tenant at will of lands affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

Judgment of the Queen's Bench Division, 24 O. R. 12, reversed.

Moss, Q.C., and *MacTavish*, Q.C., for the appellants.

Shepley, Q.C., and *G. F. Henderson*, for the respondents.

MORROW v. CANADIAN PACIFIC RAILWAY CO.

Negligence—Contributory negligence—Evidence—Onus of proof—Jury—Non-suit.

In an action tried by Judge and jury to recover damages for negligence, where contributory negligence is set up as a defence, the onus of proof of the two issues is respectively upon the plaintiff and the defendant; and, though the Judge is entitled to hold negatively that there is no evidence to go to the jury on either issue, he cannot declare affirmatively that either issue is proved. The question of proof is for the jury.

The necessity for bearing in mind that *Weir* v. *Canadian Pacific R. W. Co.*, 16 A. R. 100, was tried without a jury emphasized.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., for the appellants.

Marsh, Q.C., and *E. G. Porter*, for the respondent.

[8TH MAY, 1894.

WEALLEANS v. CANADIAN SOUTHERN RAILWAY CO.

Corporations—Delegation of powers—Railways—Negligence—Fire.

A railway company incorporated under the laws of this Province cannot, without legislative sanction, confer upon a

foreign railway company the immunities and privileges which it possesses, and the foreign railway company in running engines over the line of railway in this Province is subject to the common law liability imposed upon a person using a dangerous and fire-emitting machine, and is liable for damages without proof of negligence.

Judgment of the Queen's Bench Division reversed.

Moss, Q.C., for the appellants.

H. Symons and *D. W. Saunders*, for the respondents.

CH D.] [16TH APRIL, 1894.

HEADFORD v. McCLARY MANUFACTURING CO.

Master and servant—Workmen's Compensation for Injuries Act, R. S. O. c. 141—Way—Defect—Hoist.

An unguarded hoist on one side of a well lighted passage twelve feet wide is not a defect in a way within the meaning of the Workmen's Compensation for Injuries Act, R. S. O. c. 141.

Judgment of the Chancery Division, 23 O. R. 335, affirmed on other grounds.

Gibbons, Q.C., for the appellant.

W. Nesbitt and *Monro Grier*, for the respondents.

[8TH MAY, 1894.

DEROCHIE v. TOWN OF CORNWALL.

Municipal corporation—Highway—Repair—Sidewalk—Ice—Negligence.

Allowing for a fortnight water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street is non-repair for which the municipality is liable.

Judgment of the Chancery Division, 23 O. R. 355, affirmed; BURTON, J.A., dissenting.

W. Cassels, Q.C., and *Leitch*, Q.C., for the appellants.

Moss, Q.C., for the respondent.

C.P.D.] [16TH APRIL, 1894.

ROBERTSON v. GRAND TRUNK RAILWAY CO.

Railways—Conditions—Negligence—Shipping contract—Horse—51 V. c. 29, s. 246 (D.)—Damages—New trial.

The plaintiff delivered to the defendants a race horse for transport over part of their line of railway, nothing being said as to its value, and at the time signed a shipping contract which stated that the horse was received for transport at a special named rate, and that, in consideration of this special rate, the defendants should not be liable for any loss unless caused by collision, and then only to the extent of $100. The horse was killed in a collision caused by the defendants' negligence, and the jury found that its value was $5,000.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that the special limitation having been entered into in good faith on the declared value of $100, and not for the purpose of evading liability, was valid and not in contravention of 51 V. c. 29, s. 246 (D.).

Per BOYD, C., that under that section the limitation of liability for damages resulting from negligence was invalid, but that a new trial should be ordered because of the allowance of excessive damages.

Per MACLENNAN, J.A., that a limitation of liability against damages caused by negligence would be valid as being in effect a pre-ascertainment of the amount of damages, but that the particular shipping contract in question, having regard to the freight classification made under s. 226 of the Act, did not effect such a limitation, and that a new trial should be ordered because of the allowance of excessive damages.

Vogel v. *Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162; 11 S. C. R. 612, considered.

In the result the judgment of the Common Pleas Division, 24 O. R. 75, was affirmed.

H. H. Collier, for the appellant.

Osler, Q.C., for the respondents.

BOYD, C.] [2ND APRIL, 1894.

BRETHOUR v. BROOKE.

Mortgage—Power of sale—Lease—Possession—Timber—R. S. O. c. 107, clauses 7, 17.

This was appeal by the plaintiff from the judgment of BOYD, C., reported 23 O. R. 658, and was argued on the 2nd April, 1894.

Lynch-Staunton and *S. Livingston*, for the appellant.

W. Cassels, Q.C. and *C. E. Oles*, for the respondents.

At the conclusion of the argument the appeal was dismissed with costs, the Court agreeing with the judgment of the learned Chancellor.

[16TH APRIL, 1894.

COVENTRY v. McLEAN.

Landlord and tenant—Lease—Forfeiture—Option to purchase.

The Court will not make a declaration relieving against forfeiture of a lease for non-payment of rent as of the date of a previous tender, when the trial of the action for that relief takes place after the lease would have expired by effluxion of time, even though the lease gives an option of purchase to be exercised during the term, and the lessee has attempted to exercise that option after the forfeiture and at the time the tender was made.

Judgment of BOYD, C., affirmed.

W. Nesbitt and *Monro Grier*, for the appellant.

W. Cassels, Q.C., for the respondent.

GALT, C.J.] [8TH MAY, 1894.

SUTHERLAND v. WEBSTER.

Covenant—Assignment—Damages—Partnership.

A covenant by an incoming partner to indemnify and save harmless a retiring partner against the liabilities, contracts, and agreements of the firm, cannot, after breach of an agreement

to sell goods but before action or ascertainment of the damages, be assigned to the damnified purchaser so as to enable him to recovered the damages by direct action against the covenantor.

Judgment of GALT, C.J., affirmed.

Moss, Q.C., for the appellants.

W. M. Douglas, for the respondent.

ARMOUR, C.J.]

BANK OF HAMILTON v. SHEPHERD.

BAILEY v. BANK OF HAMILTON.

Banks and banking—Security – Contemporaneous advance—Bills of exchange and promissory notes—Renewal—Substitution of securities—Assignments and preferences—Confession of judgment—Cognovit actionem—53 V. c. 31, ss. 74, 75 (D.)—R. S. O. c. 51, s. 113—R. S. O. c. 124, s. 1.

A renewal of a note is not a negotiation of it within the meaning of s. 75 of the Bank Act, 53 V. c. 31 (D.), so as to support a security taken at the time of the renewal in substitution for a previously existing security.

A withdrawal of defence under s. 113 of the Division Courts Act, R. S. O. c. 51, is not a confession of judgment or *cognovit actionem* within the meaning of s. 1 of the Assignments and Preferences Act, R. S. O. c. 124.

Judgment of ARMOUR, C.J., affirmed.

W. Nesbitt and *Monro Grier*, for the appellants.

E. Myers and *J. N. Fish*, for the respondents.

FERGUSON, J.]

In re STAEBLER, STAEBLER v. ZIMMERMAN.

Will—Legacies—Charity—Marshalling—Abatement—Executors and administrators—Evidence—Corroboration—R. S. O. c. 61, s. 10.

Though there can be marshalling in favour of charities, yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty, and personalty,

the charitable legacies do not fail *in toto*, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty.

The evidence of executors that promissory notes belonging to the testator had, when they came into their hands, indorsements upon them showing that payments had been made to the testator, does not require corroboration under s. 10 of R. S. O. c. 61.

Judgment of FERGUSON, J., reversed.

Robinson, Q.C., and *Monro Grier*, for the appellants.

J. P. Mabee and *R. T. Harding*, for the respondents.

ROSE, J.]

In re McCOLL v. CITY OF TORONTO.

Municipal corporations—Arbitration and award—Withdrawal—49 V. c. 66 (O.).

Sub-section 6 of s. 1 of 49 V. c. 66 (O.), the Don Improvement Act, makes applicable to an arbitration under that Act all the provisions of the Municipal Act as to arbitrations, including the provision enabling the council to withdraw from the arbitration, and not merely the provisions for determining the amount of compensation.

Judgment of ROSE, J., reversed.

W. R. Meredith, Q.C., for the appellants.

Lash, Q.C., for the respondent.

STREET, J.] [16TH APRIL, 1894.

NASON v. ARMSTONG.

McCLELLAND v. ARMSTRONG.

WRIGHT v. ARMSTRONG.

Vendor and purchaser—Sale of land—Conditions of sale—Title—Objection—Time—Will—Defeasible estate.

An agreement for the sale of land contained the condition that "the vendee is to examine the title at his own expense and

to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time."

Held, per HAGARTY, C.J.O., and OSLER, J.A., that this condition did not, even in the absence of objection within the time limited, compel the vendee to accept a defective title.

Per BURTON and MACLENNAN, JJ.A., that the condition was sufficiently wide to bind the vendee, in the absence of objection within the limited time, to accept such title as the vendor might be able to give.

A devise to two persons of separate lots of land, with a proviso that if either devisee should die without lawful issue, the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue, the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple.

Judgment of STREET, J., 22 O. R. 542, affirmed.

Moss, Q.C., and *J. A. Macdonald*, for the appellant.

Armour, Q.C., *Marsh*, Q.C., *G. G. S. Lindsey*, and *J. J. Smith*, for the respondents.

Co. J., WELLINGTON.] [17TH APRIL, 1894.

REGINA v. MARTIN.

Intoxicating liquors—Powers of license commissioners—License regulations—Liquor License Act, R. S. O. c. 194.

A regulation by license commissioners requiring the lower half of bar-room windows to be left uncovered during prohibited hours is valid and reasonable.

Regina v. *Belmont*, 35 U. C. R. 298, questioned.

Judgment of the County Judge of Wellington reversed.

J. R. Cartwright, Q.C., for the appellant.

James Haverson, for the respondent.

IN CHAMBERS.

[OSLER, J.A., 8TH MAY, 1894.

PICKERING v. TORONTO RAILWAY CO.

Appeal to Court of Appeal—Dismissal—Cross-appeal—Right to retain—Rule 821.

A proceeding under Rule 821 by way of cross-appeal, taken by the respondent to an appeal to the Court of Appeal, is a mere branch or off-shoot of the main appeal; and if the respondent chooses to dismiss the main appeal for want of prosecution, he cannot retain such cross-appeal for any purpose.

The difference in the English practice pointed out.

The Beeswing, 10 P. D. 18, distinguished.

Semble, if a party does not wish his own objection to a judgment to be subject to the prosecution of his opponent's appeal, his only course is to launch an independent appeal by giving notice and security. Under ordinary circumstances the two appeals would be consolidated.

E. F. Blake, for the plaintiff.

James Bicknell, for the defendants.

[MACLENNAN, J.A., 24TH APRIL, 1894.

PAUL v. RUTLIDGE.

County Court appeal—Delay in setting down—Stay of proceedings—Dismissal—R. S. O. c. 47, s. 46—Rule 836.

The fact that the appellant in a County Court appeal has obtained from the Judge of the Court appealed from, under R. S. O. c. 47, s. 46, a stay of proceedings to enable him to give security, does not absolve him from the necessity of complying with Rule 836 by setting the appeal down for hearing at the first sittings of the Court which commences after the expiration of thirty days from the decision complained of, although such sittings commence before the expiration of the stay.

And where judgment in a County Court was entered on the 17th January, notice of appeal served on the 30th January, a stay of proceedings for thirty days granted on the 12th February, and security given on the 12th March, but the appeal not set down for the March sittings of the Court of Appeal, an order was made dismissing it with costs, no sufficient excuse being given for the delay.

E. G. Graham, for the appellant.

Langton, Q.C., for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ROSE, J., 16TH MAY, 1891.

BELL v. TOWNSHIP OF BROOKE.

Drainage—Municipal corporations—Drain on line between townships—Maintenance and repair—R. S. O. c. 184, s. 586—Liability for damage by overflow.

Action for damages for bringing water upon the plaintiff's land by means of a drain constructed by the defendants. The work was commenced in 1874 and completed in the autumn of 1875. The drain was constructed for the purpose of relieving lands in the township of Brooke, and was dug along the concession line between the 12th and 13th concessions until it reached the town line between Brooke and Enniskillen, where it was turned at right angles, in a southerly direction, along and upon the town line until it found an outlet. So much of it as was on the town line was not in either township, but, in the opinion of the engineer, it benefitted lands in Enniskillen, and contribution was exacted from the residents of that township whose lands were benefitted. No authority was given to the township to dig the drain on the town line or to bring water thereon.

Held, that the duty of maintenance and repair of the portion of the drain on the town line could not be charged upon the

township of Enniskillen; but that s. 586 of the Municipal Act, R. S. O. c. 184, should be so read as to provide for maintenance and repair by the township of Brooke.

Held, upon the evidence, that by reason of the drain more water was brought upon the town line at certain seasons than was carried away, and some of it came upon the plaintiff's premises.

Held, therefore, that the defendants were liable, first, for bringing water upon the plaintiff's premises which would not have come there in ordinary course; secondly, for neglect of duty in not keeping the town line drain in repair, that is, for not deepening, extending, or widening it sufficiently to carry off the water which was brought down to the town line; and thirdly, for bringing water to the town line without authority and not providing a sufficient drain to carry it away; and whether or not the drain when originally constructed was fit for the performance of its work, was not material.

W. R. Meredith, Q.C., and *Moncrieff*, Q.C., for the plaintiff.

Osler, Q.C., and *Lister*, Q.C., for the defendants.

CHANCERY DIVISION.

[THE JUSTICES IN BANC, 15TH FEBRUARY, 1894.

REGINA v. CONNOLLY AND McGREEVY.

Criminal law—Conspiracy—Evidence—Agreement—Overt acts—Acts of co-conspirators—Acts before date alleged in indictment—Engineer's report—Entries in books—Secondary evidence—Examination in civil action—Present to official—Fictitious tenders—Deceit—"Unlawful"—Procedure at trial—Right to reply.

L., C., & Co., a firm of contractors in Quebec, tendered to Harbour Commissioners for certain work, sending in three tenders, one in their own name and two in the names of others with a common mistake as to price in all three. The work had to be done with the approval of the Government. The defendant McG., whose brother had been admitted to the firm as a

partner without the payment of any capital, was both a Member of Parliament and of the Harbour Commission. The three tenders with others were received and opened by the Commissioners, McG. being present, and were then forwarded to the Government at the city of O., in Ontario. McG. went to O., and succeeded in obtaining from the Government engineer the particulars of the calculations and results of all the tenders sent in, of which he advised his brother by letters. When the mistake in the price was notified by the Government engineer to the three tenderers, one was withdrawn, one was varied so as to make it higher than the others, and the firm's was allowed to remain as it was with the manifest error, and so became the lowest tender and was accepted. One Government engineer was given a situation and another received a valuable present.

As soon as the contract was signed, promissory notes to an amount of many thousand dollars were signed by the firm and given to McG., and he also received money from his brother, whose only means of paying were his profits as a partner.

Upon a Crown case reserved after conviction of the defendants upon an indictment for conspiracy:—

Held, that there is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individual implicated are admissible; and, following *Mulcahy* v. *The Queen*, Ir. R. 1 C. L. at p. 86, that the letters written by McG. at O. were overt acts in furtherance of the common design, and admissible in evidence against all privy to the conspiracy; and as the defendant C. was, by his own admission, privy to the large payment after it was made, it was a matter for the jury to say whether he was not throughout a participator in the proceedings.

2. That the transactions, conversations, and written communications between R., McG., (the partner) and his brother, and the other members of the firm, were receivable in evidence, in the circumstances of this case. If at first not available against both defendants, they became so when the proof had so far advanced and cumulated as to indicate the existence of a common design.

3. That evidence concerning contracts previous to the date mentioned in the indictment was properly received as introductory to the transaction in question.

4. That letters written by a member of the firm in the name of an employee and purporting to be signed by him were also properly in evidence.

5. That the report of an engineer was also properly in evidence, as the object of all that was done was to obtain a report in favour of the firm.

6. That entries in the books of the firm were evidence against the defendant C., (partner in the firm) and that statements prepared therefrom by an accountant were good secondary evidence in the absence of the books, withheld by the defendants.

Quære, how far they were evidence against the defendant McG., who was not a member of the firm.

7. That the examination of the defendant C. in a civil action could be used against him on this trial.

8. That the evidence of an expert in calculating results on *data* supplied and proper for an engineer to work upon, was admissible.

9. That evidence of a present being made to an engineer in charge of the work, with the knowledge of one of the defendants, was proper to be considered by the jury as casting light on the relations between the firm and that officer.

10. That the use of fictitious tenders was a *deceit*, and if done to evade the results of fair competition for the contract, it was "unlawful."

11. That, although evidence was called by only one of the defendants, it might have enured to the benefit of both; so the right of a general reply was with the counsel for the Crown.

Osler, Q.C., *J. K. Kerr*, Q.C., and *Hogg*, Q.C., for the Crown.

S. H. Blake, Q.C., and *Lash*, Q.C., for the defendant Connolly.

Aylesworth, Q.C., for the defendant McGreevy.

[FERGUSON, J., 26TH APRIL, 1894.

MILLSON v. SMALE.

Infant—Action brought in name of, without next friend—Motion to set aside proceedings after coming of age—Laches.

An infant was a part owner of a patent right and engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solicitors to take proceedings to stop the infringment of the patent, and the solicitors, not knowing that he was an infant, brought an action for that purpose, using his name as a plaintiff, without a next friend. The action was prosecuted for a time with the result that the infringment ceased, but it was subsequently dismissed with costs against the plaintiffs for want of prosecution. More than a year after he became of age, he moved to set aside all proceedings in the action.

Held, that under the circumstances mentioned, he was not entitled to relief on the ground of infancy.

Rowell, for the plaintiff Frank Wright.

Hoyles, Q.C., for Daniel McAlpine.

Tremeear, for the solicitors.

[27TH APRIL, 1894.

In re BAIN AND LESLIE.

Will—Devise—Falsa demonstratio—Deed of release—Recital—Estoppel—Title to land—Statute of Limitations.

A testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the 10th concession of B." In the early part of the will he had used the words "wishing to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the 10th concession of B. was a part of lot 29. The will contained no residuary devise.

Upon a petition under the Vendor and Purchaser Act :—

Held, that the part of lot 29 owned by the testator did not pass by the will to the son.

After the death of the testator all his children executed a deed of release to the executors of his will, containing a recital that the part of lot 29 owned by the testator was devised to the son G. and that he was then in possession.

Held, that there was no estoppel as among the members of the family who together constituted one party to the deed.

Held, however, upon the evidence, that G. had acquired a good title to the lands in question by virtue of the Statute of Limitations.

Begue, for the vendor.

G. W. Field, for the purchaser.

[28TH APRIL, 1894.

GREENE v. CASTLEMAN.

Chattel mortgage—Affidavit of bona fides—Incorporated company—Officer of—Agent—Authority—R. S. O. c. 125, s. 1.

Where a chattel mortgage was made in favour of an incorporated trading company, and the affidavit of *bona fides* was made by the secretary-treasurer, who was also a shareholder in the company and had an important share in the management of its affairs, there being, however, a president and vice-president:—

Held, that the affiant was to be regarded not as one of the mortgagees, but as an agent, and, as no written authority to him was registered, as required by R. S. O. c. 125, s. 1, the mortgage was invalid as against creditors.

Bank of Toronto v. *McDougall*, 15 C. P. 475, distinguished.

Freehold Loan Co. v. *Bank of Commerce*, 44 U. C. R. 284, followed.

George Kerr, for the plaintiffs.

W. H. P. Clement, for the defendant Castleman.

[Rose, J., 14th March, 1894.

COOK v. SHAW.

Restraint of trade—Covenant—Partial restraint—Limited time—Reasonableness—Public policy—Good faith—Injunction.

On a purchase of a manufacturing business by the plaintiff from the defendants, the latter covenanted that they would not "engage, directly or indirectly, in the manufacture or sale of said bamboo ware and fancy furniture, either as principal, agent, or employee, at any place in the Dominion of Canada for the term of ten years from the date hereof. This clause does not prevent them" (the defendants) "from engaging in the retail business of furniture and bamboo ware selling. It covers wholesale or jobbing business."

Held, that, as the restraint of trade was partial only, being confined to manufacturing certain articles and to selling them by wholesale or by jobbing, and for a limited time, and as there was no evidence on which it could be held to be unreasonable, and the interests of the public were not interfered with, the agreement was not contrary to public policy; and, as good faith required that the defendants should be held to their bargain, an injunction should be granted restraining them from violating its terms.

J. A. Hutcheson and *A. A. Fisher*, for the plaintiff.

W. J. Code, for the defendants.

COMMON PLEAS DIVISION.

[The Divisional Court, 5th February, 1894.

GRINSTED v. TORONTO RAILWAY COMPANY.

Street railways—Persons entitled to be transferred—Illegal removal from car—Illness consequent on exposure to cold—Damages therefor—Remoteness—Evidence of operating railway.

A passenger on a street railway, having the right to be transferred from a car on one street line to that on another street line on the railway, was refused such right by the conductor of the car to which he had the right to be transferred, and was forced to leave it.

Held, that he was entitled to recover damages occasioned by an illness caused by the exposure to the cold in leaving the car, such damages not being too remote.

The defendants, an incorporated company, were the successors of certain persons who had purchased the road, and, although no conveyance of the road to the defendants was proved, it was shown that the persons working the railway at the time of the occurrence were in the defendants' employment, and that the car in question was in charge of their employees.

Held, sufficient evidence that the defendants were operating the road to render them liable to the plaintiff.

W. J. McWhinney, for the plaintiff.

Laidlaw, Q.C., for the defendants.

[MacMahon, J., 9th May, 1894.

MACKEY v. BIEREL.

Pleading—Demurrer—What constitutes—Striking out—Irregularity—Rules 388, 389.

To an action for wrongfully taking out of the possession of the plaintiff goods seized by him as a bailiff under process against the goods of an absconding debtor, the defendants set up a number of defences of fact, and also alleged that the statement of claim disclosed no cause of action, since it contained no allegation that the goods seized by the plaintiff were the property of the absconding debtor, and stated that the defendants set up the same rights as if they had demurred.

Held, that this was a demurrer, and, as it was pleaded along with defences, without an affidavit under Rule 388 or an order under Rule 389, it should be struck out as irregular.

Vandusen v. *Malcolm*, 4 C. L. T. 211, and *Snider* v. *Snider*, 11 P. R. 140, referred to.

The proper procedure for the plaintiff was to move to strike out the pleading, not to set it down as a demurrer.

L. F. Heyd, for the plaintiff.

Higgins, for the defendants.

NEW BRUNSWICK

In the Supreme Court.

[18TH APRIL, 1894.

Ex parte WEYMAN.

Canada Temperance Act—Dismissal of inspector appointed under 49 V. c. 57 (N.B.)—Municipal corporations—"Cause" for dismissal.

This was an application for a *certiorari* to quash a resolution of the King's county council dismissing the applicant from the position of an inspector under the Canada Temperance Act for the county, appointed under the authority of 49 V. c. 57, (N.B.) At the regular meeting of the municipal council in January, 1894, a resolution for the dismissal of the applicant was moved at five o'clock in the afternoon, alleging certain charges against him, and, although a motion was made to postpone the discussion and decision of the resolution until the next morning, a narrow majority pushed the resolution through dismissing him from office. The applicant was present when these proceedings took place, but was not given any opportunity to answer the charges. The Act under which he was appointed defines the duties of an inspector, and also provides "that no inspector under this Act be dismissed except for cause."

Held, that the affidavits failed to disclose any sufficient cause, except the allegations contained in the resolution dismissing the inspector, and of these no proof had been offered; that there was no evidence whatever of any wrong doing on the part of the inspector; and that the dismissal was rather an arbitrary act without cause, simply for the purpose of turning the inspector out of office, without giving him an opportunity of being heard.

Rule absolute.

E. McLeod, Q.C., for the applicant.

G. W. Fowler, for the municipality.

Ex parte WEYMAN (No. 2.)

Canada Temperance Act—Inspector—Salary—49 V. c. 57, (N.B.)—Mandamus.

This was an application for a *mandamus* to compel the King's county municipal council to fix the salary of the applicant as inspector for the county under the Canada Temperance Act. He was appointed under the authority of 49 V. c. 57, (N.B.) s. 6 of which provides that "Each of the said inspectors shall be paid out of the funds of the city, town, or municipality for which he is appointed, a salary not exceeding $500 per annum to be paid in equal monthly instalments; and such city, town, or municipality is hereby authorized to make an assessment for the payment of such salary and expenses connected therewith." It was urged that the municipality should be compelled to fix a reasonable salary for the applicant as such inspector. It appeared that at the regular meeting in January, 1893, the municipal council had fixed his salary at $5 per annum, and that he had performed the duties of the office for that year at that salary.

Held, that it was not now open to the applicant to complain of the salary, and the application must be dismissed.

E. McLeod, Q.C., for the applicant.

G. W. Fowler, for the municipality.

Ex parte McMANUS.

Arrest—Warrant—Constable's assistant—Habeas corpus.

This was an application for a *habeas corpus* to discharge the applicant, who was in custody under a warrant of committal issued upon a conviction for a violation of the Canada Temperance Act, referred to the Court by PALMER, J. The facts relied upon were that the constable who had the warrant for the arrest of the applicant went to the latter's place for that purpose, and took with him W. as his assistant. W. was also inspector under the Act at the time. While the constable was looking for the

applicant at one place, W., being informed that the applicant was in a house about a hundred feet distant, went towards it and meeting the applicant coming out of the door, took him in charge, and led him to the constable and delivered him up. It was urged that this was an improper arrest, inasmuch as W. had no right to make it in the absence of the constable.

Held, that the arrest was good and that the motion must be dismissed.

R. LeB. Tweedie, for the applicant.

F. A. McCully, contra.

MACPHERSON v. CITY OF ST. JOHN.

Negligence—Municipal corporations—Misdirection—"No culpable negligence"—New trial.

This was a motion by the plaintiff for a new trial. The action was for negligence. A hose cart of the defendants, in charge of its driver, who was an employee of the defendants, was being driven out of the engine-house to attend a fire. While crossing the gutter in front of the engine-house, one of the axles of the cart broke down and the wheel ran against the plaintiff, who was coming along the sidewalk, and caused a compound fracture of his leg. This axle of the cart had recently been repaired, and it was alleged the work of repair had been carelessly done. At the close of the plaintiff's case the trial Judge refused a non-suit. During his charge to the jury the Judge told them that "there had been no culpable negligence or carelessness on the part of the defendants," saying that he used the word "culpable" advisedly.

Held, TUCK, J., dissenting, that by telling the jury that there had been "no culpable negligence or carelessness on the part of the defendants," the Judge practically directed a verdict for the defendants; and that there should be a new trial.

A. A. Stockton, Q.C., for the plaintiff.

I. Allen Jack, Q.C., for the defendants.

Ex parte DOHERTY.

Certiorari—Summary conviction—Depositions of witnesses—Criminal Code, 1892, s. 590—Directory.

This was an application for a *certiorari* to remove a summary conviction, on the grounds: (1) that the witnesses had not signed the depositions taken by the presiding magistrate at the hearing; and (2) that it did not appear that these depositions had been read over to the witnesses by the magistrate in the presence of the accused, as required by s. 590 of the Criminal Code, 1892.

Held, that this was directory and merely a matter of procedure, and did not affect the jurisdiction of the justice, and therefore *certiorari* would not lie.

Ex parte Danahar, 27 N. B. Reps. 554, followed.

A. I. Trueman, for the applicant.

RUSSELL v. AITON.

Replevin—C. S. N. B. c. 37, s. 203—Claim of absolute and special property in goods seized.

C. S. N. B. c. 37, s. 203, enacts that "If the defendant, or any person claiming the property, do within forty-eight hours after seizure and service of such writ, give notice to the officer executing the same that he claims (Form No. 4 in Schedule D.) property in the goods so seized, he shall not deliver the property to the plaintiff," etc.

The defendant put in a claim as follows:—"I claim an absolute and special property in the goods seized," etc. It was objected that the defendant could not claim both an absolute and a special property in the goods seized, but that at the time of filing his claim he must elect the one or the other.

Held, that the claim was good; that, irrespective of whether the defendant claimed an absolute or a special property in the goods, the sheriff's jury could find who had the immediate right to the possession of the property, and that this finding did not in

any way interfere with or prejudice the rights of the parties to the suit, who might proceed to try out their rights no matter what the decision of the sheriff's jury might be.

George F. Gregory, Q.C., for the plaintiff.

W. Pugsley, Q.C., for the defendant.

CLARK v. PHOENIX FIRE INSURANCE COMPANY.

Fire insurance—Proofs of loss—Certificate of nearest justice of the peace—Interest of justice—Waiver.

One G. made an assignment to C. and S. in trust for the benefit of his creditors. The trustees insured the stock-in-trade and took out a policy from the defendants in their own names. They afterwards sold the stock to F. and transferred the policy to him, to which transfer the defendants consented by indorsement on the policy. After this sale and transfer of the policy a fire occurred, and a claim was made against the defendants thereunder. One requirement of the policy was that the proofs of loss should have attached to them a certificate from a justice of the peace not interested, and residing most contiguous to the place of the fire. C., one of the plaintiffs, happened to be the nearest justice. He gave the required certificate, and the proofs were sent in and nothing heard from the defendants until after the time for payment had expired, when it was learned that they disputed payment. The assigned policy being a chose in action, it became necessary to sue in the names of the original holders, one of whom was the justice who had given the certificate. At the trial a motion for a non-suit was granted on the ground that C., one of the plaintiffs, was the justice who had granted the certificate. This was now moved against, and it was urged before the Court that the defendants having received the proofs of loss and not having made any objection thereto, it was not open to them now to object on the ground of insufficiency.

Held, that receiving the proofs of loss and making no objection thereto did not amount to a waiver, and that C., being one of the plaintiffs on the record, might be held for costs in the

action, and was therefore an interested party and his certificate was bad.

J. A. Vanwart, Q.C., for the plaintiffs.

E. McLeod, Q.C., and *C. J. Coster*, for the defendants.

PICTOU BANK v. TRUEMAN.

Evidence—Commission to examine witnesses—Authority of Court to grant for purposes other than for trial.

The defendants had made an application and obtained a rule *nisi* to set aside the writ of summons and subsequent proceedings, and when the rule came up for argument it was made to appear that H., who resided in Nova Scotia, could testify to important facts on behalf of the defendants, and that he had refused to make an affidavit of these facts. The defendants then applied for a commission to examine H. under oath without the province. It was objected that the Court had no power to order a commission except for the purposes of trial.

Held, that independently of C. S. N. B. c. 37, the Court had such authority, and that, even if that authority depended upon statute, the words were sufficient to authorize a commission in other cases than for trial.

George F. Gregory, Q.C., for the plaintiffs.

W. Pugsley, Q.C., for the defendants.

ATTORNEY-GENERAL FOR NEW BRUNSWICK v. SEARS.

Succession Duty Act, 1892—Estates exceeding $50,000 in value—Exemption—Regulation of Lieutenant-Governor in Council—Ultra vires.

This was a special case submitted for the opinion of the Court.

The several defendants respectively represented estates consisting of both real and personal property, which were valued respectively at over $50,000, and the several testators and intestates represented by the defendants severally died before the 6th July, 1893.

In addition to the Act, 55 V. c. 66 (N.B.) intituled "An Act to provide for the payment of Succession Duties in certain cases," and on or after the 6th July, 1893, a regulation approved by the Lieutenant-Governor in Council was passed, purporting to have been made under the authority of s. 23 of the Act, in the following terms:—"It is hereby ordered, under and by virtue of the power and authority vested in the Lieutenant-Governor in Council under the provisions of c. 6 of 55 V., as follows: The rate of duty upon all estates which, under the above Act, are subject to a succession duty shall be $1.25 upon every $100 value thereof up to $50,000."

It was contended on behalf of the defendants that the above estates were not subject to succession duty upon the first $50,000, upon the grounds: (1) that the Order in Council was *ultra vires* the Lieutenant-Governor in Council; and (2) that the several testators and intestates aforesaid died before the Order in Council was passed.

The questions to be determined by the Court were:—

Are the above estates, which in value exceed $50,000 each, subject to succession duty upon the first $50,000 thereof, and is the above regulation authorized by the Act, 55 V. c. 6, and had the Lieutenant-Governor in Council power under the Act to pass the same so as to apply to the said several estates?

Held, that the first $50,000 of each of the above estates was exempt from taxation, and that the Lieutenant-Governor in Council had no authority under the Act to make the above regulation, which was clearly *ultra vires*.

Blair, A.-G., for the Province.

A. O. Earle, Q.C., contra.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 9TH MAY, 1894.

McKAY v. GRANT.

Interpleader—Claim by mortgagee for rent under attornment clause in mortgage—Actual tenancy—Burden of proof—Parties to interpleader issue—Who should be plaintiff.

Appeals by the two claimants from the decision of BAIN, J., *ante* p. 22.

The appeal of John Grant was allowed, and the order barring him varied by directing an issue.

Held, that there was material which showed that the case should have been submitted to a jury.

Claimant to be plaintiff. Execution creditor to pay costs of application to full Court and sheriff's costs of interpleader application. Costs of interpleader, possession money, and costs of issue, as between John Grant and execution creditor, reserved to be disposed of in Chambers.

The appeal of John R. Grant dismissed with costs. The claimant must prove his ownership of the land.

[KILLAM, J., 7TH MAY, 1894.

SCHULTZ v. ALLOWAY.

Assessment and taxes—Tax sale—Bill to set aside—Demurrer—R. S. M. c. 101, s. 186—Lien for purchase money—Arrears of taxes—Evidence of, by issue of tax deed—Remedy at law—Description of land—Boundaries—Misdescription in assessment—Effect of—Injunction.

Bill filed for a declaration that a sale of certain lands made to the defendant Alloway by the officials of the defendants the

corporation of the city of Winnipeg, for alleged arrears of taxes, was invalid and void, and for an injunction to restrain the completion of the sale and the issue of a conveyance pursuant thereto.

The bill alleged that the assessments were bad and ineffective to charge the plaintiff's land because there was not any proper description of the land intended to be assessed, and because the description included land not belonging to the plaintiff, together with the plaintiff's lands, and that lands of the plaintiff on which no taxes were due were sold. The defendants demurred *ore tenus* on the following amongst other grounds:—

(1) The bill should have shown, under the provisions of the Assessment Act, R. S. M. c. 101, s. 186, the amount paid by the purchaser at the sale and subsequently for arrears of taxes, which is a lien on the land, and payable by the owner to the tax purchaser, and have offered to repay the same.

Held, that the section cited could not have been intended to have the effect of creating a lien upon land for purchase money where there was previously no lien for taxes; and, therefore, if there were really no arrears of taxes upon the land sold, the enactment did not apply to the purchase price, though it might give a lien for taxes paid after the purchase, on the lands purchased. Such a statute should be construed strictly.

(2) If there were no taxes in arrears, the sale was a wholly void proceeding, and no bill would lie to have it declared so.

Held, that if it were not for the effect given by the statutes to the conveyances upon sales for municipal taxes, the second objection would be fatal to the bill. If the method of assessment were embarrassing or unjust to the owner for the time being, there was a remedy by appealing from the assessor. If the assessments were wholly void, as not following the statutes, or for want of sufficient descriptions to identify the lands assessed, the sale and conveyance would be inoperative, and, in such a case under the earlier statutes, the Court would not have interfered to restrain the issue of the conveyance. It refused to do so in *Archibald* v. *Youville*, 7 Man. L. R. 473; 11 Occ. N. 115. But by s. 190 of the Assessment Act, R. S. M. c. 100, amended by 55 V. c. 26, s. 6, the deed, when issued, would be *prima facie* evidence that there were taxes in arrear upon the land

described in the deed, at the time of sale, for which the same could be sold. Under such circumstances, taking the case put by the bill, a court of equity should interpose to prevent the municipality from placing in the hands of a purchaser such a weapon as the conveyance would constitute under the statutes.

(3) The plaintiff had a sufficient remedy at law, or did not sufficiently negative the existence of such.

The defendant contended that the plaintiff should have applied to the city council, bringing to its attention the alleged error committed by its officers, thus enabling the council to determine whether it would redeem the lands.

Held, that on this point there might have been some difficulty, but for the course taken by the defendants. It was clear the city desired to uphold the sale, and it would seem absurd in such a case to dismiss the bill for want of such an application to the council.

As to the suggestion that the plaintiff should redeem, and then sue the city to recover back her money, that could not be regarded as such an adequate remedy as would negative the right to an injunction.

Considerable evidence was given on the disputed points as to the positions of the northern and southern boundaries of the land.

The description of the land in the advertisement of sale was different from that in the notice of assessment. There was an error on the eastern side, which was, at most, only three feet.

The bill did not show that the owners of the land during the various years had not notice of the assessments and opportunity to object to them, or whether they appealed from the assessments.

Held, that if the owners chose to allow them thus to go on from year to year, whatever might be the effect at law, it did not appear that a court of equity should interpose to prevent a sale on conveyance of the property by the description contained in the rolls.

The onus was upon the plaintiff to show that she would be unlawfully injured by the completion of the sale and the issue of the conveyance. It was not sufficient for her to show that the civic officials had assumed to sell by a description different from their assessments and leave it for the defendants to show that the land was the same: *McRae* v. *Corbett*, 6 Man. L. R. 426.

A description in an assessment and on a sale for arrears of taxes should be construed on the same principles as a conveyance by the owner. If ambiguous, it must be taken to convey only the land clearly within the description. If the owner had conveyed by the description in the assessment rolls, the conveyance would have been effectual to transfer all of the plaintiff's land except a little on the eastern side.

The plaintiff had no absolute right to an injunction. The purchaser should not be prevented from obtaining a conveyance and asserting it for what it may be worth.

Bill dismissed with costs.

Ewart, Q.C., and *Phippen*, for the plaintiff.

Howell, Q.C., for defendant Alloway.

I. Campbell, Q.C., for the city of Winnipeg.

Aikins, Q.C., for the mortgagees.

Supreme Court of Canada.

NOVA SCOTIA.] [20TH FEBRUARY, 1894.

NIXON v. QUEEN INSURANCE CO.

Fire insurance—Condition of policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire, and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of, and found the loss to be between $3,000 and $4,000.

An action on the policy was defended on the ground of non-compliance with this condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc, (as in the condition) were not answered. The

trial Judge gave judgment in favour of N., which the Court *en banc* reversed and ordered judgment to be entered for the company.

Held, affirming the decision of the Court *en banc*, that, as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerable correct list of the goods lost, the condition was not complied with.

Held, further, that, as under the evidence the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company.

Borden, Q.C., for the appellant.

Harrington, Q.C., and *Mellish*, for the respondents.

SALTERIO v. CITY OF LONDON FIRE INSURANCE CO.

Fire insurance—Condition against assigning policy—Breach of condition.

A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with, or in any way incumbered, the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S., the insured under the policy, assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on the property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S. without such consent made it void and he could not recover the amount insured in case of loss.

Harrington, Q.C., for the appellant.

Newcombe, Q.C., for the respondents.

FRASER v. FAIRBANKS.

Sale of land—Sale subject to mortgage—Indemnity of vendor—Special agreement—Purchaser trustee for third party.

L. F. agreed in writing to sell land to C. F. and others, subject to mortgages thereon; C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L. F. become a member, receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as a third party to indemnify L. F., his vendor, against a judgment in that action.

Held, reversing the decision of the Supreme Court of Nova Scotia, TASCHEREAU and KING, JJ., dissenting, that from the evidence it appeared that the original agreement contemplated the sale being to the company and not to C. F., and the latter was not liable to indemnify the vendor.

Borden, Q.C., for the appellant.

Harris, Q.C., for the respondent.

PARKE v. CAHOON.

Title to land—Disseisin—Adverse possession—Paper title—Joint possession—Statute of Limitations.

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's county, N.S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a

son of C., then about twenty-four years old, who had resided with C. from the time he took possession. Both deeds were registered in Queen's. The son shortly afterwards married and went to live on the Queen's portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's county. P. worked on the Lunenburg land with C. for a few years, when a dispute arose and he left. C. afterwards, and by an intermediate deed, conveyed the land in Lunenburg to his wife.

On one occasion P. sent a cow upon the land in Lunenburg, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry, the title to the land was not traced back beyond the deed executed in 1856.

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title, his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him; that neither he nor his successors in title ever had actual possession of the land in Lunenburg; and that the possession of C. was never interfered with by the deeds executed, and having continued for more than twenty years, he had a title to the land in Lunenburg by prescription.

McInnes, for the appellant.

Borden, Q.C., for the respondent.

MORSE v. PHINNEY.

Chattel mortgage—Affidavit of bona fides—Compliance with statutory form—R. S. N. S., 5th ser., c. 92, s. 4.

By R. S. N. S., 5th ser., c. 92., s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides* "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn

to at in the county of , this day of A.D. . Before me a commissioner," etc.

Held, reversing the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day July, 1891," etc., without naming the county, it avoided the mortgage, notwithstanding the affidavit was headed "in the county of Annapolis," and that the defect was not cured by c. 1, s. 11, of the same series, providing that where forms are prescribed, slight deviations from the forms, not affecting the substance nor calculated to mislead, shall not vitiate them.

Archibald v. *Hubley*, 18 S. C. R. 116, followed.

Smith v. *McLean*, 21 S. C. R. 355, distinguished.

Borden, Q.C., for the appellant.

Harrington, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 26TH MAY, 1894.

GILMOUR v. McPHAIL.

County Court appeal—Delay in setting down—Dismissal—Extending time—Lodging of appeal—Rule 836—R. S. O. c. 47, ss. 46, 51.

Section 46 of the County Courts Act, R. S. O. c. 47, providing that the County Court Judge shall stay the proceedings for not more than thirty days to afford an appellant time to give security to enable him to appeal, and Rule 836, providing that a

County Court appeal shall be set down for the first sittings which commences after the expiration of thirty days from the decision complained of, are to some extent in conflict. When the statute was amended by allowing the Judge to stay proceedings for thirty days instead of ten, the Rule should have been altered so as to require the appeal to be set down for the first sittings after the expiration of so many days from the allowance of the security. But the Court can always extend the time, on application, where the appeal has been lodged, and will do so, as a matter of course, where there has been no wanton delay in giving the security within the time allowed by the County Court Judge.

Until the proceedings in the Court below have been sent up to the Court of Appeal by the County Court Judge, as directed by s. 51 of the County Courts Act, the appeal is not lodged, and the Court can neither dismiss it nor extend the time for setting it down for hearing.

Paul v. *Rutlidge*, *ante* p. 253, commented on.

A. C. Macdonell, for the appellant.

MacGregor, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 21st May, 1894.

HURDMAN v. CANADA ATLANTIC R. W. CO.

Negligence—Railways—Licensee—Volenti non fit injuria—Loan of engine and crew—Evidence of.

In an action under Lord Campbell's Act for damages arising from the death of a servant of a lumber company, who was engaged in counting lumber in a car of the defendants in the lumber company's yard, caused by his being squeezed between two piles of lumber, owing, as the jury found, to the negligence

of the defendants' servants in charge of an engine in giving the car too strong a push :—

Held, that, assuming knowledge on the part of the crew of the engine of the position of the deceased in the car, it would be a negligent act to propel the car so rapidly against another as to be likely to injure him, and, there being a conflict of evidence as to the rate of speed, the case could not have been withdrawn from the jury.

2. That the knowledge of the crew that the deceased was in the car, and of the probable consequences to him of the work in which they were engaged, if done without due care, imposed upon them a duty, whether he was there as mere licensee or otherwise, to use the care necessary to avoid causing that injury.

Batchelor v. *Fortescue*, 11 Q. B. D. 474, distinguished.

3. The finding of the jury that the deceased voluntarily accepted the risks of shunting did not entitle the defendants to judgment; he voluntarily accepted the risks of shunting, but did not give the defendants leave to run the risk of killing him by doing their shunting negligently.

Smith v. *Baker*, [1891] A. C. 325, applied and followed.

4. Upon the evidence there was no loan to the lumber company by the defendants of the engine and its crew; and the fact that the latter were acting under the direction of the servants of the lumber company in moving such cars as they were told to move, did not make them the servants of the lumber company.

Cameron v. *Nystrom*, [1893] A. C. 308, followed.

McCarthy, Q.C., and *Kidd*, for the plaintiff.

Wallace Nesbitt, for the defendants.

[25TH MAY, 1894.

In re WILSON AND COUNTY OF ELGIN.

Courts—Appeal from Judge in court—Divisional Court—Consent—Rule 219.

The words "other cases where all parties agree that the same may be heard before a Divisional Court" in Rule 219 do

not include appeals from a Judge in Court; and the consent of all parties cannot give a Divisional Court jurisdiction to hear such an appeal.

Beatty v. *O'Connor*, 5 O. R. 731, 737, not followed.

N. McDonald and *James A. McLean*, for the applicant.

J. M. Glenn, for the township.

[FERGUSON, J., 27TH MARCH, 1894.

CONFEDERATION LIFE ASSOCIATION v. TOWNSHIP OF HOWARD.

Municipal corporations—Drainage—Void by-law—Debenture issued under—Action on—Estoppel—Money had and received.

In an action to recover the amount of a debenture issued by the defendants pursuant to their by-law No. 16 of 1883, passed for the levying of a special rate upon a particular locality for the purpose of cleaning out and repairing a drain:—

Held, following *Alexander* v. *Township of Howard*, 14 O. R. 22, and *Re Clarke and Township of Howard*, 16 A. R. 72, that the by-law was void, the defendants having no power to pass a by-law for such a purpose.

The debenture was silent as to the purposes for which it was issued, but referred to the by-law under which it was issued, which disclosed the purposes. There was no representation by the defendants that it was good.

Held, that although the plaintiffs were innocent holders and had paid the full value of the debenture, they could not recover upon it, because the defendants had no power to make the contract professedly made by it.

Webb v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642, distinguished.

Marsh v. *Fulton County*, 10 Wallace S. C. U. S. 672, specially referred to.

Held, however, that as the defendants were bound to keep the drain in repair and to pay for repairs out of their general funds, and as they had received the price of the debenture

directly from the plaintiffs and had the full benefit of it, without giving any consideration, the plaintiffs were entitled to recover their money as money received by the defendants.

J. C. Hamilton and *Snow*, for the plaintiffs.

M. Wilson, Q.C., and *E. Bell*, for the defendants.

CHANCERY DIVISION.

[BOYD, C., 18TH APRIL, 1894.

ROBERTS v. BANK OF TORONTO.

Artisan's lien—Manufacture of bricks on property of another person—Possession.

Where the plaintiff was employed to manufacture for another, bricks in a brick-yard belonging to the latter, and it appeared that possession of the brick-yard was in the plaintiff for the purpose of his contract with the owners of the brick-yard to manufacture the bricks, and that he remained and was in possession of the bricks at the time of the seizure thereof by the sheriff under an execution against the owner of the brick-yard, who immediately after such seizure had made an assignment for the benefit of creditors :—

Held, that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of a chattel mortgagee, though the mortgage covered bricks in course of manufacture during its continuance.

Elgin Myers, for the plaintiff.

G. T. Blackstock and *R. McKay*, for the defendants.

[19TH APRIL, 1894.

CHURCH v. LINTON.

Copyright—Circulars—Forms—"Books and literary compositions"—Right to protection—R. S. C. c. 62.

The plaintiff, being a proprietor of a school for the cure of stammering, had obtained copyrights for; (1) "Applicant's

Blank," a series of questions to be answered by entrants to the school; (2) "Information for Stammerers," an advertisement circular; (3) "Entrance Memorandum," an agreement to be signed by entrants; and (4) "Entrance Agreement," similar to No. 8, but more formal.

Held, that under copyright law comprehensiveness they might be reckoned as "books and literary compositions" within R. S. C. c. 62. The purely commercial or business character of a composition or compilation does not oust the right to protection, if time, labour, and experience have been devoted to its production.

Griffin v. *Kingston and Pembroke R. W. Co.*, 17 O. R. at p. 665, dissented from.

George Bell, for the plaintiff.

Watson, Q.C. and *Bentley*, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 11TH MAY, 1894.

ALLAN v. MANITOBA AND NORTH-WESTERN R. W. CO.

Counsel—Appeal to full court—Numerous respondents—Only two counsel to be heard.

Appeal by the petitioners from an order dismissing their petition.

Ewart, Q.C., for the petitioners, stated to the Court that there were five separate respondents on the appeal, all of whom were represented by different counsel, and all opposed to the application. He suggested that the practice adopted by the Privy Council should be followed on appeals to the full Court here, namely, that, whatever the number of respondents or

counsel representing them, only two should be allowed to address the Court, the selection of the two to be left to the respondents and their counsel.

The Court decided that only two counsel should be heard in general opposition to the petition, and that others would be heard only upon the question of the effect of the petition on their particular interests.

[26TH MAY, 1894.

REGINA v. CHAMBERLAIN.

Criminal law—Perjury—Personation at election—Authority of deputy returning officer to administer an oath.

Crown case reserved upon an indictment and conviction of the prisoner for perjury. The prisoner presented himself at a polling station in Winnipeg the day an election took place for a member for the House of Commons of Canada, and applied for a ballot paper, stating that he was Matthew Leggatt, a person who was named on the list of voters for the polling district. The agent of one of the candidates required that he should be sworn, and thereupon the deputy returning officer administered to him the the oath of qualification in the form given in schedule S, referred to in s. 45 of the Dominion Elections Act, amended by s. 16 of 54 & 55 V. c. 19. In taking this oath the prisoner falsely swore that he was the person named by the name of Matthew Leggatt in the list of voters for the polling division. It did not appear that the prisoner was an elector.

The point raised was that the deputy returning officer was only authorized to administer the oath to an elector, and, as the prisoner was not an elector, the deputy returning officer had no authority to administer the oath to him, therefore the prisoner, although he swore falsely that he was an elector, could not be convicted of perjury.

Held, that the prisoner was properly convicted, and the conviction should be affirmed. The word "elector" in s-s. 2 of s. 45 should be held to apply to any person acting or representing himself as an elector, and the deputy returning officer is under that

sub-section authorized to administer the oath to such person, and by s. 130 of the Election Act to administer the oath taken by the prisoner.

Howell, Q.C., for the crown.

Hagel, Q.C., and *Phippen*, for the prisoner.

[TAYLOR, C.J., 19TH MAY, 1894.

MACDONALD v. GREAT NORTH-WEST CENTRAL R. W. COMPANY.

IMPERIAL BANK OF CANADA v. GREAT NORTH-WEST CENTRAL R. W. COMPANY.

Interpleader issue—Summons to amend—Action brought by sheriff—Costs of action.

In these cases executions were, early in 1893, placed in the hands of the sheriff of the western district. In consequence of claims made to the property seized, the sheriff applied to the Court, and on 2nd May, 1893, an interpleader order was made. This order was appealed against, and it was varied so as to extend the time for giving security.

On 24th July, 1893, one Delap sent to the sheriff by mail a notice in which he claimed to be the owner of two engines and tenders, part of the property seized. About the middle of August, 1893, another notice was served on behalf of Delap and the Canadian Locomotive and Engine Company claiming that they, or one or other of them, was or were owner or owners of the same two engines and tenders which had been claimed by Delap under the first notice. At the time when that notice was given, there was a summons pending before the Court, issued by the receiver in a suit of Charlebois against the defendants. On 24th August this summons was enlarged until the first Chambers day after vacation, but the sheriff was ordered in the meantime to deliver over to the receiver one locomotive and two cars, the receiver to hold these for the sheriff under the execution and to return them when ordered by a Judge.

On 21st February, 1894, the sheriff was served with a notice signed by the attorneys who had signed the notice given in August, as attorneys for Delap and the Canadian Locomotive Company, that the company had transferred all its interest in the engines and tenders to Delap; that "Delap is now the absolute owner thereof and entitled to the possession thereof;" and that the company abandoned as against Delap the claim to the engines and tenders served on the sheriff on 14th August, 1893. On the same day a notice was served, signed by the same attorneys, claiming that Delap was the absolute owner of the engines and tenders and demanding delivery of them forthwith to him.

On 22nd February, 1894, a writ was issued by Delap against the sheriff for the return of the engines and tenders, and damages for their detention. The sheriff appeared and pleaded that he did not detain the goods as alleged and that they were not the plaintiff's, and on these pleas issue was joined.

On 3rd April the sheriff obtained a summons to amend the interpleader order by adding Delap as a claimant, and on 28th April this was dismissed by the referee. The sheriff appealed It was urged that the sheriff was not entitled to the order asked for, because of his delay, and especially because he had appeared to and defended the action brought by Delap.

Held, that as the claimant was not shown to have been prejudiced, and as the real question, whether he owned the engines and tenders, could be determined as well by an interpleader issue as by the action, the summons to amend the interpleader order should be made absolute upon the terms of the sheriff paying the costs of the action at law and of the summons.

Appeal allowed, the order of the referee reversed, and the summons in Chambers made absolute upon the payment of the costs of the action at law and of the proceedings in Chambers before the referee. No costs of the appeal.

Clark, for the sheriff.

Bradshaw, for the railway company.

Nugent, for Macdonald.

[31ST MAY, 1894.

GRANT v. McKAY.

Interpleader—Infant claimant—Next friend.

On an interpleader summons, at the instance of a sheriff, an issue was directed between John G. Grant, a claimant, and the execution creditor, the former being made plaintiff. Against this order the claimant appealed to the full Court, and his appeal was dismissed on 9th May, 1894. On 17th May the issue was served. The execution creditor then obtained a summons to set aside the issue served, on the ground that the claimant was an infant, and could proceed only by next friend. This summons was dismissed by the referee, on the ground that it was too late, and the execution creditor appealed.

Held, that the referee was right in refusing to set aside the issue and put an end to the claim made, but he should have ordered proceedings to be stayed until the appointment of a next friend. Order varied by directing a stay, and requiring a next friend to be appointed within one month, and in default that the claimant be barred; costs to be costs in the cause.

For the proceedings in the first instance a next friend for the infant was not required, because the sheriff was the party carrying on these, and he was entitled to relief and protection whether the claimant was an infant or not. It was only when the claimant became an actor that a next friend for him was necessary.

An infant may sue out a writ in his own name, and without a next friend, but he cannot take any further step without having one appointed: *Campbell* v. *Matthewson*, 5 P. R. 91.

The serving of an issue is similar to the service of a declaration in an ordinary action, and the infant should, before doing so, have a next friend appointed.

Baker, for the execution creditor.

Vivian, for the claimant.

DEMILL v. MCTAVISH.

Interpleader—Seizure of goods exempted—Claimant resident out of Province.

Interpleader summons at the instance of a sheriff. A claim by the wife of the execution debtor to the greater part of the property seized was disposed of by the direction of an issue, but the referee referred to a Judge in Chambers another claim to the remainder of the property not covered by the wife's claim. This claim was made by the defendant, on the ground that what he claimed was exempt.

The execution creditor opposed the claim on the grounds that the claimant did not live in this Province, that the articles claimed were not in use, and were not household furniture.

The claimant described himself in his affidavit as "formerly of Carman, in the Province of Manitoba, but at present residing in the city of Montreal."

Except a gun and twelve volumes of books none of the articles claimed by the defendant came under the exemption clauses.

Held, that the defendant was entitled to the gun and twelve volumes of books which he might select, but he must be barred as to the rest of the property claimed by him. The sheriff would be entitled to his costs, but no costs to the other parties.

Huggard, for the execution creditor.

Bain, for the claimant.

[BAIN, J., 22ND MAY, 1894.

LITTON v. NICHOLLS.

Real Property Act—Dismissal of petition—Non-compliance with statute.

The caveator, claiming an interest in lands registered under the new system, filed a caveat, and on 30th March, 1894, the District Registrar caused him to be served with a notice under s. 140 of the Real Property Act that the caveatee had applied to register a transfer of the lands; the caveator, disregarding the directions of s. 140, filed a petition on 14th May asking that it might be declared that the caveatee, the registered owner, held the lands in trust for him. No security had

been given by the caveator, and no order made authorizing him to file a petition. The fourteen days since the service of the notice on the caveator had expired.

Held, that the caveat had lapsed and the petition must be dismissed with costs.

Andrews, for the caveator.

Machray, for the caveatee.

In re MAGEE AND SMITH.

Landlord and tenant—Overholding tenant—"Colour of right"—Notice to quit—"By," meaning of—Surrender.

A landlord applied, under the Overholding Tenants' Act, for an order for a writ of possession. The tenancy on which the premises were let was a monthly one, expiring on the last day of the month. On 31st March the landlord's agent wrote out a notice to quit and addressed it to the tenant, and gave it to a clerk with instructions to put it in the post office; the tenant had the notice the following day, the 1st April, but it was not shown that he received it before that day. The notice said, "You will please vacate by the 30th April, 1894." After the tenant received the notice he spoke to the agent about having received it, and apparently acquiesced in it and led him to believe that he would give up the premises on 30th April or 1st May. About 1st May or a day or two later he gave up possession of three rooms to a new lessee but retained possession of another room and refused to give it up.

Held, that the landlord had failed to show that the tenant was holding the premises without colour of right, and the application must be dismissed, but without costs. The notice was received by the tenant too late to determine the tenancy on the last day of the same month.

The word "by," when used, as it was in the notice in this case, as a terminal of time, means "not later than" or "as early as," *i.e.*, that the tenant was to vacate the premises before 30th April. Although the tenant had given up possession of three of the rooms to the person to whom the landlord intended to rent the premises, as he was still in possession of and refused to give

up one of the rooms, it could not be said that there had been a surrender of the term by operation of law. Where a notice to quit is insufficient, it cannot have the effect of determining the tenancy, even although it has been acquiesced in.

Doe d. Murrell v. *Milward*, 8 M. & W. 828, and *Bessell* v. *Landsberg*, 7. Q. B. 638, referred to.

Andrews, for the landlord.

Hagel, Q.C., for the tenant.

[25TH MAY, 1894.

In re COMMERCIAL BANK OF MANITOBA.

ROBERTSON'S CASE.

Company—Winding-up of bank—Claim by depositor — Cheque given to manager for specific purpose—Cheque cashed on eve of insolvency—Property in bank notes.

For some time prior to 30th June, 1893, the claimant, Robertson, had an amount exceeding $1200 to his credit in an ordinary deposit account in the above bank, and on 12th June he drew a cheque on this account for $1200 payable to the order of Duncan Macarthur, and left the cheque with Macarthur, who was arranging to make an investment for the claimant on a mortgage. Macarthur was the president and general manager of the bank, and the cheque was left with him to enable him to draw the money for the purpose of investing it as stated; he had no authority to cash the cheque for any other purpose. On 30th June, the last day the bank was open, Macarthur, who knew the bank was then insolvent, indorsed the cheque and had it charged to the claimant's account, and drew from the teller $1200 in notes of the bank, which he enclosed in an envelope. The envelope, sealed up and addressed to Dr. Robertson, with the words "twelve hundred dollars" written thereon, was placed, by Macarthur's instructions, in the bank's vault, and it was there when the winding-up proceedings were commenced, when it came into the possession of the liquidators. The claimant made a demand on them for the package, but they refused to give it up, claiming that the money

was still the property of the bank, and the claimant's name was placed on the list of creditors as an ordinary creditor, as if the cheque had not been charged to his account.

Held, that the application must be refused, and the claimant considered as only an ordinary creditor of the bank for the $1200. The cheque in question was left with Macarthur for a specific purpose; in drawing the money and depositing it in the vault, he was acting without the claimant's authority. As it was Macarthur's duty, as general manager, to attend to directions he received from the bank's customers as to the payment of their cheques, it must be implied that the bank had notice that when he cashed the cheque and placed the money in the vault, he was acting without authority; and the money remaining in the possession of the bank, there was no change in the property of the money as long as the transaction remained unratified by the claimant; and as he had not ratified it when the winding-up proceedings were commenced, the money was still the property of the bank; the claimant's attempt to ratify the transaction since the suspension of the bank did not affect the position. The presentation of the petition and the appointment of provisional liquidators fixed the position of the parties.

Phippen, for the liquidators.

C. H. Campbell, Q.C., for the claimant.

In re COMMERCIAL BANK OF MANITOBA.

LA BANQUE D'HOCHELAGA'S CASE.

Winding-up of bank—Cheque altered after being marked by bank—"Material" alteration—Liability of bank on marked cheque.

La Banque d'Hochelaga claimed to be a creditor of the Commercial Bank for the amount of three cheques, drawn by A. H. Corrèlli on the Commercial Bank and indorsed to the claimants. After the evidence had been gone into, the liquidators admitted the claim as regarded two of the cheques, but contested the third, which was dated 27th June, 1893, and originally made payable to the Equitable Life Assurance Society or order, of which

society Correlli was district manager; it appeared to have been stamped by the Commercial Bank as "accepted" on the day it was drawn, and the bank charged the amount to Correlli's account. Correlli sent the cheque to the agents of the society in Toronto, but after the bank suspended payment he telegraphed the agents to return the cheque, which they did, without having indorsed it. In the meantime Correlli had arranged with La Banque d'Hochelaga for an advance, as collateral security for which that bank was to get the three cheques. Before the third cheque was handed over, Correlli drew a pen through the word "order" and wrote the word "bearer" above it, and signed his name below the alteration.

Held, that any obligations the bank might have incurred by certifying and charging the cheque had been avoided by the alteration that Correlli afterwards made in it; it was made without the assent of the bank, and if, in a legal sense, it was a material alteration, then by s. 68 of the Bills of Exchange Act the cheque was void, except as against Correlli himself. An alteration of this kind in not specially mentioned in s-s. 2, but the list is not exhaustive, and any alteration that would have been deemed to be material before the Act was passed will be material still, although it is not mentioned in the sub-section. The materiality of an alteration is a question of law and must be looked at with reference to the contract itself, and not with reference to the surrounding circumstances.

An unaccepted cheque is not an assignment of money in the hands of a banker; there is no debt between a banker and his customer till a demand has been made: *Schroder* v. *Centra Bank*, 24 W. R. 71.

The holder of a cheque which the bank has accepted at the request of a holder is in a different position from the holder of a cheque which he has not presented and had marked; the holder of a cheque by taking the acceptance of the bank discharges the drawer, and the bank becomes the debtor of the holder for the amount of the cheque: *Boyd* v. *Nasmith*, 17 O. R. 42.

La Banque d'Hochelaga had failed to prove that it was a creditor of the Commercial Bank for the amount of the third cheque, and its claim must be disallowed. No costs to either party.

Phippen, for the liquidators.

Huggard, for La Banque d'Hochelaga.

NORTH-WEST TERRITORIES.

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 1ST JUNE, 1894.

ELLIS v. CHEESEBORO.

Parties—Interpleader issue—Who should be plaintiff—Security for costs.

Interpleader summons. The claimant resided in Montreal, and by his affidavit claimed the goods seized by virtue of the indorsement to him, by the manufacturers, of certain lien notes given by the debtor for part of the purchase price of the goods, agricultural machinery, the amount of which the claimant had paid to the manufacturers. The claimant swore that at the time of seizure the debtor was in possession of the goods as his bailee.

Held, that, as the onus was on the claimant to prove the above facts, he should be plaintiff in the issue; and further that the order for the issue should provide for the claimant giving security for costs, and, in default, that he should be barred.

Harvey, for the sheriff.

McCarter, for the claimant.

McCaul, Q.C., for the execution creditor.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. C. York.] [30th May, 1894.

DONOGH v. GILLESPIE.

Principal and agent—Banks and banking—Bills of exchange and promissory notes—Payment—Set-off—Debtor and creditor.

Bankers are subject to the principles of law governing ordinary agents, and therefore bankers to whom as agents a bill of exchange is forwarded for collection can receive payment in money only, and cannot bind the principals by setting off the amount of the bill of exchange against a balance due by them to the acceptor.

Judgment of the County Court of York affirmed.

Aylesworth, Q.C., and *J. Cowan*, for the appellants.

Shepley, Q.C., for the respondents.

1st D. C. Peel.] [Maclennan, J.A., 7th June, 1894.

DOMINION BANK v. WIGGINS.

Bills of exchange and promissory notes—Lien note—Negotiable instrument—Reservation of title.

An instrument in the form of a promissory note, given for part of the price of an article, with the added condition "that

the title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid," is not a promissory note or negotiable instrument, and the holder thereof takes it subject to any defence available to the maker against the vendors.

Judgment of the 1st Division Court in Peel reversed.

A. E. H. Creswicke, for the appellant.

W. S. Morphy, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE JUSTICES IN BANC, 31ST MAY, 1894.

REGINA v. UNGER.

Criminal law—Criminal Code, s. 308—Fraud—Receiving money on terms.

Crown case reserved. Indictment and conviction of the defendant under s. 308 of the Criminal Code for receiving from one Snelgrove $888.46, the property of one Scott, on terms requiring the defendant to account for it or pay it over to Scott, and, instead thereof, fraudulently converting it to his own use.

W. R. Riddell, for the defendant, contended that as no terms were imposed by Snelgrove, there was no offence under the Code.

J. R. Cartwright, Q.C., for the Crown, was not called upon.

The Court held that the section does not mean "terms imposed by the person paying the money," but "terms on which the defendant, when he receives it, holds it."

Conviction affirmed.

REGINA v. HOLLAND.

Criminal law—Tampering with witness—Liquor License Act, R. S. O. c. 194, s. 84—Ultra vires—Conviction under s. 154 of Criminal Code—Effect of s. 138.

Crown case reserved. Indictment and conviction of the defendant under s. 154 of the Criminal Code for attempting by

corrupt means to dissuade a man from giving evidence upon certain prosecutions of the defendant and another for offences against the Liquor License Act, R. S. O. c. 194. The question reserved was whether s. 84 of the Liquor License Act was now *ultra vires* of the Ontario legislature, and, if not, whether the defendant could properly be convicted under s. 154 of the Code.

Murphy, Q.C., for the defendant, contended that s. 154 was not now *ultra vires*, s. 188 of the Code having given it efficacy, and that the defendant should have been indicted under it, and not under s. 154 of the Code.

J. R. Cartwright, Q.C., for the Crown, contended that *Regina* v. *Lawrence*, 48 U. C. R. 164, was still law; that s. 188 of the Code was passed merely to cover any case not otherwise provided for in the Code.

The Court held, following *Regina* v. *Lawrence*, that s. 84 was *ultra vires*, and that the conviction should be affirmed.

[THE DIVISIONAL COURT, 8TH JUNE, 1894.

REID v. BARNES.

Master and servant—Workmen's Compensation Act—56 V. c. 26—"Servant in husbandry"—Knowledge of danger—Questions for jury—General verdict—Non-direction—New trial.

In action under the Workmen's Compensation Act and at common law for damages for injuries sustained by the plaintiff while engaged in digging a drain upon the defendant's farm, it did not appear that the plaintiff engaged with the defendant to do any particular work, but that he was first put by the defendant at mason work and then at digging the drain.

Held, that it was a question for the jury whether the hiring of the plaintiff was as a servant in husbandry within the meaning of 56 V. c. 26, and whether the work he was engaged in was in the usual course of his employment as such, and also whether the danger was known to the defendant and unknown to the plaintiff or the converse.

The jury were asked certain questions, one being whether the hiring was as a servant in husbandry, but they were told that they might give a general verdict, and they gave one for the plaintiff, answering none of the questions. The trial Judge in his charge gave them no instruction on this point and no direction as to what the law was.

Held, that they were not competent to find a general verdict, and there should be a new trial.

Stuart Livingston, for the plaintiff.

Carscallen, Q.C., for the defendant.

JOURNAL PRINTING COMPANY OF OTTAWA v. McLEAN.

Libel—Incorporated company—Publishers of newspaper—Charge of corruption—Injury to business—Special damage.

The plaintiffs were a company incorporated for the purpose of publishing a newspaper. The defendant wrote and published statements that the plaintiffs' newspaper reported favourably or adversely at ten cents a line and that it was corrupt and prostitute.

Held, that a jury might well find that these statements imported the charge that the plaintiffs were in the habit of selling the advocacy of their newspaper, and that such a charge tended to bring them into contempt and to injure their business, and was therefore a libel.

A corporation such as the plaintiffs can maintain an action of libel in respect of a charge of corruption, affecting their business, without alleging special damage.

Metropolitan Saloon Omnibus Co. v. *Hawkins*, 4 H. & N. 87, commented on and distinguished.

South Hatton Coal Co. v. *North-Eastern News Association*, [1894] 1 Q. B. 188, followed.

Non-suit by FALCONBRIDGE, J., set aside.

Shepley, Q.C., for the plaintiffs.

McCarthy, Q.C., and *Stuart Henderson*, for the defendant.

[FERGUSON, J., 5TH JUNE, 1894.

In re MILLER AND TOWNSHIP OF HALLAM.

Municipal corporations—Provisional judicial district—Application to quash by-law—Forum—R. S. O. c. 185, s. 57.

Summary application to quash a municipal by-law of the township of Hallam, in the district of Algoma.

R. S. O. c. 185, s. 57, provides that "if any dispute arises as to the validity of any by law . . . of any municipality in the provisional judicial districts of Algoma or Thunder Bay, the same shall be referred to the Judge of the district, whose decision thereon shall be final."

The motion was made before FERGUSON, J., holding the weekly Court at Osgoode Hall.

W. H. P. Clement, for the applicant, contended that, under the wording of the section above quoted, it was proper to make the motion in the ordinary way, and if upon the motion, as was the case here, a dispute arose as to the validity of the by-law, it should be referred by the Court to the Judge of the district.

W. M. Douglas, for the township corporation.

FERGUSON, J., ruled that the motion should be made in the first instance to the Judge of the district; and directed that the present application should stand adjourned until after application had been made to such Judge.

[MACMAHON, J., 10TH MAY, 1894.

KENNEDY v. PROTESTANT ORPHANS HOME.

Will—Executors and administrators—Succession duty—55 V. c. 6 (O.)

Where a testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided *pro rata* among the legatees:—

Held, that it was the duty of the executors to deduct the succession duty payable in respect to the pecuniary legacies, before paying the balance over to the legatees respectively, and they had no right to pay such succession duty out of the residue left after paying the legacies in full.

E. D. Armour, Q.C., for the plaintiffs.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

Huson Murray, Q.C., *W. Mortimer Clark*, Q.C., *A. Hoskin*, Q.C., *J. Reeve*, Q.C., and *Vickers*, for other parties interested.

CHANCERY DIVISION.

[THE JUSTICES IN BANC, 1ST JUNE, 1894.

REGINA v. DOTY.

Criminal law—Conviction for seduction—Evidence to support rape—Bill for rape ignored by grand jury—R. S. C. c. 157, s. 3 (a).

The prisoner was charged under s. 3 (*a*) of the Act respecting offences against public morals and public convenience, R. S. C. c. 157, with having unlawfully seduced a girl between 14 and 16 years of age, and the girl gave evidence sufficient, if believed, to support a conviction for rape. An indictment for rape had been presented to the grand jury at the same assizes and had been ignored. The trial Judge reserved a case as to whether a conviction under the above section could under the circumstances be supported.

Held, that it could. Conviction affirmed.

DuVernet, for the prisoner.

J. R. Cartwright, Q.C., for the Crown.

[THE DIVISIONAL COURT, 1ST JUNE, 1894.

MULCAHY v. COLLINS.

Husband and wife—Married woman—Separate estate—Chose in action—Contract of married woman.

Decision of STREET, J., *ante* p. 99; 24 O. R. 441, affirmed.

Though it might be impossible to ascertain until the winding-up of the testator's estate whether the residuary gift to the married woman was of any value, yet, at the lowest, she had a chose in action, a right to have the estate of the testator duly administered, and the residue, after satisfying all proper demands against it, handed over to her, and, assuming this to be so, such chose in action was personal estate and separate estate within the meaning of R. S. O. c. 132.

W. Cassels, Q.C., for the defendant Elizabeth Collins.

J. A. Macdonald, for the plaintiff.

WILSON v. TENNANT.

Malicious prosecution—Charge of theft—Reasonable and probable cause as to some articles only—Misdirection.

In an action for malicious prosecution of a charge of theft of several articles, the trial Judge held that there was no reasonable and probable cause for charging the theft of some of the articles, and withdrew the case as to them from the jury, but held otherwise as to the charge of theft of the other articles, and directed the jury that the fact that there was reasonable and probable cause to charge the theft of some of the articles bore only upon the question of damages, and left the case to the jury, who found a verdict for the plaintiff.

Held, that there was no misdirection.

Johnstone v. *Sutton*, 1 T. R. 547, considered and distinguished.

James Parkes, for the plaintiff.

Clute, Q.C., for the defendant.

O'HARA v. DOUGHERTY.

Evidence—Action for malicious prosecution—Proof of acquittal—Production of original record by clerk—Certified copy.

In an action for malicious prosecution the plaintiff sought to prove his acquittal before the County Judge's Criminal Court of

the county of Haldimand, of a charge of misdemeanour, in respect to which charge this action was brought, by means of the production of the original record signed by the County Judge, and produced and verified by the Clerk of the Peace and Crown Attorney, in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer.

Held, reversing the decision of MacMahon, J., at the trial, that the evidence should have been admitted in either of the above two forms; and judgment dismissing the action set aside and a new trial ordered.

Per Robertson, J.—In cases of misdemeanour the defendant is entitled to a copy of the record as of right.

Carscallen, Q.C., for the plaintiff.

T. W. Howard, for the defendant.

REDFERN v. POLSON.

Company—Sale of all assets—Contract to transfer all shares—Winding-up order before completion—Specific performance.

The shareholders of a Dry Dock Company, in November, 1888, sold and transferred their buildings and plant, and also contracted that they would, within a year, transfer their charter by assigning all their stock to the nominee of the purchaser. A portion of the purchase money only was paid. The purchaser did not, however, nominate a person to whom the shares should be transferred, and the same were not transferred before this action, and in November, 1890, an order for the winding-up of the company was made. The liquidators of the company now brought this action to recover the balance of the purchase money and interest.

Held, affirming the decision of MacMahon, J., that they were entitled to judgment for the same.

Per Meredith, J.—There could be no transfer in accordance with the terms of the agreement until the purchaser had named the person to whom the shares were to be transferred. But the winding-up order did not relieve the purchaser from the contract.

Shares may be bought and sold after the making of a winding-up order, and a contract of that kind is binding upon a party, though he may be ignorant of the fact that the company is in liquidation.

Marsh, Q.C., for the plaintiffs.

Hoyles, Q.C., for the defendants.

SMITH v. BEAL.

Assignments and preferences—Assignment for benefit of creditors—Costs of litigation in respect to disputed claims—Right of assignee to charge same against estate—R. S. O. c. 124.

An assignee for the benefit of creditors, acting under the instructions of the duly appointed inspectors, served notice of contest, under the statute, of the plaintiff's claim upon the assets. The plaintiff then brought an action against the assignee to establish his claim, which at the trial was dismissed with costs, but, on appeal to the Divisional Court, this judgment was reversed, with costs to be paid by the defendant. At a meeting of creditors, thereupon called, it was resolved in writing to take the opinion of counsel upon the advisability of appealing to the Court of Appeal, and that the inspectors should act on such opinion. The opinion having been obtained, it was resolved at a meeting of the inspectors that the assignee should proceed to the Court of Appeal, which he did, but this appeal was dismissed with costs to be paid by the appellant. The assignee charged against the estate the total sum he had to pay in respect of the costs of these proceedings.

Held, affirming the decision of ROBERTSON, J., that he was entitled to do so.

Semble, *per* BOYD, C., that the right of the assignee to be recouped the costs of the appeal to the Court of Appeal might not improperly be limited to the share of the estate applicable to those creditors who were contesting the claim.

Per MEREDITH, J.—The cases seem to throw considerable doubt upon the assignee's right to be recouped the costs of going to the Court of Appeal, and to show that he should have

been satisfied with the adverse judgment of the Divisional Court, and should perhaps have taken indemnity from those who desired to carry the case further. But in all these cases the judgment was in the first instance adverse to the trustee, whereas here the judgment in the first instance was in his favour. It may seem hard that a creditor, whose claim on the estate has been unsuccessfully contested, should have his dividend largly reduced by such contestation—that the costs should not be, at least, first chargeable against the dividends of the opposing creditors—but it has to be borne in mind that his claim is not reduced—that still remains, except in so far as reduced by the dividend, recoverable just as it always was from the debtor.

Aylesworth, Q.C., and *R. T. Harding*, for the plaintiff.

Snow, for the defendant, the assignee.

QUEEN'S COLLEGE AT KINGSTON v. CLAXTON.

Mortgage—Payment off—Demand of assignment to nominee of mortgagor—Subsequent incumbrancers—R. S. O. c. 102, s. 2.

The owner of land executed a mortgage upon it, a third party joining in the personal covenant for payment. The owner afterwards conveyed away the whole of his equity of redemption to different purchasers of various portions of the lands, some of whom afterwards mortgaged such equity. The first mortgagee, having commenced foreclosure proceedings, one Smith, through her solicitor, who was also solicitor for the mortgagor, paid to the first mortgagee the amount due on his mortgage, and demanded an assignment of the same to her instead of a discharge, also forwarding a written direction to that effect, signed by every subsequent owner or incumbrancer of the land with one exception; but the first mortgagee refused to execute such assignment, upon the ground that there were subsequent incumbrancers whose rights intervened, and also on the ground that the mortgage had presumably been paid off with funds of the mortgagor, as the money had come from the mortgagor's solicitor, and that therefore the mortgagee held the estate in the lands for the next incumbrancers, having had notice of them.

Held, affirming the decision of ARMOUR, C.J., that the first mortgagee was bound to execute the assignment as asked.

Per BOYD, C.—Even had the money come from the mortgagor, he was liable on the covenant to pay and was being sued by the mortgagee. He had conveyed all the lands to others, who, as between him and the mortgagees, were primarily liable to pay the mortgage and relieve him. Thus he became merely a surety for all claiming through and under him, and was entitled on payment to have the mortgage kept alive for his protection and to enable him to recover from those who were liable to indemnify him.

Per ROBERTSON, J.—The mortgagor, being sued upon his covenant to pay, was a "mortgagor entitled to redeem," within the meaning of R. S. O. c. 102, s. 2.

Teevan v. *Smith*, 20 Ch. D. 724, distinguished.

Langton, Q.C., for the plaintiffs.

C. J. Holman, for the defendants.

JOHNSTON v. CITY OF TORONTO.

Municipal corporations—Construction of sewer—Subsequent erection of house with permission to drain into same—Negligence.

Actions brought by owners of adjoining houses on the north side of King street west, in the city of Toronto, to recover damages alleged to have been occasioned by the negligence or improper conduct of the defendants in respect to the sewer in that street and the drainage of the houses.

It appeared that the sewer had been properly constructed and maintained by the defendants, according to a plan of drainage adopted by them, and the houses in question were erected after the construction of the sewer, the owner having first sought and obtained leave to drain and discharge his sewage from the houses into it. He, however, made the cellars of the houses too deep to be drained by the sewer, though otherwise the houses were situated in the proper and appropriate location for draining them thereby.

Held, affirming the decision of STREET, J., at the trial, that the plaintiff's action must be dismissed with costs.

Per FERGUSON, J.—It seemed that the only complaint the plaintiff could make was that the plan and levels adopted by the defendants, in this system of drainage, were erroneous and wrong, but the authorities showed that an action on this ground would not lie. The duties of municipal authorities in adopting a general plan of drainage and determining when and where the sewers shall be built, at what size and at what level, are of a quasi-judicial nature, and not subject to revision by a Judge or jury in a private action for not sufficiently draining a particular lot of land.

Per MEREDITH, J.—There was no authority for saying that the defendants were bound to furnish an efficient system of drainage for all those who drain with their leave into common sewers. Neither the owner of the houses nor the tenants were ever required by the defendants to drain or discharge sewage into the sewer in question. If either had been, the case might present a very different question. Nor had anything ever been paid for the use of the sewer.

J. W. McCullough, for the plaintiffs.

H. L. Drayton, for the defendants.

[9TH JUNE, 1894.

COLEMAN v. BANK OF MONTREAL.

Evidence—Foreign commission—Discretion—Terms—Security for costs.

An order for a foreign commission being discretionary, there is power to impose proper terms in making it.

And the plaintiff was required to give security for the costs of a commission to examine a witness abroad, where the information as to his exact locality was slender and it seemed doubtful whether he would attend to be examined.

Langen v. *Tate*, 24 Ch. D. 523, followed.

W. R. Riddell, for the plaintiff.

Worrell, Q.C., for the defendants.

[FERGUSON, J., 6th JUNE, 1894.

In re ONTARIO EXPRESS AND TRANSPORTATION CO.

Master in Ordinary—Jurisdiction—Winding-up Act—Fraudulent transfer—R. S. C. c. 129—53 V. c. 32 (D.)

Held, that the Master in Ordinary has no power to decide questions of fraudulent transfer arising in the course of a reference in winding-up proceedings under the Dominion Winding-up Act and amending Acts.

H. D. Gamble, for the appellants.

Hoyles, Q.C., for the liquidator.

[ROBERTSON, J., 1ST JUNE, 1894.

MOLSONS BANK v. HEILIG.

Principal and surety—Security held by creditor—Release of same without consent of surety—Judgment against surety.

The plaintiffs sued the defendant as indorser of a promissory note made by Patterson Bros. It appeared that they held a number of notes of Patterson Bros. indorsed by various persons, and that they also held a mortgage from Patterson Bros. on certain lands to secure their general indebtedness. Before this action the plaintiffs had released and discharged certain of the lands comprised in the mortgage without the consent of the defendant, but, in consideration of such discharge, had received the full value of the said lands and had applied the proceeds in reduction of the general indebtedness of Patterson Bros.

Held, that the defendant as a surety was entitled to have credited, in reduction of his liability upon the note, a *pro rata* share of the amount realized by the plaintiffs on the mortgage, and also a *pro rata* share of the value of the security still in their hands, and there must be a reference to the Master to ascertain the same, and an order for payment by the defendant to the plaintiffs of the balance which should be found due from him after taking such account.

Crerar, Q.C., and *P. D. Crerar*, for the plaintiffs.

J. W. Nesbitt, Q.C., for the defendant.

COMMON PLEAS DIVISION.

[BOYD, C., 30TH MAY, 1894.

BARBER v. ADAMS.

Attachment—Disobedience to subpœna—Substituted service.

A witness is not liable to attachment for disobedience to a *subpœna* served substitutionally pursuant to an order authorizing such service.

Mills v. *Mercer*, 15 P. R. 281, applied and followed.

N. McCrimmon, for the plaintiff.

Kilmer, for the witnesses.

[MACMAHON, J., 15TH JUNE, 1894.

In re BURTON AND VILLAGE OF ARTHUR.

Municipal corporations—By-law—Motion to quash—55 V. c. 42, s. 332—Recognizance—Bond—Allowance—Condition precedent.

A condition precedent to the entertaining of a motion to quash a municipal by-law is the entering into, allowance, and filing of a recognizance, in the manner provided by s. 332 of the Municipal Act, 55 V. c. 42; and a bond, even though allowed by a County Court Judge, cannot be effectively substituted for a recognizance.

E. F. B. Johnston, Q.C., for the applicant.

Aylesworth, Q.C., for the corporation.

IN CHAMBERS.

[BOYD, C., 2ND JUNE, 1894.

ADAMS v. ANDERSON.

Summary judgment—Rule 739—Conditional leave to defend—Payment into Court—Discretion.

In an action to recover $1547.47 the plaintiffs moved for summary judgment under Rule 739, and the defendants set

up as a defence that the plaintiffs had agreed to discharge him upon his making an assignment for the benefit of creditors to their nominee. The weight of testimony upon the motion was against the existence of such an agreement.

Held, that it was a proper exercise of discretion to require the defendants to pay $300 into Court as a condition of being allowed to defend.

Dunnet v. *Harris*, 14 P. R. 437, followed.

Rowell, for the plaintiffs.

Masten, for the defendant.

REGINA v. GILLESPIE.

Evidence—Criminal Code, 1892, ss. 584, 843—Appeal to Sessions—Subpoena to witnesses in another Province.

Under the provisions of ss. 584 and 843 of the Criminal Code, 1892, it is competent for a Judge of the High Court or County Court to make an order for the issue of a subpoena to witnesses in another Province to compel their attendance upon an appeal to the General Sessions from the action of justices of the peace under ss. 879 and 881.

F. E. Hodgins, for the applicant.

[FERGUSON, J., 7TH JUNE, 1894.

KENDELL v. ERNST.

Writ of summons—Provisional judicial districts—Shortening time for appearance—47 V. c. 14, s. 7—Rules 3, 275 (a), 485—Local venue—Action of ejectment—57 V. c. 32, s. 3—Rule 653.

The effect of Rule 275 (*a*) is to supersede s. 7 of 47 V. c. 14, and to incorporate its provisions into the Rules, and the former practice, being inconsistent with the Rules, is superseded by the provisions of Rule 3; and therefore there is now power, under the provisions of Rule 584, to abridge the time for appearance to

a writ of summons issued in the district of Algoma or Thunder Bay.

The indorsement on a writ of summons, issued in the district of Thunder Bay after the passing of 57 V. c. 32, shewed that the claim was for cancellation of a lease of a mining location in the district of Rainy River, for possession of the location, and for an injunction restraining the defendants from entering thereon.

Held, that the action was not one of ejectment within the meaning of Rule 658, and therefore the venue was not local, and it was not necessary that the writ should be issued by the local registrar at Rat Portage under s. 8 of the Act.

E. T. English, for the plaintiff.

D. W. Saunders, for the defendant.

[ROBERTSON, J., 26TH MAY, 1894.

MERCER CO. v. MASSEY-HARRIS CO.

Venue—Change of—Expediting trial—Illness of witness—Costs.

The place of trial of an action may be changed for the purpose of expediting the trial.

And where the plaintiffs named Barrie as the place of trial, and the defendants had it changed to Toronto, and, through no fault of the parties, the action was not tried at the spring sittings there, nor at Barrie under an alternative order, it was, on the application of the plaintiffs, changed to Bracebridge, where a summer sittings had been appointed, a witness for the plaintiffs being so dangerously ill that he might die at any moment, and there being no summer sittings at Toronto or Barrie.

Costs were not given against the plaintiffs, as they were not in fault.

Bleakley v. *Easton*, 9 U. C. L. J. (O.S.) 28; *Mercer* v. *Voght*, 4 U. C. L. J. (O.S.) 47; and *McDonell* v. *Provincial Ins. Co.* 5 U. C. L. J. (O.S.) 186, specially referred to.

F. E. Titus, for the plaintiffs.

A. Mills, for the defendants.

[STREET, J., 30TH MAY, 1894.

In re SOLICITORS.

Solicitor and client—Taxation of bill of costs—Ex parte order—Time—Services as parliamentary agents—"Special circumstances"—Burden of proof.

Where a bill of charges and disbursements rendered by solicitors was posted to the client on the 11th April, 1893 but did not reach the client till a day or two later:—

Held, per the Master in Chambers, that an *ex parte* order for taxation made on the 11th April, 1894, was made after the expiry of twelve months, and should be set aside.

The bill was for services rendered and moneys expended in obtaining an Act of Parliament for the divorce of the client from her husband.

Held, per the Master, that it was a solicitors' bill and as such taxable under the Solicitors' Act.

Quære, per STREET, J., as to this.

Held, per STREET, J., that "special circumstances" justifying an order for taxation after twelve months from delivery of the bill must be proved by the affidavits filed upon the application, and where they consist of alleged overcharges, they should be plainly indicated by the applicant, on whom lies the *onus* of establishing them.

And where the only overcharge indicated was the payment to a physician, who was absent from his business three days for the purpose of giving evidence before a parliamentary committee, of $50 and his disbursements, and it appeared that the solicitors had paid the amount in good faith and the client had at one time assented to it, and it did not appear that the physician's attendance could have been secured for any less sum:—

Held, that there were no special circumstances warranting an order for taxation after the lapse of twelve months and after settlement of the bill by cash and notes, which latter had been paid in part and renewed from time to time.

Decision of the Master on this point reversed.

E. T. English, for the solicitors.

Allan McNab, for the client.

NOVA SCOTIA.

In the Supreme Court.

REGINA v. CREELMAN.

Crown Rules—Power of the Court to make—Estreating recognizances—Notice to sureties—Jurisdiction of Court in banc to hear motion to rescind order—Rules 84 and 86—52 V. c. 40.

C. G. C., with two sureties, entered into a recognizance conditioned for his appearance to answer a charge of conspiracy to defraud, by pleading to such indictment as might be found against him by the grand jury.

C. G. C. failed to appear in fulfilment of the condition, and, after he had been duly called in open Court, the recognizance was declared to be forfeited.

No notice to the sureties was given before forfeiting the recognizance, as contemplated by R. S. C. c. 179, s. 12, and Crown Rules, (1889,) 84 and 86.

Held, by McDONALD, C.J., WEATHERBE and HENRY, JJ., that the order estreating the recognizance must be set aside and rescinded.

RITCHIE and MEAGHER, JJ., dissented.

Per HENRY, J., delivering the judgment of the Court:—

(1) That the Crown Rules 84 and 86 apply to recognizances taken under the Criminal Procedure Act, s. 81.

(2) That such Rules are within the powers of the Court under the Dominion Act 52 V. c. 40.

(3) That the non-observance of the Rules, in a case where a recognizance has been estreated in the absence of the accused and his bail, renders the estreating of the recognizance and the issuing of execution irregular.

(4) That the Supreme Court, sitting *in banc*, has jurisdiction in such case to rescind and set aside the order.

BISHOP v. NORWICH UNION FIRE INSURANCE SOCIETY.

Fire Insurance—Policy—Submission of claim to arbitration—Conditions—Non-occupation of premises.

A policy of insurance issued by the defendants contained a condition providing that "where any difference shall arise with respect to the amount of any loss or damage by fire, such difference shall, at the request of either party, be submitted to arbitrators," etc.

A subsequent clause provided that no suit or action for the recovery of any claim should be sustainable "until after an award shall have been obtained fixing the amount of such claim in the manner above provided," etc.

Held, that, in the absence of a request by the defendants, the submission to arbitration was not a condition precedent to the plaintiff's right of action.

The policy contained a further condition that it should not cover unoccupied buildings, unless insured as such, and that if the premises insured became unoccupied, the policy should cease and be void, unless continued by indorsement on the policy.

The buildings insured consisted of a house and two barns. The evidence showed, and the jury so found, that the house was only occupied part of the time during the currency of the policy.

Held, that there was not an occupancy of the premises insured within the meaning of the condition.

In re CAROLINE LAWSON.

Will—Alteration in—Inference as to date of—Burden of proof—Residuary bequest—Subsequently acquired property.

The onus is upon the party who seeks to have an interlineation or alteration in a will admitted to probate to show by some evidence that it was made before execution.

On one page of the will of C. M. L. were several interlineations, which were numbered from one to five and initialled, and referred to in the attestation clause. At the foot of the same page were a number of words in the handwriting of the testatrix, which appeared to have been written at the same time as the previous alterations, but which were not numbered or initialled or otherwise referred to. These words were written at the foot of the page and in the body of the will, with the exception of one word, which extended into the margin.

Held, TOWNSEND, J., dissenting, that the latter words were not admissible to probate as part of the will.

The will, after disposing of portions of her property, contained the following bequest: "I bequeath to my dear husband, G. L., for use during his life, all else of which I die possessed, namely, the dwelling house and premises No. 5 South street, furniture, silver, books. . . . Also for my husband for life I leave all dividends and proceeds of the remainder of my estate, to continue as at present invested, or altered only with the consent of both executors."

Held, that this bequest carried the portion of the estate of her father to which testatrix became entitled in her lifetime, after the date of the making of her will.

REGINA v. McLEAN.

Liquor License Act of 1886, and amending Acts—Conviction for third offence — Statement of previous convictions — "Again" — Fine and imprisonment—Costs of conveying to gaol.

The defendant was detained in gaol under a warrant issued on a conviction of a third offence against the Liquor License Act of 1888 and amending Acts.

The warrant recited the conviction and the first conviction, and the fact that on a day mentioned the defendant was "again duly convicted."

The warrant directed both the levying of a fine and the imprisonment of the defendant, and, among the costs to be paid by him, included costs of conveying to gaol.

Held, that the warrant was good.

That, under 49 V. c. 3, s. 7, the word "again" was a sufficient statement that the conviction recited was a second conviction.

CLAYTON v. McDONALD.

Summary judgment—Order 14, Rule 1—Promissory note—Proof of presentment and of cause of action.

Order 14, Rule 1, which provides a summary method of obtaining judgment in the case of writs specially indorsed under Order 3, Rule 5, does not dispense with any element of proof in the summary proceeding which would be essential on a trial.

In an action on a promissory note made "payable at the Bank of British North America, Halifax:"—

Held, that, on the summary proceeding, it was essential for the plaintiff to aver and prove presentment, and also to prove his cause of action.

DOYLE v. PHŒNIX INSURANCE CO.

Master and servant—Summary dismissal—Right to notice—Construction of contract—Reasonable time—Damages.

The plaintiff was general agent of the defendant company for Nova Scotia. The instrument appointing him contained the following provision: "Each party hereto may terminate this agreement by giving the other written notice to that effect, and the agent shall not be entitled to any commission upon premiums collected or received after the expiration of such notice," etc., etc. The company having terminated the contract without previous notice, the plaintiff claimed damages.

Held, that either party was at liberty to terminate the contract at a moment's notice.

Semble, assuming it to have been contemplated that some time should elapse after notice, that the verdict for the plaintiff could not be upheld, the trial Judge having failed to instruct the jury in respect to what was a reasonable time, or to instruct them to confine the damages to the time which should elapse between the giving of the notice and the termination of the contract.

TOWN OF SYDNEY v. HILL.

Municipal corporations—Action against town clerk for moneys detained—Counter-claim for salary—Resolutions fixing amount of remuneration—Towns' Incorporation Act, 1888.

The defendant was appointed town clerk of the town of S. under the special Act incorporating the town, and continued to fill that office, with others, after the passing of the Towns' Incorporation Act of 1888, down to the time of his resignation. From time to time, while the defendant held office, resolutions were passed by the council, and acquiesced in and acted upon by the defendant, fixing the remuneration to be paid him. There was no evidence of contract for any specific period of service, or amount of salary. The defendant was free to resign his position at any time.

Held, in an action by the town for money retained by the defendant, that he was not entitled to counter-claim for salary.

TURNER v. ISNOR.

Master and servant—Accident caused by reckless driving of servant—Liability of master for—Degree of care—Injury to children.

The defendant's servant, while engaged in his master's business, was driving at a rapid pace down hill. The horse was a wild one, hard in the mouth, and difficult to control or check suddenly. The plaintiff's two children, aged respectively two and ten years, were playing on the road some distance ahead. The driver saw the children, but supposed that there was sufficient space to pass between them, and made no attempt to pull up the horse until it was too late to do so. Both children were run over and injured.

Held, that the servant had failed to exercise the degree of care that was requisite under the circumstances, and that the defendant was liable.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 9TH JUNE, 1894.

ALLAN v. MANITOBA AND NORTH-WESTERN R. W. CO. (NO. 1.)

Railway company—Mortgagees—Petition for leave to fill bill to enforce security and for receiver.

The petitioners in this matter were mortgagees of the first division or first 180 miles of the defendants' railway, under a mortgage executed by the defendants to secure payment of an issue of first mortgage bonds; they alleged default in payment and desired to enforce their security.

The plaintiffs were judgment creditors of the defendants, and on the 18th July, 1893, obtained a decree declaring that they were entitled to have a receiver appointed of the undertaking and property of the company, and one of the plaintiffs was appointed receiver. The petition asked for leave to take such proceedings as the petitioners might be advised for enforcing their right to enter upon possession of the property conveyed to them; for the appointment of a manager and receiver; for a foreclosure of the mortgaged premises; or that they might take such other proceedings as they might be advised for enforcing their rights.

This petition was dismissed by BAIN, J., and from his order the petitioners appealed to the full Court.

Held, that the appeal should be allowed, the order dismissing the petition set aside, and an order made giving the petitioners leave to take such proceedings as they might be advised to procure the appointment of a receiver of the revenues, tolls, and profits, and for a sale of the property embraced in their security. The petitioners to be entitled to the costs of the re-hearing.

The costs of the original petition to be added to any costs they might be entitled to as mortgagees when enforcing their security.

The objection that the petitioners were not entitled to apply because they were parties to the cause, could not be supported. The petitioners were not, when the petition was filed, parties, or bound by the decree, for the order making them parties in the Master's office had not then been served. Proceedings which might have since been taken by the plaintiffs in the way of serving the order could not deprive the petitioners of any right they had when they filed their petition.

The petitioners were entitled to a receiver of the tolls, fares, freights, incomes, rents, issues, and profits of the first division of the line covered by their mortgage, and to have these, after payment of such outgoings as were properly a first charge on them, applied in discharge of the indebtedness which was secured by the mortgage. The petitioners were entitled of right to a receiver, default having been made in payment of interest on the bonds secured by the mortgage; they were not bound to be satisfied with the receiver appointed at the instance of the plaintiffs with the consent of the company. They could not have a manager. They were also entitled to come to the Court to enforce payment of the interest upon their bonds, and for a sale of the division of the railway covered by their mortgage; they could not have that relief in the present suit. The Court should remove out of their way the difficulty of the officer of the Court being in possession.

Ewart, Q.C., and *Wilson*, for the petitioners.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Atkins, Q.C., *Culver*, Q.C., *Hough*, Q.C., *Maclean*, and *Bain*, for the several defendants.

ALLAN v. MANITOBA AND NORTH-WESTERN R. W. CO. (NO. 2).

Railway company—Suit to appoint receiver and ascertain incumbrances—Making parties in Master's office.

The plaintiffs were judgment creditors of the defendant company, and filed their bill as such. They were also the

holders of bonds issued by the company in connection with a part of the railway; of bonds issued by the Saskatchewan, etc., Railway Company, the interest upon which, guaranteed by the defendant company, was overdue and unpaid; and they also held debenture stock issued by the defendant company, which was a first lien on the railway, subsequent to the right of the first mortgage bonds upon the first division or 180 miles of the railway. In addition they claimed to be creditors to a large amount for moneys advanced to the defendant company.

By the decree a receiver who had been appointed was continued, and the Master was directed, among other things, "to inquire and state what are the debts of the said company, and whether the same and which of them are incumbrances or charges on the undertaking of the company, its land grant, and other assets, or the tolls and moneys arising out of the same, and what part of the same respectively, and how the same respectively were created, and to settle the rights and priorities of the persons for the time being interested therein, and to tax them the costs of proving their claims; and the said Master is to add such of the parties as have such incumbrances."

Pursuant to this direction, the Master on the 21st July, 1898, issued an order making parties in his office certain persons, and among them, F. D. Grey and another, who were the trustees for the bondholders having a first lien and charge upon the first division or 180 miles of the railway, and holding as such trustees a mortgage upon the first division of the railway. Thereupon they presented a petition praying that the sixth paragraph of the decree might be discharged, or that it might be varied and discharged so far as it directed or sanctioned any inquiry as to the plaintiffs' claims and as to the plaintiffs' priority or directed or sanctioned the addition of the petitioners as parties in the Master's office; that the order and direction of the Master adding the petitioners as parties in his office might be vacated and discharged; and that the decree might be varied, so far as it authorized the receiver to apply any moneys received in respect of the operation of the first division or 180 miles of the railway to any purposes other than the operating expenses of that portion of the line of railway.

At the hearing of the petition it was dismissed with costs, and the petitioners then set it down for re-hearing before the full Court.

Held, that the petitioners were not properly made parties. They had a lien and charge which was prior to any claim the plaintiffs had. What possible right then could the plaintiffs have to bring in the petitioners and make them parties to this suit in the Master's office?

The order dismissing the petition should be reversed, and an order made amending the sixth paragraph of the decree, so as to give the Master power to add only such parties as have subsequent incumbrances, and setting aside the Master's order making the petitioners parties and the service of the order upon them. The petitioners to be entitled to the costs of the petition, of the original hearing, and of this re-hearing.

ROBINSON v. TAYLOR.

Sale of goods—Liability of husband for wife's purchases where she has left him—Authority—Corroboration.

Appeal from decision of BAIN, J., *ante* p. 147.

Appeal allowed, order on the original appeal set aside with costs, and judgment of the County Court Judge restored.

The evidence upon the point whether the wife had express authority to purchase the goods was conflicting. The wife stated that on one occasion, when she went to the husband's house to get her clothes, he told her she could go to Winnipeg and get what she liked out of stores, in his name. In another part of her evidence she stated he was willing she should go home for her confinement, and she could go to Winnipeg and get supplies from any stores, as all knew him.

As to what occurred when she went for her clothes, she was corroborated by her step-father, who accompanied her; he stated he heard the defendant tell her she could go to Winnipeg and buy what she wanted; he stated further that he afterwards saw the defendant, who said he had told his wife she could buy what she wanted, and if she had not done so yet, she could do so. Both the wife and the step-father were contradicted by the defendant, but with the evidence before him the learned County County Judge gave judgment in favour of the plaintiff. It could

not be said he was wrong in believing the wife and her step-father, or that he drew any incorrect conclusions from their evidence, and it did not appear that the verdict he entered should be set aside.

Haggart, Q.C., for the plaintiffs.

Machray, for the defendant.

BRAUN v. DAVIS.

Appeal—Not set down in time—Erroneous impression of attorney—Extension of time—Evidence—Sufficiency of—Information and belief only—Affidavit.

In this case judgment was given by TAYLOR, C.J., on 28th March, 1894, (*ante* p. 194) allowing an appeal from an order of the Referee and setting aside a garnishing order obtained by the plaintiff.

The order was signed by the Chief Justice and dated on 30th March. On 31st March the plaintiff obtained an order from a Judge staying all proceedings under the order for fourteen days from that date, and directing that if notice of appeal to the full Court should be given within that period, the stay of proceedings should continue until the hearing or other disposition of the appeal.

The præcipe to enter and set down the appeal was filed with the prothonotary on 14th April.

The defendant moved before the full Court to strike out the plaintiff's appeal, on the ground that it was not entered with the prothonotary nor notice thereof given to the defendant within fourteen days from the date and service of the order appealed from.

The Court struck out the appeal, with leave to the appellant to make a substantive application under Rule 66 for an extension of time.

Subsequently the plaintiff moved before the full Court to extend the time to appeal, supported by the affidavit of his attorney that he was under the impression at the time that the order for a stay of proceedings distinctly gave the plaintiff leave

to appeal from the order of 30th March, at any time within fourteen days from the date of the stay of proceedings, and if such were not the case, it was through his error and misconception of the terms of the order staying proceedings, and not through any fault or delay or misconduct on the part of the plaintiff.

The following cases were referred to: *Robertson* v. *Wigle*, 15 S. C. R. 214; *Sievewright* v. *Leys*, 9 P. R. 200; *Dederick* v. *Askdown*, 4 Man. L. R. 349; *In re Manchester Economic Building Society*, 24 Ch. D. 488; *Whitfield* v. *Merchants' Bank*, Cassels' S. C. Dig. 390; and *Cusack* v. *London and North-Western R. W. Co.*, [1891] 1 Q. B. 347.

Held, that, as the opposite party had not been prejudiced, and the mistake was one made in good faith, under a misapprehension by the attorney, the appeal might be set down within two days, on payment of the costs of the application.

The appeal was then set down to be heard.

On the same coming on for argument an objection was taken by the plaintiff that the application to set aside the garnishee order was made on the affidavit of the partner of the defendant's attorney based on information and belief. The plaintiff filed no affidavits in answer. The affidavit on which the garnishing order was obtained was made by the plaintiff on information and belief, and was sufficient under the statute. It was contended that the application to set aside the garnishing order was not an interlocutory application; it was one that affected and disposed of the rights of parties, and the evidence should have been the same as at a trial; and *Gilbert* v. *Endean*, 9 Ch. D. 259, was relied on. The same objection to the sufficiency of material had been taken before the Referee and the Chief Justice.

Held, that, as the affidavit on which the plaintiff obtained the garnishing order was sufficient under the statute to entitle him to the order, that order should not be set aside on evidence that was merely hearsay and that was, at best, of no more weight than the evidence on which the order was made. Appeal allowed, and order appealed from set aside, with costs both of the appeal from the Referee and of this application.

Hough, Q.C., for the plaintiff.

Perdue, for the defendant.

[TAYLOR, C.J., 5th JUNE, 1894.

HANBURY v. CHAMBERS.

Pleading—County Court—Sale of goods—Action for price—Defence that goods not properly measured—Weights and Measures Act—Pleading in dispute note—Illegality—Burden of proof.

County Court appeal. This action was brought to recover the price of a quantity of lime alleged to have been sold by the plaintiffs to the defendant. At the trial the County Court Judge entered a verdict in favour of the plaintiffs.

Upon the appeal the objection was taken that the plaintiffs were bound to show that the lime was measured by a standard measure according to the Dominion Weights and Measures Act, and, not having done so, they could not recover. The plaintiffs answered that the defendant could not rely upon the Act because it had not been pleaded or set up in the dispute note filed.

There was no evidence that the measure used was not duly stamped. There was only an absence of evidence on the part of the plaintiffs that it was stamped. The only witness for the defendant who seemed to have been asked about a measure, said, "I do not know whether it was stamped or not; I can say it was a bushel measure."

Held, that the appeal should be dismissed with costs.

If a defendant in a County Court suit intends to rely on a statute which it would be necessary for him to plead specially in an action at law, he must set it up by his dispute note.

Illegality, whether it arises on a statute or at common law, must be pleaded: *Martin* v. *Smith* 4 Bing, N. C. 486; *Boucher* v. *Shewan*, 14 C. P. 419. It makes no difference whether the illegality appears from the plaintiff's own proofs or otherwise: *Fenwick* v. *Laycock*, 1 Q. B. 414.

The onus of proving the illegality rests on the defendant: *Forster* v. *Taylor*, 5 B. & Ad. 887.

Ewart, Q.C., for the plaintiffs.

Sifton, A.-G., for the defendant.

[8TH JUNE, 1894.

MILLER v. DAHL.

Tenant for life—Remainderman—Unproductive investment—Loss, how borne—Apportionment of moneys received—Use and occupation by tenant for life—Calculation of interest where received at different rates.

Suit for administration. Cross-appeals by the plaintiff and one of the defendants from the Master's report. Some of the moneys belonging to the estate had been invested in securities which turned out to be unproductive, and there was a loss on realization. The question was raised who should bear the loss.

Held, that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers: *Cox* v. *Cox*, L. R. 8 Eq. 343. A calculation should be made of what sum invested at the date from which interest was to run, at six per cent. per annum, would amount with interest to the sum recovered and interest on this principal; the difference between this principal and the amount recovered should be paid to the tenant for life and the balance to the remainderman. A tenant for life cannot be compensated for loss of income unless there is a fund out of which compensation can be made: *Moore* v. *Johnson*, 33 W. R. 446.

On one of the mortgages belonging to the estate seven per cent. interest was received; other portions of the estate produced a lower rate. The Master gave the tenant for life income at six per cent. upon what he found to be the whole value of the estate, after deducting the debts.

Held, that the tenant for life was not entitled to the seven per cent. actually received.

The executors sold certain lands, the equity in which they had foreclosed, for $1,000 cash, $1,000 in two years, and $1,000 in three years, without interest.

Held, that as the executors sold on the best terms they could get, they could not be held responsible for depriving the tenant for life of income.

The defendant sought to charge the tenant for life with an occupation rent for the farm she lived on.

Held, that she was not liable to be charged with such; in the statement and accounts produced before the Master by the defendant, no sum appeared as a proper charge to make against her for occupation, and no serious proposal was ever made to so charge her. It appeared that all the family were living on the place, and that it was her second husband who was really in occupation and farming the land.

Both appeals dismissed with costs.

Monkman, for the plaintiff.

Wade, for the defendants.

[BAIN, J., 21ST JUNE, 1894.

CREDIT FONCIER FRANCO-CANADIEN v. SCHULTZ.

Mortgage—Foreclosure suit—Sale after foreclosure decree.

The plaintiffs, mortgagees, having filed a bill for foreclosure, a decree for foreclosure was made and the Master made his report and appointed a day for payment.

The plaintiffs then petitioned that, notwithstanding the decree, the Court should make an order for the sale of the mortgaged premises and that the mortgagor should pay the balance that might remain due after deducting the amount realized by the sale, upon the ground that the mortgaged premises were not worth the amount due under the mortgage.

Held, that the Court had not the power to make an order for sale after there had been a decree for foreclosure, except by the consent of all parties interested, and that the decree could be changed or varied only on a re-hearing.

Petition dismissed with costs, to be set off against the amount due the plaintiffs by the defendant.

Girdlestone v. *Lavender*, 9 Ch. App. 53; *Wayn* v. *Lewis*, 22 L. J. Ch. 1051, followed.

Huggard, for the plaintiffs.

Phippen, for the defendant.

NORTH-WEST TERRITORIES.

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 19th JUNE, 1894.

EDISON GENERAL ELECTRIC COMPANY v. DAVIS.

Security for costs—Default—Dismissal of action—Locus standi of plaintiffs—Order in Chambers—Motion to set aside—Procedure.

By s. 8 of the Judicature Ordinance proceedings to set aside a Judge's order should be taken before the Court, and not by summons, but by motion, as provided by s. 470.

Lagrange v. *McAndrew*, 4 Q. B. D. 210, followed.

By an order in Chambers the plaintiffs were required to give security for costs, and it was directed that in default of their doing so within three months, the action should be dismissed with costs, and that there should be a stay of proceedings meanwhile.

Held, that, under s. 520 of the Judicature Ordinance, the plaintiffs' action stood dismissed upon their non-compliance with the terms of the order, unless the Court or Judge, on special application, otherwise ordered; and so long as the plaintiffs were in default they had no *locus standi* to object to any proceedings taken by the defendants.

P. McCarthy, Q.C., for the plaintiffs.

McCaul, Q.C., *Muir*, Q.C., and *J. E. Hooper*, for the several defendants.

Supreme Court of Canada.

EXCHEQUER COURT.] [13th MARCH, 1894.

THE SANTANDERINO v. VANVERT.

Maritime law—Collision—Defective steering gear—Prompt action—Questions of fact—Appeal on.

The S. S. *Santanderino* was entering Sydney harbour, where the barque *Juno* was lying at anchor about 200 yards to the right of the centre of the channel. She was making eight or nine knots with a slight list to port, and the *Juno* was on her starboard bow. As she came near the *Juno* her head fell off to port, and in porting the helm she came too much to starboard, and in putting the helm to starboard to put her straight on her course it was found that the wheel would not work. She was then 200 to 250 yards from the *Juno* and on her port quarter. The third officer, who was at the wheel, told the master that it would not work, and the master sent the second and third officers below to see what was the matter and inform the engineer, at the same time telegraphing to stop the engine. He then ordered the port anchor to be let go, the engine to be reversed and then to be reversed at full speed, but before that could be done the steamer struck the *Juno* on the port side.

In an action for damages caused by this collision it appeared that the defect in the steering gear was caused by the breaking of a small pin called the taper pin, which caused a longer pin to drop out and prevent an eccentric rod, by which the motion was imparted, from working. The Judge in Admiralty found that the steering gear was constructed under a proper patent and was

in good order when the steamer left Liverpool for Sydney, but that the collision was due to want of prompt action on the part of the officers of the steamer when it broke down.

Held, affirming the decision of the Judge in Admiralty, 3 Ex. C. R. 378, SEDGEWICK and KING, JJ., dissenting, that, though it was doubtful whether the evidence was sufficient to support this conclusion, it was not so clearly erroneous that an appellate Court would reverse it, the decision depending only on a question of fact.

Newcombe and *McInnes*, for the appellants.

Borden, Q.C., for the respondents.

ONTARIO.] [29th MARCH, 1894.

McGEACHIE v. NORTH AMERICAN LIFE ASSURANCE CO.

Life insurance—Condition in policy—Note given for premium—Non-payment—Demand of payment after maturity—Waiver.

A policy of life insurance issued by the defendants contained a condition that if any premium, or note, etc., given for a premium, was not paid when due, the policy should be void. M., who had insured by this policy, gave a note for the premium, and when it matured he paid a part and renewed for the balance. The last note was twice renewed and was overdue and unpaid when M. died. After the last renewal matured, the defendants' manager wrote demanding payment. In an action by M.'s widow to recover the sum insured with interest :—

Held, affirming the decision of the Court of Appeal for Ontario, 20 A. R. 187, which reversed the judgment of a Divisional Court, 22 O. R. 151, that the policy was void under the condition, and that the demand of payment after the last renewal was not a waiver of the breach of the condition so as to keep it in force.

Aylesworth, Q.C., for the appellant.

J. K. Kerr, Q.C., for the respondents.

QUEBEC.] [2ND APRIL, 1894.

McLACHLAN v. MERCHANTS BANK.

McLAREN v. MERCHANTS BANK.

Partnership—Dissolution—Married woman—Benefit conferred on wife during marriage—Contestation—Priority of claims.

On the 10th April, 1886, J. S. McL., a retiring partner from the firm of McL. & Bros., composed of J. S. McL. and W. McL. agreed to leave his capital, for which he was to be paid interest, in a new firm, to be constituted by W. McL. and one W. R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full The new firm undertook to carry on business under the same firm name up to the 31st December, 1889. J. S. McL. died on 18th November, 1886. Mrs. A. McL., the wife, separate as to property, of J. S. McL., had an account in the books of both firms. On the 17th April, 1890, an agreement was entered into between the new firm of McL. Bros. and the estate of J. S. McL. and Mrs. A McL., by which a large balance was admitted to be due by them to the estate of J. S. McL. and to Mrs. A. McL. The new firm was declared insolvent in January, 1891. Claims having been filed respectively by Mrs. A. McL. and the executors of the estate of J. S. McL. against the insolvent firm, the Merchants Bank of Canada contested the claims on the grounds, *inter alia*, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886; that Mrs. A. McL.'s moneys formed part of J. S. McL.'s capital; and that the dissolution was simulated.

Held, reversing the judgment of the Court of Queen's Bench, Q. R. 2 Q. B. 421, and restoring the judgment of the Superior Court, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to Mrs. A. McL., after crediting her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her during marriage benefits contrary to law; and that the bank had a sufficient interest to contest these claims, the

transaction being in fraud of their rights as creditors ; FOURNIER and KING, JJ., dissenting.

Laflamme, Q.C., and *Greenshields*, Q.C., for the appellants.

Hall, Q.C., and *Geoffrion*, Q.C., for the respondents.

[1ST MAY, 1894.

PARÉ v. PARÉ.

Account—Promissory note—Acknowledgment and security by notarial deed—Novation—Arts. 1169, 1171, C. C.—Onus probandi—Art. 1213, C. C.—Prescription— Arts. 2217, 2260, C. C.

In an action of account instituted in 1887 the plaintiff claimed, *inter alia*, the sum of $2,861.10, being the amount due under a deed of obligation and constitution *d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and in the manner mentioned in the promissory note. The defendant pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side, Q. R. 2 Q. B. 489, that the deed did not effect a novation : Arts. 1169 and 1171, C. C. At most it operated as an interruption of the prescription and a renunciation of the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue : Art. 2264, C. C. And, as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years : Art. 2260, C. C.

As to the other items of the accounts, the Supreme Court restored the judgment of the Court of review, whereby the amount found due to the plaintiff was compensated by the balance to the credit of the defendant, which appeared in the plaintiff's books.

C. A. Geoffrion, Q.C., for the appellant.

A. Ouimet, Q.C., for the respondent.

McINTOSH v. REGINAM.

Criminal law—Appeal—Criminal Code, 1892, s. 742—Larceny—Undivided property of co-heirs—Fraudulent misappropriation—Unlawful receiving —R. S. C. c. 164, ss. 65, 83, 85.

Where on a criminal trial a motion for a reserved case made on two grounds was refused, and on appeal to the Court of Queen's Bench, appeal side, that Court was unanimous in affirming the decision of the trial Judge as to one of such grounds, but not as to the other:—

Held, that an appeal to the Supreme Court of Canada could only be based on the one as to which there was a dissent.

A conviction under s. 85 of the Larceny Act, R. S. C. c. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under s. 65.

A fraudulent appropriation by the principal and a fraudulent receiving by the accessory may take place at the same time and by the same act.

Two bills of indictment were presented against A. and B. under ss. 85 and 83 of the Larceny Act.

By the first count each was charged with having, unlawfully and with intent to defraud, taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same.

The second count charged B., the appellant, with having unlawfully received the $7,000, the property of the heirs, which had before then been unlawfully obtained and taken and appropriated by A., the taking and receiving being a misdemeanour under s. 85 at the time when he so received the money.

A., who was the executor of C.'s estate and was the custodian of the money, pleaded guilty to the charge of the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving.

On the question submitted in a reserved case whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of

Queen's Bench for Lower Canada, on appeal, LACOSTE, C.J., dissenting, held the conviction good.

At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased a railway ticket for the United States, made a parcel of the money, took it to B.'s store, handed it to him, saying, "here is the boodle; take good care of it," and on the same evening absconded to New York.

Held, affirming the judgment of the Court below, GWYNNE, J., dissenting, that whether A. was a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under s. 88 of receiving it, knowing it to have been unlawfully obtained.

H. Saint-Pierre, Q.C., for the appellant.

J. K. Quinn, Q.C., for the respondent.

ROYAL ELECTRIC CO. v. CITY OF THREE RIVERS.

Contract—Electric plant– Reference to experts by Court—Adoption of report by two Courts—Reference clause in contract.

The Royal Electric Company having sued the corporation of the city of Three Rivers for the contract price of the supplying and erection of a complete electric plant, which under the terms of the contract was to be put in operation for at least six weeks before payment of the price could be claimed, the Court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada, appeal side, affirmed the judgment of the Superior Court. On appeal to the Supreme Court of Canada:—

Held, that where there are concurrent findings of two Courts on a question of fact, this Court will not interfere, unless the findings of fact are conclusively wrong.

2. That where a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras made under the contract will not be exigible prior to the completion of the main contract.

Quære, whether a right of action exists where a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration.

Quebec Street R. W. Co. v. *City of Quebec*, 18 Q. L. R. 205, referred to.

Beique, Q.C., and *Geoffrion*, Q.C., for the appellant.

George Irvine, Q.C., for the respondent.

ROYAL ELECTRIC CO. v. LEONARD.

Action en garantie—Contract—Sub-contract—Legal connection.

The appellants, who had a contract with the corporation of the city of Three Rivers to supply and set up a complete electric plant, sublet to the respondents the part of their engagement which related to the steam engine and boilers. The original contract with the corporation embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the corporation for the agreed contract price, the latter pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgments of the Courts below, that there was no legal connexion (*connexité*) existing between the contract of the respondents and that of the appellants with the corporation, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed.

Beique, Q.C., for the appellants.

A. R. Oughtred, for the respondents.

ATLANTIC AND NORTH-WEST R.W. CO. v. JUDAH.

Railway company—Expropriation—Award—Additional interest—Confirmation of title—Diligence—Railway Act, ss. 170, 172.

To a petition to the Superior Court praying that a railway company be ordered to pay into the hands of the prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in Court under s. 170 of the Railway Act of Canada, and praying further that the company should be enjoined and ordered to proceed to confirmation of title in order to proceed to the distribution of the money, the company pleaded that the Court had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher Courts for an increased amount.

Held, reversing the judgment of the Courts below, that by the terms of s. 172 of the Railway Act, it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held, further, FOURNIER, J., dissenting, that, assuming the Court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title.

H. Abbott, Q.C., for the appellants.

Branchaud, Q.C., for the respondent.

HUNT v. TAPLIN.

Appeal—Amount in controversy—Pecuniary interest—R. S. C. c. 135, s. 29.

The plaintiff, who had acted as agent for the late M. S., brought an action for $1,470 for a balance of account as *negotiorum gestor* of M. S., against the defendants, executors of M. S. The defendants, in addition to a general denial, pleaded compensation for $8,416 and interest. The plaintiff replied

that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not a giving in payment but a giving of a security. The Court of Queen's Bench held that the defendants had been paid by the *dation en paiement* of the immovables, and that the defendants owed a balance of $1,154 to the plaintiff. On application being made to the Registrar of the Supreme Court in Chambers, the security for appeal to the Supreme Court was allowed.

On a motion to quash the appeal by the plaintiff for want of jurisdiction, on the ground that the amount in controversy was under $2,000:—

Held, that the pecuniary interest of the defendants affected by the judgment appealed from was more than $2,000 over and above the plaintiff's claim, and therefore the case was appealable under R. S. C. c. 135, s. 29.

MacFarlane v. *Leclaire*, 15 Moo. P. C. 181, followed.

Motion to quash refused with costs.

Buchan, for the motion.

Butler, Q.C., contra.

MONTREAL STREET RAILWAY CO. v. CITY OF MONTREAL.

Assessment and taxes—Street railway company—Municipal corporation—Tax on horses.

By a by-law of the city of Montreal a tax of $2.50 was imposed upon each working horse in the city.

By s. 16 of the appellants' charter it was stipulated that each car employed by them should be licensed and numbered, &c., for which the company should pay, "over and above all other taxes, the sum of $20 for each two horse car and $10 for each one horse car."

Held, affirming the judgment of the Court below, Q. R. 2 Q. B. 391, that the appellants were liable for the tax of $2.50 on each and every one of its horses.

Branchaud, Q.C, and *Geoffrion*, Q.C., for the appellants.

L. J. Ethier, Q.C., for the respondents.

[16TH MAY, 1894.

CHAMBERLAND v. FORTIER.

Appeal—Action negatoire—Amount in controversy—Future rights—R. S. C. c. 135, s. 29 (b)—56 V. c. 29, s. 1.

In an action *negatoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $80 damages.

Held, that under 56 V. c. 29, s. 1, amending R. S. C. c. 135, s. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound.

Vineberg v. *Hampson*, 19 S. C. R. 369, distinguished.

Motion to quash refused.

Languedoc, Q.C., for the motion.

Amyot, Q.C., contra.

NOVA SCOTIA.] [18TH MARCH, 1894.

MACK v. MACK.

Trusts and trustees—Administrator of estate—Release to, by widow and next of kin—Misrepresentation—Rescission of deed of release—Laches.

M., administrator of his brother's estate, obtained from the widow and next of kin of the testator a release of all their respective interests in the real and personal property of the deceased, representing to them that if the property was sold at auction it would be sacrificed, and the most could be made of it by his having full control. The testator died in 1871, and from that time until his own death in 1888 M. held the property as his own and did nothing with it as executor, either by passing accounts in the Probate Court or attempting to wind up the estate. During that period he wrote a number of letters to the testator's widow, in most of which he stated that he was acting for her benefit in regard to the property, and would see that she

lost nothing by his having it, and in 1881 he paid her $1,000. Prior to this payment, as it appeared from his letters, the widow had repented handing over the estate, and kept urging him to give her a statement of his dealings with the property, and early in 1881 he wrote that it would take two years more to enable him to know how the business stood, but no such statement was given, and after his death the widow brought an action against his executors, asking for an account of the estate and his dealings therewith and payment of her share, and to have the release set aside. The defendants set up the release as an answer to the claim, and also pleaded that the plaintiff was precluded by laches from maintaining the action.

Held, affirming the decision of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that the release should be set aside; that the widow in signing it was ignorant of the state of her husband's business and was dominated by the stronger will of M.; and that M. after the release had admitted his liability to her as trustee, and promised to account to her for the property without regard to his legal title and paid money to her on account of such liability.

Held, further, that the plaintiff was not precluded by delay in pressing her claim from taking these proceedings; that the delay was due to M. himself, who, by his promises to render a statement of the affairs of the estate, had induced her to refrain from taking proceedings; and that M. by his correspondence had elected to divest himself of his legal title, and must be treated as a mere trustee for the widow; and there was no statute of limitations to bar a *cestui que trust* from proceeding against his trustee for breach of an express trust, nor was there in Nova Scotia any prescription in favor of an administrator or executor against a beneficiary bringing suit for his share of an estate, except in the case of a legatee.

Borden, Q.C., for the appellants.

Newcombe and *McInnes*, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Ch. D.] [30th June, 1894.

KNICKERBOCKER v. RATZ.

Costs—Settlement of action—Power of Master or Judge in Chambers to dispose of costs—Consent—Principle of decision—Discretion—Circumstances of case—Appeal.

An appeal by the plaintiffs from an order of a Divisional Court of the Chancery Division, 16 P. R. 80, affirming, as the result of a disagreement, an order of a Judge in Chambers reversing an order of the Master in Chambers, upon a summary application, disposing of the costs of the action in favour of the plaintiffs, was allowed and the Master's order restored.

Held, that he had a jurisdiction to make the order which did not necessarily depend upon consent of the parties to go before him.

North v. *Great Northern R. W. Co.*, 2 Giff. 64, and *Tompson* v. *Knights*, 7 Jur. N. S. 704, followed.

2. That the Judge in Chambers had exercised his discretion and reversed the Master's order upon a wrong principle, and his decision was appealable.

Wansley v. *Smallwood*, 11 A. R. 439, and *Crowther* v. *Elgood*, 34 Ch. D. 691, followed.

3. Agreeing with the opinion of Boyd, C., in the Court below, that when the action was begun the circumstances justified it, and there was nothing to take the case out of the

ordinary rule that the person in the wrong shall answer in costs.

Proctor v. *Bayley*, 42 Ch. D. 390, distinguished.

W. M. Douglas, for the appellants.

W. H. P. Clement, for the respondents.

BOYD, C.]

RATTÉ v. BOOTH.

Reference—O. J. A., s. 101—Assessment of damages—Discretion—Appeal.

The right of the trial Judge to refer the question of damages, as a question arising in the action, under s. 101 of the Judicature Act, is indisputable, at all events as a matter of discretion and subject to review; and it is for the party objecting to the reference to show that the discretion has been wrongly exercised.

And where, in an action for damages for injury to the plaintiff's land on the bank of a navigable river and to his business as a boatman, by the acts of the three several defendants, who owned saw-mills higher up on the stream, in throwing refuse into it, it appeared that the plaintiff's title to relief and the liability of the defendants had been established in a former action, and the trial Judge heard the case only so far as to satisfy himself that the plaintiff had established a *prima facie* case on the question of damages, and directed a reference to assess and apportion them among the defendants, reserving further directions and costs:—

Held, that there was no miscarriage, and the discretion of the trial Judge should not be overruled.

McCarthy, Q.C., and *R. V. Sinclair*, for the appellants.

Moss, Q.C., for the respondent.

GALT, C.J., AND MACMAHON, J.]

MOLSONS' BANK v. COOPER.

Summary judgment—Rule 744—Application of—Special grounds for relief—Substantial defence.

In two actions to recover the amounts of overdue promissory notes, motions were made by the plaintiffs at an early stage

under Rule 744 for summary judgments, upon the ground that the sheriff had seized and sold certain property of the defendants under execution, and that in order to share in the distribution of the proceeds of sale under the Creditors' Relief Act, it was necessary for the plaintiffs to have immediate judgment.

Held, not a sufficient special ground for the application of the Rule.

In answer to the motions the defendants set up on affidavits the defence that there was an agreement between them and the plaintiffs that moneys collected on collaterals should be applied in discharge of the notes sued on, among others, and that moneys were so collected and applied; but the agreement was denied by the plaintiffs.

Held, per OSLER, J. A., that this was a substantial defence and ought not to be tried summarily upon affidavits.

Leslie v. *Poulton*, 15 P. R. 382, followed.

Remarks by MACLENNAN, J.A., on the origin and application of Rule 744.

Judgments of GALT, C.J., and MACMAHON, J., reversed.

Shepley, Q.C., for the plaintiffs.

Aylesworth, Q.C., for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE JUSTICES IN BANCO, 21ST JUNE, 1894.

REGINA v. ALWARD.

Justice of the peace—Indian Act—Sale of intoxicating liquors—Information—Several offences—Objection taken at hearing—Summary conviction.

When an information laid against the defendant under the Indian Act charged that he sold intoxicating liquor to two persons on the 5th July and to two persons on the 8th July, and the justices, notwithstanding that the defendant's counsel objected to

the information on this ground, proceeded and heard evidence in respect of all the offences so charged, then amended the information by substituting the 8th August for the 8th July, proceeded and heard evidence in respect of the substituted charge and dismissed it, and convicted the defendants for selling to two persons on the 5th July, the conviction was quashed.

Regina v. *Hazen*, 20 A. R. 688, distinguished.

Per STREET, J.—It was the duty of the justices when the objection was taken to have amended the information by striking out one or other of the charges and to have heard the evidence applicable to the remaining charge only.

Aylesworth, Q.C., for the defendant.

T. W. Howard, for the complainant.

[THE DIVISIONAL COURT, 21ST JUNE, 1894.

HOLLENDER v. FFOULKES.

Writ of summons—Special indorsement—Interest—Unliquidated demand—Summary judgment for liquidated portion of demand—Rules 245, 705, 711, 739.

Where the writ of summons was indorsed to recover the amount of a foreign judgment, together with interest from the date thereof until judgment:—

Held, that the claim for interest was for an unliquidated amount, and the two claims together did not constitute a good special indorsement within Rule 245.

Held, also, that the plaintiff was not entitled upon such indorsement to a summary judgment under Rule 739 for the amount of the foreign judgment only, with liberty to proceed for the interest, for Rule 739 cannot be made applicable where there is a claim for a liquidated demand joined to one for unliquidated damages.

Rules 245, 705, 711, and 739 considered.

Solmes v. *Stafford*, 16 P. R. 78, followed.

Hay v. *Johnston*, 12 P. R. 596, not followed.

McBrayne, for the plaintiff.

W. H. Bartram, for the defendant.

IRVINE v. MACAULAY.

Revivor—Ejectment—Ontario Judicature Act, 1881, Rules 383, 384, 385.

An action of ejectment was begun in 1874, and in 1879 the parties, being at issue, agreed that no further proceedings should be taken until the result of another action should be known. Judgment in that action was given in 1891. In 1886 the original plaintiff conveyed the lands to M.

Held, that an order made in 1898 allowing the action to be continued in the name of M. as plaintiff was proper; for, as the original plaintiff did not convey away the lands till after the passing of the Ontario Judicature Act, 1881, Rules 383, 384, and 385 of that Act (Con. Rules 620, 621, and 622) were applicable to the action, and it did not become defective when the conveyance was made.

Lemesurier v. *Macaulay*, 20 A. R. 421, distinguished.

W. R. Meredith, Q.C., for the plaintiff.

A. H. Marsh, Q.C., for the defendants.

FINDLEY v. FIRE INSURANCE COMPANY OF NORTH AMERICA.

Fire insurance—Policy—Statutory conditions—Other conditions—Variations—55 V. c. 39, s. 33—Representations in application—R.S.O. c. 167, s. 114, condition 1—Moral risk—Apprehension of incendiarism.

Where a fire insurance policy does not contain the statutory conditions, but other conditions not printed as variations, it must be read as containing the statutory conditions and no others.

Citizens' Insurance Company v. *Parsons*, 7 App. Cas. 96, followed.

And the law in this respect has not been altered by 55 V. c. 39, s. 33.

Where the policy is based upon an application containing statements or representations relating to matters as to which the insurers have required information, the first of the statutory

conditions in s. 114 of R. S. O. c. 167 must be taken to refer to such statements and representations, whether the risk they relate to is physical or moral.

Reddick v. *Saugeen Mutual Fire Insurance Co.*, 15 A. R. 868, followed.

And where in the application the insured was asked whether any incendiary danger to the property was threatened or apprehended, and untruly answered "no":—

Held, that the policy was avoided.

Masten, for the plaintiff.

Ryckman, for the defendants.

CRAM v. RYAN.

Negligence—Fire—Liability for acts of another—Control—Navigable waters—Access to shore and navigation rights—Public rights—Private rights.

Held, affirming the decision of STREET, J., 24 O. R. 500, that the defendants were liable for the negligence of the owner of the tug hired by them in so placing it as to communicate fire to the plaintiff's scow, as in doing so he was obeying the orders of the defendants' foreman, and was under his direct and personal control.

Bartonshill Coal Co. v. *Reid*, 3 Macq. Sc. App. Cas. 266, followed.

Held, however, reversing the decision of STREET, J., that the plaintiff in mooring his scow where he did was not a trespasser, at all events as against the defendants, who were mere licensees "to take sand from in front of" the land granted by the Crown.

The grant to the shore of the river, reserving free access to to the shore for all vessels, boats, and persons, carried the land to the water's edge, and not to the middle of the stream. The effect of the removal of the shore line back from its natural line was to make the water so let in as much *publici juris* as any other part of the water of the river, and such removal did not take away the right of free access to the shore so removed.

Watson, Q.C., and *Masten*, for the plaintiff.

McCarthy, Q.C., for the defendants.

[ARMOUR, C.J., 27TH JUNE, 1894.

In re GARSON AND TOWN OF NORTH BAY.

Arbitration and award—Motion to set aside award—Time—9 & 10 Will. III. c. 15—52 V. c. 13, ss. 2, 4, 6—Reference back to arbitrator—Diligence.

A notice of motion to set aside an award made on the 24th July, 1893, of which the applicants had notice on the 7th August, 1893, was served on the 29th March, 1894.

Held, too late.

The motion, if made under 9 & 10 Will. III. c. 15, should have been made before the last day of what was formerly Trinity Term; and, if the award was one to which s. 4 of 52 V. c. 13 did not apply, by s. 6 could not have been made after the expiration of three months from the making and publication.

The provision of s. 2 of that Act as to filing awards does not prevent the time limited by 9 & 10 Will. III c. 15, and 52 V. c. 13, s. 6, from running.

Where the time has elapsed for moving to set aside an award, the matters referred may in some cases be remitted to the reconsideration of the arbitrator, but only where the applicant is reasonably prompt in coming to the Court for relief.

Aylesworth, Q.C., for the motion.

Masten, contra.

[FERGUSON, J., 1ST JUNE, 1894.

CAMERON v. ADAMS.

Will—Devise—Right to "a home"—Interest in land—Equitable execution—Receiver.

A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were

living upon the land at the time of the making of the will and of the death of the testator, when there were two dwelling-houses thereon. Afterwards the trustee and the nephew's father-in-law at their expense improved and altered the property so that the number of houses was increased to seven. The nephew lived with his family in one, and received the rents of the others.

In an action by judgment creditors of the nephew and his wife seeking the appointment of a receiver to receive the rents in satisfaction of the judgment:—

Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of the plaintiffs' claim.

Allen v. *Furness*, 20 A. R. 84, distinguished.

D. B. Maclennan, Q.C., and *C. H. Cline*, for the plaintiffs.

Leitch, Q.C., and *R. A. Pringle*, for the adult defendants.

Dingwall, for the infant defendants.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 30th JUNE, 1894.

WILKES v. KENNEDY.

Summary judgment—Rule 739—Action on implied covenant—Land Titles Act, R. S. O. c. 116, s. 29—Unconditional leave to defend.

In an action by the assignee of a charge registered against land under the Land Titles Act, R. S. O. c. 116, to recover money due under the covenant for payment implied by virtue of s. 29, there being no entry on the register negativing the implication, the defendant, in answer to an application for

summary judgment under Rule 739, swore that it was clearly understood between him and the original chargees that the land only was to be liable, and this was corroborated by one of the original chargees, the plaintiff however swearing that she was a *bona fide* purchaser for value without notice of this understanding.

Held, that there was a *bona fide* contest of a question to some extent novel, which ought to be fairly litigated is the usual way, without hampering conditions being imposed on the defence.

Jones v. *Stone*, [1894] A. C. 124, followed.

James A. Macdonald, for the plaintiff.

F. J. Roche, for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 23RD JUNE, 1894.

McKEE v. HAMLIN.

HAMLIN v. CONNELLY.

Costs—Taxation—Solicitor and client—Retaining fee.

By the judgment in an action the defendant was required to pay the plaintiffs' costs of a former action, as between solicitor and client, to be taxed.

Held, that a retaining fee which the plaintiffs had agreed in writing to pay to their solicitors, over and above the costs of the action, could not be taxed against the defendant.

Re Geddes and Wilson, 2 Ch. Chamb. R. 447, and *Ford* v. *Mason*, 16 P. R. 25, approved and followed.

Re Fraser, 13 P. R. 409, distinguished.

Douglas Armour, for the plaintiffs.

W. H. P. Clement, for the defendant.

NEW BRUNSWICK

In the Supreme Court.

[13TH JUNE, 1894.

SAINT STEPHEN'S BANK v. BONUS.

Promissory note—Subsequent securities—Liability of indorser—Evidence—New trial.

Action to recover $1,000, the amount of a promissory note made by S. in favour of the defendant, and by him indorsed to the plaintiffs. Subsequently to the taking of this note, the plaintiffs, without consulting the defendant, took a bond and warrant of attorney and a bill of sale for $6,000 from S., upon which they realized $4,200, leaving a balance of $1,800 due, and they now sought to recover the amount of this note from the defendant as indorser. The defence was that the note had been paid by the proceeds of the subsequent securities taken from S. by the plaintiffs.

Held, per TUCK and BARKER, JJ., that the plaintiffs had the right to take the bill of sale and bond and warrant of attorney as an additional security to their debt, without affecting their claim against the defendant on the note; but that there should be a new trial on the ground of the improper admission of evidence.

Held, per HANNINGTON and LAUNDRY, JJ., that the note had been paid by the proceeds of the bill of sale.

The Court dividing evenly, the verdict for the defendant stood.

REGINA v. THERIAULT.

Criminal law--Manslaughter—Danger of bodily harm to prisoner's wife and family—Question for jury—Non-direction—New trial.

This was an application to quash a conviction for manslaughter against the defendant. At the trial the defence gave evidence of danger of bodily harm to the prisoner's wife and family, but this feature of the case was not commented upon by either of the counsel or the presiding Judge. The principal ground relied upon now was that it had not been presented to the jury by the Judge.

Held, that there was evidence that the prisoner might have had reasonable apprehension of danger of bodily harm to his wife and family, and that, as this question had not been left to the jury, there should be a new trial. The application to quash the conviction was refused and a new trial granted.

George F. Gregory, Q.C., for the defendant.

A. S. White, S.-G., for the Crown.

REGINA v. ELLIS.

Costs—Contempt of Court—Power of Court to inflict costs—Counsel fees—Attorney and client.

The first application in this case was to vary the order of the Court sentencing the defendant to be imprisoned and pay a fine and costs for contempt of Court, by striking out the words relating to costs. The defendant urged that the Court had no authority to order costs in cases of this nature.

Held, that the authority of this Court to award costs in such a case was sufficiently clear, and that the application should be dismissed with costs.

A second application was made at the same time for a direction from the Court as to what costs were to be taxed under the above order, the amounts disputed being chiefly counsel fees.

Held, that the clerk should tax to the prosecutor all counsel fees paid out by the prosecutor's attorney, provided the attorney had the authority of his client to engage such counsel; that this authority might be a specific or an implied authority; that the clerk should tax all costs which could lawfully be charged by the attorney against his client; but that counsel fees charged by the attorney to his client were not included in the order.

Application dismissed without costs.

L. A. Currey, for the prosecutor.

H. H. McLean, for the defendant.

VROOM v. CONNER.

Trusts and trustees—Promissory note made by trustee—Misappropriation of proceeds—Lien on trust estate.

This was an appeal from a decree of the Equity Court. L., who was trustee of the S. estate, induced the defendant to indorse a promissory note made by L., as trustee, in favour of himself and indorsed by him, and represented to the defendant that he was negotiating for a mortgage loan by which to consolidate the whole debt of the estate, and that when these negotiations were completed, this note should be paid from the proceeds. The note was renewed several times, and finally L. left the country a defaulter to the estate and others. In the Equity Court the defendant obtained a decree in his favour, ordering the amount to be paid from the personal property of the estate. This appeal was from that decree.

Held, that, inasmuch as it was not denied that L. had appropriated to his own use the funds obtained by the note in question, and that the estate had never got any benefit from any part of such funds, the defendant had no lien upon the property of the estate. There had been no agreement or any pretence of an agreement that the defendant should be secured by a mortgage on the property of the estate.

Appeal allowed with costs.

Ex parte JOHNSON.

Schools—Assessment—Legality of—Administration of school law.

This was an application for a *certiorari* to quash an assessment of the school district of B. made for school purposes. Several grounds were taken, but counsel for the applicants admitted that the principal object of the applicants was to obtain the opinion of the Court as to whether the school law had been legally administered in the district of B.

Held, that the assessment as made by the school trustees was strictly legal, and, that being so, the Court would not express any opinion as to whether the school law had been administered legally or otherwise by the school trustees of the district.

Application dismissed.

C. N. Skinner, Q.C., and *George W. Fowler*, for the applicants.

R. A. Lawlor, contra.

Ex parte HANFORD (No. 1).

Attorney and client—Application for attachment—Bona fide dispute.

This was an application for an attachment against D., an attorney, for not paying over certain moneys which the applicants claimed he held in his hands as their attorney. Upon the argument D. produced affidavits which showed that he was willing to settle with the applicants; that the money he had of theirs had been placed with him for investment; that he had lent $1,000 upon a promissory note, which appeared to him to be good security at the time; and that he had since offered to settle with the applicants by handing over this note and the balance of $900, which the applicants had refused.

Held, that, as there appeared to be a *bona fide* dispute between the parties, the Court should not exercise summary jurisdiction in the way asked.

Application dismissed.

I. A. Jack, Q.C., for the applicants.

L. A. Currey, contra.

Ex parte HANFORD (No. 2).

Attorney and client—Attorney's fees—Services as agent—Attachment of attorney.

This was an application for an attachment against D., an attorney, to compel him to pay over $1,500 which the applicant alleged he held as her attorney. In answer D. produced an affidavit which went to show that the services he had rendered to the applicant were not rendered in his capacity of an attorney, but rather as her agent.

Held, that, as in his bill rendered for services to the applicant D. had made certain charges for services as an attorney, he was to be regarded as having acted as an attorney of this Court.

Rule for an attachment to be made absolute unless D. should deliver his account and pay over to the applicant the balance due her before the 1st August next.

I. A. Jack, Q.C., for the applicant.

L. A. Currey, contra.

DAY v. DOMINION SAFETY FUND LIFE ASSOCIATION.

Life insurance—Change of occupation—New trial—Misdirection.

Action to recover the amount of a life insurance policy issued by the defendants upon the life of the plaintiff's husband, whose death was caused by an accident while he was engaged in braking cars. In the application for insurance the deceased was described as a shoemaker. At the trial the plaintiff recovered a verdict. The chief ground relied upon for a new trial was the misdirection of the trial Judge "in not directing the jury that the deceased was engaged at the time of his death in braking cars, which occupation was more hazardous than that of a shoemaker."

Held, that the case had been fairly left to the jury, and a new trial must be refused.

H. A. Powell, for the plaintiff.

C. W. Weldon, Q.C., for the defendants.

BRADSHAW v. BAPTIST FOREIGN MISSION BOARD.

New trial—Order for—Jurisdiction of Judge in Equity.

An appeal from the decision of the Judge in Equity refusing to grant an order for a new trial, on the ground that, not having heard the case, he had no jurisdiction under the Equity Act to make the order.

Held, HANINGTON, J., *hesitante*, that the decision appealed from was correct and that the motion should be dismissed, but without costs.

McALEER v. REID.

Promissory note—Insurance premium—Representations of agent—Insured bound by statements in his application.

This was an appeal from a verdict and judgment in a County Court. The action was brought to recover the amount of a promissory note made by the appellant in favour of the respondent, and given for the first premium on a life insurance policy. At the trial the appellant set up as a defence that the respondent, who was the agent of the company, had represented that the policy would be incontestable after one year, but that the policy issued to him was not incontestable until after two years. The respondent obtained a verdict, which was now appealed from.

Held, that, as the application signed by the appellant stated that the policy applied for would not be incontestable until after the period of two years, the appellant was bound by this, and not by any statement of the agent made to him at the time.

BANK OF BRITISH NORTH AMERICA v. LANTALUM.

Summary judgment—Supreme Court Amendment Act, N. B., 1894, ss. 14, 15—Action on promissory note—Proof of presentment—Affidavit.

This was a motion by the defendants to set aside an order made by a Judge at Chambers under the provisions of the

Supreme Court Amendment Act, 1894, s. 14, allowing the plaintiffs to sign summary judgment in an action on a promissory note. This enactment provides that when a defendant appears to a writ of summons specially indorsed, &c., the plaintiff may, on an affidavit made by himself or any other person who can swear positively to the debt or cause of action, obtain from a Judge in Chambers a summons calling upon the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed with interest, if any, and costs; and s. 15 authorizes the Judge, upon return of the summons, unless the defendant by affidavit or otherwise satisfies him that he has a good defence to the action in the merits, or discloses such facts as may deemed sufficient to entitle him to defend the action, to make an order empowering the plaintiff to sign judgment. The affidavit used by the plaintiff in this action stated that the note had been "duly presented for payment," and it was urged that this was insufficient, and that the affidavit should have disclosed the the manner in which the note had been presented.

Held, that the same rule applied in this case as in the case of affidavits to hold to bail, in which the statement that the note had been "duly presented" had always been held sufficient. The motion was accordingly refused with costs.

Blair, A.-G., for the plaintiffs.

C. W. Weldon, for the defendants.

Ex parte TURNBULL REAL ESTATE COMPANY.

Assessment and taxes—Motion to quash assessment—Certiorari—Remedy by appeal to common council.

An application for a *certiorari* to quash an assessment made by the municipal corporation of the city of St. John upon the property of the applicants, under the provisions of the Assessment Act of that city.

It was contended that the assessors had based their valuations for assessment purposes upon a wrong principle, and over-valued the property assessed.

For the city corporation it was objected that the application would not lie, because the applicants had a remedy by appeal from the decision of the board of assessors to the common council, as provided by the Act, which should have been resorted to before applying for a *certiorari*.

Held, that the objection was fatal; and, by a majority of the Court, that the motion should not succeed on the merits; and it was accordingly refused.

Alward, Q.C., and *Pugsley*, Q.C., for the applicants.

I. A. Jack, Q.C., for the city corporation.

CHUTE v. GRATTAN.

Registry laws—Decree in equity—Registration of—Effect.

A decree in equity affecting lands takes effect from its date, and not from the date of its registration only.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 9TH JULY, 1894.

WARK v. CURTIS.

Partnership—Contract signed by one partner—Want of authority—Agency—Action against one partner—Demurrer.

An appeal by the plaintiff from the decision of TAYLOR, C.J., *ante*, p. 281, allowing a demurrer to the declaration, was allowed without costs, and the demurrer overruled.

Held, that the Court could not look at the contract in question otherwise than as presented in the declaration, as a simple contract, not under seal; and, considering it as a simple contract executed by the defendant in the firm name without the authority of his partner, the defendant having received and accepted from the plaintiff or his assignor a large portion of the work done under the contract, there was nothing to preclude the plaintiff from suing the defendant personally and alone for the price of the work done and for damages for refusal to allow the plaintiff to complete his contract.

The contract as set out in the declaration concluded with the words, "In witness whereof the parties hereto have hereunto set their hands and seals," but it was not averred that it was actually sealed.

Held, that the law will not intend that a person has sealed a bond or deed, unless it be averred that he did so, or unless words are used which, in themselves, import that he did.

Cabell v. *Vaughan*, 1 Wms. Saund. 461, n. 1; *Moore* v. *Jones*, 2 Ld. Raym. 1536, followed.

Hagel, Q.C., for the plaintiff.

Culver, Q.C., for the defendant.

[DUBUC, J., 5TH JULY, 1894.

BROWN v. WATSON.

Husband and wife—Alleged fraudulent conveyance—Mistake—Correcting same.

The plaintiff filed this bill to enforce certain judgments obtained by him against the defendant John Watson, and asked that two conveyances, one by John Watson to W. Blanchard and the other by W. Blanchard to the defendant Mary Ann Watson, the wife of the defendant John Watson, be declared fraudulent and void as against the plaintiff. The lands were purchased from Blanchard by the wife in 1888, and payment was made by her, partly with money received by her from the estate of her first husband, partly with money given to her by

her own son, and the balance with money raised on a mortgage, which she afterwards paid. On her paying the purchase money a conveyance was made by Blanchard to her husband, and the mortgage was executed by him. The deed and mortgage were dated 8th February, 1889.

On the 20th December, 1892, the husband conveyed to Blanchard, and on the 8th August, 1893, Blanchard conveyed to the wife. It was sworn by the husband, the wife, and Blanchard that it was by mistake that the deed of 8th February, 1889, was made to the husband, and that it should have been made to the wife. The husband and the wife were both illiterate and not able to read; the deed was kept by the wife; she discovered that the property was in her husband's name in December, 1892, when she went to borrow money from Blanchard. It was then that the deed by the husband to Blanchard was made. Blanchard swore that he had sold the land to the wife and had never known the husband in the transaction: that the conveyances by the husband to him and by him to the wife were not fraudulent, but were made because the land belonged to the wife in the first place and to correct the mistake of the previous deed.

Held, that the property was at first conveyed to the husband by the mistake of all parties concerned, and the deed of 20th December, 1892, by the husband to Blanchard was made with no fraudulent intent, but for the purpose of correcting the mistake.

Bill dismissed with costs.

Howell, Q.C., and *Machray*, for the plaintiff.

Haggard, for the defendants.

NANTON v. VILLENEUVE.

Assessment and taxes—Tax sale—Irregularities—Deed not in duplicate—Error in seal—Warrant to levy—Reference to repealed statute—Assessment by wards—Description of land—Burden of proof.

An issue under the Real Property Act. The plaintiff claimed under a tax sale deed dated 18th October, 1893. The defendants, who were the owners at the time of the sale, raised the objection

that the plaintiff's deed was not proved to have been made and executed in duplicate, as required by s. 187 of the Assessment Act, R. S. M. c. 101.

Held, that this did not invalidate the deed; it was required to be in duplicate for the benefit of the purchaser, and if he chose to waive his right to a duplicate, he could do so.

2. That the deed was not invalid on the ground that the old seal of the municipality of St. Francois Xavier was used, while the present name of the corporation was the Rural Municipality of St. Francois Xavier, the seal used having been adopted by the present municipality.

3. The warrant authorizing the treasurer to levy taxes upon the lands was dated 18th August, 1891, and was as follows:— "I command you, under the authority of s. 642, 49 V. c. 52, assented to 28th May, 1886, and amendments thereto, that you levy upon all the lands in the annexed list described," etc. The lands were sold for taxes due for 1889 and 1890. The assessment roll for those years had been made under the provisions of the Municipal Act, 1886. On 1st June, 1890, a new Municipal Act came into force, which repealed the Act of 1886, that under which the treasurer was commanded to act.

Held, that the warrant was invalid and conferred on him no power to sell the land.

4. The municipality was divided into wards previous to 1889, in which year the assessment was made according to wards, but not so in 1890.

Held, that this informality or omission did not render the assessment roll invalid.

5. The lands were described in the roll as lot 59. In the list of lands liable to be sold annexed to the warrant and in the advertisement and tax deed they were described as "inner and outer two miles, lot 59." The district registrar gave evidence that "lot 59" would mean only the inner two miles. The Municipal Act, 1886, s. 589, provides that "the assessors . . . shall enter every piece or parcel of land upon the assessment roll by a true and accurate description."

Held, that the description in the assessment roll could not be said to be a true and accurate description.

6. The defects and irregularities were not cured by R. S. M. c. 101, ss. 190 and 191, as amended by 55 V. c. 26, ss. 6, 7.

7. The onus was on the plaintiff to prove that the requirements of the statute as to the assessment and imposition of the rate had been complied with.

Verdict for the defendants without prejudice to any lien of the plaintiff for taxes paid.

Munson, Q.C., and *Beairsto*, for the plaintiff.

Ewart, Q.C., and *Coutlee*, for the defendants.

[KILLAM, J., 29TH JUNE, 1894.

MONTGOMERY v. HELLYER.

Costs—Amount in controversy—Jurisdiction of County Court—Counsel fee—Jurisdiction of Judge to allow.

The plaintiff recovered an amount within the jurisdiction of a County Court, and a certificate was granted to prevent a set-off of costs. On taxation the plaintiff sought to be allowed a counsel fee, and his right to it being disputed, the question was brought before the Judge by application for a fiat for the same. The Administration of Justice Act, R. S. M. c. 1, s. 62, s-s. (*b*), and the County Courts Act, R. S. M. c. 33, ss. 156, 158, were referred to. It was objected that, at any rate, the Judge was *functus officio*, having exhausted his authority in giving the certificate at the trial.

Held, that the trial Judge had jurisdiction to allow a fee. The certificate merely settles whether costs are to be allowed to the defendant and to be set off against the plaintiff's verdict and costs. The statute says that when it is given, a certain practice becomes applicable to fix the amounts to be recovered. The authority which the County Court Judge could exercise in a like case has become vested in the trial Judge in this Court. That authority the County Court Judge could exercise at any time before judgment, and the trial Judge could do the same.

A fee of $40 allowed to the plaintiff in addition to his witness fees and other proper disbursements which he would have incurred if he had sued in a County Court.

Machray, for the plaintiff.

Sifton, A.-G., for the defendant.

Supreme Court of Canada.

EXCHEQUER COURT.] [1ST MAY, 1894.

CARTER v. HAMILTON.

Patent of invention—Novelty—Infringement.

C. & Co. were assignees of a patent for an article called "The Paragon Black Leaf Check Book," used by shopkeepers to prepare duplicate accounts of sales; and the invention claimed was: "In a black leaf check book composed of double leaves, one-half of which are bound together, while the other half folds in as fly leaves, both being perforated across so that they can readily be torn out, the combination of the black leaf bound into the book next the cover, and provided with the tape bound across its end, the said black leaf having the transferring composition on one of its sides only." What was alleged to be new in this patent was the device, by means of the tape across the end of the black leaf, by which it could be folded over without soiling the fingers or causing the leaf to curl up.

C. & Co. brought an action against H. for infringing this patent, the alleged infringement consisting of a similar device, but with about half an inch of the carbonized leaf free from carbon, the leaf being turned over by means of this margin instead of the tape.

Held, affirming the decision of the Exchequer Court of Canada, 8 Ex. C. R. 351, that the evidence at the trial showed the device for turning over the black leaf without soiling the finger to have been used before the patent of C. & Co. was issued; that the tape across the end of the black leaf was the only novel element in the patented article; and that the device used by H.

was not an infringement of the patent depending on the tape to render it patentable.

W. Cassels, Q.C., and *J. F. Edgar*, for the appellants.

E. F. B. Johnston, Q.C., and *Heighington*, for the respondents.

[8TH MAY, 1894.

MAYES v. REGINAM.

Contract—Public work—Special quality of timber—Inspection—Change in terms of contract—Authority of engineer—Delay.

M. contracted with the Dominion Government to build a bridge in connection with a railway under construction in Nova Scotia. The contract called for the use of creosoted pine timber, of which the creosoting could only be done in S. Carolina. By one clause in the contract no change could be made in its terms without an order-in-council therefor, and by another clause M. was not to bring any suit or proceeding for damages caused by delay.

The timber was procured in S. Carolina, and M. wrote to the engineer asking for an inspection. The engineer undertook to send an inspector to S. Carolina, but neglected to do so for some weeks, and M. was put to greater expense in transporting it to Nova Scotia by reason of the delay. Having proceeded against the Crown for damages, a demurrer was filed to his petition of right.

Held, affirming the decision of the Exchequer Court, 2 Ex. C. R. 403, that by the express terms of the contract the Crown was not liable; that the engineer could not bind the Crown by entering into a supplementary contract for inspection; and that M. had, by reason of his covenant, no cause of action based on delay.

Pugsley, Q.C., for the suppliant.

W. H. B. Ritchie, for the Crown.

ONTARIO.] [22ND MAY, 1894.

FRANK v. SUN LIFE ASSURANCE CO.

Life insurance—Payment of premium—Contract dehors the policy—Avoidance of policy.

A policy of life insurance contained no condition making it void in case of non-payment of premiums or of any note, etc., given for a premium. The first premium was not paid in cash, but the assured signed and gave to the company an agreement in the form of a promissory note payable at a certain time for part, and a like agreement, payable at a later period, for the other part, each of the documents containing an undertaking by the assured that if it was not paid when due the policy should be void. The assured died after the time for payment under the first agreement, but before the second had matured, and leaving the first unpaid.

Held, affirming the decision of the Court of Appeal for Ontario, 20 A. R. 564, that by the failure to pay the part of the premium as agreed by the overdue instrument, the policy was void.

Wilkes, Q.C., for the appellant.

Aylesworth, Q.C., and *E. B. Brown*, for the respondents.

[23RD MAY, 1894.

SNETSINGER v. PETERSON.

Arbitration and award—Submission—Question of fact—Second award—Arbitrator functus officio.

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third party was chosen to enable them to effect a settlement. S. claimed that such third party was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator.

The arbitrator, having gone over the accounts, made out a statement showing $235 to be due to S. Some time after he presented a second statement showing the amount due to be $286. S. was given a cheque for the latter amount, which he asserted was only taken on account, and he afterwards brought an action for the winding-up of the partnership affairs.

Held, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which this Court would not interfere with the finding of the trial Judge that all matters were submitted, affirmed, as it was, by a Divisional Court and the Court of Appeal.

Held, further, that there was a valid award for $235; that, having made his award for that amount, the arbitrator was *functus officio*, and the second award was a nullity; and that the Divisional Court was wrong in holding that, as P. relied only on the second award, the judgment should be against him on the case as claimed by S.

W. R. Riddell, for the appellant.

McCarthy, Q.C., for the respondent.

NOVA SCOTIA.] [1ST MAY, 1894.

CITIZENS' INSURANCE CO. v. SALTERIO.

Fire insurance—Condition in policy—Assignment of policy—Change of title in property insured.

A condition in a policy of insurance against fire provided that the policy should not be assignable without the consent of the company indorsed thereon; that all incumbrances should be notified to the company within fifteen days; and that, in the event of any sale, transfer, or change of title in the property insured, the liability of the company should thenceforth cease. S., the insured under this policy, gave a chattel mortgage to a creditor of all his stock-in-trade insured thereby, and also "all policies of insurance on said stock and all renewals thereof." The consent of the company to the giving of this mortgage was not indorsed on the policy.

Held, reversing the decision of the Supreme Court of Nova Scotia, that, as the chattel mortgage and subsequent transactions showed that S. intended the policy to pass to the creditor, there was a breach of the condition, and the policy was void.

Held, further, that though the chattel mortgage was not a "sale" or "transfer" of the insured property within the meaning of the condition, it was a "change of title" therein which freed the company from liability; and it was also an "incumbrance" even if the condition meant an incumbrance on the policy.

Newcombe, Q.C., for the appellants.

Chisholm, for the respondent.

STUART v. MOTT.

Res judicata—Different causes of action.

In 1883 S. brought a suit for specific performance of an alleged verbal agreement by M. to give him one-eighth of his, M.'s, interest in a gold mine. At the hearing M. denied the alleged agreement, but admitted that, in order to prevent S. from acting in the interest of rival mine-owners, he had promised to give him one-eighth of his interest in the proceeds of the mine when sold. Judgment was given against S. in the suit on the ground that his alleged agreement was within the Statute of Frauds and void for not being in writing. Some years afterwards, the mine having been sold, S. brought another action against M. for payment of the share in the proceeds which M. had admitted he promised to give him.

Held, reversing the decision of the Supreme Court of Nova Scotia, 24 N.S. Reps. 526, that the judgment in the former suit for specific performance was not *res judicata* of the claim made by S. in his subsequent action.

Osler, Q.C., and *Newcombe*, Q.C., for the appellant.

Borden, Q.C., and *Mellish*, for the respondent.

NEW BRUNSWICK.]

ST. JOHN GAS LIGHT CO. v. HATFIELD.

Master and servant—Common employment—Negligence--Questions of fact—Finding of jury.

The St. John Gas Light Co., being engaged in laying a main through one of the public streets of the city, applied to one Wisdom, a plumber and gas-fitter, for the services of a competent man, and H. was sent by Wisdom to work on the main. While H. was working at one end of a pipe he was injured by gas escaping therefrom being set on fire from a salamander used in carrying on the work, and exploding. One of the servants of the company, whose duty it was to turn on the gas at this pipe every evening and turn it off every morning, had neglected to turn it off the morning the accident happened, and there was evidence that the salamander had been moved from its usual place and put near the end of the pipe where H. was working by order of the manager of the company.

In an action by H. for damages for such injury, the jury found that the company were guilty of negligence, and that H. at the time of the injury was not in the service of the company, but in that of Wisdom. A verdict in favour of H. was sustained by the full Court.

Held, affirming the decision of the Supreme Court of New Brunswick, that the finding as to negligence was warranted by the evidence.

Held, further, that whether or not there was a common employment between H. and the servants of the company was a question of fact, and the jury having found that H. was not in the service of the company, their finding would not be interfered with on appeal.

Hazen, for the appellants.

Currey, for the respondent.

[10TH MAY, 1894.

GRANT v. MACLAREN.

Executors and trustees—Probate Court—Passing of accounts—Res judicata.

G. was executor and trustee under a will, and as such passed his accounts yearly in the Probate Court. The accounts so passed contained all the charges and disbursements of G., both as executor and trustee, and the beneficiaries under the will were not represented by counsel on any occasion before the Probate Court. A suit in equity having been brought to remove G. from his position as executor and trustee, the Judge in Equity, before entering upon the merits, ordered a reference to take the accounts of G., and the referee reported that, having taken them, a number of items were disallowed as improper charges. On exceptions to this report the Equity Judge held that the action of the Probate Court in reference to the accounts was final and not open to review by the Court in such suit. On appeal this ruling was reversed by the Supreme Court of New Brunswick, and the referee's report confirmed. On appeal to the Supreme Court of Canada:—

Held, affirming the decision of the Court appealed from, that the Probate Court had no jurisdiction over the accounts of G. as a trustee, and, as it appeared that the items disallowed related to the duties of G. in that capacity, the referee could properly deal with them.

Held, further, that this Court would not reconsider the items dealt with by the referee, as he and the Supreme Court of New Brunswick had exercised a judicial discretion as to the amounts, and no question of principle was involved.

The plaintiffs' bill in the equity suit set out a letter written by G. to one of the plaintiffs threatening that if proceedings were taken against him he would make disclosures of malpractices by the testator which might result in heavy penalties being exacted from the estate.

Held, that this was such an improper act by G. that the Court should have immediately removed him from the trusteeship of the estate.

McLeod, Q.C., and *Palmer*, Q.C., for the appellants.

Hazen, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [30th JUNE, 1894.

OSTROM v. BENJAMIN.

County Court—Jurisdiction—Claim over $200—Liquidated or ascertained amount—R. S. O. c. 47, s. 19, s-s. 2.

Whenever a sum up to $400 is agreed on by the parties as the remuneration for a service to be performed or as the price of any article sold, if the service be performed or the article be delivered in pursuance of the bargain, the amount may be recovered in the County Court, denial of the contract and price not availing to oust the jurisdiction.

Robb v. *Murray*, 16 A. R. 503, considered.

Judgment of the Queen's Bench Division affirmed, OSLER, J.A., dissenting.

F. E. Hodgins, for the appellant.

A. J. Russell Snow, for the respondent.

JOHNSON v. GRAND TRUNK RAILWAY COMPANY.

Negligence—Evidence—Railways—Release.

An appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 64, was dismissed with costs, the Court agreeing with the reasons given in the Court below.

Osler, Q.C., for the appellants.

Stuart Livingston, for the respondent.

GIBSON v. TOWNSHIP OF NORTH EASTHOPE.

Drainage—Petition—Withdrawal.

The plaintiff in 1884, after signing a petition for the construction of a drain, wrote to the municipal council objecting to the work for reasons set out, but in 1885 the council passed the necessary by-law and issued debentures. Subsequently the plaintiff gave notice of his intention to move to quash the by-law, but afterwards he withdrew this notice and tendered for the work. In 1889 he attacked the by-law, alleging, among other grounds, that it was void by reason of his withdrawal.

Held, per HAGARTY, C. J. O., that before 53 V. c. 50, s. 35, a petitioner could not withdraw.

Per BURTON, J.A., that there was no power of withdrawal, and in any event the question whether there had been withdrawal or not was for the council.

Per OSLER and MACLENNAN, JJ.A., that there was a power of withdrawal, but the plaintiff was estopped from maintaining the action, his conduct having been such as to induce the council to believe that their jurisdiction was not contested.

Judgment of the Queen's Bench Division reversed.

Idington, Q.C., for the appellants.

J. B. Rankin, for the respondent.

CH. D.] [19th MARCH, 1894.

GRANT v. NORTHERN PACIFIC JUNCTION RAILWAY COMPANY.

Railways—Carriers—Connecting lines—Misdelivery of goods—Principal and agent—Consignor and consignee.

An appeal by the defendants from the judgment of the Chancery Division, affirming that of STREET, J., reported 22 O. R. 645, was dismissed with costs at the conclusion of the argument.

MacGregor and *R. G. Smyth*, for the appellants.

T. Wells and *W. Nesbitt*, for the respondents.

[30th JUNE, 1894.

INNES v. FERGUSON.

Statutes of Limitations—Prescription—Easement.

The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner.

Judgment of the Chancery Division reversed.

Bayly, Q.C., for the appellant.

Purdom, for the respondent.

TAYLOR v. BRANDON MANUFACTURING COMPANY.

Patent of invention—Novelty—Specifications—Ambiguity.

There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having been previously made in two separate pieces.

A specification providing merely that such a protector is to be arranged "at an angle" is void for uncertainty.

Judgment of the Chancery Division affirmed.

Osler, Q.C., for the appellants.

Shepley, Q.C., for the respondents.

C. P. D.]

MILLOY v. GRAND TRUNK RAILWAY COMPANY.

Railways—Carriers—Warehousemen.

When a shipper stores goods from time to time in a railway warehouse, loading a car when a car load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental

destruction by fire the shipper has no remedy against the company.

Judgment of the Common Pleas Division, 23 O. R. 454, reversed.

H. S. Osler, for the appellants.

Fullerton, Q.C., for the respondent.

SAMUEL v. FAIRGRIEVE.

Bills of exchange and promissory notes—Patent of invention—Transfer of patent—"Given for patent right—53 V. c. 33, s. 30, s-s. 4 (D.)—Consideration—Composition—Agreement.

Sub-section 4 of s. 30 of the Bills of Exchange Act, 1890, 53 V. c. 33 (D.), requiring notes, the consideration of which consists in whole or in part of the purchase money of a patent right, to have thereon the words "given for a patent right," does not apply to notes given by a firm to cover the individual indebtedness of one of the partners, part of the consideration to the unindebted partner for joining in the notes being, to the knowledge of the creditor, the transfer to him by the indebted partner of an interest in a patent.

An advance of money by a creditor to a debtor whose debt has been released by a composition agreement is sufficient consideration for notes given by that debtor and his partner to the creditor for part of the released debt.

Judgment of the Common Pleas Division, 24 O. R. 486, reversed.

Watson, Q.C., and *J. Parkes*, for the appellants.

Moss, Q.C., and *C. W. Thompson*, for the respondents.

COUNTY OF LINCOLN v. CITY OF ST. CATHARINES.

Municipal corporations—Road—Maintenance—Liability.

Under the legislation relating to the Queenston and Grimsby Road and the city of St. Catharines, that city is not liable to

pay to the county of Lincoln any part of the expenditure of the latter in connection with that road.

Judgment of the Common Pleas Division affirmed.

S. H. Blake, Q.C., and *J. C. Rykert*, for the appellants.

Aylesworth, Q.C., and *F. W. Macdonald*, for the respondents.

ARMOUR, C.J.]

JARVIS v. CITY OF TORONTO.

Registry Act—Easement—Notice—Equitable interest.

A municipal council who, with the oral consent of the owner, build a sewer through land, acquire an equitable right to compel a conveyance of so much of the land as is occupied by the sewer, but a purchaser of the land without notice of the consent or of the existence of the sewer is protected by the Registry Act.

Judgment of ARMOUR, C.J., affirmed.

E. D. Armour, Q.C., and *H. M. Mowat*, for the appellants.

Moss, Q.C., and *W. D. McPherson*, for the respondent.

MERIDEN BRITANNIA COMPANY v. BRADEN.

Bills of sale and chattel mortgages—Simple contract creditors—"Void as against creditors"—55 V. c. 26, s. 2.

"Void as against creditors" in s. 2 of 55 V. c. 26, which extends the provisions of the Act respecting Mortgages and Sales of Personal Property to simple contract creditors, suing on behalf of themselves and other creditors, must be read "voidable as against creditors," and it is not until an election is made by the simple contract creditors so suing, by the commencement of proceedings to attack it, that it is too late to validate a defective chattel mortgage by taking possession under it, and a sale of the goods by the mortgagee before action cannot be impeached.

Whether such an action can be brought by a simple contract creditor whose debt is not due, *quære*.

Judgment of ARMOUR, C.J., reversed.

J. J. Scott and *A. McLean Macdonell*, for the appellants.

J. W. Nesbitt, Q.C., and *J. Bicknell*, for the respondents.

TOWN OF TRENTON v. DYER.

Assessment and taxes—Roll—Certificate of clerk—Collector—Bond—R. S. O. c. 193, s. 120.

The provision contained in s. 120 of the Assessment Act, R. S. O. c. 193, requiring the clerk to deliver to the collector the roll "certified under his hand," though possibly directory as to time, is imperative as to the certificate, and a roll unsigned by the clerk is not sufficient authority to entitle the collector to distrain, and he and his sureties are not liable under their bond for the amount of uncollected taxes.

Judgment of ARMOUR, C.J., reversed; BURTON, J.A., dissenting.

T. A. O'Rourke and *A. A. Abbott*, for the appellant.

Marsh, Q.C., for the respondents.

FERGUSON, J.]

EVANS v. KING.

Will—Construction—Estate tail—Shelley's case—Intention.

A testator by the third clause of his will devised certain lands "to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James to hold in fee simple; but, in default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane to hold in fee simple; but, in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause the testator added: "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will."

Held, reversing the judgment of FERGUSON, J., 23 O. R. 404, that the clauses must be read together, and that, having regard to the later clause, and to the direction that the issue of James

were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only, to prevent the application of the rule in Shelley's case.

J. Bicknell, for the appellant.

E. D. Armour, Q.C., for the respondent.

ROSE, J.]

KERRY v. JAMES.

Bills of sale and chattel mortgages—Agreement to give security—R. S. O. c. 125, s. 6—Assignments and preferences—55 V. c. 26, s. 2.

An assignee for the general benefit of creditors is, by virtue of 55 V. c. 26, s. 2, entitled to take advantage of irregularities or defects in a chattel mortgage made by the assignor, to the same extent as an execution creditor.

As against such an assignee, an oral agreement, of which he has notice, by the assignor to give to an indorser a chattel mortgage to secure him against liability, will be enforced.

Judgment of ROSE, J., affirmed.

R. S. Cassels, for the appellant.

Gibbons, Q.C., for the respondents.

PALMATIER v. McKIBBON.

Ways—Dedication—50 Geo. III. c. 1—"Omnia præsumuntur rite esse acta."

A road was surveyed in 1834, and the surveyor's report was made to the Quarter Sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the Sessions under the Act then in force, nor was there any order directing it to be opened. It was, however, actually opened in 1853, with the assent of the owners of the land, and was used for several years and statute labour was done upon it.

Held, that the maxim "*omnia præsumuntur rite esse acta*" applied, and that the due adoption of the road by the Quarter Sessions should be presumed.

Held, also, that the evidence of dedication was sufficient.

Held, also, *per* MACLENNAN, J.A., that the expressions "laying out" and "opening" a road are used in the Act 50 Geo. III. c. 1 in an equivalent sense, and that actual work on the ground is not required before the road becomes a public highway.

Judgment of ROSE, J., reversed.

Aylesworth, Q.C., for the appellant.

Clute, Q.C., for the respondent.

SHERATT v. MERCHANTS' BANK OF CANADA.

Husband and wife—Gift—Chose in action.

A husband may make a valid gift of a chose in action to his wife without the intervention of a trustee.

A gift to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of it.

Judgment of ROSE, J., affirmed.

McCarthy, Q.C., and *E. M. Malloch*, for the appellants.

Watson, Q.C., and *J. M Rogers*, for the respondent.

ROBERTSON, J.]

SCULLY v. ROBERTSON.

Mortgage—Payment—Solicitor.

The *onus* of showing that a solicitor who is in possession of a mortgage and collects the interest has authority also to collect the principal, is upon the mortgagor, and, unless this *onus* is clearly discharged, the mortgagor and not the mortgagee must bear the loss arising from the solicitor's misappropriation of the funds.

Judgment of ROBERTSON, J., reversed.

Watson, Q.C., for the appellants.

W. H. Blake, for the respondents.

FALCONBRIDGE, J.]

WATEROUS ENGINE WORKS COMPANY v. McCANN.

Mortgage—Fixtures—Machinery—Lien agreement—Fire insurance.

The plaintiffs sold certain mill machinery under an agreement which provided that a mortgage of the mill property was to be given to them by the purchasers to secure the price; that the machinery was not to form part of the real estate, but was to remain personal property; that the title was not to pass till payment of the price; and that the plaintiffs might insure the machinery.

After the machinery was placed in the mill the purchasers gave to the plaintiffs a mortgage on the mill property and all machinery therein, and this mortgage contained a covenant to insure.

After this the plaintiffs insured the mill and machinery, and the purchasers, without the plaintiffs' knowledge, also placed insurance thereon.

The mill and machinery were destroyed by fire, and the plaintiffs were unable to recover owing to the breach of condition, and claimed the benefit of the purchasers' insurance of the machinery.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., affirming the judgment of FALCONBRIDGE, J., that the plaintiffs were entitled to the money payable to the purchasers under their policy, the mortgage being the governing instrument.

Per BURTON and OSLER, JJ.A., that they were not so entitled, the machinery being by the agreement personal property, and not included in the mortgage or protected by the covenant to insure.

F. A. Anglin, for the appellant.

W. H. Blake, for the respondents.

ROBERTS v. MITCHELL.

Negligence—Nuisance—Highway—Damages—Overhanging cornice.

The owner of a building, from which a cornice overhanging the sidewalk falls, because the nails fastening it to the building

have become loosened by ordinary decay, and injures a passer-by, is liable in damages without proof of knowledge on his part of the dangerous condition of the cornice, the defect being one that could have been ascertained by him by reasonable inspection.

Judgment of FALCONBRIDGE, J., affirmed.

Osler, Q.C., for the appellant.

G. F. Henderson, for the respondent.

MEREDITH, J.]

McMILLAN v. McMILLAN.

Mortgage—Priorities—Assignment—Payments by stranger.

This was an appeal by the plaintiff from the judgment of MEREDITH, J., reported 28 O. R. 351, and was argued on the 22nd and 23rd May, 1894.

Hoyles, Q.C., for the appellant.

W. H. Blake, for the respondent.

On the 30th June, 1894, the appeal was dismissed with costs, the majority of the Court holding that, on the evidence, the payments in question had not been made with any intention of taking over the mortgage.

MACLENNAN, J.A., held that the payments had been made with this intention; that the plaintiff had sufficient interest in the mortgage, owing to the possibility of his own lands being resorted to to make good any deficiency, to entitle him to make the payments; and that he had an equitable lien for the amounts paid, but that this unregistered equitable lien was cut out by the respondent's registered mortgage.

C. C. YORK.]

HOWDEN v. LAKE SIMCOE ICE COMPANY.

Negligence—Nuisance—Highway.

Allowing a broken waggon to remain on the highway for nearly two hours is not in itself sufficient evidence of negligence

to support an action by a person who strikes against the waggon while passing in a street car. Such a broken waggon does not become a nuisance or obstruction to the highway, until, having regard to the difficulty of removing it, it has been allowed to remain thereon for an unreasonable time.

Judgment of the County Court of York affirmed.

Kappele, for the appellant.

Bruce, Q.C., for the respondents.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 9TH JULY, 1894.

REGINA v. HOLMAN.

Elections—Indictment of deputy returning officer—Informality in appointment.

Reserved case. The question to be determined was whether the misdemeanour created by s. 100, s.-s. *c*, of the Dominion Elections Act, R. S. C. c. 8, was properly chargeable to a deputy returning officer, who acted as such but was not appointed by a commission under the hand of the returning officer, as prescribed by s. 80. The returning officer signed a commission appointing a deputy returning officer for the polling station at which the prisoner presided, and delivered it to the prisoner, but the name of the appointee was left blank. The prisoner acted as deputy returning officer at the polling station in question, and was convicted of fraudulently putting into the ballot box, ballot papers that he was not authorized to put in.

Held, that the conviction should be affirmed. The prisoner was *de facto*, though, perhaps, not *de jure*, the deputy returning

officer; this was sufficient to make him punishable as such officer for the misconduct charged by the indictment.

Rex v. *Holland*, 5 T. R. 607; *Rex* v. *Dobson*, 7 East 218, followed.

Howell, Q.C., for the Crown.

Hagel, Q.C., and *Phippen*, for the prisoner.

COMMERCIAL BANK v. ROKEBY.

Promissory note—Equitable pleas—Duress—Demurrer.

Judgment of BAIN, J., *ante* p. 144, overruling the demurrer, affirmed as to the first of the pleas demurred to, and reversed as to the second, and the demurrer allowed, without costs of the re-hearing. In the plea of counter-claim for moneys paid, it did not appear that the payments were made under the influence of threats or other pressure, or undue influence; and if the defendant chose to make the payments upon the assumed liability, although he had been induced by undue influence or wrongful pressure to assume it, he could not recover them back; the *onus* was on him to show by his pleas that the payments were made under such influence or pressure.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Howell, Q.C., and *Machray*, for the defendant.

COMMERCIAL BANK v. ALLAN.

Promissory note—Notice of dishonour—Note payable "on demand months after date."

Held, reversing the decision of DUBUC, J., *ante* p. 196, that the plaintiffs had failed to prove they gave the defendant due notice of the dishonour of the first note sued on.

The writ of summons could not be relied on, in the action in which it was issued, as notice of the dishonour of the note sued on; the *onus* was on on the plaintiff to show that notice was

given: Bills of Exchange Act, s. 49; and there was nothing in the Act that relieved the plaintiffs from proving that the notice was duly given before action, and there was no proof that it was given.

As to the second note sued on, the judgment of DUBUC, J., was affirmed.

Tupper, Q.C., and *Phippen*, for the plaintiffs.

Howell, Q.C., and *Machray*, for the defendants.

BENNETT v. ATKINSON.

Sale of goods—Delivery not proved sufficiently—Purchase by agent, not authorized to buy on credit—Non-suit.

In this action brought to recover the price of wheat sold by the plaintiff and purchased by the defendants through an agent, the *onus* was on the plaintiff to show that the transaction on which he based his claim was within the special or general authority of the agent, or that the wheat sold was actually received by the defendants. The evidence on these points was far from being satisfactory, and at the trial a non-suit was entered. The plaintiff moved to have this set aside and a verdict entered for him.

The wheat was purchased from the plaintiff by Isaac Bennett, the defendants' agent, not the plaintiff, and placed in an elevator. The defendants had furnished their agent with warehouse receipts or tickets, and the agent handed them to Colter, the man in charge of the elevator, who, after weighing the wheat, gave to the person who brought it one of the tickets showing the quantity and grade of the grain delivered. At the trial two of these tickets, initialled by Colter, were produced, showing the quantity of wheat delivered by the plaintiff. Cummings, one of the defendants, examined on behalf of the plaintiff, admitted that Isaac Bennett was the defendants' agent for buying wheat, but stated that Bennett was furnished with money to buy for cash, and no authority to buy on credit. The agent was not called, nor was the plaintiff, who was present in Court during the trial.

As to the receipt by the defendants of the wheat in question, Colter stated that, on the instructions received from the agent,

the wheat was loaded on the cars for the defendants, but he did not know where it went after that; he could not tell unless he could see the shipping bills, and they were not produced. Cummings stated he did not know whether the defendants received the grain in question and he had doubts whether they did receive it.

Held, that the evidence as to delivery was too indefinite and unsatisfactory to justify the Court in finding that the defendants received the wheat, especially as the fact was one that should be capable of direct proof; and the non-suit should be affirmed.

When a principal authorizes his agent to take up goods, and afterwards sends him the money to pay for them, and the agent fails to pay, the principal is liable for the goods. But if the principal gives the agent money beforehand to pay for the goods, and the agent purchases them without paying, the principal is not liable, as he never authorized the agent to pledge his credit.

Rusby v. *Scarlett*, 5 Esp. 76; *Stubbing* v. *Heintz*, 1 Peake 66, followed.

Ewart, Q.C., and *Wilson*, for the plaintiff.

Culver, Q.C., and *Hough*, for the defendants.

[DUBUC, J., 3RD JULY, 1894.

BUDD v. McLAUGHLIN.

Sale of horse—Warranty—Misrepresentation—Disease known to vendor.

Bill to rescind a contract for sale of a horse, and to set aside certain promissory notes and a mortgage given by the plaintiff as security, on the ground of false and fraudulent representation.

The horse, a stallion, was sold for breeding purposes. The plaintiff swore that the defendant represented that the horse was sound, and that a lameness, then noticed, was entirely owing to the want of shoes; he stated, "He was to give me a warranty as to the soundness of the horse and his breeding purposes," and added that he would not have purchased the horse but for the representations made to him. The defendant stated that he warranted the horse to be a good breeder, and made no other

warranty. The document given by the defendant was as follows: "This is to certify that the horse, Pride of Oxford . . . has been an average foal-getter while in my possession, but what he will do, I cannot say, under other management." This was given after the bargain had been completed and the papers signed. The evidence showed that the horse had, long previous to the time of sale, been affected with a lameness and disease of the feet, from which it became ill and subsequently died about five months after the sale. The defendant, while knowing that the horse had been previously affected with sore feet, never said anything about it to the plaintiff, and told him or led him to believe that the lameness was only temporary and caused by want of shoes.

Held, that the horse was at the time of the sale unfit for the purpose for which it was purchased, and the plaintiff was entitled to a rescission of the contract and a decree as prayed in the bill.

The implied warranty that the horse was fit for the purpose for which it was bought should not be limited to the narrow construction that it had in itself breeding qualities, whether or not it was prevented through illness, weakness, or other infirmities from being able to exercise them.

Derry v. *Peek*, 11 App. Cas. 359; *Redgrave* v. *Hurd*, 20 Ch. D. 1, followed.

Wilson and *Baker*, for the plaintiff.

Howell, Q.C., and *Machray*, for the defendant.

[KILLAM, J., 26TH JUNE, 1894.

IRISH v. DURHAM.

Pleading—Tort—Matter of inducement—Traverse.

The declaration charged that the two defendants, with force and arms, drove and struck a horse and carriage, which the defendants were then driving, against and upon the plaintiff, who was then lawfully upon a public highway, with such force and violence that the plaintiff was knocked down and trampled upon, etc.

One of the defendants pleaded the general issue, and that he was not driving the horse and carriage as alleged. The plaintiff demurred to the latter plea.

It was contended on behalf of the defendant that his driving was alleged as matter of inducement, and was not denied by the general issue, while the plaintiff's counsel argued that this was an immaterial allegation, and that the declaration would be proved by showing another person to have been the actual driver, and this defendant to have had the management and control of the driving.

Held, that the driving by the defendant, in whatever sense the expression was used, was a fact alleged as matter of inducement; and that the inducement may come after the allegation of the wrongful act.

Lewis v. *Alcock*, 8 M. & W. 188, and *Dunford* v. *Trattles*, 12 M. & W. 529, followed.

The plaintiff, having chosen to allege that the defendants were "driving," whatever the sense of the expression, must be held bound by the form of his pleading.

Demurrer overruled.

Mathers, for the plaintiff.

Mulock, Q.C., for the defendant Durham.

[29TH JUNE, 1894.

GILLIES v. COMMERCIAL BANK OF MANITOBA.

Specific performance—Agreement to pay creditors not parties to the deed—Bank Act—Question of validity of securities—Relief against trustee.

The plaintiff, a married woman, carried on business separately from her husband, and, being largely indebted to numerous creditors and to the defendant bank, applied to the bank for an advance. This was agreed to, on the plaintiff giving the bank a mortgage on her real estate and stock and all future stock to be acquired during the currency of the mortgage. She also assigned to the bank all her book debts as further security.

The chattel mortgage given contained the usual provisoes for redemption, seizure, and sale in case of default, and a covenant on the part of the bank to pay the commercial or trade indebtedness of the plaintiff and the expenses of running the business out of the proceeds of the sale of the stock and the debts collected, but so that the same should not increase the then present indebtedness to the bank beyond the amount then due for principal and interest due or accruing due. The plaintiff, pursuant to the arrangement entered into, kept her account with the bank; she deposited the moneys received from the business and made payments in connection therewith by cheques on her account.

In March, 1893, the plaintiff being very largely indebted to the bank, the bank took possession and sold the real estate and stock. The amount received was not sufficient to pay the sum due the bank.

The plaintiff then filed this bill to compel the bank to pay the creditors out of the proceeds of the real estate and stock comprised in the mortgages; and for specific performance of the agreement. She also contended that, as to the land, the mortgages were invalid under the Bank Act.

Held, that the plaintiff was not entitled to compel the bank to pay the creditors without offering to perform the agreement on her part and to pay her debt to the bank.

No trust was created by the covenant of the bank in favour of the creditors referred to therein, such covenant having been intended to refer only to the proceeds of the plaintiff's sales and to deposits and collections of book debts while the business was being carried on, and having been given only with a view to enable the plaintiff to keep the business going.

Gandy v. *Gandy*, 30 Ch. D. 67; *Gregory* v. *Williams*, 3 Mer. 582, followed.

The securities taken by the bank were valid under the then existing Bank Act, R. S. C. c. 120, s. 48.

McDermott, who purchased the premises sold by the bank under the mortgage, was made a co-defendant, as the plaintiff contended that the sale to him was invalid, and prayed that the conveyance to him should be set aside, and for a declaration that he held the property as a trustee for the bank. The bill had been noted *pro confesso* against this defendant.

Held, that, as the case failed against the bank, a decree could not be made against McDermott as purchaser.

Bill dismissed with costs as against both defendants.

Howell, Q.C., and *Darley*, for the plaintiff.

Munson, Q.C., and *Phippen*, for the defendants.

[BAIN, J., 19TH JULY, 1894.

In re COMMERCIAL BANK OF MANITOBA.

Winding-up—Insolvent bank—Rate of interest to be allowed depositors and creditors.

An application in a winding-up matter to fix the rate of interest to be allowed on debts owing by the bank.

From the evidence of the liquidators it appeared that the creditors, exclusive of the holders of notes, came within one or other of five classes:—

A. Ordinary depositors whose accounts did not bear interest.

B. Depositors whose accounts had in the past been credited with interest without written agreement.

C. Holders of drafts and bills of exchange issued by the bank and holders of cheques drawn by customers on the bank and marked or accepted by the bank.

D. Depositors whose accounts bore interest by written agreement.

E. General creditors.

Held, that the liquidators were entitled to assume that there was an agreement between the bank and all depositors comprised in class B that they were to be paid interest at the rate with which the books showed their deposits had been credited in the past, and that depositors in this class stood on the same footing with those in class D. These two classes were therefore entitled to prove and be placed on the list of creditors for the amounts of their deposits and the interest that was due thereon at the contract rate on the day of the service of the notice of the presentation of the winding-up petition, and dividends should be paid to them on the amounts of their debts as so ascertained until

these debts were paid in full. If, after all debts were been paid in full, a surplus should remain, they would be entitled to be paid interest in full, as they would have been had the bank continued to carry on its business.

Re Warrant Finance Co.'s Case, L. R. 4 Ch. 648, followed.

As to class A; the winding-up did not, in itself, convert the debts due to such creditors into interest bearing debts, and interest could not be allowed out of surplus assets on any debts on which there was no agreement for the payment of interest, unless it were one on which interest in the shape of damages would be allowed under the statute 8 & 4 Wm. IV. c. 42, s. 28. The statute would be complied with if the demand were made on the liquidators.

The foregoing would be applicable to the creditors comprised in class E.

As to class C; they should, in the event of there being an available surplus, be allowed the same interest that they would be entitled to recover in an action. Holders of bills and drafts who had presented them for payment to the parties on whom they were drawn would be entitled to interest at six per cent. from the date of presentment. Interest should be allowed on these drafts and bills only from the time when they were presented for payment and were dishonoured. Holders of marked cheques would be entitled to interest only if they had put themselves in a position to claim it under the statute.

Phippen, for the liquidators.

Howell, Q.C., *Aikins*, Q.C.. and *I. Campbell*, Q.C., for the different classes of creditors.

Supreme Court of Canada.

ONTARIO.] [1ST MAY, 1894.

CITY OF TORONTO v. TORONTO STREET RAILWAY CO.

Contract—Construction of—Street railway—Permanent pavements—Arbitration and award.

The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last for thirty years, at the expiration of which period the city corporation could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The company was to keep the roadway between the rails and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation, the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard.

The city corporation laid upon certain streets, traversed by the company's railway, permanent pavements of cedar block, and issued debentures for the whole cost of such work. A by-law was then passed charging the company with its portion of such cost in the manner and for the period that adjacent owners were assessed under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, when they refused to pay, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the

city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specified sum annually per mile, "in lieu of all claims on account of debentures maturing after that date, and in lieu of the company's liability for construction, renewal, maintenance, and repair in respect of all the portions of street occupied by the company's tracks so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends."

This agreement was ratified by an Act of the legislature passed in 1890, which also provided for the holding of the arbitration, which having been entered upon, the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow the claim, an action was brought by the city to recover this amount.

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the agreement discharged the company from all liability in respect to construction, renewal, maintenance, and repair of the streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted *ex majori cautela*, and could not do away with the express contract to relieve the company from liability.

Held, further, that, as by an Act passed in 1877 and a by-law made in pursuance thereof the company was only assessed as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be

such, therefore after the termination of the franchise the company would not be liable for these rates.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the appellants.

McCarthy, Q.C., for the respondents.

NOVA SCOTIA.] [31ST MAY, 1894.

CITY OF HALIFAX v. REEVES.

Public street—Encroachment on—Building upon "or close to" the line—Petition to remove obstruction—Judgment on—Variance—Jurisdiction.

By s. 454 of the charter of the city of Halifax, any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the city engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained, the Supreme Court, or a Judge thereof, may, on petition of the recorder, cause it to be removed.

A petition was presented to a Judge under this section asking for the removal of a porch built by R. to his house on one of the streets of the city, which, as the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855, and removed in 1884: while it stood, the portion of the street outside of it, and, since its removal, the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the Judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:—

Held, that there was evidence to justify the Judge in holding that the porch was upon the line, but having held that it was close to the line, while the petition only called for its removal as upon it, his order was properly reversed.

Decision of Supreme Court of Nova Scotia affirmed, but on different grounds.

An objection was taken to the jurisdiction of the Supreme Court of Canada, on the ground that the matter did not originate in a Superior Court.

Held, TASCHEREAU, J., dissenting, that the Court had jurisdiction.

Canadian Pacific R. W. Co. v. *Ste. Therese*, 16 S. C. R. 606, and *Virtue* v. *Hayes*, *ib.* 721, distinguished.

MacCoy, Q.C., for the appellant.

Newcombe, Q.C., for the respondent.

NEW BRUNSWICK.]

PORTER v. HALE.

Evidence—Foundation for secondary evidence—Execution of agreement—Proof of signatures—Laches—Relief asked for, inconsistent with claim.

Land was left by will to trustees in trust to divide the same or proceeds of sale thereof among the testator's children. C., one of the beneficiaries, agreed to sell a part of the land to P., but the trustees and C. afterwards sold the same part to other persons. In a suit by P. against C., the trustees, and the registered owners under the last conveyance, for specific performance of the agreement of sale by C., and the cancellation of the conveyance, and an injunction against further transfers, P. alleged that the trustees and other beneficiaries under the will had signed an agreement by which the land in question was to be conveyed to C. in settlement of the estate. On the hearing secondary evidence of this agreement was tendered, and proof that C., who was the proper custodian of it, was without the jurisdiction and supposed to be in Scotland, and that P. had written to him and to his sister and one of the trustees inquiring where he was but could not get the information. None of the letters contained any reference to the agreement nor to P.'s object in making the inquiry. Secondary evidence having been received :—

Held, affirming the decision of the Supreme Court of New Brunswick, that sufficient foundation for its reception had not

been laid, and it should not have been received; that P. should have stated in his letters that he wanted this specific document; that he should have had inquiries made in Scotland by some independent person to ascertain where C. was to be found, and if he had been found to ask him for the paper in question; and that a commission might have been issued to the Court of Session in Scotland and a commissioner appointed by that Court to procure the attendance of C. and his examination as a witness.

The secondary evidence given of the execution of the agreement was that it was signed by at least four persons, but the handwriting of only two of them, including one of the trustees, was known to the witness proving it.

Held, that the proof of execution was insufficient to establish the case set up by P.; that an instrument signed by one only of the trustees could convey no title, legal or equitable, to C.; and that the evidence of its contents was not satisfactory.

The alleged agreement by C. to sell the land to P. was executed in 1884, and the suit was not instituted until more than four years after.

Held, that the delay in taking proceedings was a sufficient answer to the suit; though P. was in possession of the land in the interval, the evidence clearly showed that it was not in the capacity of a prospective purchaser, but in that of a caretaker, having been so appointed by the trustees.

P. also claimed to be entitled to a decree for performance, in the event of the case made by his bill failing, on the ground that the testator's will had not been registered in New Brunswick, as required by law, and was consequently void as against him, a purchaser from C., one of the heirs.

Held, that, as the bill claimed title under the will, P. could not have a decree based on the proposition that the will was void as against him, and no amendment could be allowed, making a case, not only at variance with, but antagonistic to, the bill, especially as such amendment was not asked for until the hearing.

McLeod, Q.C., and *Palmer*, Q.C., for the appellant.

Weldon, Q.C., *Currey*, and *Vince*, for the respondents.

SCOTT v. BANK OF NEW BRUNSWICK.

Debtor and creditor—Payment to pretended agent—False representations as to authority—Indictable offence—Ratification of payment by creditor—Adoption of agency.

S., a shipmaster, before starting on a voyage deposited $1,000 in a bank and obtained a deposit receipt therefor, which he left with R., part owner and manager of his vessel, for safe keeping. S. was absent for four years, and when he returned and asked for a settlement with R., who owed him $2,650 on ship's account, he found that R. had received the amount of the deposit from the bank and applied it to his own use. To avoid proceedings against him, R. gave to S. a bill of exchange on a person in Ireland for £250 and a mortgage on an interest he claimed to have in his father's property, and S. went to sea again without stating any of these facts to the bank. In two years he returned again and found that R. had left the country, the bill of exchange had not been accepted, and nothing had been realized on the mortgage. He then demanded the amount of his deposit from the bank, which they refused to pay, and he brought an action to recover the same.

The action was twice tried. On the first trial a verdict was given in favour of S., the jury having found that when R. took the deposit receipt to the bank, with the name of S. indorsed on it, such indorsement had not been written by S., and the trial Judge held that the finding was, in effect, that of forgery by R., which could not be ratified. The jury also found that the security taken by S. did not include the $1,000. The full Court ordered a new trial on the ground that the last finding was against evidence (31 N. B. Reps. 21), and an appeal from that decision to the Supreme Court was not entertained (21 S. C. R. 30). On the second trial the bank obtained a verdict, which was affirmed by the full Court. On appeal from the latter decision:—

Held, affirming the judgment of the Court below, 18 Occ. N. 248, that the doctrine of estoppel was not involved in the case; that R. obtained the money from the bank by falsely representing that he had authority from S.; that S. by ratifying and confirming the payment adopted the agency, and his act made the payment equivalent to one to a person having authority to

receive it; and it made no difference that by his false representations R. may have committed an indictable offence.

McLeod, Q.C., and *Palmer*, Q.C., for the appellant.

Blair, A.-G., for the respondents.

ROURKE v. UNION MARINE INSURANCE COMPANY.

Trover—Joint owners of vessel—Sale by one—Conversion—Marine insurance—Abandonment—Salvage.

A vessel partly insured was wrecked, and the ship's husband gave notice of abandonment to the underwriters, whose agent caused the hull and outfit to be sold to one K. The underwriters afterwards notified the ship's husband that the vessel was not a total loss and requested him to pay the charges and take possession. He paid no attention to the notice, and K. took the vessel to a port in Maine, U.S., and attempted to repair her, and he afterwards caused her to be libelled for salvage in a United States Court and sold. R., owner of eight shares which had not been insured, brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the conduct of the ship's husband, who was agent for R. in respect of the vessel, precluded the latter from bringing such action; that by his notice of abandonment the underwriters became joint owners with R. of the vessel; that they had not sold the vessel so as to deprive R. of her beneficial interest in her nor to destroy her; that the ship's husband might have taken possession before the vessel was libelled; and that R. was not deprived of her interest by any action of the underwriters but by the decree of the Court under which she was sold for salvage.

McLeod, Q.C., for the appellants.

Weldon, Q.C., and *Palmer*, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[OSLER, J.A., 4TH SEPTEMBER, 1894.

In re WEST ALGOMA PROVINCIAL ELECTION.

WHITACRE v. SAVAGE.

Election petition—Service out of the jurisdiction.

Motion by the respondent to set aside the service of the petition upon him, on the ground that it was made out of the jurisdiction, viz., at Winnipeg, where he happened to be during the brief period allowed by law for giving notice of the presentation of the petition.

Swabey, for the respondent.

Aylesworth, Q.C., for the petitioner.

OSLER, J.A.—I have found no case in the books in which the question of service of the election petition beyond the jurisdiction of the Court has been raised except the *Shelburne* case, 14 S. C. R. 258 . . . . In the case before me no application was made for leave to effect service in this manner or to allow the service which was made, as good service. I am, however, of opinion that the respondent's objection fails. What the Act requires (s. 15) is that notice of the presentation of the petition, with a copy of the petition, shall be served on the respondent, within the prescribed time, "as nearly as may be in the manner in which a writ of summons is served or in such other manner as may be prescribed." The object of this is not

to compel the respondent to come into Court or to appear . . It is simply to give the respondent notice of its presentation, so that he may, if he will, defend it. The Court takes and acquires no jurisdiction over his person by reason of the service, and does not by the petition or its service purport to make an order upon or give any direction to the respondent . . . . Actual notice having been given to the respondent by service upon him in the manner, or one manner, in which a writ of summons is served, viz., by personal service, which requires no confirmation or special order for its allowance, I think that is all that is necessary, and that notice of the presentation of the petition, etc., was well given . . . The case of *Credits Gerundeuse* v. *Van Weede*, 12 Q. B. D. 171. . . . supports my conclusion. It is therefore unnecessary to consider the other answer made to the objection, viz., that by filing an appointment of an agent in the matter of the petition after the service had been made, the respondent was estopped from now attacking the service. The motion will therefore be dismissed with the usual costs.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 21st June, 1894.

STEWART v. SCULTHORP.

Bailment—Delivery of seed on contract to plant—Property not passing—Condition—Warranty—Damages to land from impurity of seed—Remoteness—Performance of contract—Estoppel—Slander—Words not imputing crime—Privilege—Actual malice.

The defendant gave the plaintiff two bushels of variegated sweet peas to be planted by the plaintiff in his own land, and the produce to be cultivated, harvested, threshed, and delivered to the defendant for the reward to the plaintiff of $2 per bushel. This contract was performed on both sides, but the peas turned out to be only partly variegated sweet peas, and partly vetches.

The defendant delivered the seeds as and for variegated sweet peas, honestly believing them to be such, and the plaintiff so received them, and neither knew that there were vetch seeds among them, nor at the time did either of them know vetch seeds from variegated sweet peas.

In an action for damages for the injury sustained by the plaintiff by reason of the peas turning out to be partly vetches :—

Held, that if the transaction had been a sale of the peas, it would have been a condition that the seeds delivered should have been variegated sweet peas, and if they were not, the plaintiff would have been at liberty to reject them.

Chanter v. *Hopkins*, 4 M. & W. 399, specially referred to.

But if, instead of rejecting them, the plaintiff had accepted them, the condition would have become an implied warranty, for the breach of which the plaintiff would have been entitled to compensation.

Behn v. *Burness*, 8 B. & S. 751, followed.

The transaction was, however, not a sale, for the property did not pass; it was merely a bailment.

Assuming that the principles applicable to a sale were also applicable to a bailment such as this, the damages which the plaintiff sought to recover by reason of some of the seeds of the vetches dropping upon the ground when harvested, and cropping up in the following year, were not within the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 346, and *Cory* v. *Thomas Iron Works Co.*, L. R. 8 Q. B. 181, and were too remote.

McMullen v. *Free*, 13 O. R. 57, and *Smith* v. *Green*, 1 C. P. D. 92, distinguished.

The vetch was not a weed, but a plant cultivated in husbandry, and if the plaintiff had strictly performed his contract and delivered the entire produce of the seed, he could not have been damnified.

The plaintiff had, besides, disentitled himself to recover, because, knowing that vetches were growing with the peas from the seed which the defendant had delivered to him, he permitted them to continue to grow, and harvested, threshed, and delivered them to the defendant and received pay for them, without ever mentioning the fact to the defendant.

McCallum v. *Davis*, 8 U. C. R. 150, specially referred to.

The plaintiff also claimed damages for slander in respect of words spoken by the defendant to a third person to the effect that the plaintiff had changed the seed given him. The jury found that the defendant did not by these words charge the plaintiff with a crime.

Held, that the plaintiff could not recover.

The plaintiff also claimed damages for slander in respect of words spoken to him by the defendant, in the presence of others, to the effect that he had sold the seed given him. The jury found that the words were not spoken in good faith in the usual course of business affairs for the protection of his own interests.

Held, that there was no evidence to sustain such a finding; that the evidence showed that the defendant honestly and justifiably believed that the plaintiff had defrauded him; that the occasion was privileged and the plaintiff had failed to show actual malice; and therefore he could not recover.

E. B. Stone and *W. R. Riddell*, for the plaintiff.

Aylesworth, Q.C., and *Gunther*, for the defendant.

[ROBERTSON, J., 1ST JUNE, 1894.

In re WILSON AND TOWN OF INGERSOLL.

Municipal corporations—By-law to fix number of tavern licenses—Procedure of municipal council—Two-thirds vote—Third reading—Defect on face of by-law—Omission of year.

A by-law to regulate the proceedings of a town council required that every by-law should receive three readings, but that no by-law for raising money or which had a tendency to increase the burdens of the people should be finally passed on the day on which it was introduced except by a two-thirds vote of the whole council.

A by-law to fix the number of tavern licenses, which required such two-thirds vote, was read three times on the same day and declared passed, but did not receive the required two-thirds vote. A special meeting was then called for the following evening, when the by-law was merely read a third time, and when it received the required two-thirds vote.

Held, that the by-law was bad; for, having been defeated when first introduced by reason of not having received a two-thirds vote, it was not validated by merely reading it a third time at the subsequent meeting.

The by-law did not show, as required by the Liquor License Act, the year as to which it was to be applicable.

Held, that it was bad for this reason also.

Osler, Q.C., and *J. B. Jackson*, for the applicant.

Fullerton, Q.C., contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 30TH JUNE, 1894.

MORRIS v. DINNICK.

Contract—Hiring—Commission on sales of manufactured goods—Liability to continue manufacturing—Length of hiring—Construction.

The defendants, trading as a company, agreed with the plaintiff as follows: "We hereby agree to pay you a commission of . . . on all sales of goods manufactured by us . . you are to use all diligence to make sales . . . . and for that purpose you are to act as our agent . . . The above commission to be paid to you from time to time as collections are made . . . In one year from this date it shall be at the option of yourself or ourselves to determine this agreement . . . ."

Soon after the agreement was make, one of the defendants bought out the other two, and notified the plaintiff that the agreement was at an end, alleging that the company had ceased to exist.

Before the year had expired the plaintiff brought an action for wrongful dismissal.

Held, affirming the decision of STREET, J., that there was no express contract of employment for any term, on the face of the contract.

That the relation was not that of master and servant, but expressly one of agency.

That there was no undertaking to manufacture any defined quantity of goods, or to manufacture at all, and that no such term should be implied, and that the plaintiff was to get a commission as agent on the sale of goods manufactured, and the continuance of the manufacturing was left at large to be determined by the interests of the principal.

And the action was dismissed with costs.

Rhodes v. *Forwood*, 1 App. Cas. 256, and *Turner* v. *Goldsmith*, [1891] 1 Q. B. 549, referred to and distinguished.

E. T. English and *Allan McNab*, for the plaintiff.

W. R. Riddell, for the defendants.

SHEPPARD v. BONANZA NICKEL MINING COMPANY OF SUDBURY.

Mining company—Acquisition of land—Mortgage for purchase money—Covenant.

Where a mining company has power to acquire land for the purposes of its incorporation, it has power to give a mortgage for, and to bind itself by covenant to pay, the purchase money.

J. K. Kerr, Q.C., for the defendants.

McCarthy, Q.C., and *W. B. Raymond*, for the plaintiffs.

[ROSE, J., 5TH APRIL, 1894.

MERRITT v. CITY OF TORONTO.

Municipal corporations—Auctioneers—Right of council to refuse licenses—Power to prohibit—55 V. c. 42, s. 495, s.-s. 2.

Section 495, s-s. 2, of the Municipal Act, 55 V. c. 42, which empowers the council of any city, etc., to pass by-laws for the "licensing, regulating, and governing auctioneers and other

persons selling or putting up for sale, goods, wares, merchandize, or effects by public auction; and for fixing the sum to be paid for every such license, and the time it shall be in force," is only for the purpose of raising a revenue, and does not confer any right of prohibition so long as the applicant is willing to pay the sum fixed for the license.

Where, therefore, a city corporation refused to license the plaintiff as an auctioneer, on the ground that he was a person of a notoriously bad character and ill repute, and in an action for a mandamus to compel them to issue to him such license, set up their grounds of refusal as a defence, a demurrer was allowed.

J. E. Jones, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

[STREET, J., 14TH MAY, 1894.

In re KOCH AND WIDEMAN.

Will—Power of sale—Surviving executor—Devolution of Estates Act.

Where executors were given power under a will to sell lands with a direction to invest part of the proceeds of sale:—

Held, on a petition under the Vendor and Purchaser Act, that such power could be exercised by the surviving executor, and was not interfered with by the Devolution of Estates Act, R. S. O. c. 108, and amending Acts, such power not being merely a bare power, but one coupled with an interest; and could likewise be exercised even though it should be held to be without an interest.

A. H. Marsh, Q.C., for the petitioner.

No one showed cause.

[21ST MAY, 1894.

HANDY v. CARRUTHERS.

Timber—Growing—Interest in land—License to enter, cut, and remove—Valuable consideration—Part performance—Statute of Frauds.

The plaintiff sold by parol certain standing timber to the defendants for value, giving such time for the removal as should

be necessary. At the end of three years he gave them notice not to cut or remove any more, which was disregarded.

Held, that this sale of growing timber was a sale of an interest in land, with a parol license to enter for the purpose of cutting and removing the trees.

And that the making of the agreement for the sale of timber with the license to enter and remove it for a valuable consideration was an answer to the plaintiff's claim for damages, and the Statute of Frauds was met by showing part performance.

And that, notwithstanding the notice, the defendants might show the existence of the agreement for a valuable consideration, under which they were entitled to do what was charged as a trespass, and under which no right of revocation existed.

And the action was dismissed with costs.

McManus v. *Cooke*, 35 Ch. D. 681, referred to.

Haughton Lennox and *G. W. Lount*, for the plaintiff.

W. A. Boys, for the defendants.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 25TH MAY, 1894.

REGINA v. BELL.

Summary conviction—By-law against swearing in street or public place—Private office in government building.

A city by-law enacted that no person should make use of any profane swearing, obscene, blasphemous, or grossly insulting language, or be guilty of any other immorality or indecency, in any street or public place. Under it the defendant was summarily convicted of an offence committed in his private office in the customs house, a government building.

Held, that the object of the by-law was to prevent an injury to public morals, and applied to a street, or a public place *ejusdem generis* with a street, and not to the place in question; and the conviction was quashed.

Langton, Q.C., for the defendant.

F. W. Garvin, for the prosecutor.

[BOYD, C., 1ST JUNE, 1894.

TORONTO GENERAL TRUSTS COMPANY v. QUIN.

Devolution of Estates Act—Right of widow to distributive share—Bar of dower—Ante-nuptial contract.

Special case submitted to the Court in an action brought by the administrators of the estate of John Charles Quin, who died intestate on the 28th November, 1893, leaving him surviving his widow, the defendant Annie Quin, and his two children by a former wife, the defendants Charles W. Quin and Mary M. McBain.

The intestate died possessed of or entitled to certain lands.

The defendant Annie Quin and the intestate were married in the Province of Ontario on the 17th March, 1880. The defendant Annie Quin had two children by the intestate, but they died in infancy before the death of the intestate.

By an ante-nuptial marriage agreement the defendant Annie Quin agreed to accept the sum of $250 from her husband in full satisfaction of her dower and right to dower, in the event of her surviving her husband or otherwise, in such lands as he should be possessed of at the time of the intended marriage or at any future time. This agreement was duly executed and the consideration money paid to the defendant Annie Quin. The lands of which the intestate died possessed were owned by him at the time of the execution of the agreement and at the time of the marriage, and so continued until his death.

The defendant Annie Quin claimed to be entitled to a one-third interest in the lands of her deceased husband under the provisions of the Devolution of Estates Act. She had not elected in writing, as provided for by s. 4, s.-s. 2, of that Act, to take the one-third interest, but claimed the right to so elect.

The defendants Charles W. Quin and Mary M. McBain claimed that, as against them, the defendant Annie Quin had by the agreement barred and deprived herself of all dower and right to dower in the lands or the proceeds thereof, and that, as against them, she was deprived of the right to share in the real estate of the deceased under the provisions of the Act.

The questions submitted for the opinion of the Court were: (1) whether in the distribution of the estate of the intestate

by the plaintiffs, the defendant Annie Quin was entitled to any share or interest in the real estate of the intestate; (2) and if so, to what share or interest; and (3) how the costs should be borne.

The case was argued before BOYD, C., on the 31st May, 1894.

E. T. Malone, for the plaintiffs.

Slaght, for the defendant Annie Quin.

W. M. Douglas, for the defendants Charles W. Quin and Mary M. McBain.

Judgment was delivered on the following day.

BOYD, C.—The widow in this case has no right of dower in the lands of her intestate husband. By marriage settlement and for valuable consideration, she agreed to accept an equivalent in full satisfaction of her dower and right of dower which in the event of surviving her husband she could or might in anywise have a claim to, whether at common law or otherwise howsoever, out of the lands owned by her husband. The lands were assets then owned by her husband, and the question arises whether the widow can claim the distributive share provided for by s. 4 of the Devolution of Estates Act, R. S. O. c. 108. The second sub-section declares the scope of the Act to be in regard to cases where there is an existing right to dower outstanding at the death of the husband. In such case the widow is put to her election to take dower or the distributive statutory share from the hands of the legal personal representatives. Here the widow cannot do that, for she has already received the equivalent for her dower formerly and during the lifetime of her husband. She ought not to have both the then appraised value of her future dower and also the benefit of the share under the Act. The case appears to be taken out of the province of the statute by the ante-nuptial contract made between the parties afterwards married. The intention of the Act is that if the widow elects to take the statutory share, she shall yield her dower for the benefit of the estate, and consequently if she takes dower, she foregoes any other claim upon the proceeds of the real estate. But having already had the value of her dower during her husband's life, she cannot be allowed further to diminish his estate in respect of this marital claim after his death.

As I think the case is not within the statute, I answer the questions submitted in the special case thus:—

(1) and (2) The widow is not entitled to any share or interest in the real estate of the intestate.

(3) As the situation is new and proper for submission to the Court, I will give costs to all parties out of the estate.

[5TH JUNE, 1894.

In re CHAMBERS AND TOWNSHIP OF BURFORD.

Municipal corporations—By-law establishing road—Certainty in description of land taken—Publication—Bi-monthly paper.

A by-law recited that certain land thereinafter described had been used as a public road for thirty years; and that public money had been expended and statute labour performed upon it; that it was a continuation of a public road; and that it was in the interest of the public that the same should be clearly established by by-law. The by-law then enacted that the land, describing it as commencing at the north-east angle of lot number 7 in the 11th concession of the township of Burford, where a stone has been planted, then south 16 degrees, 10 minutes east, 84 chains and 4 links, to a stake; then north 78 degrees, 30 minutes, 1 chain, to a stake; then north 16 degrees, 10 minutes, west 84 chains and 4 links, to the north-west angle of lot number 6 in the said 11th concession; then westerly in a straight line, 1 chain, to the place of beginning, containing $3^{2}/_{5}$ of an acre; is established as a common and public highway.

Held, that there was no uncertainty in the description of the land taken.

One of the courses was given as 24 chains and 4 links, instead of 84 chains and 4 links, but as the parallel course was correctly given, and the error appeared so obvious as not to be calculated to mislead, it was held not to be a ground of objection.

Where there is no weekly paper published in the township, but only one bi-monthly, the statute does not render it obligatory to use such paper for publication of the by-law.

S. A. Jones, for the motion.

Harley, contra.

[MacMahon, J., 1st June, 1894.

PHELPS v. LORD.

Will—Devise—Indefiniteness.

A testator by his will devised to certain named persons, who were appointed the executors and trustees of the will, the remainder of the estate to be used to further "the cause of our Lord Jesus Christ."

Held, that the legacy was not void for indefiniteness; and, discretion having been given to the executors and trustees, it was not necessary that a scheme should be reported by a Master.

German, for the heirs-at-law.

Moss, Q.C., and *A. Fraser*, contra.

IN CHAMBERS.

[Boyd, C., 4th June, 1894.

In re CLARKE v. BARBER.

Prohibition—Division Court—Splitting of cause of action—Agreement for sale of land.

Where under an agreement for the sale of land the balance of the purchase money was payable by instalments with interest at a named rate half-yearly, and three of the instalments, amounting to $240, as well as the interest, amounting to $70, and three years' taxes, were overdue; and an action was commenced in a Division Court for the $70 and two years' taxes, amounting to $125,

Held, that the action was maintainable and did not come within s. 77 of the Division Courts Act, whereby the splitting of causes of action is forbidden; and prohibition was refused.

R. B. Beaumont, for the motion.

R. M. Macdonald, contra.

[STREET, J., 16TH MAY, 1894.

In re CHILLIMAN.

Infants—Custody of—Religious faith—Appointment of guardian.

C. died in 1892, leaving him surviving his widow and five children. By his will he appointed J. executor and guardian of his children, to whom probate was granted. The children lived with their mother until her death in 1894, when J. took charge of them, and had the custody of them for a few days, when they were clandestinely taken away by F., the wife's sister, who claimed she was entitled to their custody under a document signed by the wife, not under seal, purporting to place the children in her charge. C. and J. were Protestants, while F. was a Roman Catholic, and the object of appointing J. guardian was that the children should be brought up in their father's faith. F. was not possessed of any means to support the children, while J. had made arrangements to have them placed in an institution where they would be brought up in their father's faith.

The custody of the children under the circumstances was granted to J.

The document signed by the wife was not subject to probate, not being of a testamentary character, as it purported to take effect immediately; nor did it take effect as an appointment under R. S. O. c. 137, s. 14, not being under seal; but even were it held to be a valid appointment under that section, the Court, under the powers conferred by s. 15, would direct that the children should be placed in the institution in question.

The inference, in the absence of evidence to the contrary, is that children are to be brought up in their father's faith.

F. E. Hodgins, for the applicant.

Murphy, Q.C., contra.

[18TH MAY, 1894.

In re DAVIS.

Infant—Custody—Decree of foreign Court—Divorce of parents.

The parents of a female child of seven, British subjects, married in this province, removed to the United States, where

the father became naturalized. In consequence of his alleged intemperance and adultery his wife left him, and on the ground of such adultery applied to a Court in the United States and obtained a decree of divorce, which also gave her the custody of the child. Shortly before the decree was pronounced, and with the object of defeating it, the father removed to this province, taking the child with him.

On an application by the mother, an order was made granting her the custody of the child.

L. G. McCarthy, for the mother.

W. H. Blake, for the father.

NOVA SCOTIA

In the Supreme Court.

ARCHIBALD v. CUMMINGS.

Slander—Meaning of words used—Question for jury—Finding of jury—Interference with.

In an action for slander the meaning of the language complained of was left to the jury, who found for the defendant.

Held, that the question was peculiarily one for the jury, and, although their finding was unsatisfactory to the trial Judge, whose opinion was concurred in by the Court, as the case was not a clear one of unreasonableness or perversity, the verdict could not be disturbed.

SALTERIO v. CITIZENS' INSURANCE COMPANY.

Fire insurance policy—Conditions as to assignment of policy and change of title—Chattel mortgage.

The defendant company issued two policies of insurance against fire on stock and merchandize belonging to the

plaintiff. The policies contained, among others, the two following conditions: (1) that the policies or any interest in them should not be assignable without the consent of the company, expressed by indorsement made thereon; and (2) that in the event of any sale, transfer, or change of title in the property insured the liability of the company should thenceforth cease. The plaintiff gave a bill of sale or chattel mortgage of the stock covered by the policies to secure certain promissory notes.

Held, following *Lazarus* v. *Commonwealth Insurance Company*, 19 Pick. 81, that the chattel mortgage did not within the meaning of the condition assign the policies which, by their terms, were not assignable.

Held, also, following *Sovereign Insurance Company* v. *Peters*, 12 S. C. R. 35, that the making of the chattel mortgage was not a "sale, transfer, or change of title" in the property insured within the meaning of the condition; that the expressions used must be construed to refer to a transfer and determination of the assured's whole interest.

BOURQUE v. LOGAN.

Jury—Verdict contrary to evidence—Proof of fraud.

In an action against a sheriff for goods alleged to have been unlawfully taken and detained, the main question was as to the *bona fides* of an assignment for the benefit of creditors and a sale to the plaintiffs of the goods covered by the assignment. In answer to questions submitted, the jury found that the assignment was not made with the intention of defrauding creditors, and that the purchaser at the sale, a brother of the assignor, bought for himself and not for his brother. The evidence of fraud being clear, a new trial was ordered with costs.

PARTRIDGE v. TOWN OF NORTH SYDNEY.

Municipal corporations—Laying out street less than statutory width—Interlocutory injunction—Discretion of Judge—Notice not required where perpetual injunction is sought.

The defendant corporation, under colour of improving an existing street, attempted to lay out and open a new street of less than the statutory width.

Held, that such attempt and all proceedings connected therewith were illegal and void.

The affidavits were conflicting as to whether the street was completed or not at the time an application for an interlocutory injunction was made and granted.

Held, that the granting of an injunction was in the discretion of the Judge, and that his discretion was rightly exercised.

Held, also, that one of the main objects of the suit being to obtain a perpetual injunction, no notice was requisite under 54 V. c. 41, amending the Towns' Incorporation Act of 1888.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 27TH JULY, 1894.

MACDONALD v. GREAT NORTH-WEST CENTRAL R. W. COMPANY.

Interpleader issue—Summons to amend—Action against sheriff—Costs.

Appeal by J. B. Delap from order of TAYLOR, C.J., *ante* p. 284, dismissed and order affirmed with costs.

JOHNSTONE v. HALL.

Landlord and tenant—Farm lease—"Clean" farm—Fraudulent representations—Damages—Counter-claim for rent.

Appeal from the judgment of KILLAM, J., *ante* p. 287, dismissed with costs.

TURNER v. FRANCIS.

Replevin—Two defendants—Joint conversion—Principal and agent.

This was an action of replevin against two defendants for the wrongful taking and detention of the plaintiffs' goods. The defendants jointly pleaded that they did not take the goods as alleged, and that the goods were theirs and not the plaintiffs'.

The action was tried before TAYLOR, C.J., who found that there was not a joint taking, and entered a verdict against the defendant Francis and in favour of the defendant Bertrand.

Francis was a trader who had given to the plaintiffs a license or power, upon a certain contingency, to take possession of his stock and sell it in payment of his indebtedness to them.

The plaintiffs, alleging that the contingency had happened, made a seizure and placed a person in possession as their attorney and agent, and the latter, with their consent, appointed Francis his "substitute" to act as such and hold his powers jointly with him for a certain fixed period, and left Francis in apparent sole possession. At the expiration of the period one of the plaintiffs and the agent attempted to resume actual possession, but were prevented by Francis. Five days afterward Francis made an assignment to his co-defendant Bertrand. An employee of the assignee took possession from Francis of the stock, but Francis remained in possession assisting him. While matters were in this state the plaintiffs replevied, but an agreement was made between them and the assignee by which the latter was to sell the stock, the proceeds to remain in his hands until the determination of this suit.

The plaintiffs moved to set aside the verdict for the assignee Bertrand and for a verdict against both parties. The defendant Francis also moved to set aside the verdict against him.

The plaintiffs' application was granted, and the application of Francis refused, in each case with costs.

Held, that the plaintiffs were entitled on the expiration of the period of Francis' authority to maintain this action or an action of trover against Francis; the general property in the goods remained in him, but the plaintiffs by taking possession, assuming that this was lawful, acquired a special property therein. Francis was not really given back the possession of the goods; he

was merely appointed joint agent with the original agent to hold them for the plaintiffs, in whom the legal possession continued. The assertion by Francis of a right to hold them as against the plaintiffs constituted a taking and conversion for which they could have sued him: *Roberts* v. *Wyatt*, 2 Taunt. 268; *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202. The plaintiffs were entitled to consider Francis' possession to be still theirs, so as to enable them to maintain an action against any other wrongful taker. The assignee adopted the acts of his representative who took the goods from Francis. The taking of them by the assignee as goods assigned to him when Francis held only as agent of the plaintiffs was an act of conversion of itself. Francis did not stand aside and leave the assignee to exercise such rights as the latter might deem himself to have, but he remained in possession assisting. This course showed an active concurrence in asserting the claim of the assignee to the goods under the assignment, which amounted to a joint conversion with him.

Howell, Q.C., and *Darby*, for the plaintiffs.

Ewart, Q.C., and *Elliott*, for the defendants.

CONFEDERATION LIFE ASSOCIATION v MERCHANTS BANK.

Mortgagor and mortgagee—Overpayment by mistake—Action to recover.

Action to recover moneys paid by mistake. The plaintiffs in July, 1892, agreed to make a loan to Bell Bros. of $18,000 upon mortgage. On 14th September, Bell Bros. signed an order addressed to the manager of the plaintiffs requesting him to issue to the defendants at Brandon from time to time all cheques covering the loan. This order was taken with the object of securing the defendants for advances. The plaintiffs were not to advance the money all at once, but from time to time upon an architect's certificates. The defendants' manager at Brandon knew all about the loan, how it was to be paid out, and everything in connection with it. The plaintiffs, having received the architect's certificates, sent to the defendants

cheques amounting to $15,400; then they received a certificate dated 1st February, 1898, which showed that at that date $1,500 was required to complete the building, which amount they were to retain in their hands. When this certificate was received the cheque for $1,400 had not been posted up to the account of Bell Bros., and the plaintiffs' mortgage clerk, who had charge of such matters, had forgotten the issuing of that cheque; he therefore drew a cheque for $2,000, got it signed by the plaintiffs' manager, who stated he had no recollection of the $1,400 cheque, and sent it to the defendants. When the defendants' manager received the cheque, he had reason to suspect and did suspect that a mistake had been made; he admitted this and kept the amount, over and above the $500 he expected to get, for some days on a special account awaiting events. On the morning of 20th February the defendants' manager and the plaintiffs' agent had a conversation about this cheque, and the former was then told that too much had been sent. The greater part of the money was applied the same day on notes given by Bell Bros. and held by the defendants under discount.

A telegram sent from the plaintiffs' Toronto office requesting a return of the cheque did not arrive until after banking hours on 20th February.

At the trial a verdict was entered for the plaintiffs for $1,500. The defendants appealed.

Held, that the plaintiffs were entitled to recover. The defendants could not stand in any better position than Bell Bros., and if the plaintiffs would be entitled to recover from them a payment made by mistake, they could recover it from the defendants. There could be no doubt from the evidence that the cheque for $2,000 was sent under such circumstances of mistake that if it had been sent to Bell Bros. the plaintiffs could recover it back. The defendants could set up no better right or claim to the money they received than Bell Bros. could, and so the plaintiffs were equally entitled to recover from them.

Bell Bros. were entitled to receive $1,067, so out of $2,000. the amount overpaid by mistake was $933, and for that amount the plaintiffs were entitled to a verdict. As the

defendants failed on the contention which they raised, claiming entire exemption from liability, they should pay the costs of the appeal.

Aikins, Q.C., and *Dawson*, for the plaintiffs.

Ewart, Q.C., and *Wilson*, for the defendants.

[TAYLOR, C.J., 14TH AUGUST, 1894.

THOMPSON v. DIDION.

Fraudulent judgment—Bill to set aside—Husband and wife—Preference—Evidence.

Bill to set aside, as fraudulent and void, a judgment recovered by the defendant Catherine Didion against her husband. The bill alleged that the husband was indebted to the plaintiffs; that he carried on business as a merchant and from time to time rendered to his creditors statements of his affairs which did not show any indebtedness to his wife; that on 14th February, 1894, a writ was issued against him at the suit of his wife, to which on the same day an appearance was entered and a declaration filed; that on 28rd February judgment by *nil dicit* was signed, execution issued, and the judgment registered; that these proceedings were a fraudulent scheme to defeat the plaintiffs; and that the husband was not possessed of goods or lands sufficient to pay his creditors, over and above what would be required to satisfy the alleged claim of the wife. The bill asked for a declaration that the judgment was fraudulent and void as against the plaintiffs.

Both defendants denied the charges of fraud and claimed that the husband was indebted to the wife for moneys advanced to him by her out of the sale of real estate which she inherited from her father, setting out the dates and amounts advanced.

The husband made an assignment for the benefit of his creditors four days after the judgment was entered.

Held, that the case did not come under the provisions of the Act as to fraudulent and preferential assignments. The judg-

ment might be a preferential one, but it was not on that account void. It was recovered in regular course, not obtained in any of the modes forbidden by the Act. There was no evidence against the wife, to question her having advanced to her husband the money sued for. The only evidence against the judgment was that it was recovered in an action brought under instructions from the husband, and that he told a creditor that it was recovered to secure his wife's claim; that was not evidence against the wife.

The bill must be dismissed with costs.

Howell, Q.C., and *Darby*, for the plaintiffs.

Baker, *Chaffey*, and *Bradshaw*, for the defendants.

COLQUHOUN v. DRISCOLL.

Assessment and taxes—Tax sale—Patent not issued—No proper assessment—Part of land liable for taxes.

Bill filed to have a tax deed declared void and of no effect and to be a cloud upon the plaintiff's title. The defendant was not the purchaser at the tax sale, but received the deed as assignee of the certificate given at the sale to the original purchaser.

Upon the collector's roll for 1888 the land appeared in two parcels, the north-west quarter, the taxes on which were $3.66, and the south-west quarter, the taxes on which were the same amount. On the roll of 1889 the land appeared as one parcel, the west half, the amount of taxes appearing in the column headed "Total for the current year" as $17.47, and there was an entry of $7.22 in the next column, which was headed "arrears." The land was sold in one parcel, the amount of taxes and charges for which it was sold being $25.53.

Held, that the north-west quarter was not liable to be assessed in 1888, as the Crown patent for it did not issue until the 29th October in that year. It only became liable to taxation in 1889, and, if so, then at the time of the sale there were no

taxes, in respect of that quarter section, due and unpaid for more than one year after the 31st day of December in the year in which the rate was struck. It was only when the whole or any portion of any tax had been for that period due and unpaid that the land became liable to be sold. R. S. M. c. 101, s. 190, as amended by 55 V. c. 26, s. 1, did not apply to the present case. Under the terms of 56 V. c. 24, ss. 27 and 28, that section as it stood before the amendment applied to this case, so the tax deed here was not, as it would be if the amended section applied, even *prima facie* evidence that the lands described in the deed were liable for taxation in respect of the taxes for which they were sold.

Blackwell on Tax Titles, s. 518, says, "If part of the land is liable for the taxes, and the rest not . . . the sale is void;" as in this province the whole of the land is sold for the best price obtainable, there was no reason why a sale should not be valid as against the owner to the extent of the land assessed even when other land is improperly included. If this view be correct, then the deed here could not be set aside, but must stand good for so much of the land included in it as was properly assessed.

But there was another objection, that there was no proper assessment of the land in 1888. If so, then upon neither quarter, even had the north-west quarter been liable to taxation, were there, at the time of the sale, any taxes due and unpaid for more than one year after the 31st day of December in the year, in which the rate was struck.

The sale must be set aside.

The defendant by his answer set up that the plaintiff was not the absolute owner of the land in question, but that the deed to him, although absolute in form, was intended to be, and was, only a security for moneys advanced and to be advanced by him for the then owner, one Litton. He alleged further that the plaintiff had been repaid all moneys advanced by him, that Litton had conveyed to the defendant, and he prayed that the plaintiff might be ordered to convey to him.

The decree should be one declaring the tax sale deed void, and of no effect, and a cloud upon the plaintiff's title, and it must be with costs.

As cross-relief was prayed, the decree might, if it were thought necessary, be without prejudice to any proceedings the defendant might be advised to take to redeem the land in question.

Howell, Q.C., and *Machray*, for the plaintiff.

Ewart, Q.C., and *Elliott*, for the defendant.

FULLERTON v. BRYDGES.

Deed—Bill to reform—Conveyance subject to mortgage—Obligation to indemnify against mortgage—Estoppel, operation of recital as.

In November, 1892, the plaintiff was indebted to the defendants Andrew Allan, F. H. Brydges, and W. R. Allan, who were then carrying on business as bankers under the firm name of Allan, Brydges, & Co.

On 4th November he executed a bill of sale to the defendants, covering a large quantity of property; it contained a recital that the plaintiff was the owner of the goods, etc., and had agreed with the defendants for the absolute sale to them of the same and of all book accounts and debts owing to him and of the equity of redemption in certain lands granted by him to them by instrument of even date, in consideration of the release by the defendants of the plaintiff from his indebtedness to them. The consideration was expressed to be $16,200 due by the plaintiff to the defendants, and the release of the plaintiff from his indebtedness to the defendants. On the same day the plaintiff, for the expressed consideration of $1,000, conveyed to the defendants Brydges and W. R. Allan lot 48, St. Vital.

The *habendum* was subject to a mortgage to the Canada Settlers' Loan Company for $8,150 and interest. The covenants were the usual short form covenants, that against incumbrances containing an exception of the mortgage.

The bill alleged that the defendants entered into an agreement with the plaintiff to pay off the mortgage to the loan

company and to indemnify the plaintiff against payment of the same; that the plaintiff was led to believe that the deed was to all the members of the firm; that it was, in fraud of his rights, altered after it had been prepared by striking out the name of Andrew Allan; that he did not read it over or examine it before execution; and that the defendants fraudulently concealed from him the fact of such alteration having been made. In November, 1898, the loan company recovered judgment against the plaintiff upon the covenant for payment contained in the mortgage.

The prayer was that the defendants might be ordered to pay and discharge the claim of the loan company; to indemnify and keep indemnified the plaintiff from the mortgage and from the payment of all moneys due or accruing due thereon; and that the deed might be reformed by adding the name of Andrew Allan as one of the grantees therein.

Held, that there was not a tittle of evidence to support the charges of fraud in connection with the alteration of the deed and of misrepresentation by which the plaintiff was induced to execute it. The plaintiff's right to such relief as he sought must depend upon whether, independent of agreement, there arose, as the result of the dealing between the parties and by implication, a covenant to indemnify him: *Bridgman* v. *Daw*, 40 W. R. 258; *British Canadian Loan Co.* v. *Tear*, 28 O. R. 664; *Fraser* v. *Fairbanks*, 23 S. C. R. 79. The right to an indemnity arises from the sale and not from the mere conveyance: *Walker* v. *Dickson*, 20 A. R. 106.

The implication that the purchaser is to pay off the mortgage, or indemnify the vendor against it, does not arise from anything contained in the deed, nor from the construction to be placed upon the deed itself, but is an implication arising from the facts: *Beatty* v. *Fitzsimmons*, 28 O. R. 245; and it is open to the purchaser on the facts and circumstances of the particular case to negative any obligation to indemnify the vendor; to rebut the presumption, if such it may be called: *British Canadian Loan Co.* v. *Tear*, 28 O. R. 677.

The evidence did not show that the defendants purchased, or intended to purchase, or that the plaintiff supposed they were purchasing, the land in question. Unless they were

purchasers, they could not be held to have come under any obligation or liability to pay off the mortgage, or to indemnify the plaintiff against it. They were creditors of the plaintiff to a large amount, and the bill of sale and deed of the plaintiff's equity of redemption in the land were executed, that out of the chattels and the land they should pay themselves the amount of the debt, they intending to make over to the plaintiff the surplus, if any, which might remain. That in consideration of the plaintiff putting them in this position, they were willing to release and did release him from any personal liability, could make no difference.

To make a recital operate as an estoppel one essential is that there must be either an action directly founded on the instrument containing the recital, or one which is brought to enforce rights arising out of such instrument.

Bill dismissed with costs.

Wilson, for the plaintiff.

Phippen, for the defendants.

[DUBUC, J., 30TH JULY, 1894.

LATTA v. OWENS.

Peace officer—Appointment of—Sheriff's bailiff—Action for escape.

Appeal from a County Court. Action against the defendant as sheriff's bailiff for failing to execute a distress warrant issued by two justices of the peace under the Masters and Servants' Act. The warrant was addressed to all or any of the constables or other peace officers in the district. The defendant claimed that he was not a peace officer within the meaning of the statute. The evidence showed that he undertook to execute the warrant, but afterwards returned it to the plaintiff's attorney.

The County Court Judge held that the defendant could not legally execute the warrant; that his undertaking to do so was an unlawful undertaking; and that his failure to do the illegal act he undertook to do did not render him liable to an action. The plaintiff appealed.

The defendant was shown to have acted as sheriff's bailiff for about four years; he had not taken any oath of office, and it did not appear whether he had given a general bond to the sheriff for the due performance of his duties.

Held, that the judgment in favour of the defendant should be affirmed with costs. As a special servant of the sheriff he was not authorized to perform the functions of a public or peace officer. If he had been specially appointed to act as such and had accepted the trust, that would be different: Manitoba Summary Convictions Act, 1893, c. 32; Criminal Code, 1892, ss. 889 to 909; s. 8, s.-s. 8; Atkinson on Sheriffs, pp. 80, 82; Churchill on Sheriffs, p. 48.

Pitblado, for the plaintiff.

R. M. Smith, for the defendant.

[KILLAM, J., 24TH JULY, 1894.

BOLE v. MAHON.

Trustee—Payment into Court—Reference—Balance admitted.

Appeal from an order of the referee refusing a motion to compel payment of money into Court.

The suit was brought by creditors of one Pritchard to enforce the trusts in an assignment for the benefit of creditors, the defendant Mahon being the assigne. A decree was made referring it to the Master to find what was due to the creditors and to take an account of the property come to the hands of the defendant under the assignment. The accounts were taken and showed an admitted balance in the assignee's hands of over $1,000, but the reference was not closed and stood until after vacation. The plaintiff moved for an order that the assignee pay into Court $1,000, which was refused by the referee.

Held, that an order should go for payment into Court of $1,000 forthwith; the defendant Mahon to pay the costs of the appeal; costs of the original application to the referee to be costs in the cause. Such an application may be granted pending a reference as to the state of the accounts, where it is clear, upon the trustee's own admissions that there is a balance of

a trust fund in his hands: *Brown* v. *De Tastet*, 4 Russ. 126; *Mills* v. *Hanson*, 8 Ves. 68; *London Syndicate* v. *Lord*, 8 Ch. D. 84.

Mather, for the plaintiff.

Huggard, for the defendants.

[31st July, 1894.

ALLAN v. MANITOBA AND NORTH-WESTERN R. W. COMPANY.

Railway company—Application of receiver to raise money by issuing certificates—Paramount rights of first bondholders.

Motion on behalf of the plaintiffs and the defendant railway company for an order authorizing the receiver appointed in this cause to borrow on the security of the company's railway, and the earnings thereof, in priority to all other charges thereon a considerable sum of money to be used in paying various debts of the company incurred for what was claimed to have been working expenditure within the meaning of the Dominion Railway Act, 51 V. c. 29.

The plaintiffs were judgment creditors and had instituted this suit for the appointment of a receiver.

Under the authority of certain statutes the company had issued bonds which formed a first lien and charge upon a portion of the railway, secured by a mortgage deed made to trustees for the bondholders. The trustees had commenced a suit for the sale of the mortgaged property and the appointment of a receiver; they were not parties to this suit, although they appeared by counsel on this application and objected to the making of the order asked for.

Held, that the Court had no jurisdiction or discretion, as against the holders of the first mortgage bonds and their trustees, to apply, or guarantee the application of, the company's revenues in derogation of the strict rights of those parties, however much it might deem this in their interest, or in that of the company or other incumbrancers. This suit, so far as it related to the first division of the road, was merely between the subsequent incumbrancers and the company. The Court had

assumed control of the revenues of the company as between them, but it could not, in this suit, control the paramount rights of other persons not parties to this suit to any greater extent than those subsequent incumbrancers or the company could do. The application, if it could succeed at all, must be made in the suit brought by the first mortgagees. See *Greenwood* v. *Algesiras Railway Co.*, [1894] 2 Ch. 205.

Phippen, for the plaintiffs.

I. Campbell, Q.C., for the railway company.

Ewart, Q.C., and *Wilson*, for the bondholders.

NORTH-WEST TERRITORIES.

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 14TH AUGUST, 1894.

HOGAN v. MILLER.

Witness of summons—Amendment—Replevin—Jurisdiction.

In an action of detinue, the plaintiff, in person, issued a writ of summons under s. 18 of the Judicature Ordinance, in form A applicable to the small debt procedure, and then issued and served a writ of replevin.

On motion of the defendants to set aside the writ and declare all proceedings null and void:—

Held, that the Court had no power to amend the original writ of summons so as to make it conform to form C; and the writ and all proceedings thereunder were set aside with costs.

P. McCarthy, Q.C., for the defendant.

C. C. McCaul, Q.C., for the plaintiff.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.] [26TH SEPTEMBER, 1894.

McDONALD v. DICKENSON.

Municipal corporations—Municipal councillors—Pathmaster—Negligence—Ways—Notice of action—R. S. O. c. 73.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O. R. 45.

J. M. Glenn and *J. A. McLean*, for the appellants.

N. McDonald and *W. J. Tremeear*, for the respondent.

At the conclusion of the argument the appeal was dismissed with costs.

The Court agreed with the views expressed in the judgment below as to notice of action; and as to the further point raised by the appellants that the right of action, if any, was against the township, expressed no opinion, thinking that that question had not been properly raised by the pleadings or tried. Leave to amend was given.

C. P. D.] [11TH SEPTEMBER, 1894.

GOSNELL v. TORONTO RAILWAY COMPANY.

Toronto Railway Company—Ways—Negligence.

The Toronto Railway Company have not under their charter and their agreement with the city of Toronto an

exclusive right of way upon their tracks or the right to run at any rate of speed they please to adopt or that the corporation please to allow. Whilst the cars of the company must not be wilfully impeded, the company are bound to recognize the rights and necessities of public travel and so to regulate the speed of their cars that they may be quickly stopped should occasion require it.

Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the Common Pleas Division upholding a verdict against the company was affirmed.

Osler, Q.C., and *Laidlaw*, Q.C., for the appellants.

Fullerton, Q.C., for the respondent.

BROWN v. DEFOE.

Bailment—Warehouseman—Negligence—Collapse of warehouse.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 24 O. R. 569.

S. H. Blake, Q.C., *H. E. Irwin*, and *A. C. Macdonell*, for the appellants.

Osler, Q.C., and *J. E. Robertson*, for the respondent.

The majority of the Court, without dealing with the question of law, ordered a new trial, without costs here or below, being of opinion that from the answers of the jury it was not possible to say with certainty what the cause of the accident was.

BURTON, J.A., was of opinion that the answers, while ambiguous, did not go far enough to show any negligence on the defendant's part, and therefore that the action failed.

FERGUSON, J.]

McKINNON v. LUNDY.

Will—Construction—Condition—Forfeiture—Felony.

Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the testatrix herself pays

off the mortgage in her lifetime, the devise is good, such a condition being a condition subsequent.

Where a devisee kills the testatrix and is convicted of manslaughter, he does not forfeit the devise, the element of intent being in such case necessarily absent.

Cleaver v. *Mutual Reserve Life Fund Association*, [1892] 1 Q. B. 147, distinguished.

Judgment of FERGUSON, J., 24 O. R. 132, reversed.

Aylesworth, Q.C., for the appellant.

S. H. Blake, Q.C., and *Guthrie*, Q.C., for the respondents.

IN CHAMBERS.

[OSLER, J.A., 22ND SEPTEMBER, 1894.

In re KINGSTON PROVINCIAL ELECTION.

VANALSTINE v. HARTY.

Cross-petition—Security for costs—Ontario Controverted Elections Act, ss. 7, 13.

Motion by the respondent to set aside a cross-petition presented by one Vanalstine complaining of unlawful and corrupt acts by the candidate who was not returned. No security for costs was given with the cross-petition, and this was alleged as an irregularity.

E. F. Blake, for the respondent, contended that by s. 13 of the Ontario Controverted Elections Act security for costs was required upon the cross-petition as well as upon the original or principal petition.

J. Bicknell, for the cross-petitioner contra.

OSLER, J.A.—Previous to the year 1874 there was no power to file a cross-petition for any purpose. The Act provided merely for the presentation of a petition against the sitting member to set aside the election and subsequent proceedings thereon or connected therewith. The provisions as to security for costs were the same as they now are except that by 39 V. c. 10, s. 39, (1876) the security was to be by deposit of $1,000 . . .

These provisions, so far as they need here be noted, are found in s. 18 of the Controverted Elections Act, R. S. O. c. 10, which, under the heading "security for costs," enacts that at the time of "the presentation" of the petition, or within three days thereafter, security shall be given on behalf of the petitioner for the payment of all costs, charges, and expenses that may become payable by the petitioner, (*a*) to every person summoned as a witness on his behalf, or (*b*) to the *member* whose election or return is complained of. This section was perfectly apt and proper in the case of a petition presented complaining of the undue return or undue election of a member. . . It is still the only case the section provides for, although the right to file a petition against the defeated candidate is now given by s. 7 of the Act, which is now placed in the group of sections headed "presentation of petition." That section was at first an isolated, independent enactment, s. 1 of 38 V. c. 8 (1874) . . . It enacts that in case a petition is *presented* against the return of a member, the respondent or any other person authorized by law to present an election petition may, within 15 days after the service of the petition against the return, file a petition complaining of any unlawful and corrupt act by any candidate at the same election who was not returned, whether the seat is or is not claimed by him or on his behalf, and the trial of such petition shall take place at the same time as the trial of the petition against such member or respondent or at such other time as may be appointed. . . . In the revision of the statutes this section now finds its place in the group already spoken of, headed "presentation of petition." It can hardly be disputed that had the question arisen prior to the revision, the contention would have been utterly without foundation. There could have been no pretence whatever for holding that a clause in the general Act requiring security to be given for the sitting member's costs on the presentation of petition against his return applied to the case of a cross-petition authorized by the amending Act filed against the defeated candidate. The simple answer was that the Act had not provided for the latter case, as would have been at once manifest had it been attempted to give the security by recognizance. The revision has, in my opinion, made no difference. The security required is upon the presentation of a petition against the return of a member to secure the member's costs, not upon the filing of a cross-petition

against one who is not the member but the defeated candidate. It is not the deposit which is required, as the respondent contends, but the deposit as security, and the object of the security shows that it is not and cannot be required on a cross-petition, as it could never be made available by the respondent on such a petition.

Motion dismissed with costs to the petitioner in any event.

[28TH SEPTEMBER, 1894.

In re WEST.

Appeal—Single Judge—R. S. O. c. 50, s. 33—Judge in Court—Costs.

An application having been made to the Judge of the Surrogate Court of the county of Middlesex to pass the accounts of the executors of the West estate and to fix their compensation, he fixed it at more than $200, and from his order the executors, being dissatisfied, appealed, under s. 33 of the Surrogate Courts Act, R. S. O. c. 50, to a Judge of the Court of Appeal, who dismissed the appeal with costs.

Upon taxation of these costs the executors contended that the appeal was to a Judge in Chambers and not to the Court, and that the costs should be taxed accordingly.

Section 33 permits an appeal "to the Court of Appeal or to a single Judge of such Court."

Mr. Thom, taxing officer, referred the question to OSLER, J.A., who had heard the appeal, and it was argued before him on the 27th September, 1894.

W. E. Middleton, for the appellants.

Rowell, for the respondents.

Judgment was delivered on the following day.

OSLER, J.A.—As to the appeal to "a single Judge" provided for by the Surrogate Courts Act, R. S. O. c. 50, s. 33, I am of opinion, after consultation with the other Judges of the Court, that there is no reason to regard an appeal to a single Judge as an appeal to a Judge in Chambers, as the statute does not call it so. Costs should be taxed on the usual scale.

[2ND OCTOBER, 1894.

In re WEST YORK PROVINCIAL ELECTION.

LLOYD v. HILL.

Cross-petition—Security for costs—Deposit made in error—Withdrawal—Terms—Payment of expense of publication—Unnecessary length of petition.

An application by the petitioner in the cross-petition for an order to take out of Court the sum of $1,000 deposited by him as security with his cross-petition, on the ground that by the Act he is not required to give security with such petition, and that the money paid in does not, even on the terms on which alone it can be taken as having been paid in, stand in any way as security to the respondent, or to any one upon whom the Act, in the case of a cross-petition, confers the right to have security.

Godfrey, for the cross-petitioner.

H. E. Irwin, for the respondent.

OSLER, J.A.:—I held the other day in the case of the Kingston cross-petition that it was not necessary under the Act to give the security, and I think the grounds of my decision entitle the petitioner in this case to the order which he asks. The respondent neither consents to nor opposes the order, but upon behalf of the returning officer shows that the petitioner left with the registrar for him a copy of the petition to be published by him in a newspaper in assumed compliance with s. 12 of the Act; and that such petition was accordingly published by the returning officer at a cost of $61 or thereabouts, which has not been paid, and of which, though demanded, no notice has been taken by the petitioner or his solicitor. It appears to me that, as the petitioner now comes into Court to be relieved from the consequences of his own error, he cannot complain if it is made a condition of the relief that he shall pay or satisfy the liability, which at his request, as it may properly be held, this public officer has incurred. On its being made to appear that this has been done, the order may go. The proper amount to be paid to the printer can be settled between the parties, as I have no means of knowing whether $61, the sum charged, is or is not too much.

I cannot help remarking upon the extraordinary and unnecessary length of the cross-petition. Everything necessary to the petition might have been said in two, or at most three, short paragraphs, instead of eighteen long ones, and the respondent would have had just as much information of the charges against him as the latter give him. The object of the petition is to give the respondent notice of the nature of the charges against him, as, *e.g.*, bribery, treating, undue influence, personation, etc. Details should be reserved for the particulars. This petition, with its iterations and reiterations and reduplicated repetitions, is a useless survival of an out-of-date system.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[The Divisional Court, 3rd March, 1894.

STEVENS v. GROUT.

Jury—Findings—No verdict—Ruling of trial Judge—New trial—Right to—Motion for—Divisional Court—Time—R. S. O. c. 44, s. 84—Rules 789, 792.

At the trial of an action for malicious prosecution the jury, in answer to questions, made two findings in favour of the plaintiff, but found that he was entitled to no damages. The trial Judge expressed the opinion that no verdict could be entered for either party, and refused motions for judgment made by both. The plaintiff, treating the trial as void, gave a new notice of trial for a later sittings. A motion by the defendant to set aside this notice was refused by a local Judge and a Judge of the High Court on appeal. The plaintiff then entered the action for trial, but the presiding Judge refused to try it, holding that it was not properly before him.

Upon appeal by the defendant from the order in Chambers refusing to set aside the notice of trial, and upon motion by the plaintiff by way of appeal from the ruling of the Judge at the

second trial, or for leave to move against the finding of no damages at the first trial, notwithstanding that two sittings of the Divisional Court had passed since that finding :—

Held, that, although no judgment could be entered for either party, the findings of fact remained, and neither party could ignore them and proceed to trial again as if they did not exist; the trial Judge could do nothing but order or refuse judgment upon them; it was for the Divisional Court to deal with the action and the findings, either by sending it down for a new trial or by ordering judgment for either party under Rule 755; and, under all the circumstances of this case, the proper course was to give leave to move for a new trial notwithstanding the lapse of time, and upon that motion to set aside the whole of the findings and order a new trial.

R. S. O. c. 44, s. 84, and Rules 789 and 792 considered.

Wills v. *Carman*, 14 A. R. 656, specially referred to.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

[21st June, 1894.

WILLIAMS v. THOMAS.

Landlord and tenant—Rent—Distress—Action for conversion—Evidence—Finding of trial Judge—Non-interference with—Double value of goods distrained—Chattel mortgage—Jus tertii—Assessment of damages—Recovery of amount received from sale of goods—Claim and counter-claim—Judgments—Set-off.

In an action by a tenant against his landlord for a wrongful distress in October, when no rent was due, as the plaintiff alleged, until December :—

Held, that, although the direct evidence of the defendant and his wife that the rent was due in October, before the distress, was corroborated by the fact that in the previous years of the tenancy the plaintiff had always paid his rent before December, the finding of the trial Judge that the defendant and his wife were not worthy of belief and that no rent was due at the time of the distress could not be reversed.

There was no allegation in the statement of claim that the action was brought upon 2 W. & M., sess. 1, c. 5, s. 5, nor that the goods distrained were "sold," but an allegation that the

defendant "sold and carried away the same and converted and disposed thereof to his own use," nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute.

Held, reversing the decision of FERGUSON, J., that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained should be recovered; but, according to the finding that no rent was due, it was proper to make a liberal assessment of the damages.

Held, also, reversing the decision of FERGUSON, J., that a wrong-doer taking goods out of the possession of another is not at liberty to set up the *jus tertii*, but the person out of whose possession the goods are taken may show the *jus tertii*, and in such case the wrong-doer make take advantage of its being so shown; and the plaintiff, having shown a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of the mortgaged goods from the defendant without protecting the latter against another action at the suit of the mortgagee.

Held, also, *per* FERGUSON, J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value of the goods; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due.

Hoore v. *Lee*, 5 C. B. 754, followed.

Judgment being given in the favour of the plaintiff upon his claim, and in favour of the defendant upon his counter-claim:—

Held, reversing the decision of FERGUSON, J., that the amounts should be set off.

McConnell, for the plaintiff.

N. McDonald and *Tremeear*, for the defendant.

MORTON v. COWAN.

Company—Shares—Sale under execution—Validity of assignment not entered in books—R. S. O. c. 157, s. 52—Equity of redemption—R. S. O. c. 64, s. 16.

A *bona fide* assignment or pledge for value of shares in the capital stock of a company incorporated under R. S. O. c. 157

is valid between the assignor and the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in property seized can be sold under execution, the rights of a *bona fide* assignee cannot be cut out by the seizure and sale of the shares, under execution against the assignor, after the assignment.

R. S. O. c. 157, s. 52, considered and construed.

Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in s. 16 of the Execution Act, R. S. O. c. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares.

W. R. Riddell, for the plaintiff.

Wallace Nesbitt and *Monro Grier*, for the defendants.

[STREET, J., 14TH SEPTEMBER, 1894.

In re MARTIN AND COUNTY OF SIMCOE.

Public schools—54 V. c. 55, ss. 82, 96—Boundaries of school sections—Action of township council—Appeal—Time—County council—Jurisdiction—By-law—Appointment of arbitrators—Award—Confirmation—Waiver—Evidence of.

In the absence of satisfactory evidence of waiver of the objection by all persons interested, a county council has no jurisdiction under s.-s. 8 of s. 82 of the Public Schools Act, 54 V. c. 55, to appoint arbitrators to hear an appeal from the action or refusal to act of a township council and to determine or alter the boundaries of school sections, unless a notice of appeal has been duly given within the time mentioned in s.-s. 1.

Where a by-law of the county council appointing arbitrators was passed pursuant to a notice of appeal, in the form of a petition, filed with the county clerk after such time had expired, and there was no evidence of waiver:—

Held, that the authority of the arbitrators to enter upon the inquiry being affected by the want of jurisdiction of the council to pass the by-law, their award could not be confirmed by s. 96 of the Public Schools Act; and the by-law was quashed.

The application to quash was made by a ratepayer of the school section whose boundaries were in question, acting at the request of the trustees of the section, and the solicitors acting for him were also retained by the trustees, whose secretary-treasurer appeared before the committee of the county council, before the by-law was passed, and before the arbitrators, and did not make objections to the jurisdiction of either body.

Held, that, in the absence of proof of the authority of the secretary-treasurer to represent the trustees, it could not be said that they had waived their right to object to the proceedings, nor that the rights of the applicant were entirely gone and merged in those of the trustees.

C. E. Hewson, for the applicant.

Pepler, Q.C., for the county corporation.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 30TH JUNE, 1894.

McCAUSLAND v. QUEBEC FIRE INSURANCE COMPANY.

Fire insurance—Policies in different companies—Division of risks—Relative proportion of loss—Costs.

The plaintiff had insured a building, composed of a front and rear parts, in three different insurance companies; for $3,000 in the first company, placing $2,000 on the front, and $1,000 on the rear; for $2,000 in the second company, placing $1,000 on each; and in the third company for $2,000 on the whole building, making no division.

A loss occurred appraised at $2,819.81, of which $162.55 was in respect of the front, and $2,657.26 in respect of the rear.

Held, *per* ROSE, J., that the proper mode of ascertaining the relative amounts payable by the three companies was to add the amounts of all their policies together, without reference to the division of the risks, and that each company was liable for its relative proportion, and that the third company, which had the

risk on the whole building, was liable for two-sevenths of the loss.

Held, also, that as the third company had offered that proportion before action, the plaintiff should pay their costs, as there was no issue between the defendants on the record; refusing to allow certain letters from the other defendants' solicitors to be put in.

Held, on appeal to the Divisional Court, that an appeal lies from a judgment awarding costs on a wrong principle, though there is no appeal from the exercise of an erroneous discretion on particular facts; that this was an appealable matter, especially having regard to the correspondence which was excluded by the trial Judge in disposing of the costs; and that, as the litigation was in essence attributable to the refusal of two of the companies to pay their proper share of the loss, which was so found by the trial Judge, the companies who failed should pay the costs of the company who succeeded; and the judgment was modified to that extent.

George Kerr, for the plaintiff.

A. Hoskin, Q.C., for the defendants.

CARSON v. SIMPSON.

Fixtures—Severance from realty—Mortgage of realty—Mortgage of personalty—Execution creditor—Mortgagee, rights of.

On 18th August, 1881, G., being the owner, mortgaged a biscuit factory, in which were certain fixtures (machinery), to the H. trustees. Two days afterwards, by a chattel mortgage, he mortgaged these fixtures and certain other machinery, not then on the premises, but which was subsequently placed upon the premises, as fixtures, to F. On 3rd November he, by a chattel mortgage, mortgaged both sets of fixtures to the same trustees, and F.'s mortgage was paid off. On 24th June, 1884, he further mortgaged the premises on which the fixtures were, to H. M. became the assignee of a judgment against G. and of the mortgage to H., and commenced an action on both, making C., the present claimant, who had become a tenant of the premises previous to the making of the mortgage to H., a party, and in that action C. as such tenant in November, 1887, redeemed M.

and obtained an assignment of the H. mortgage. C. had also become the assignee of the mortgage to the H. trustees. On 16th August, 1888, the sheriff seized the fixtures under an execution on the judgment against G.

Held, affirming the decision of ROBERTSON, J., that, for the purpose of the F. mortgage and the H. trustees' mortgage, there was a severance of the chattels from the realty, but at the date of the seizure the F. mortgage was at an end, and only the mortgage to the trustees existed; that the effect of the mortgage to H. was that the whole place, land and fixtures, was mortgaged to him in June, 1884, and thus an intention was indicated by the owner G. to reunite the property temporarily severed by the mortgage to the H. trustees, and the whole became land subject to that intermediate chattel mortgage, and when it expired, which it did in 1889, the temporary character of the personalty disappeared, and the increased value went to feed the land-owner's title, and was not intercepted by the execution.

Langton, Q.C., for the appeal.

Walkem, Q.C., contra.

CHURCH v. CITY OF OTTAWA.

Damages—Inadequacy of amount found by jury—Right of Court to interfere—New trial.

Notwithstanding that it is unusual for a Court to interefere with a verdict of a jury on the ground of the inadequacy of the amount of damages found, still such verdicts are subject to the supervision of a Court of first instance, and, if necessary, of the Court of Appeal, and if the amount awarded be so small or so excessive that it is evident that the jury must have been influenced by improper motives or led into error, then a new trial must be granted.

Held, on the evidence in this case, where a practising physician had been badly, and perhaps permanently, injured by stepping into a hole in one of the streets of the defendant corporation, and his professional business also injured, that $700 was not enough; and a new trial was ordered.

W. R. Riddell and *Charles Macdonald*, for the plaintiff.

Aylesworth, Q.C., for the defendants.

[STREET, J., 14TH SEPTEMBER, 1894.

In re ONTARIO FORGE AND BOLT COMPANY.

Company—Winding-up—R. S. C. c. 129, s. 3—52 V. c. 32, s. 3—Voluntary winding-up—Compulsory liquidation—"Doing business in Canada."

There is no clashing between s. 8 of the Winding-up Act, R. S. C. c. 129, and s. 8 of the Winding-up Amendment Act, 52 V. c. 32; the latter Act provides for the voluntary winding-up of the companies falling within its provisions, and not to their compulsory liquidation, which is provided for by the former.

A company incorporated under an Act of the Province of Ontario, and carrying on business in Ontario, is "doing business in Canada" within the meaning of s. 8 of the original Act.

John Greer, for the petitioners.

McCarthy, Q.C., and *W. B. Raymond*, for the respondents.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 3RD MARCH, 1894.

McDERMOTT v. GROUT.

Jury—Findings—No verdict—Ruling of trial Judge—New trial—Right to—Motion for.

This action was tried with *Stevens* v. *Grout*, *supra*, p. 424, and came before this Court upon the same state of facts as that upon which that action came before the Queen's Bench Division.

Held, that the judgment of the trial Judge at the first trial was a judgment of the High Court, and, as neither party moved against it, it was a binding adjudication that no verdict could be entered on the findings of the jury, and the Judge at the second trial should have proceeded to try the action; and a motion to the Divisional Court was not necessary.

Wills v. *Carman*, 14 A. R. 656, followed.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

[STREET, J., 17TH SEPTEMBER, 1894.

CHAMBERS v. KITCHEN.

Revivor—Order for, after judgment—Motion to set aside judgment—Rule 622—Execution issued before revivor—Rule 886—Irregularity.

After judgment pronounced by the Court upon default of defence the plaintiff died, and the defendant, desiring to have the judgment set aside and be let in to defend, issued a præcipe order under Rule 622 reviving the action in the name of the executor of the plaintiff's will.

Upon motion to set this order aside:—

Held, that Rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained.

Arnison v. *Smith*, 40 Ch. D. 567, distinguished.

Curtis v. *Sheffield*, 20 Ch. D. 398, and *Twycross* v. *Grant*, 4 C. P. D. 40, followed.

After the death of the plaintiff and before the order of revivor the solicitor who had acted for her issued a writ of *hab. fac. poss.* upon the judgment, without the leave required by Rule 886.

Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action.

The defendant let in to defend upon terms.

L. F. Heyd, for the plaintiff by revivor.

H. J. Scott, Q.C., for the defendant.

IN CHAMBERS.

[ROSE, J., 28TH SEPTEMBER, 1894.

KAVANAGH v. LENNON.

Infant—Money in Court—Payment out—Marriage—Foreign law.

Where a female was entitled at majority to payment out of Court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due her, an order was made for immediate payment out.

E. T. Malone, for the applicant.

J. Hoskin, Q.C., official guardian, contra.

[STREET, J., 18TH SEPTEMBER, 1894.

HOLLENDER v. FFOULKES.

Security for costs—Time—Dismissal of action for default—Waiver—Rule 1251—Effect of.

Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive.

Rule 1251 does not give a plaintiff any further time for, or relieve him from the obligation of, putting in his security for costs; it only enables him to remove the stay effected by the order for the sole purpose of making a motion for judgment under Rule 739; and if he does not succeed in that motion, he must obey the order by putting in the full security.

But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under Rule 739 and appealed to a Judge in Chambers and afterwards to a Divisional Court from the order made upon such motion, without taking the objection that the action was at an end:—

Held, that he had waived the objection; and a bond filed after the time limited was allowed.

Carter v. *Stubbs*, 6 Q. B. D. 116, followed.

Burns v. *Chisholm*, 2 Ch. Chamb. R. 88, not followed.

Newcombe v. *McLuhan*, 11 P. R. 461, referred to.

Teetzel, Q.C., for the plaintiff.

Bartram, for the defendant.

MANITOBA.

IN THE SURROGATE COURT OF THE WESTERN JUDICIAL DISTRICT.

[CUMBERLAND, SURR. J., 18TH AUGUST, 1894.

In re CAMPBELL'S ESTATE.

Succession Duty Act—Bank stocks—"Property situate within this Province."

Application under the Succession Duty Act, 1893. The deceased, who lived in Manitoba, died there; with the exception

of cattle on a farm in the Province, valued at $4,500, the whole of the estate, valued at over $70,000, consisted of bank stocks in several Canadian banks, the head offices of which were in Quebec or Ontario, shares in the Hudson's Bay Company, and moneys in the hands of that company in London.

A question arose under the Succession Duty Act as to the duty payable on the estate, if any.

Held, that the matter might be decided on the simple ground that the statute, when it expressly limited its operation to "property situate within this Province," should be taken to mean property actually situated, not merely deemed to be situated, within Manitoba. It seemed unlikely that the word "situate" would have been inserted if it had been intended that the provisions of the Act should extend to personalty which, though actually situated abroad, was by fiction of law considered as having for certain purposes a *situs* where the deceased person had his domicil. While it is true that personal property for some purposes is said to follow the domicil of the deceased owner, and to be dealt with as if it had been situated in the country where that domicil was, it could not properly be said that the property was situated there. There were other provisions in the statute which were consistent only with the idea that the property intended to be taxed was property actually situated within the Province. Even if the word "situate" had not been used in the statute, taking it as a whole the proper construction to place upon it would be one which would exclude personalty outside the Province. There was no sufficient reason to draw a distinction between property such as bank stock, and personalty of a more tangible character, so as to hold the statute applicable in the case of the former though not of the latter. It appearing that the sons and daughters of the deceased were the only beneficiaries, there was no reason why the matter should not be considered, for the purposes of the Act, as if the $4,500 were the only property passing under the will, and, if so, under s. 8, s-s. 2, no duty would be payable.

Blackwood v. *The Queen*, 8 App. Cas. 82, referred to.

Perdue and *Wade*, for the executors and legatees.

Maclean, for the Attorney-General.

Supreme Court of Canada.

ONTARIO.] [31ST MAY, 1894.

ERDMAN v. TOWN OF WALKERTON.

Evidence—Action for personal injuries—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Right of third party.

Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children claim, in effect, under the deceased: therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse*, and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action brought after his death under the Act; TASCHEREAU and GWYNNE, JJ., dissenting.

The admissibility of such evidence as against the original defendants is not affected by the fact that they, a municipal corporation, being sued for injuries caused by falling into an excavation in a public street, have caused a third party to be added as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action and had no opportunity to cross-examine him; TASCHEREAU and GWYNNE, JJ., dissenting.

Judgment of the Court of Appeal, 13 Occ. N. 224; 20 A. R. 444, affirmed.

Aylesworth, Q.C., for the appellants.

Shaw, Q.C., for the respondent.

H. P. O'Connor, Q.C., for the third party.

WEEGAR v. GRAND TRUNK R. W. CO.

Railway company—Injury to employee—Negligence—Finding of jury—Interference with on appeal.

The plaintiff was an employee of the defendants, and it was his duty to couple cars in their Toronto yard. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed, owing to the engine backing down and bring the cars together before the coupling was made. On the trial of an action for damages resulting from such injury, the conductor denied having given directions for the coupling, and it was contended that the plaintiff improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions, and the plaintiff obtained a verdict, which was affirmed by the Common Pleas Divisional Court, 23 O. R. 436, and the Court of Appeal, 18 Occ. N. 298; 20 A. R. 528.

Held, per FOURNIER, TASCHEREAU, and SEDGEWICK, JJ., that though the findings of the jury were not satisfactory upon the evidence, a second court of appeal could not interfere with them.

Held, per KING, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as the plaintiff had a right to rely on the engine not being moved until the coupling was made and he could properly perform the work in the most expeditious way, which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode would save time; and that the plaintiff was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

Judgment of the Courts below affirmed.

McCarthy, Q.C., for the appellants.

W. R. Smyth, for the respondent.

QUEBEC.] [1ST MAY, 1894.

BAXTER v. PHILLIPS.

Rights of succession—Sale by co-heir—Sale by curator before partition—Retrait successoral—Art. 710, C. C.—Prescription.

When a co-heir has assigned his share in a succession before partition, any other co-heir may claim such share, upon reimbursing the purchaser thereof the price of such assignment, and such claim is imprescriptible so long as the partition has not taken place: Art. 710, C. C.

A sale by a curator of the assets of an insolvent, even though authorized by a Judge, which includes an undivided share of a succession of which there has been no partition, does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.

The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser, and not bound in his action to tender the moneys paid by the purchaser.

Judgment of the Court below affirmed.

Beique, Q.C., for the appellant.

Driscoll and *D. G. Bowie*, for the respondent.

BELL'S ASBESTOS CO. v. JOHNSON'S CO.

Action en bornage—R. S. Q. Art. 4155—Straight line.

Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points: R. S. Q. Art. 4155.

Judgment of the Court below affirmed.

Stuart, Q.C., and *A. Hurd*, for the appellants.

Irvine, Q.C., and *J. Lavergne*, for the respondents.

[31st May, 1894.

GUYON v. CITY OF MONTREAL.

ALLAN v. CITY OF MONTREAL.

Expropriation—35 V. c. 32, s. 7, P.Q.—Interference with award of arbitrators.

In matters of expropriation, where the decision originally of a majority of arbitrators, who were men of more than ordinary business capacity, has been given, such decision should not be interfered with on appeal upon a question which is merely one of value.

Judgment of the Court below affirmed.

Robertson, Q.C., and *Geoffrion*, Q.C., for the appellants.

Ethier, Q.C., and *Greenshields*, Q.C., for the respondents.

CHAMBERLAND v. FORTIER.

Action negatoria servitutis—Right of passage—Private road—Government moneys in aid of—R. S. Q., Arts. 1716, 1717, 1718—Arts. 407, 1569, C. C.

The plaintiff, proprietor of a piece of land in the parish of Charlesbourg, claimed to have himself declared proprietor of a heritage purged from a servitude, being a right of passage claimed by his neighbour, the defendant. The road was partly built with the aid of government and municipal moneys, but no indemnity was ever paid to the plaintiff, and the privilege of passing on the private road was granted by notarial agreement by the plaintiff to certain persons other than the defendant.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side, that the mere granting and spending of a sum of money by the government and the municipality did not make such private road a colonization road, within the meaning of Art. 1718, R. S. Q.

Amyot, Q.C., for the appellant.

Languedoc, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. C., HALDIMAND.] [5TH OCTOBER, 1894.

SHERK v. EVANS.

Costs—County Court appeal—Allowance of, for want of jurisdiction in Court below—Costs below—Rule 1256—Discretion.

The appeal was by the defendant from the judgment of the County Court of the county of Haldimand, and was allowed with costs, on the ground of want of jurisdiction in the Court below, the amount claimed being too great.

The certificate of the judgment, as settled by the registrar, contained a clause dismissing the action with costs.

Upon motion by the plaintiff to vary the certificate by strik out this clause:—

Held, that this Court made no order as to the costs in the Court below; and *semble*, it could not have done so, as the appeal was allowed on the ground of want of jurisdiction, and Rule 1256 seemed to leave the costs below in the discretion of the County Court Judge.

The certificate was varied as asked without costs of the motion.

J. Bicknell, for the plaintiff, respondent.

Aylesworth, Q.C., for the defendant, appellant.

IN CHAMBERS.

[OSLER, J.A., 20TH OCTOBER, 1894.

In re MACPHERSON AND CITY OF TORONTO.

Arbitration and award—55 V. c. 42, s. 487 (1)—Foreign commission—Jurisdiction.

A Judge of the Court of Appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbitration pending before an arbitrator named by a Judge of that Court under s. 487 (1) of the Municipal Act, 55 V. c. 42. Such an arbitration is not a "reference by rule, order, or submission," within the meaning of s. 49 of the Act respecting arbitrations and references, R. S. O. c. 53; nor, even if it were a "matter," within the meaning of Rule 566, would a Judge of the Court of Appeal have any jurisdiction, by reason of his having appointed the arbitrator or otherwise.

And *semble*, distinguishing *Re Mysore West Gold Mining Co. (Ltd.)*, 37 W. R. 794, it is not such a "matter."

H. J. Scott, Q.C., for the claimant.

J. B. Clarke, Q.C., for the city corporation.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 21ST JUNE, 1894.

WESTBROOK v. WHEELER.

WHEELER v. WESTBROOK.

Partnership—Assignment of interest of partner—Termination of partnership—Possession of partnership premises—Notice to quit—Tavern license—Transfer of—R. S. O. c. 194, s. 37.

A partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the part-

ners of his interest in the business, at his own instance or at the instance of his assignee, against the will of the other partner.

And where a partnership is so put an end to, the assignor being the lessee of the premises on which the business is carried on, and assigning the term to the assignee, the latter is entitled to recover possession of the premises against the other partner without notice to quit or demand of possession.

Where the holder of a tavern license enters into partnership with another person, to whom he assigns an interest in his tavern business, such assignment is not an assignment of his business within the meaning of s. 37 of the Liquor License Act, R. S. O. c. 194, and does not require a transfer of the license. And, upon the construction of the partnership agreement in this case, the new partner did not take an undivided one-half interest in the license.

Judgment of ROBERTSON, J., varied.

Wallace Nesbitt, for the Westbrooks.

Brewster and *L. F. Heyd*, for the Wheelers.

[BOYD, C., 11TH OCTOBER, 1894.

ROSS v. ORR.

Club law—Bicycle race—Protest—Award of challenge cup—Private tribunal—Decision of—Refusal of Court to interfere—Injunction.

A bicycle race was entered upon subject to conditions expressed in a declaration of trust made by the trustees of a challege cup, which was to be awarded to the club whose riders scored the greatest number of "points" in the race. By the declaration it was provided that "all arrangements pertaining to the course and race, protests, and matters connected with the welfare of the club will be decided by the trustees."

The plaintiffs, representing one of the clubs whose riders joined in the race, obtained an *ex parte* interim injunction order restraining the trustees from handing over the cup to another club, on the ground that one of its riders did not turn a post,

but went inside of it. A protest had been lodged, but the trustees had not given their decision as to the result of the race.

Held, upon motion to continue the injunction, that the declaration covered the decision of the question as to which was the winning club, which was peculiarly a question for the consideration of the trustees, and, in order to dispose of it satisfactorily, it was not necessary that they should be able to take evidence on oath; and therefore the Court ought not to interfere; and the injunction should be dissolved.

Brown v. *Overbury*, 11 Ex. 715; *Ellis* v. *Hopper*, 3 H. & N. 768; and *Newcomen* v. *Lynch*, Ir. R. 9 C. L. 1; Ir. R. 10 C. L. 248, followed.

W. R. Riddell, or the plaintiffs.

C. B. Jackes, *Du Vernet*, and *Ryckman*, for the defendants.

[18TH OCTOBER, 1894.

In re O'CONNOR AND FIELDER.

Arbitration and award—Reference to three arbitrators—Award by two—Invalidity—Private authority.

It is a general rule, applicable to all cases of private authority, trust or reference, to be exercised by several persons, that unless the constituent instrument permits action or decision by a majority, the office is regarded as joint, and all must act collectively. Different considerations arise when the duties are of a public nature, but in transactions between individuals they make their own bargain and so become a law unto themselves.

And where a submission to arbitration provided that the award should be made by three arbitrators, an award by two of them the other dissenting, was set aside on summary application.

N. F. Davidson, for O'Connor.

Haverson, for Fielder.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 18TH OCTOBER, 1894.

BALDWIN v. QUINN.

BALDWIN v. M'GUIRE.

Costs—Taxation between solicitor and client—Agreement to pay costs of two actions—Separate sets of costs—Affidavits on production—Motion for summary judgment—Defective indorsement on writ of summons.

Two actions were brought by the same plaintiff against different defendants to recover rent for different parcels of land. The defences were not identical; and though one solicitor acted for both defendants, he did not respond to overtures of the plaintiffs to have one action abide the result of the other. A compromise was effected, and it was agreed between the parties "that judgment shall be entered in each of the said actions for the amounts claimed therein by the plaintiffs, with costs of suit between solicitor and client;" and judgments were entered accordingly.

Held, that the plaintiffs were entitled to tax a separate set of costs for each action.

The plaintiffs made six affidavits on production, either prompted by the action of the defence or by way of voluntary supplement to the original affidavits.

Held, per BOYD, C., in Chambers, that they were entitled to tax the costs of one affidavit only, with extra folios for the additional matter contained in the subsequent affidavits.

Held, also, *per* BOYD, C., that upon the taxation "between solicitor and client" of the plaintiffs' costs, they were not entitled to the costs of a motion for summary judgment under Rule 739, which was useless and not according to the practice and was refused because the indorsement on the writ of summons claimed "interest on arrears of rent," and was therefore not a good special indorsement.

J. T. Small, for the plaintiffs.

C. Millar, for the defendants.

[BOYD, C., 18TH OCTOBER, 1894.

DODDS v. THE ANCIENT ORDER OF UNITED WORKMEN.

Life insurance—Infants—Payment to executors—Security—Discharge—R. S. O. c. 136, ss. 11, 12.

Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under ss. 11 and 12 of R. S. O. c. 136, be paid to the executors of the will of the insured, as provided by s. 12, without security being given by them, and payment to them is a good discharge to the insurers.

Totten, Q.C., for the executors and the insurers.

A. J. Boyd, for the infants.

[15TH OCTOBER, 1894.

In re FERGUSON, BENNETT v. COATSWORTH.

Will—Construction—"Right heirs"—Period of ascertainment—Distribution of estate—"Equally"—Per capita and not per stirpes.

Upon appeal from the Master's report on a reference for the administration of the estate of the testator whose will was construed in *Coatsworth* v. *Carson*, 24 O. R. 185:—

Held, having regard to the judgment in that case, that the "right heirs" were to be ascertained at the date of the death of the testator's daughter, and among them the whole of the estate was to be divided equally, share and share alike.

The expression "*per stirpes*" in the former judgment was improvidently used, due weight not having been given to the word "equally."

W. M. Clark, Q.C., *Starr*, and *A. J. Boyd*, for the descendants of Jane Ball.

Macklem, for the descendants of Eliza Purdy.

F. E. Hodgins, for the executors.

[ROSE, J., 28TH SEPTEMBER, 1894.

In re THE ONTARIO EXPRESS AND TRANSPORTATION COMPANY.

THE DIRECTORS' CASE.

Company—Appointment of directors as officers—Right to salaries.

Held, on appeal from a decision of the Master in Ordinary, that where a director of a company is appointed an officer of the company, he does not hold such appointment as director; and therefore where an Act of incorporation enacted that no by-law for the payment of the president or any director should be valid or acted upon until the same had been confirmed at a general meeting of the shareholders, this applied only to the payment of money for the services of a director *qua* director, and of the services of the president as presiding officer of the board of directors, but that the company having appointed the directors to various salaried offices, and there being in this case no contract with the company upon which they could recover remuneration, they were nevertheless entitled to a *quantum meruit* for services rendered to the company during the time they discharged the duties of their respective offices.

F. A. Hilton and *W. R. Smyth*, for the claimants.

Hoyles, Q.C., for the liquidator.

[STREET, J., 21ST JULY, 1894.

In re JENKINS AND TOWNSHIP OF ENNISKILLEN.

Drainage—New outlet—Municipal Act, 1892, ss. 569, 585—Petition—Township by-law—Adjoining townships—Agreement as to proportion of cost—Report of engineer—Description of lands.

A township council, finding that a government drain in the township did not carry off the water, by reason of the natural flow being in another direction, accepted a report made by their engineer and passed a by-law adopting a scheme for a new drain leading from the middle of the government drain into an adjoining township, where it was to find an outlet.

Held, that the proposed drain properly came within the description of a new outlet, although not at the end of the government drain, and although the former outlet remained to serve to carry off a part of the water; and, so long as the proposed drain was designed merely as an outlet for the water from the government drain, it might under s. 585 of the Municipal Act of 1892, be provided for without any petition under s. 569, even although it should incidentally benefit the locality though which it should run, nothing being included in the plan beyond what was reasonably requisite for the purpose intended.

Although a township council is not powerless with regard to the drainage report of their engineer, it is contrary to the spirit and meaning of the Act that two adjoining councils should agree upon a drainage scheme and upon the proportion of its cost to be borne by each, and that the engineer of one of them should be instructed to make a report for carrying out the scheme and charging each municipality with the sums agreed on; for that would interfere with the independent judgment of the engineer and pledge each township in advance not to appeal against the share of the cost imposed upon it, to the possible detriment of the property owners assessed for the portions of that share.

And where such a course was pursued, a by-law of one of the councils adopting the engineer's report was quashed.

In describing lands for assessment, "the north east part," even with the addition of the acreage, is an ambiguous description; and *quære* as to the effect upon the validity of the by-law

Aylesworth, Q.C., and *Shaunessy*, for the motion.

McCarthy, Q.C., and *Moncrieff*, Q.C., contra.

COMMON PLEAS DIVISION.

[THE JUSTICES IN BANC, 23RD JUNE, 1894.

REGINA v. FRAWLEY.

Criminal law—Conspiracy—Failure to complete fraud—Indictment of one of two conspirators.

A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud.

One of two conspirators can be tried on an indictment against him alone charging him with conspiring with another to defraud, &c., the other conspirator being known in the country.

J. R. Cartwright, Q.C., for the Crown.

L. V. McBrady, for the defendant.

[29TH JUNE, 1894.

REGINA v. WITTMAN.

Criminal law—Keeping common gaming-house—Offence in United States—Criminal Code, s. 108.

In a betting game called "policy," the actual betting took place in the United States, all that was done in Canada being the happening of the chance on which the bet was staked.

Held, that there was no offence of keeping a common gaming-house, within s. 108 of the Criminal Code.

J. R. Cartwright, Q.C., for the Crown.

Osler, Q.C., for the defendant.

[THE DIVISIONAL COURT, 23RD JUNE, 1894.

HELLEMS v. CITY OF ST. CATHARINES.

Municipal corporation—Removal of officers—Liability.

It is provided by s. 27 of the Municipal Act, 55 V. c. 42, that officers appointed by the council shall hold office until removed by the council.

Held, that all such officers hold their offices during the pleasure of the council, and may be removed at any time without notice or cause shown therefor, and without the corporation incurring any liability thereby.

Where, therefore, a city commissioner was appointed by a resolution of the council, and shortly afterwards another resolution was passed rescinding the former one, the appointment was rescinded without the corporation having incurred any liability.

Watson, Q.C., and *Lancaster*, for the plaintiff.

Aylesworth, Q.C., and *F. W. Macdonald*, for the defendants.

MIDDLETON v. FLANAGAN.

Contract—Construction of—Horses—Plant—Meaning of—Evidence.

By one of the clauses of a railway contract for excavation, "all machinery, and other plant, materials, and things whatsoever," provided by the contractor, were until the completion of the work to be the property of the company, when such as had not been used and converted into the works and remained undisposed of were to be delivered over to the contractor, but in other clauses the words teams and horses were respectively used as well as the word "plant."

Held, under the contract, that horses were not included in the word "plant;" and that expert evidence was not admissible to explain its meaning; but in any event the plaintiffs must fail, for the evidence showed that the horses in question did not belong to the contractor, and so did not come within the contract.

Osler, Q.C., for the plaintiffs.

Aylesworth, Q.C., for the defendant.

SCOTT v. REBURN.

False arrest—Constable—Notice of action—Necessity for—Requisites of.

Where, in an action against a constable for false arrest, it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously.

Fullerton, Q.C., and *W. J. Elliott*, for the plaintiffs.

J. B. Clarke, Q.C., for the defendant.

JONES v. GODSON.

Arbitrators—Excessive fees—Penalty—Liability—Taxation of fees.

The liability imposed on arbitrators by s. 29 of R. S. O. c. 53, in case of an overcharge of fees, to pay treble the amount of the

fees charged, is penal in its nature, and arises only where there has been a refusal or delay to make, execute, or deliver an award, after previous demand made, unless such excessive charges are paid.

Taxation of the fees is not a condition precedent to maintaining an action for the penalty.

W. R. Smyth, for the plaintiff.

Wallace Nesbitt and *Monro Grier*, for the defendants.

[MacMahon, J., 5th July, 1894.

CHRISTIE v. CITY OF TORONTO.

Assessment and taxes—55 V. c. 48, s. 124—Goods subject to distress—Occupancy.

Section 24 of the Consolidated Assessment Act, 55 V. c. 48, only authorizes a distress for non-payment of taxes upon the goods of the person who ought to pay the same, or upon any goods in his possession, or upon any goods found on the premises, the property of, or in the possession of, any other occupant of the premises, and not upon goods on the premises which are not the goods and chattels of the person who ought to pay the taxes or of any occupant thereof.

W. M. Hall, for the plaintiff.

W. C. Chisholm, for the defendants.

W. R. Smyth, for the third party.

[Street, J., 8th May, 1894.

EDWARDS v. FINDLAY.

Will—Codicil—Revocation of bequest.

A testator by the third clause of his will bequeathed to S. the sum of $3,000 for life, and after his death to his children, &c., and by a subsequent clause directed his executors to deduct out of the $3,000 all payments made to S. after the date of the

will. By a codicil he directed that the bequest to S. of the interest on $8,000 should be revoked, and in lieu thereof the sum of $800 be paid to him, or his heirs, and that the direction as to payments made after the date of the will should apply thereto.

Held, that the effect of the codicil was to revoke the whole of the third clause.

J. B. Clarke, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *J. F. Canniff*, for certain residuary legatees.

J. Hoskin, Q.C., for the infants and certain adults.

[22nd SEPTEMBER, 1894.

HEROD v. FERGUSON.

Contract—Remuneration for services—Subsequent promise to pay by third person—Judgment on—Collateral contract—Novation—Release.

In an action for the value of surgical and medical services rendered by the plaintiff to the defendant, it appeared that after all the services had been rendered and charged to the defendant only, in the books of the plaintiff, the defendant's son had asked the plaintiff to send the account to him; that the plaintiff had done so, making out the account in the son's name, which the son had promised to pay; that the plaintiff had recovered judgment by default against the son for the amount, but, finding him to be worthless, had not issued execution; and had then brought this action. It was found as a fact that the contract for the services had been made with the father and not with the son. There was no evidence of any agreement by the plaintiff to accept the son as his debtor and to release the father.

Held, that the son became liable to the plaintiff, if at all, upon a subsequent promise, which was not a satisfaction of the original cause of action, but collateral to it; that the original cause of action still existed, because there had been no novation of it, no payment or release of it, and no judgment recovered upon it; and the plaintiff was entitled to recover.

Moss, Q.C., and *Guthrie*, Q.C., for the plaintiff.

F. Fitzgerald, for the defendant.

IN CHAMBERS.

[BOYD, C., 4TH JUNE, 1894.

In re SHEPHERD v. COOPER.

Prohibition — Division Court — Increased jurisdiction — Ascertainment of amount—Conditional contract.

A Division Court has no jurisdiction to entertain a claim for $200 on a contract signed by the defendant, where, to entitle the plaintiff to recover, evidence *ultra* must be given to show that conditions of the contract on the plaintiff's part have been complied with.

Prohibition granted.

H. M. East, for the defendant.

C. Millar, for the plaintiff.

[9TH OCTOBER, 1894.

In re CUMMINGS AND COUNTY OF CARLETON.

Prohibition—Arbitration and award—Lands injuriously affected—Joint work by city and county—Remedy—Appointment of arbitrator—Powers of County Judge—One arbitrator for two municipalities—Municipal Act, 55 V. c. 42, ss. 391, 483, 487—Interpretation Act, R. S. O. c. 1, s. 8 (24).

An order of prohibition is an extreme measure, to be granted summarily only in a very plain case of excessive jurisdiction on the part of a subordinate tubunal.

A land-owner alleged that by the building of a bridge over a river forming the boundary between a county and city, a joint work undertaken by two municipalities, his land in the county had been injuriously affected, and he sought damages therefor from both municipalities.

Held, having regard to s. 483 of the Municipal Act, 55 V. c. 42, that he had no remedy except by arbitration under the Act.

Pratt v. *City of Stratford*, 14 O. R. 260, 16 A. R. 5, followed.

Held, also, that the case was covered by s. 391 of the Act; the expression "a municipal corporation," by force of the Interpretation Act, R. S. O. c. 1, s. 8 (24), being capable of being read as a plural.

Held, also, that it was competent for the County Judge to appoint the same arbitrator for both corporations, upon their making default in naming an arbitrator, and that he could proceed to do so *ex parte*.

Held, lastly, that s. 487 did not apply to the case of a joint claim against city and county.

And prohibition to the arbitrators was refused.

Moss, Q.C., for the city of Ottawa.

H. M. Mowat, for the county of Carleton.

W. M. Douglas, for the land-owner.

[13TH OCTOBER, 1894.

In re REID v. GRAHAM BROTHERS.

Prohibition—Division Court—Judgment summons—Examination—Refusal of evidence—Partnership—Judgment against firm—Parties—Members of firm—Commitment.

An order having been made in a Division Court upon judgment summons committing a defendant under s. 240, s.-s. 4 (c), of R. S. O. c. 51, for having made away with his property:—

Held, that it was not a ground for prohibition that the Judge refused to allow the defendant under examination to make explanations as to his dealings with money lent by and repaid to him after judgment. The refusal of evidence is not ground for prohibition.

The members of a firm sued in the firm name are parties to the litigation; and when judgment is obtained in a Division Court against a firm as such, though execution can go only against the goods of the firm and against the individual goods of one who is sued as and found to be a partner, yet a judgment

summons may be issued against another member of the firm, if only to get discovery of goods of the firm available for execution, and if he makes wilful default in attendance, he is liable to be committed as for contempt of Court.

D. Armour, for the plaintiff.

R. S. Neville, for the defendants.

[15TH OCTOBER, 1894.

REGINA v. MINES.

Criminal law—Summary conviction—"Procuring" a weapon with intent—Criminal Code, s. 108—Amended conviction—Information for shooting with intent—Justices of the peace—Substituting new charge—Imprisonment—Habeas corpus—Discharge.

The defendant was brought before justices of the peace on an information charging him with the indictable offence of shooting with intent to murder. The justices, not finding sufficient evidence to warrant them in commiting for trial, of their own motion, at the close of the case, summarily convicted the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared by the evidence that the weapon was bought and carried and used by the defendant personally.

By the Criminal Code, s. 108, it is a matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do any injury to any other person.

The return to a writ of *habeas corpus* shewed the detention of the defendant under a warrant of commitment based upon the above conviction; and upon a motion for his discharge:—

Held, that the detention was for an offence unknown to the law; and, although the evidence and the finding showed an offence against s. 108, the motion should not be enlarged to allow the magistrates to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid; and the prisoner should, therefore, be discharged.

A. H. Marsh, Q.C., for the defendant.

RYAN v. CAMERON.

ATTORNEY-GENERAL FOR CANADA v. ONTARIO AND WESTERN LUMBER CO.

Consolidation of actions—Application by plaintiffs—Identity.

The practice at law was not to consolidate actions unless the plaintiffs were the same, the questions the same, and the evidence the same; and, as a matter of form, actions could only be consolidated at the instance of the defendants; but the Court may give relief, in proper circumstances, even to a plaintiff, where the actions are so germane that one may serve as a test for all.

Where the plaintiffs were different, the defendants different, and the relief sought entirely different, though part of the evidence in the one action might be available in the other, an application by the plaintiffs conjointly for an order consolidating the two actions was refused.

Semble, the defendants would be entitled to an order to have the actions tried together in case the plaintiffs were bringing them on at different Courts.

W. R. Riddell, for the plaintiffs.

Hoyles, Q.C., for the defendants.

[FERGUSON, J., 17TH OCTOBER, 1894.

CONMEE v. WEIDMAN.

Libel—Candidate for public office—R. S. O. c. 57, s. 5—Notice of action—Summary dismissal for want of—Rule 387—Security for costs.

The plaintiff was a candidate at an election of a member of the Legislative Assembly of Ontario, and brought this action in respect of several libels alleged to have been published by the defendant in his newspaper, some of them before the date of the writ of the election, and some after that date but before the election.

Held, that the plaintiff was not a candidate for a public office in this Province, within the meaning of R. S. O. c. 57, s. 5, s.-s. (2) (*a*), before the date of the writ for the election; that

as to the libels alleged to have been published before that date, a notice before action under the statute was necessary; but the paragraphs of the statement of claim charging these libels could not, on the ground that the notice was not given, be struck out under Rule 387, nor the action as to them summarily dismissed; and as to the libels alleged to have been published after that date, security for costs could not be ordered under the statute, because the plaintiff was then a candidate for a public office within the meaning of s. 5, s.-s. (2) (*a*), and the statute did not apply.

D. Armour, for the plaintiff.

D. W. Saunders, for the defendant.

[19TH OCTOBER, 1894.

SCHMIDT v. TOWN OF BERLIN.

Discovery—Examination of officer of municipal corporation—Caretaker of building.

In an action for damages for negligence in keeping a building in such a dangerous condition that one of the plaintiffs was injured while in it:—

Held, that the caretaker of the building, an employee of the defendants, was an officer examinable for discovery under Rule 487.

F. E. Hodgins, for the plaintiffs.

W. H. P. Clement, for the defendants.

[ROSE, J., 16TH OCTOBER, 1894.

In re SOLICITOR.

Solicitor—Striking name off roll—Procedure—Order for payment over—Court or Chambers—Subsequent application—Costs.

Where a client applies to strike the name of a solicitor off the roll for misconduct in neglecting to pay over the client's money in his hands as solicitor, the first application should be

made to a Judge in Court, whereupon, in a proper case, an order will be made requiring the solicitor to pay over the money by a named day, and in default that his name be struck off. Upon default, no further application is necessary, except an application to have the roll brought into Court for the purpose of having the name struck off, and this should be on notice to the solicitor.

Ruling of a taxing officer that costs of the first application should be taxed as of a Chambers motion only, reversed on appeal.

H. M. Mowat, for the appellant.

W. H. Blake, for the solicitor.

[ROBERTSON, J., 2ND OCTOBER, 1894.

NOYES v. YOUNG.

Consolidation of actions—Application of common defendant—Identity of cause of action.

Two separate actions were brought by a husband and wife against the same defendant for damages for injuries received by each of the plaintiffs, owing to the alleged negligence of the defendant in permitting a pair of horses to run away and run into a vehicle in which both plaintiffs were seated, causing them to be thrown out and trampled on. The husband alleged greater injury than the wife and claimed $3,000 damages, while she claimed $2,000. The defences were the same, with the addition in the wife's action of a paragraph stating that such action was unnecessary; the main defence in both was contributory negligence.

Held, upon an application made by the defendant at the trial, that both claims should have been joined in one action; and an order was made consolidating them.

Smurthwaite v. *Hannay*, 10 Times L. R. 649; *Westbrook* v. *Australian, etc., Navigation Co.*, 23 L. J. N. S. (C. P.) 42; *Williams* v. *Township of Raleigh*, 14 P. R. 50, distinguished.

A. G. Chisholm, for the plaintiffs.

Love, for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 8TH OCTOBER, 1894.

McMAIN v. OBEE.

Prohibition—County Court—Amount in dispute—Liquidation—Interest—County Courts Act, s. 330—Amendment to give jurisdiction—Discretion—Statute of Limitations.

Application for a writ of prohibition. The plaintiff sued in a County Court and recovered a verdict for $820.54 with costs. The defendant applied for a writ of prohibition, on the ground that the action was brought for the balance of an unsettled account exceeding $400. The particulars indorsed showed the claim to be upon a promissory note for $255, with interest at eight per cent. from the date of the note, 12th March, 1888 amounting to $178.30, making a total of $438.30, but credit was given for two sums paid on account, making $100, thus arriving at the balance claimed, $338.30. The note, a copy of which was attached to the summons, was payable nine months after date, and bore interest at eight per cent. during its currency, but did not provide for interest at any specified rate after its maturity. At the trial an objection to the jurisdiction was taken, but the Judge allowed the plaintiff to abandon the excess, or allowed an amendment of the particulars so as to make the claim for interest since the maturity of the note at six per cent. only, and thus bring the case within the jurisdiction of the Court.

Held, that the claim which was made for interest at eight per cent. was clearly a claim in respect of an unsettled unliquidated demand.

Sheba Gold Mining Co. v. *Trubshawe*, [1892] 1 Q. B. 674, followed.

Although s. 330 of the County Courts Act gives very extensive powers of amendment, it could not be said that a Judge, where he had no jurisdiction, could amend proceedings so as to get rid of an express provision of an Act of the Legislature and so acquire jurisdiction.

Re Hopper v. *Warburton*, 11 W. R. 384; *Sherwood* v. *Cline*, 17 O. R. 30, followed.

It was argued that the granting of a prohibition was entirely discretionary, and that under the circumstances of this case it should be refused.

Held, that the defendant had applied in proper time, upon sufficient material, and had not by misconduct or laches lost his right, and was therefore entitled to a prohibition.

Farquharson v. *Morgan*, [1894] 1 Q. B. 552, followed.

It was argued that prohibition should not be granted, because the Statute of Limitations might bar the bringing of another action; but

Held, that the Court could not be governed by any notions of hardship.

Rhodes v. *Smethurst*, 4 M. & W. 68, followed.

Summons absolute with costs.

Andrews, for the plaintiff.

Clark, for the defendant.

THOMPSON v. DIDION.

Costs—Set-off—Solicitor's lien.

The plaintiffs, judgment creditors of E. Didion, filed their bill to have a judgment recovered against him by C. B. Didion set aside as fraudulent and void. The bill was dismissed against both E. Didion and C. B. Didion with costs: *ante* p. 409.

The minutes were spoken to, the plaintiffs claiming to set off the costs payable by them to E. Didion *pro tanto* against their

judgment. Their doing so was opposed on the ground that the solicitor's lien could not be interfered with.

Held, that the decree could not provide for the plaintiffs setting off the costs payable to E. Didion against their judgment. It would seem that where costs in a particular suit are payable to and by different parties to it, there may be a set-off, and no question of the solicitor's lien will be entertained to prevent it. But where the costs are in different suits, or where it is sought to have costs set off against moneys due from the party entitled to receive the costs, the set-off will not be allowed, if thereby the solicitor's lien will be interfered with and prejudiced.

Collett v. *Preston*, 15 Beav. 458; *Webb* v. *McArthur*, 4 Ch. Chamb. R. 68, followed.

Darby, for the plaintiffs.

Baker and *Bradshaw*, for the defendants.

[18TH OCTOBER, 1894.

In re RURAL MUNICIPALITY OF MACDONALD.

Municipal corporation—Resolutions of council—Special meetings—Procedure at—Power of council to expend moneys.

Summons, under s. 385 of the Municipal Act, to quash two resolutions passed by the council of the municipality.

In 1893 a commission was issued to inquire into the financial affairs of the municipality, and at a meeting of the Legislature a bill was introduced to amend the Municipal Boundaries Act, the effect of which, had it passed, would have been to abolish the municipality and divide its territory among neighbouring municipalities.

The first resolution moved against was passed at a meeting of council held on 24th February, 1894, and authorized the reeve to take any steps he might see fit to protect the interests of the municipality, and to employ additional counsel; and the council assumed liability for all his actions, and guaranteed payment of all expenses incurred.

The second resolution was passed at a meeting held on 20th March, 1894, when the reeve and treasurer were instructed to sign cheques in favour of the solicitor, to be used by him in opposing the bill for dismemberment and for expenses incurred on behalf of the municipality before the commission, in accordance with the resolution passed by the council at the previous meeting.

Some of the objections taken were that the council had no power to use the funds of the municipality otherwise than as provided in s. 432 of the Municipal Act; that the council had no power to use the moneys of the municipality in opposing the bill for dismemberment; that the meetings of the council were special meetings, of which reasonable notice was not given, nor did the notices given mention the subjects or matters to be taken into consideration; that the power to expend moneys as contemplated could only be exercised by by-law.

Held, that the attendance of counsel on a commission in the interest of the municipality could not be necessary, for the commissioner was there in that interest.

As to expending money in opposing the bill, that appeared to stand on a different footing. There seemed to be a difference of opinion among the ratepayers as to the advisability of such a proceeding, and the council, knowing that, might not unreasonably oppose the passing of the bill.

The notices calling the special meetings did not contain any notice of the intended business. That being so, it was not competent for the council at these meetings to deal with the questions of the commission or the bill, and to pass the resolutions which were passed and which were moved against.

If the council had power to apply moneys of the municipality for any of the purposes dealt with in the resolutions, it should have proceeded by by-law: *East Nissouri* v. *Horseman*, 16 U. C. R. 581.

Summons absolute with costs.

Haney, for the applicant.

Martin, for the municipality.

ONTARIO.

Supreme Court of Judicature.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[BOYD, C., 18TH OCTOBER, 1894.

In re STEPHENS AND TOWNSHIP OF MOORE.

Municipal corporations — Drain constructed out of general funds—Maintenance and repair—Assessment of lands benefited—By-law—Petition—55 V. c. 42, ss. 569, 586—Complaints as to assessment—Court of Revision—Notice—Service — Section 571 (2) — Irregularities — Lands "to be benefited"—Policy of drainage legislation—Interference by Court.

A township council has power under s. 586 (2) of the Consolidated Municipal Act, 55 V. c. 42, to maintain and repair a beneficial drain, originally constructed out of general funds, at the expense of the local territory benefited, by passing a by-law to that effect, without a petition therefor.

And although such a by-law referred to lots "*to be* benefited," and so appeared to contemplate prospective advantages, it did not bring the work within the category of drains to be constructed under s. 569 of the Act.

Application to quash the by-law in question being made by several persons, who among them owned one of the lots assessed, alleging that they were not benefited by the original drain and could not be by its continuance and repair, and that the amount charged against their lot was not duly apportioned among them:—

Held, that they should have applied to the Court of Revision for relief; and not having done so, and the work having all

been done and the benefit of it enjoyed, this Court would not interfere to declare the by-law invalid.

Held, also, having regard to s. 571 (2), that the applicants had sufficient notice of the by-law, service having been effected upon a grown-up person at the house where they all lived as members of one family.

Held, also, that upon this application the Court would not inquire what other persons were not served who were not seeking relief, nor consider irregularities or errors in the assessment of such others.

It appeared on the face of the by-law that the drain in question was an old one, constructed out of general funds, and out of repair, and although the assessment was referred to as on the property "to be benefited," yet the same clause spoke of it as "upon the property benefited: "—

Held, that the by-law was not bad in its face.

In drainage matters the policy of the Legislature is to leave the management largely in the hands of the localities, and the Court should refrain from interference, unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights.

M. Wilson, Q.C., for the applicants.

Lister, Q.C., for the township corporation.

[29TH OCTOBER, 1894.

ARGLES v. McMATH.

Landlord and tenant—Fixtures—Lease—Short Forms Act—Covenants.

Under a lease pursuant to the Short Forms Act, containing covenants by the lessee to repair and to leave in good repair, he cannot, having regard to the extended meaning of the covenants, remove at the end of the term fixtures erected by him for the purposes of trade.

In the term "fixtures" are embraced gas fixtures, shelving, mirrors, window fixtures, outside awnings, and other articles, brought on the demised premises as independent personal

chattels, and physically attached by nails or screws; but not carpets spread with tacks for the purpose of keeping them in place.

Shepley, Q.C., and *Donald*, for the plaintiff.

William Macdonald, for the defendant.

[ROSE, J., 16TH OCTOBER, 1894.

TALLMAN v. SMART.

Chattel mortgage—Validity of renewal—Right of assignee for creditors to question—R. S. O. c. 125, ss. 4, 11—55 V. c. 26, s. 2.

Action by a chattel mortgagee against the assignee for the benefit of creditors of the mortgagor to have it declared that the plaintiff had a preferential lien upon the chattels in the assignee's hands.

The defendant did not attack the *bona fides* of the transaction, but set up that the mortgage had ceased to be valid by reason of non-compliance with the provisions of R. S. O. c. 125, s. 11, requiring the renewal of a mortgage in the manner there provided, the objection being that the renewal statement filed did not show all payments made on account of principal and interest. It was not charged that this was by any want of *bona fides* on the plaintiff's part, but by error and omission.

The plaintiff contended that the assignee could not raise such a question, and the defendants admitted that he could not unless by virtue of 55 V. c. 26, s. 2, by which the words "void as against creditors" are declared to extend to any assignee for the general benefit of creditors within the statutes in that behalf.

Moss, Q.C., and *Lavell*, for the plaintiff.

Everts, for the defendant.

ROSE, J.—Adopting the language of the learned Chancellor in *Re Gilchrist and Island*, 11 O. R. at p. 589, the words in s. 2 "void as against creditors" are but symbolical words, for the meaning of which reference is to be had to the exponential words. And again, "resort cannot be had to the exponential clause, unless there is found in the instrument a symbolical

clause to which the former is the parliamentary equivalent." The words "void as against creditors" are found in s. 4 of R. S O. c. 125, where it is provided that "in case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors," etc. We therefore understand by s. 2 of c. 26 that the provisions of s. 4 extend to assignees. But we find no such words as "void as against creditors" in s. 11. The words there are: "Every mortgage or copy thereof filed in pursuance of this Act shall *cease to be valid* as against the creditors of the persons making the same," etc. By s. 4 the mortgage is declared to be void . . void from the beginning. Section 11 presupposes a valid mortgage, which, by reason of the non-observance of the requirements as to renewal, ceases to be valid. The conditions are not the same; the words are not the same; and I am unable therefore to find in s. 2 of c. 26 any exponential words applying to any language in s. 11.

Judgment declaring the right of the plaintiff to rank upon the estate as a preferential creditor to the extent of the balance due upon his mortgage.

CHANCERY DIVISION.

[The Divisional Court, 13th October, 1894.

PEIRCE v. CANADA PERMANENT LOAN AND SAVINGS COMPANY.

Mortgage—Building loan—Further advances—Priority of subsequently registered mortgage—Registry Act—Notice.

After purchasing certain land under an agreement which provided that $2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding $12,000, the purchaser executed a building mortgage to a loan company for $11,500, which was at once registered, but only part of the $11,500 was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above

agreement, then registered her mortgage for $2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—

Held, reversing the decision of FERGUSON, J., *ante* p. 98, 24 O. R. 426, ROBERTSON, J., dissenting, that the plaintiff was not entitled to the priority claimed by her.

Per BOYD, C.—The further advances were made upon a mortgage providing for such advances, and to secure which the legal estate had been conveyed, and equity as well as law protected the first mortgage so advantageously placed, as against the subsequent mortgage, even though registered, where notice had not as a fact been communicated to the first mortgagee respecting the subsequent instrument. The Registry Act did not apply because the company claimed interest in the lands under a prior mortgage, carrying the legal estate, and the fact that advances were made on the first mortgage subsequent to the registration of the second mortgage was not contemplated or covered by R. S. O. c. 114, s. 80.

Per MEREDITH, J.—It could not be that, in the face of her agreement, the plaintiff might at her whim bring the whole building scheme to nought at any stage of the work, causing perhaps a total loss of all that might then have been done, even if she had given actual notice of her mortgage to the loan company, and expressly claimed priority over subsequent advances made by them.

George Bell, for the plaintiff.

S. H. Blake, Q.C., and *Beverley Jones*, for the defendants the Canada Permanent Loan and Savings Company.

CRAWFORD v. BRODDY.

Will—Devise—Conditional fee—Executory devise over.

A testator by his will devised as follows:—

"I give and bequeath to my son F. . . lot No. . . at the age of twenty-one years, giving the executors power to lift

the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years. . . . At the death of any one of my sons or daughters leaving no issue, their property to be divided equally among the survivors."

F. attained twenty-one and died unmarried and without issue.

Held, reversing the judgment of FERGUSON, J., a conditional fee with an executory devise over.

J. C. Hamilton and *T. Dixon*, for the plaintiffs.

W. H. McFadden and *T. J. Blain*, for the defendants.

In re MOBERLEY v. TOWN OF COLLINGWOOD.

Prohibition—Division Court—Jurisdiction—Rent—Incorporeal hereditament—Title to.

The bare assertion of the defendant in a Division Court action that the title to any corporeal or incorporeal hereditament comes in question is not sufficient under R. S. O. c. 51, s. 69, s.-s. 41, to oust the jurisdiction of the Court. The Judge has authority to inquire into so much of the case as is necessary to satisfy him on that point; and if there are disputed facts, or a question as to the proper inference from undisputed facts, that is enough to raise the question of title; but if the facts can lead to only one conclusion, and that against the defendant, then there is no such *bona fide* dispute as to title as will oust the jurisdiction of the Court.

Upon motion for prohibition to a Division Court to prohibit proceedings in an action for rent, on a covenant in a lease, in which it was contended that the lease had been surrendered :—

Held, affirming the decision of ARMOUR, C.J., MEREDITH, J., dissenting, that the Division Court had jurisdiction.

Per MEREDITH, J.—A *bona fide* defence against the plaintiff's right to any rent due under the lease was raised, and as rent reserved is an incorporeal hereditament, the jurisdiction of the Division Court is expressly excluded.

J. Bicknell, for the plaintiffs.

W. H. P. Clement, for the defendants.

[ARMOUR, C.J., 29TH AUGUST, 1894.

In re DOMINION PROVIDENT, BENEVOLENT, AND ENDOWMENT ASSOCIATION.

Constitutional law—Provincial Legislature—Insurance Corporations Act, 1892—Powers conferred on Masters—Intra vires—Adjudicating upon creditors' claims—Settling lists of contributories.

The Ontario Legislature has power to confer upon Masters the powers conferred by the Insurance Corporations Act, 1892.

The Master has power under the provisions of that Act to settle schedules of creditors, and that implies power to adjudicate upon the claims of creditors, to ascertain whether they should appear as creditors in the schedules, but he is not empowered to adjudicate upon the question whether they have been guilty of such conduct as deprives them of their right to claim as creditors.

The Master has also power to settle schedules of contributories, but is not empowered to adjudicate upon the question whether they have been guilty of such breach of duty as makes them liable for any loss by reason thereof. All such matters can only be determined by action.

W. D. McPherson, for Hessin.

E. Sidney Smith, Q.C., for Barnsdale and Robertson.

J. M. Clark, for Baker.

T. H. Loscombe, for the directors.

J. P. Mabee, for the certificate-holders.

G. G. McPherson, for the receivers.

Idington, Q.C., for the infants.

[STREET, J., 28TH SEPTEMBER, 1894.

BROUN v. BUHSEY.

Highway—Closing of—Adjoining owner—Rights of mortgagee—Consolidated Municipal Act, 1892, s. 550, s.-s. 9.

A mortgagee of land adjoining a highway is a person, or at least one of the persons, in whom the ownership of it is vested

for the purposes of s.-s. 9 of s. 550 of the Consolidated Municipal Act, 1892.

Where a part of a highway was being closed up :—

Held, that the plaintiff, as mortgagee of the adjoining land, was entitled to insist upon a right to have the part closed up sold to her as mortgagee, subject to the right of the mortgagor to redeem it along with her mortgage, or to have it sold to the mortgagors, subject to her mortgage, if the mortgagors so preferred.

G. M. Macdonnell, Q.C., for the plaintiff.

E. H. Smythe, Q.C., for the defendant McIver.

[25TH OCTOBER, 1894.

HENDERSON v. BANK OF HAMILTON.

Banks and banking — Special deposit — Wrongful refusal to pay out — Action—Damages—Costs.

The plaintiff, a clergymen, made a special deposit in the defendants' savings bank department, subject to fifteen days' notice of withdrawal, if required. He demanded his money; the defendants, however, refused to give it him, because he had been ordered in certain litigation with them to pay certain costs, which, however, had not been taxed. The plaintiff brought his action, and the defendants paid a certain sum into Court, which, they contended, represented the amount to the plaintiff's credit, with interest.

Held, that the plaintiff was entitled to judgment for the whole amount to his credit, as the defendants could not retain the money to cover costs which had not been taxed; but, not being a trader, the plaintiff could recover no damages beyond interest on his money. However, as the amount paid into Court was twenty cents less than the correct amount, and the parties were on their strict rights, the plaintiff was entitled to full costs of the action.

Held, also, that as the defendants had not based their refusal to pay the money on the absence of fifteen days' notice, which

they had not required, they could not set up such absence of notice as a defence to the action.

J. P. Mabee, for the plaintiff.

Idington, Q.C., for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 23RD JUNE, 1894.

In re ANDERSON v. VANSTONE.

Arrest—Order to commit—County Court—"Process"—R. S. O. c. 70, s. 1—Habeas Corpus.

An order made by the Judge of a County Court in Chambers for the commitment to close custody of a party to an action in that Court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, is "process" in an action, within the meaning of the exception in s. 1 of the *Habeas Corpus* Act, R. S. O. c. 70; and where such a party was confined under such an order, a writ of *habeas corpus* granted upon his complaint was quashed as having been improvidently issued.

Aylesworth, Q.C., for the plaintiffs.

J. P. Mabee, for the defendant.

DISHER v. CLARRIS.

Undue influence—Payment procured by—Right to recover back—Fiduciary relationship.

Where, by reason of the confidential relationship existing between the plaintiff, a female, and the defendant, and the influence he was able to exert over her by his asserting a knowledge of matters which could be used to her prejudice, and which at the trial he admitted had no existence, he was enabled to procure

from her an excessive amount for services performed—and which was paid by her after she had obtained independent advice —she was held entitled to recover back the amount, less a reasonable sum for his services performed.

McCarthy, Q.C., and *J. S. Robertson*, for the plaintiff.

Wallace Nesbitt and *Norman Macdonald*, for the defendant.

CANADIAN PACIFIC R. W. CO. v. TOWNSHIP OF CHATHAM.

Municipal corporation—Contract—Ultra vires—Liability—By-law—Necessity for—Executed contract.

Under a by-law passed under the provisions of ss. 569 and 576 of the Municipal Act, R. S. O. c. 184, a drain was built in the defendant township, benefiting as well lands in an adjoining township, which, therefore, had been assessed for a portion of the cost. After the drain was built, it was found that an opening through the plaintiffs' embankment,—which, when the by-law was passed, was deemed sufficient to carry off the water brought down by the drain,—was insufficient therefor, whereby the adjoining lands were flooded, and actions were threatened against the defendants. To prevent such actions and to enable the water to be carried off, an agreement was entered into between the plaintiffs and defendants, whereby the plaintiffs were to build, and the defendants to pay the cost of, a culvert through the embankment sufficient to carry off the water. The culvert was built by the defendants at a cost of over $200, and on its completion was accepted and used by the defendants, who, however, refused to pay for it, on the ground that the agreement for its construction was *ultra vires*. No by-law had been passed authorizing the construction of the culvert, nor were any of the proceedings required by ss. 569-582 of the Municipal Act taken.

Held, by STREET, J., and affirmed by the Divisional Court, ROSE, J., dissenting, that the work in question was new work, and, therefore, did not come within s. 578, but came within ss.-ss. 1 and 8 of s. 588, and, inasmuch as the cost exceeded $200, no liability could arise until the proceedings pointed out by s. 585 had been complied with, namely, the proceedings required

by ss. 569-582; and as these had not been taken, the agreement was invalid and could not be enforced.

Bernardin v. *Corporation of North Dufferin*, 19 S. C. R. 611, considered on the question of the absence of a by-law where there is an executed contract.

Moss, Q.C., and *Angus MacMurchy*, for the plaintiffs.

Pegley, Q.C., and *M. Wilson*, Q.C., for the defendants.

IN CHAMBERS.

[BOYD, C., 27TH OCTOBER, 1894.

In re McLEOD.

Executors and administrators—Contention as to grant of administration—Surrogate Court—Removal into High Court—Disqualification of Surrogate Judge—Administration quoad—Joint administration.

Upon an application by certain of the next of kin of an intestate, under s. 81 of the Surrogate Courts Act, R. S. O. c. 50, to remove from a Surrogate Court into the High Court a cause in which a contention arose as to the grant of administration, it appeared that the widow and a trust company had petitioned for joint administration of the estate, which was a large one; that the next of kin opposed the petition; that neither widow nor next of kin could unaided supply the necessary security; and that there were no creditors.

Held, that the jurisdiction to award grant, being of a discretionary kind, could be better exercised by the Surrogate Judge, and the cause should not be removed.

The personal disqualification of a Surrogate Judge to pass upon an application, by reason of his interest as a shareholder in a company applicant, is not a ground for removal to the High Court; for he can call in the aid of a neighbouring County Judge.

Where the assets are separable, administration may be granted *quoad, i.e.*, to the widow as to one part, and to the next of kin as to another part, or there may be a joint grant to the widow and next of kin.

McCarthy, Q.C., *Guthrie*, Q.C., *W. Cassels*, Q.C., *W. Davidson*, and *W. M. Douglas*, for the next of kin.

Moss, Q.C., and *G. T. Blackstock*, for the widow and the Trusts Corporation of Ontario.

[ROBERTSON, J., 27TH OCTOBER, 1894.

McCLARY v. PLUNKETT.

Costs—Examination for discovery—Rule 1177, rescission of—Rule 1384, effect of, on pending actions—Order for costs—Trial Judge.

By Rule 1384, Rule 1177 was rescinded, and a new Rule substituted providing that the costs of every interlocutory examination should be borne by the examining party, unless otherwise ordered.

In an action begun before the passing of the Rule, but tried and judgment given after the passing:—

Held, that the new Rule applied, and the taxing officer had no power to tax to the successful plaintiff the costs of examining the defendants for discovery, without an order therefor.

Application for such order should be made to the trial Judge at the trial or immediately after judgment.

J. E. Jones, for the plaintiff.

Waldron, for the defendants.

NOVA SCOTIA

In the Supreme Court.

THOMAS v. THOMPSON.

Costs—Municipal election petition.

No costs whatever are taxable in connection with municipal election petitions in excess of $100.

R. S., 5th series, c. 57, s. 61, considered.

THOMSON v. PITTS.

Mortgage—Foreclosure—Personal judgment for deficiency.

An order for foreclosure contained a clause giving the plaintiff leave to move for judgment for the balance remaining due after foreclosure and sale of the lands covered by the mortgage.

Held, that the plaintiff was entitled to the order in the form in which it was made.

MACK v. MACK.

Partnership—Action by widow of deceased partner for account—Laches.

In an action brought by the widow of a deceased partner against the executors of her husband's co-partner, claiming an account of the partnership affairs, the administration of the estate of her deceased husband, and to set aside, as obtained by

fraud and misrepresentation, a conveyance made by her to the co-partner of all her interest in her husband's estate :—

Held, that seventeen years' delay in bringing the action was, under the circumstances, no bar to the plaintiff's right to recover.

(Affirmed by the Supreme Court of Canada : *ante* p. 884 ; 28 S. C. R. 146.)

CARSLEY v. McFARLANE.

Statute of Limitations—R. S., 5th series, c. 112—Acknowledgment—Letters promising to pay.

The defendant wrote to the plaintiffs, who had forwarded for his acceptance a draft for the amount due them, saying that he was unable to accept at present owing to failure in business, but that, if the plaintiffs would wait three months, he would have his business settled by that time and would pay them. In a subsequent letter, referring to the plaintiffs' claim, he said, "I will be able to attend to you about 1st April."

Held, that these promises were a sufficient acknowledgment of the debt to take the claim out of the statute R. S., 5th series, c. 112.

HOGAN v. GATES.

Referee's report—Verdict of jury—Only one side heard—Based upon wrong principle—Irregularity in proceeding with reference—Acquiescence—Notice of motion.

The report of a referee, to whom a matter of account is referred, is not to be treated as equivalent to the verdict of a jury, and only to be set aside for the same reasons.

It is entitled to less weight where only one side has been heard.

Where the report is based upon a wrong principle, it may be either set aside or varied.

The reference was held at another place than that mentioned in the order.

The defendants' counsel objected in the first instance, but afterwards acquiesced. The objection was not taken in the notice of motion.

Held, per RITCHIE, J., that the objection could not be entertained.

FRASER v. KAYE.

Ejectment—Mesne profits—Recovery of, where judgment is for plaintiffs jointly—Title—Amendment of judgment—Order 26, Rule 11.

In an action for the recovery of land and for mesne profits, where there were several plaintiffs, the judgment was a joint one in the names of all the plaintiffs.

Held, that the recovery of the mesne profits must also be joint.

The plaintiff F. having shown no title or possession in him previous to 1889, the plaintiffs could not jointly recover any mesne profits before that date.

Per GRAHAM, E.J., dissenting, that there could be no objection to one of the plaintiffs recovering; that under Order 16 judgment should be given for the party entitled to recover notwithstanding any misjoinder; that the joint judgment might have been amended without appeal under Order 26, Rule 11.

WHITE v. BECKHAM.

Liquor License Act—Police officer—Entering private house where liquor is supposed to be sold—Well grounded belief—Unreasonable hour—Meaning of words "reputed to be sold."

The Liquor License Act of 1886, s. 54, as amended by 52 V. c. 17, s. 2, empowers any policeman, etc., to enter at any time any place where liquors are reputed to be sold, or where he

believes that liquors are kept for sale or disposal contrary to the provisions of the Act or any amending Act, and to make searches in every part thereof, as he may think necessary.

Held, that these words afford no protection to a policeman who invades a private house at an unreasonable hour, and without a well founded and honest belief that the law has been violated.

Quære, whether information received from one person satisfies the words "reputed to be sold."

ANGEVINE v. SMITH.

Mortgage—Defeasement clause—Construction of the word "within" in relation to time of payment—Subsequent verbal agreement—Consideration—Tender.

A., being indebted to S., gave him an absolute deed of his farm on the 10th March, 1890, taking an agreement signed by S., in which he agreed to reconvey the farm to A., provided A. paid the amount of the indebtedness with interest as agreed upon "within one year." On the 4th August of the same year A. tendered to S. the principal and interest due up to that date, which S. refused.

Held, that the use of the word "within" in the defeasement enabled A. to pay off the amount due at any time within the year; that the tenders were sufficient and stopped the accruing of interest; and that there was no consideration for a verbal agreement made by A. with S., subsequent to the making of the original agreement, to pay additional interest and regain possession of his farm on different terms.

SALTERIO v. CITY OF LONDON FIRE INSURANCE CO.

Fire insurance—Condition avoiding policy in case of change of interest—Chattel mortgage.

A policy of insurance issued by the defendants contained a condition as follows: "If during this assurance any change takes

place in the title to or possession of the policy described in the policy, or in the event of any change affecting the interest of the assured therein, whether by sale, legal process, judicial decree, or conveyance of any kind, . . . then, and in every such case, this insurance shall be absolutely void, unless the consent of the company in writing shall have been obtained and indorsed hereon." Subsequently to the insurance a chattel mortgage was made by the insured, covering the subject of insurance.

Held, that this instrument was a conveyance and constituted a change affecting the interest of the insured, within the meaning of the condition.

(Affirmed by the Supreme Court of Canada: *ante* p. 274; 23 S. C. R. 32.)

McDONALD v. McDONALD.

Specific performance—Contradictory evidence—Refusal to disturb finding of trial Judge—Sufficiency of description.

In an action for specific performance of an agreement to convey certain lands, there was some conflict of evidence as to the lands to be conveyed, but the trial Judge found that the weight of evidence was in the plaintiff's favour. The defendant omitted to call a witness who was present when the agreement was made, and who, if called, might have made a preponderance of evidence in the defendant's favour.

The Court refused to disturb the finding.

It was admitted that the subject-matter of the agreement was some part of a well defined lot, owned by the defendant, and in part occupied by the plaintiff, and that it was some portion of which the western extremity would form a part. The plaintiff's evidence was that of the whole lot, with the exception of a portion already conveyed, the defendant was to convey the western portion as far as an old fence.

The locality and direction of the fence being established:—

Held, that there was nothing in the way of granting a decree.

2. That if in the proceedings against the plaintiff the members of the House of Assembly were sitting as a court of record, trying a matter within the jurisdiction of the court, the members could not be sued for their proceedings in such judicial capacity.

3. That if the Act constituting the House of Assembly a court of record were *ultra vires*, the members who took part in the proceedings were indemnified by the provisions of R. S. N. S. c. 8, s. 26, enacting that no member shall be liable to any civil action, *i.e.*, by reason of any matter or thing brought by him by petition, bill, resolution, motion, or otherwise, or said by him before such House.

Per WEATHERBE, J., that the presentation of a petition by the plaintiff reflecting on members of the House was a violation of law for which he was liable to punishment under R. S. N. S. c. 8.

2. That the House had power to imprison or otherwise punish for disobedience of its orders during the session.

3. That the Legislature had power to enact a law to indemnify members against any action by reason of any proceedings in the Houses.

4. That R. S. N. S. c. 8, s. 29, s.-s. 1, including among matters and things prohibited and to be deemed infringements of the Act, "libels upon members of either House during the session of the Legislature," was *intra vires*, and not an interference with the authority of the Dominion Parliament to deal with and define crime.

Per MCDONALD, C.J., and GRAHAM, E.J., that under the British North America Act crimes of the character of that for which the plaintiff was punished and the procedure in regard to them were exclusively within the legislative authority of the Dominion Parliament.

2. That a Provincial Legislature cannot adjudicate upon a crime indictable at common law, merely because the offence touches its privileges.

3. That it was the intention of the British North America Act that crimes of the nature of that in question should be tried by Judges appointed and paid by the federal authorities.

4. That if there was no power to try or punish the plaintiff, there was no contempt on his part in refusing to submit to the sentence.

5. That it is not competent to a Provincial Legislature to confer power to punish for contempt by imprisonment.

6. That R. S. N. S. c. 8, s. 26, was not to be construed as applying to a case where punishment was inflicted for contempt or for not submitting to the sentence of the House in a criminal matter.

[TOWNSHEND, J., 19TH OCTOBER, 1894.

REGINA v. ROBERTS.

Stipendiary magistrate—Appointment of before constitution of territorial jurisdiction—54 V. c. 48, s. 2—Invalidity—Summary conviction—Canada Temperance Act—Certiorari—Motion to quash—Costs.

Three summary convictions having been made by a stipendiary magistrate in and for the county of Pictou, against the defendant for violation of the Canada Temperance Act, a motion was made for a *certiorari* to remove them into the Supreme Court with the view of quashing them.

Several objections were made to the proceedings before the magistrate, but the principal one was that he was not legally appointed, the municipality of Pictou county, for which he was acting, not having been constituted a police division either prior to or at the time of his appointment, under the Acts of the Legislature of Nova Scotia for 1891, c. 48, s. 2.

On reference to the history of the appointment of stipendiary magistrates in Nova Scotia and the erection of the police divisions over which they were to preside, and having regard to the provision of the statute that the territorial jurisdiction of the county stipendiary should be constituted either prior to or concurrently with his appointment, and it appearing by affidavit that this had not been done:—

Held, that the magistrate's appointment was invalid, and that, he having acted without jurisdiction, the *certiorari* must issue, and also, the motion having been opposed, that the conviction on its return into Court, in obedience to the *certiorari*, should be quashed without further order, with costs.

John J. Power, for the applicant.

E. M. McDonald, for the magistrate and informant.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 31ST OCTOBER, 1894.

SMITH v. EDMUNDS.

Arrest—R. S. M. c. 43—Application for discharge—Third application—Jurisdiction of County Judge—Res judicata.

Application for the release of the defendant, who had been arrested on a *capias* under an order issued by the County Court Judge of the Western Judicial District on the 9th August, 1894. On the 30th August a summons was issued by the County Court Judge calling on the plaintiffs to show cause "why an order should not be issued releasing the defendant from custody upon grounds stated in the affidavit of the defendant." This summons was discharged on 31st August. On the same day a second summons was issued by the County Court Judge for the release of the defendant. This second summons was also discharged.

The defendant then procured a summons from a Judge of the Court of Queen's Bench calling upon the plaintiffs "to show cause why the above named defendant should not be discharged from close custody in the gaol," etc., and why the order for the writ of *capias* and the writ should not be set aside.

The defendant's affidavits on the applications were almost identically the same.

The County Court Judge dismissed the applications, on the ground that the affidavit of the defendant was defective in not complying with s. 20 of the Debtors' Arrest Act, R. S. M. c. 43, and the right being purely statutory, the defect was fatal.

Held, that there was no distinction between applications of this kind and other interlocutory applications, in regard to the effect of one being dismissed. The same principles must be applied.

Saunderson v. *Westley*, 8 Dowl. 652; *Regina* v. *Inhabitants of Barton*, 9 Dowl. 1021, followed.

The attempt to go back and set aside the order and writ did not make this application so far different from the former ones as to take it out of the general rule.

Leggo v. *Young*, 17 C. B. 549, followed.

The County Court Judge had clear jurisdiction to discharge the defendant under either s. 18 or s. 20 of R. S. M. c. 43, and another Judge should not now entertain the application.

Summons discharged with costs.

Crawford, Q.C., for the plaintiffs.

Clark, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[RICHARDSON, J., 21ST SEPTEMBER, 1894.

MOORE v. HALL.

Writ of summons—Substituted service—Material on motion.

Application by the plaintiffs for an order directing substituted service of the writ of summons, heard by RICHARDSON, J., in the absence of ROULEAU, J.

The writ was issued in the form for personal service upon a defendant residing within the judicial district. Affidavits made by the plaintiffs' agent verified the cause of action and stated that on the 11th August, 1894, twelve days before the writ issued, the defendant left Edmonton, where he had resided for two years, since when he had not been heard of, and although the deponent had made inquiries of various persons, he had failed to get any information about the defendant, and verily believed that he did not intend to return to Edmonton; that he had made inquiries of the post-master and station agent at Edmonton, among others; that the former stated that he had received no letters for the defendant, nor did he leave any directions for forwarding letters; and the latter stated that he did not sell the defendant any ticket, but saw him board the train leaving Edmonton for the south.

Johnstone, Q.C., for the plaintiffs.

RICHARDSON, J.—I am asked to grant an *ex parte* order for substituted service by advertisement in the Edmonton *Bulletin*.

I assume that on the face of the præcipe for this writ the defendant's residence was given as at Edmonton, or some place in Northern Alberta, and that based upon this information the deputy-clerk issued the writ in the form he has, although, by inadvertence as I suppose, the defendant's residence is omitted in the writ itself.

There are two reasons why I feel unable to allow the application.

First, the material produced does not supply reasonable ground for supposing that the order, if made, will come to the notice of the defendant: *Furber* v. *King*, 29 W. R. 536; *Hope* v. *Hope*, 19 Beav. 237.

Second, the material does not supply reasonable ground on which I can presume that the defendant, when the writ issued, could have been served personally in the North-West Territories, did he not evade service; and, failing this, an order cannot, I hold, be made for indirect service of the writ as issued: *Wilding* v. *Bean*, [1891] 1 Q. B. 100, in appeal.

Supreme Court of Canada.

EXCHEQUER COURT.] [1ST MAY, 1894.

BULMER v. REGINAM.

Crown domain—Disputed territory—License to cut timber—Implied warranty of title—Breach of contract—Damages—Cross-appeal—Supreme Court Rules 62, 63.

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute, which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, at a time when six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under ss. 49 and 50 of 46 V. c. 17, and the regulations made under the Act of 1879 provided that "the license may be renewed for another year, subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council."

On a claim for damages by the licensee :—

Held, that orders in council issued pursuant to 46 V. c. 17, ss. 49 and 50, authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the Crown and proposed licensees, such orders in council being

revocable by the Crown until acted upon by the granting of licenses under them.

2. That the right of renewal of the licenses was optional with the Crown, and that the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.

The licenses which were granted and were actually current in 1884 and 1885 conferred upon the licensee "full right, power, and license to take and keep exclusive possession of the said lands, except as thereinafter mentioned for and during the period of one year from the 31st December, 1883, to the 31st December, 1884, and no longer."

Quære:—Though this is in law a lease for one year of the lands comprised in the license, is the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment.?

Held, also, that a cross-appeal will be disregarded by the Court when Rules 62 and 63 of the Supreme Court Rules have not been complied with.

Judgment of the Court below, 13 Occ. N. 31; 3 Ex. C. R. 184, affirmed.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Robinson, Q.C., and *Hogg*, Q.C., for the respondent.

[21ST MAY, 1894.

THE "MINNIE" v. REGINAM.

Maritime law—Seal Fishery (North Pacific) Act, 56 & 57 V. c. 23, ss. 1, 3, 4 (Imp.)—Judicial notice of order in council thereunder—Protocol of examination of offending ship by Russian war vessel—Sufficiency of —Presence within prohibited zone—Bona fides—Statutory presumption of liability—Evidence—Question of fact.

The Admiralty Court is bound to take judicial notice of an order in council from which the Court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament 56 & 57 V. c. 23, the Seal Fishery (North Pacific) Act, without proof.

A Russian cruiser, manned by a crew in the pay of the Russian Government, and in command of an officer of the Russian navy, is a "war vessel" within the meaning of the order in council, and a protocol of examination of an offending British ship by such cruiser, signed by the officer in command, is admissible in evidence in proceedings in the Admiralty Court in an action for condemnation under the Seal Fishery Act, and is proof of its contents.

The ship in question in this case, having been seized within the prohibited waters of the thirty-mile zone round the Kamandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the onus cast upon her of proving that she was not used or employed in killing or attempting to kill any seals within the seas specified in the order in council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and order in council.

Judgment of the Court below affirmed.

Belyea, for the appellant.

Hogg, Q.C., for the respondent.

ONTARIO.] [9TH OCTOBER, 1894.

ALLISON v. McDONALD.

Partnership—Debtor and creditor—Novation—Mortgage—Collateral security—Principal and surety—Release.

Two partners borrowed money, giving as security a mortgage on partnership property and a joint and several promissory note. The partnership having been dissolved, the mortgagee gave the member of the firm who continued to carry on the business, and who had assumed the liabilities, a discharge of the mortgage, on his undertaking to pay back the money borrowed, which he failed to do, but mortgaged the property again, and finally became insolvent and absconded. An action having been brought against the retiring partner on the note :—

Held, affirming the decision of the Court of Appeal, 18 Occ. N. 455 ; 20 A. R. 695, which reversed the judgment of the

Queen's Bench Divisional Court, 13 Occ. N. 181; 12 O. R. 288, that the plaintiff could not compel the retiring partner to pay the mortgage debt, without being prepared on payment to reconvey the lands mortgaged, which he had incapacitated himself from doing. His action, therefore, was rightly dismissed.

Held, also, that by the terms of dissolution of partnership the relation of the partners was changed to that of principal and surety, and the trial Judge having found as a fact that the mortgagee had notice of such terms, his discharge of the principal, the partner who continued the business, released the surety, the retiring partner.

Aylesworth, Q.C., for the appellant.

John A. Robinson, for the respondent.

TREBILCOCK v. WALSH.

Gaming—Betting on election—Stakeholder in bet between individuals—R. S. C. c. 159, s. 9—Accessory—R. S. C. c. 145—Recovery from stakeholder—Parties in pari delicto.

W. and another made a bet on the result of an election for the House of Commons, and each deposited the sum betted with T. By the result of the election W. lost his bet, and the money was paid by T. to the winner. W. then brought an action against T. for the amount he had deposited with him, claiming that the transaction was illegal and the contract to pay the money void.

Held, reversing the decision of the Court of Appeal, *ante* p. 2; 21 A. R. 55, TASCHEREAU, J., dissenting, that T. in becoming the depositary of the money was guilty of a misdemeanour under R. S. C. c. 159, s. 9 (Criminal Code, s. 204); that W. was an accessory by R. S. C. c. 145; and that the parties being *in pari delicto*, and the illegal act having been performed, W. could not recover.

W. R. Meredith, Q.C., for the appellant.

Aylesworth, Q.C., and *McKillop*, for the respondent.

QUEBEC.] [5TH NOVEMBER, 1894.

LARIVIÈRE v. SCHOOL COMMISSIONERS OF THE CITY OF THREE RIVERS.

Appeal—Fees of office—Future rights—R. S. C. c. 135, s. 29 (b)—R. S. Q., s. 2073—Motion to allow appeal bond.

The plaintiff, a school mistress, by her action claimed $1,243 as fees due to her in virtue of s. 68 of C. S. L. C. c. 15, now s. 2073, R. S. Q., which were collected by the school commissioners of the city of Three Rivers while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court, dismissed the action.

On a motion to the Supreme Court of Canada to allow the bond in appeal, the same having been refused by a Judge of the Court below, the Registrar of the Supreme Court, and a Judge in Chambers, on the ground that the case was not appealable:—

Held, that the matter in dispute did not relate to any office or fees of office within the meaning of s. 29 (*b*) of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

2. Even assuming it did, that there being no future right involved, and the amount in dispute being less than $2,000, the case was not appealable.

3. The words "where the rights in future might be bound" in s.-s. (*b*) of s. 29 govern all the preceding words "any fee of office," &c.

Chagnon v. *Normand*, 16 S. C. R. 661, and *Gilbert* v. *Gilman*, *ib.* 189, referred to.

J. A. Ritchie, for the motion.

J. M. McDougall, contra.

BRITISH COLUMBIA.] [21ST MAY, 1894.

MYLIUS v. JACKSON.

Pleading—Traverse of allegation by plaintiff—Sufficiency of—Objection first taken on appeal.

The plaintiff by his statement of claim alleged a partnership between two defendants, one being a married woman, whose

name, on a re-arrangement of the partnership, was substituted for that of her husband without her knowledge or authority.

Held, reversing the judgment of the Court below, that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of the plaintiff's allegation to put the party to proof of that fact.

Held, also, that an objection to the insufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Belyea, for the appellant.

Chrysler, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [18TH NOVEMBER, 1894.

HOGABOOM v. GILLIES.

Interpleader—Sheriff—Security for goods seized—Failure of—Barring claimant.

Upon appeal from the order and decision of the Queen's Bench Division, *ante* p. 118; 16 P. R. 96, the Court was equally divided and the appeal was dismissed.

Per HAGARTY, C.J.O., and OSLER, J.A., the order should be reversed.

Per BURTON and MACLENNAN, JJ.A., the order should be affirmed.

W. R. Riddell, for the appellant.

J. A. Macdonald, for the respondent.

SANGSTER v. THE T. EATON COMPANY.

Negligence—Evidence—Shop—Child of tender years.

The fact that a child of tender years, while in a shop with its mother, who is buying clothing for it, is injured by an unfastened mirror falling upon it, the cause of the fall not being known, is in itself sufficient evidence of negligence to justify the case being submitted to a jury.

Judgment of the Queen's Bench Division, *ante* p. 121; 25 O. R. 78, affirmed.

Shepley, Q.C., for the appellants.

MacGregor, for the respondents.

SCOTTEN v. BARTHEL.

Deed—Description—Evidence—Falsa demonstratio.

The deed to the plaintiff in an ejectment action purported to convey "part of lot forty-three" described as "commencing in the southerly limit of said lot forty-three at a distance of 20 feet from the water's edge of the Detroit river, thence northerly parallel to the water's edge 208 feet, thence westerly parallel to the said southerly limit 600 feet more or less to the channel bank of the Detroit river, thence southerly following the channel bank 208 feet, thence easterly 600 feet more or less to the place of beginning, together with the fishery privileges appurtenant to the premises hereby conveyed:"—

Held, that the patent of lot forty-three might be looked at to ascertain the point of commencement, and that, as that lot was described as running to the "water's edge" of a navigable river,

the point of commencement must be taken to be 20 feet landwards; and that the plaintiff was entitled to claim the strip of 20 feet along the water's edge.

Judgment of the Queen's Bench Division reversed.

McCarthy, Q.C., *W. Nesbitt*, and *O. E. Fleming*, for the appellant.

E. D. Armour, Q.C., for the respondent.

BALL v. TENNANT.

Assignments and preferences—Covenant of indemnity—R. S. O. c. 124.

The benefit of a covenant to indemnify the assignor against a mortgage does not pass to his assignee under an assignment for the general benefit of creditors.

Judgment of the Queen's Bench Division, *ante* p. 202; 25 O. R. 50, reversed.

N. F. Davidson, for the appellants.

R. U. McPherson, for the respondent.

In re HANNA v. COULSON.

Prohibition—Division Court—Garnishee—Defendant—After-judgment summons—R. S. O. c. 51, s. 235.

An appeal by the primary creditors from the judgment of the Queen's Bench Division, 13 Occ. N. 226; 23 O. R. 493, was dismissed with costs, the Court agreeing with the views stated in the judgment below, and not giving any opinion as to the effect of the amendment made by 57 V. c. 23, s. 18.

Aylesworth, Q.C., for the appellants.

J. B. Clarke, Q.C., and *Swabey*, for the respondent.

CH. D.]

BADCOCK v. FREEMAN.

Negligence—Damages—Evidence—Non-suit.

Where a workman was killed by the explosion of a tank in which refuse was being boiled into soap, and there was no evi-

dence as to the cause of the explosion, evidence of experts who had examined the tank, stating that the explosion was probably due to defects in the screws fastening the tank cover, was held sufficient to justify the submission of the case to the jury.

Judgment of the Chancery Division affirmed.

W. Nesbitt and *Monro Grier*, for the appellants.

Lynch-Staunton, for the respondent.

C. P. D.]

BEATON v. GLOBE PRINTING CO.

Discovery—Rule 566, scope of—Examination of plaintiff before delivery of defence—Libel.

Rule 566 does not apply to examinations for discovery, and cannot be made available to authorize an examination not provided for by Rules 487-506.

Fisken v. *Chamberlain*, 9 P. R. 283, overruled.

But were that Rule applicable, it was not "necessary for the purposes of justice," in the circumstances of this action for libel, to make an order allowing the defendants to examine the plaintiff for discovery before delivering their statement of defence.

Decision of the Common Pleas Division, *ante* p. 42; 15 P. R. 473, reversed.

Tate v. *Globe Printing Co.*, 11 P. R. 251, specially referred to.

Gourley v. *Plimsoll*, L. R. 8 C. P. 362, and *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183, followed.

Lynch-Staunton, for the appellant.

Osler, Q.C., and *H. M. Mowat*, for the respondent.

COUTTS v. DODDS.

Costs—Order as to, under Rule 1170—"Good cause"—Divisional Court—Amending Rule 1274, application of—Appeal—Agreement of parties.

Under Rule 1170, as it stood before the amendment made by Rule 1274, a Divisional Court had the power to make such order as to costs as might seem just, irrespective of "good cause."

Decision of the Common Pleas Division affirmed.

Myers v. *Defries*, 4 Ex. D. 176; *Marsden* v. *Lancashire, &c., R. W. Co.*, 7 Q. B. D. 641, followed.

Island v. *Township of Amaranth*, *ante* p. 44; 16 P. R. 3, approved.

Where similar motions are made to the same Court in two actions, and the parties in the first agree that the decision in the second shall govern, there is nothing to preclude an appeal in the first action, even though there is no appeal in the second.

Per MACLENNAN, J.A.—Rule 1274 was inapplicable to this action, which was tried before it came into force.

W. M. Douglas, for the appellant.

Aylesworth, Q.C., for the respondent.

SOLMES v. STAFFORD.

Summary judgment—Rule 739—Action on foreign judgment—Variation—Writ of summons—Special indorsement—Amendment—Interest—Unliquidated damages—Rules 245, 711—Motion for judgment—Rule 757, scope of.

Where the plaintiff indorsed his writ of summons with a claim for the amount of a foreign judgment and interest, and after the issue of such writ and while a motion for summary judgment under Rule 739 was pending, the foreign judgment was varied on appeal by reducing the amount:—

Held, that, even if the claim for interest did not stand in the way, the indorsement could not be amended upon the motion for summary judgment so as to accord with the foreign judgment as varied, and the plaintiff's proper course was to abandon his motion and move for leave to amend the indorsement, or to discontinue the action altogether.

Gurney v. *Small*, [1891] 2 Q. B. 584, and *Paxton* v. *Baird*, [1893] 1 Q. B. 139, followed.

Interest upon the amount of a foreign judgment from the date of its entry is not payable by contract nor by statute, nor is it awarded by the judgment as a continuing obligation, but is recoverable only as unliquidated damages, and cannot be the subject of a special indorsement.

And while, for the purpose of obtaining judgment by default, the plaintiff may indorse his writ specially for a liquidated demand and also for a further claim under Rule 711, yet if he wishes to be in a position to move for summary judgment under Rule 739, he must bring himself strictly within Rule 245 as having indorsed his writ *only* with a claim which is the subject of a special indorsement under that Rule.

Judgment of the Common Pleas Division, *ante* p. 180; 16 P. R. 78, affirmed on these three points.

Hollender v. *Ffoulkes*, 16 P. R. 175, and *Munro* v. *Pike*, 15 P. R. 164, approved.

Hay v. *Johnston*, 12 P. R. 596, overruled.

Huffman v. *Doner*, *ib.* 492, and *Mackenzie* v. *Ross*, 14 P. R. 299, commented on.

Sheba Gold Mining Co. v. *Trubshawe*, [1892] 1 Q. B. 674, and *Wilks* v. *Wood*, *ib.* 684, followed.

Where an order for summary judgment under Rule 739 is set aside on appeal, Rule 757 cannot be made available for the purpose of turning the appeal into a motion for judgment and granting a yet more summary judgment.

Judgment of the Common Pleas Division reversed on this point.

Allan Cassels, for the appellant.

Aylesworth, Q.C., for the respondent.

O'CONNOR v. HAMILTON BRIDGE COMPANY.

Negligence—Dangerous machinery—Absence of guard—"Moving machinery"—"Defect in machinery"—Factories Act, R. S. O. c. 208, s. 15—Workmen's Compensation Act, R. S. O. c. 141, s. 3—52 V. c. 23, s. 3.

The absence of a guard to a projecting screw in a revolving spindle is a violation of the provisions of the Factories Act, R. S. O. c. 208, s. 15, the spindle being a moving part of the machinery within the meaning of that Act, and it is also a "defect in the condition of the machinery" within the meaning of the Workmen's Compensation Act, R. S. O. c. 141, s. 3, as

amended by 52 V. c. 23, s. 3, and in either view damages may be recovered for an accident caused by its absence.

Judgment of the Common Pleas Division, *ante* p. 217; 25 O. R. 12, affirmed; BURTON, J.A., dissenting.

Bruce, Q.C., and *W. F. Walker*, Q.C., for the appellants.

Lynch-Staunton, for the respondent.

GRINSTED v. TORONTO RAILWAY COMPANY.

Damages—Remoteness—Expulsion from street car—Taking cold.

Where there was some evidence that serious illness from which the plaintiff had suffered had resulted from exposure to cold upon illegal expulsion from a street car, an award of damages in respect of that illness was upheld.

Judgment of the Common Pleas Divison, *ante* p. 260; 24 O. R. 688, affirmed; HAGARTY, C.J.O., dissenting.

Laidlaw, Q.C., and *J. Bicknell*, for the appellants.

W. J. McWhinney, for the respondent.

BOYD, C.]

ROBERTS v. BANK OF TORONTO.

Artisan's lien—Brick-maker.

A brick-maker who makes bricks for another person in a brick yard belonging to that person and has possession of the brick-yard while engaged in making the bricks, is entitled to a lien upon the bricks as against an execution creditor or chattel mortgagee of the owner.

Judgment of BOYD, C., *ante* p. 281; 25 O. R. 194, affirmed.

W. Nesbitt, *R. McKay*, and *Bristol*, for the appellants.

Elgin Myers and *W. J. Clark*, for the respondent.

THOMPSON v. WARWICK.

Mortgages—Assignment—Consolidation.

The mortgagors of land sold it subject to the mortgage, and the purchaser gave to them a second mortgage to secure part of the purchase money. He then sold the land subject to both mortgages, which his sub-purchaser covenanted to pay off. Subsequently the first mortgagors, under threat of action, paid the claim of the first mortgagees and took an assignment of the first mortgage to one of their number.

Held, affirming the judgment of BOYD, C., that the sub-purchaser, on being called on by the first mortgagors and first purchaser for indemnity against the first mortgage, was bound to pay it, and was not entitled to an assignment thereof unless he took at the same time an assignment of the second mortgage.

E. D. Armour, Q.C., and *Kilmer*, for the appellant.

W. Mortimer Clark, Q.C., for the respondents.

In re ONTARIO EXPRESS AND TRANSPORATION COMPANY.

Company—Shares—Discount—Illegal increase of capital—Validating Act—Winding-up.

An Act of Parliament reciting that a company had been "duly organized;" had ceased its operations; and had been "reorganized;" and declaring that the charter is in force and the company "as now organized" capable of doing business, does not give legislative sanction to an illegal increase of the capital stock so as to make holders of shares of the illegally issued stock liable as contributories in winding-up proceedings.

Judgment of BOYD, C., 13 Occ. N. 468; 24 O. R. 216, reversed.

W. D. McPherson and *J. M. Clark*, for the appellants.

Hoyles, Q.C., for the respondent.

ROSE, J.]

WRIGHT v. BELL.

Solicitor's lien—Cost of litigation—Administration—Share of party—Costs of other parties—Priorities—Time.

Where in an action for construction of a will and administration of the testator's estate, costs were ordered to be paid by one of the defendants to the other parties:—

Held, that they were entitled to be paid these costs out of his share of the fund in Court arising from the sale of the estate, in priority to the costs of his own solicitor, whose lien, if any, attached only upon the ultimate sum to which his client was entitled.

Per BURTON, J.A.—The claim of the other parties could be properly made at any time before payment out of the fund.

A. H. F. Lefroy and *H. T. Beck*, for the appellants.

McBrayne, for the respondent.

ROBERTSON, J.]

In re WILSON AND COUNTY OF ELGIN.

High schools—Alteration of districts—54 V. c. 57, s. 6—57 V. c. 58, s. 1.

Under s. 6 of the High Schools Act, 54 V. c. 57, as amended by 57 V. c. 58, s. 1, a county council has power to detach a township from a high school district without the consent of that township or of the other townships included in the high school district in question.

Judgment of ROBERTSON, J., affirmed; OSLER, J.A., dissenting.

N. Macdonald and *W. J. Tremeear*, for the appellant.

J. M. Glenn, for the respondents.

MACMAHON, J.]

HORSFALL v. BOISSEAU.

Chattel mortgage—Description—After-acquired goods — R. S. O. c. 125, s. 27—55 V. c. 26, s. 1.

A description in a chattel mortgage of after-acquired goods as "all other ready made clothing, tweeds, trimmings, gents'

furnishings, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage.

Judgment of MACMAHON, J., affirmed.

Gibbons, Q.C., for the appellants.

Kappele, for the respondents.

MEREDITH, J.]

LEWIS v. ALEXANDER.

Municipal corporations—Drains—Nuisance.

Where territory is added to a city, and the city thereupon recognizes the existence of drains or sewers in the added territory, and by health by-laws directs that these drains or sewers are to be used, the city is liable in damages to the owner of property upon whose lands sewage is, by means of these drains or sewers, discharged, and persons who have used the drains or sewers before the territory was added to the city, and have continued to use them after that time, are not so liable.

Judgment of MEREDITH, J., reversed; BURTON, J.A., dissenting.

Gibbons, Q.C., and *E. R. Cameron*, for the appellants.

M. D. Fraser, for the respondents.

DRAINAGE REFEREE.]

In re TOWNSHIPS OF HARWICH AND RALEIGH.

Municipal corporations—Drainage—55 V. c. 42, s. 590.

Per HAGARTY, C.J.O., and BURTON, J.A.:—Where a drain constructed or improved by one municipality affords an outlet,

either immediately or by means of another drain or natural watercourse, for waters flowing from lands in another municipality, the municipality that has constructed or improved the outlet can, under s. 590 of the Consolidated Municipal Act, 55 V. c. 42, assess the lands in the adjoining municipality for a proper share of the cost of construction or improvement, and the Drainage Referee has jurisdiction to decide all questions relating to the assessment.

Per OSLER and MACLENNAN, JJ.A.:—The section applies only to drains properly so called, and does not extend to or include original watercourses which have been artificially deepened or enlarged, and *In re Orford and Howard*, 18 A. R. 496, still governs.

The Court being divided in opinion, the judgment of the Drainage Referee upholding the right to assess was affirmed.

M. Wilson, Q.C., for the appellants.

Atkinson, Q.C., for the respondents.

IN CHAMBERS.

[OSLER, J.A., 27TH NOVEMBER, 1894.

In re CENTRE SIMCOE PROVINCIAL ELECTION.

Petition—Withdrawal—Disqualification of respondent—Contract with Postmaster General—R. S. O. c. 11, ss. 8, 9.

Motion by the petitioner for leave to withdraw the petition.

J. Bicknell, for the petitioner.

George Ross, for the respondent.

OSLER, J.A.—The affidavits denying collusion, the existence of any corrupt arrangement, etc., are sufficient to satisfy me as to the *bona fides* of the application, and all the prescribed formalities as to publication of notice of the application have been complied with. The only legal question raised by the petition is whether the respondent is disqualified to be elected and returned as a member by reason of his holding a contract for four years for the conveyance of Her Majesty's mails between the Grand Trunk Railway and the New Lowell post office.

The contract is in the form of a unilateral agreement signed by the respondent, and he agrees thereby, should the Postmaster General require it, to enter into "a regular contract" for the services described therein. The agreement or contract is made or to be made with the Postmaster General pursuant to the 9th and 54th and following sections of the Post Office Act.

Such a contract or agreement, however, does not come within the 8th section of the Act respecting the Legislative Assembly, R. S. O. c. 11, which, except as is thereinafter excepted, disqualifies any person accepting or holding any office, commission, or employment in the service of the Dominion, or of the Government of Ontario, at the nomination of the Crown or of the Lieutenant-Governor, to which a salary, or any fee, allowance, or emolument in lieu of a salary from the Crown or from the Province, is attached. Sub-section (*b*) also disqualifies any one holding any office, commission, or *employment of profit* at the nomination of the Crown, or of the Government, or of any head of a department in the Government of Ontario, whether such profit is or is not payable out of the public funds. "Employment of profit" is thus distinguished from a salaried office, commission, or employment, and, if it includes a contract, it is a contract with reference to Ontario and not to the Dominion.

This is further shown by s. 9, which enacts that no person holding or enjoying or undertaking or executing, directly or indirectly, alone or with any other, by himself or by the interposition of a trustee or third party, any contract or agreement with Her Majesty, or with any public officer or department, with respect to the *public service of Ontario*, shall be eligible as a member of the Legislative Assembly.

This is the section which covers the case of a contract which shall disqualify the candidate, and, as it does not cover a contract with respect to the public service of the Dominion, such a contract as the one in question, for the conveyance of the mails, does not render the respondent ineligible to be elected and returned as a member of the Legislative Assembly.

I think, therefore, there is no reason why I should not permit the petition to be withdrawn. The respondent does not ask for costs, and I make no order in that respect.

An order will also go for payment out of the deposit.

[28TH NOVEMBER, 1894.

In re SOUTH NORFOLK PROVINCIAL ELECTION.

CRUISE v. CHARLTON.

Petition—Withdrawal—Disqualification of respondent—Postmaster—R. S. O. c. 11, s. 8.

Motion by the petitioner for an order for leave to withdraw the petition.

J. Bicknell, for the petitioner.

George Ross, for the respondent.

OSLER, J.A.—The petition alleges that the respondent is disqualified or rendered ineligible for election to the Legislative Assembly by reason of his holding the office of postmaster for the post office of Lynedoch, county of Norfolk, which is a rural post office, and not a post office of any city or town. The appointment to such an office is made by the Postmaster General, pursuant to s. 49 of the Post Office Act.

Section 8 of the Act respecting the Legislative Assembly, R. S. O. c. 11, enacts that no person shall be eligible as a member of the Legislative Assembly accepting or holding (*a*) any office, commission, or employment either in the service of the Dominion of Canada, or in the service of the Government of Ontario, *at the nomination of the Crown* or of the Lieutenant-Governor, to which a salary, or any fee, allowance, or emolument in lieu of a salary from the Crown or from the Province is attached, or (*b*) any office, commission, or employment of profit at the nomination of the Crown, or of the Government, or of any head of a department in the Government of Ontario.

Section 49 of the Post Office Act enacts that the Governor in council may appoint all postmasters having fixed salaries in cities and towns, and that all other postmasters may be appointed by the Postmaster General.

The office held by the respondent is not an office in the service of the Dominion *at the nomination of the Crown* or *of the Government* or of any head of a department in the Province of Ontario. His office is held at the nomination or appointment of the head of a department in the Government of the Dominion,

viz., the Postmaster General, as distinguished from the appointment of a postmaster for a city or town, with a fixed salary, who is appointed by the Governor in council, and who would be ineligible under clause (*a*) of s. 8, s.-s. 1. The section does not cover the case of a person holding such an office as the respondent's, and he was, therefore, in my opinion, not ineligible to be elected a member of the Legislative Assembly merely by reason of his holding such office.

In the *West York Provincial Election Case*, H. E. C. 156, a question similar to this was raised on the trial of the petition, and the learned trial Judge directed a special case to be stated for the opinion of the full Court of Queen's Bench. Owing to the abandonment of the petition, the case was never argued, and I hesitated for a moment as to whether I should, as was done there, direct a special case to be stated before allowing the petition to be withdrawn. There seems, however, so little in the objection, that, holding as I do a clear opinion in the respondent's favour, I ought not to put the parties to any further expense, the case being in other respects one in which leave ought to be given to withdraw. It is proved that the application is not a collusive one, and that there is no reasonable ground for supposing that any of the other charges in the petition could be made out.

I therefore give leave to withdraw the petition. The respondent does not ask for costs.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ARMOUR, C.J., AND FALCONBRIDGE, J., 19TH NOVEMBER, 1894.

REGINA v. GIBBONS.

Summary conviction—Uncertainty—Offence not disclosed—Amendment—Criminal Code, s. 179—Exposing obscene book—Public morals—Quashing conviction—Costs.

Motion to make absolute a rule *nisi* to quash a summary conviction of the defendant by the police magistrate for the

town of Peterborough, "for that he (the defendant) did at the town of Peterborough on the 10th day of February, 1894, without lawful excuse or justification, expose to public view an obscene book tending to corrupt public morals, contrary to the Criminal Code."

The evidence taken by the magistrate showed that the book in question was one describing certain diseases, and that it was distributed *gratis* among the citizens of Peterborough by the defendant, with the object of assisting the sale by him of certain medicines.

A. G. Murray, for the defendant, contended that the conviction was bad on its face, because it did not disclose the offence which the defendant had committed, but simply followed the language of s. 179 of the Criminal Code, citing *Regina* v. *Spain*, 18 O. R. 385; *Regina* v. *Coulson*, 24 O. R. 246; and that it should not be amended because an offence was not committed of the nature specified in the conviction, the book in question not being one tending to corrupt public morals, citing *Regina* v. *Bradlaugh*, 15 Cox, C. C. 217.

W. H. Murray, for the informant, contra.

THE COURT held that the conviction was bad on its face and could not now be amended by setting out such parts of the book as might be deemed obscene or tending to corrupt public morals. It was extremely difficult to define what offences came within s. 179 of the Code, and probably different tribunals would come to different conclusions.

Rule absolute quashing the conviction without costs, and with the usual clause protecting the magistrate.

REGINA v. PLOWMAN.

Constitutional law—Criminal Code, s. 275—Bigamy—Offence committed in foreign country—Intent—Ultra vires.

Conviction for bigamy quashed where the second marriage took place in a foreign country, and there was evidence that the defendant, who was a British subject, resident in Canada, left Canada with the intent to commit the offence.

Held, that the provisions of s. 275 of the Criminal Code making such a marriage an offence are *ultra vires* of the Parliament of Canada.

Macleod v. *Attorney-General for New South Wales*, [1894] A. C. 455, followed.

J. R. Cartwright, Q.C., for the Crown.

DuVernet, for the defendant.

REGINA v. HEWITT.

Malicious prosecution—Record of acquittal—Mandamus to Attorney-General.

Motion by the defendant for an order of *mandamus* to the Attorney-General for Ontario commanding him to issue his fiat for the entry of a judgment of acquittal upon the indictment of the defendant for theft of saw-logs, or directing the officer of the Court having charge of the indictment to enter up judgment of acquittal and furnish the defendant with a copy; and appeal by the defendant from the refusal of BOYD, C., who tried the prisoner upon the indictment, to order the entry up of judgment of acquittal.

An action for the malicious prosecution of the defendant upon the indictment had been brought and had failed at the trial, because of the absence of a record of the acquittal.

Steers, for the defendant. *Regina* v. *Ivy*, 24 C. P. 78, was not followed in *O'Hara* v. *Dougherty*, 25 O. R. 347.

J. R. Cartwright, Q.C., for the Attorney-General, and *A. H. Marsh*, Q.C., for the private prosecutor, not called on.

Per CURIAM—Motion and appeal dismissed with costs, following *Regina* v. *Ivy*, 24 C. P. 78.

[ARMOUR, C.J., and STREET, J., 27TH NOVEMBER, 1894.

REGINA v. MADDEN AND BOWERMAN.

Criminal law—Evidence—Statement of prisoner in previous proceeding—Privilege—56 V. c. 31, s. 5 (D.)

Crown case reserved.

The prisoners were indicted under s. 394 of the Criminal Code for a conspiracy to defraud. Upon their trial evidence was offered by the Crown, and received, of a statement made by one of the defendants upon oath in a prosecution before a magistrate, in which the defendant was the complainant and gave evidence on his own behalf. The statement was made upon cross-examination of the defendant in the proceeding before the magistrate.

The question submitted for the opinion of the Court was whether evidence of the statement was properly received, having regard to s. 5 of 56 V. c. 31 (D.), an Act respecting witnesses and evidence, which provides: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Held, that, as the defendant did not, so far as the case showed, assert his privilege before the magistrate, the evidence was receivable.

J. R. Cartwright, Q.C., for the Crown.

George Wilkie, for the prisoners.

[THE DIVISIONAL COURT, 19TH NOVEMBER, 1894.

HOLLENDER v. FFOULKES.

Security for costs—Time—Extension of—Rule 485.

Order of STREET, J., *ante* p. 493; 16 P. R. 225, allowing bond for security for costs, varied by extending, pursuant to Rule 485, the time for giving security.

McBrayne, for the plaintiff.

W. H. Bartram, for the defendant.

OFFORD v. BRESSE.

Writ of summons—Service out of jurisdiction—Rule 271 (e)—Breach of contract within jurisdiction—Letter.

The defendants, resident in the Province of Quebec, there wrote and posted to the plaintiff in Ontario a letter putting an end to the contract of hiring subsisting between the parties.

Held, in an action for wrongful dismissal, that the breach of the contract occurred in Quebec, the receipt of the letter by the plaintiff not being the breach, but only evidence of it; and service of the writ of summons on the defendants in Quebec could not be allowed under Rule 271 (*e*).

Cherry v. *Thompson*, L. R. 7 Q. B. 573, followed.

Tremeear, for the plaintiff.

J. A. MacIntosh, for the defendants.

[23RD NOVEMBER, 189

SHAVER v. COTTON.

Pleading—Sci. fa.—Company—Promissory notes—Fraud—Ultra vires—Defences available in original action.

In an action by way of *sci. fa.* against a shareholder in an incorporated company, against which the plaintiff had recovered a fruitless judgment, the defendant alleged as defences that the judgment was recovered upon certain promissory notes which the plaintiff procured the company to make to him, without consideration, when insolvent to his knowledge; that the notes were made in fraud of the creditors and contributories and were *ultra vires* of the company; and that the company had a good defence to the action on the notes, but allowed the plaintiff to take judgment by default.

Held, that these defences might have been raised in the original action, but were not available in this; and they were struck out.

F. E. Titus, for the plaintiff.

Raney, for the defendant.

[26TH NOVEMBER, 1894.

BOECK v. BOECK.

Master's report—Confirmation—Alimony—Execution.

Where a reference is directed to the Master to ascertain and state the amount of alimony which the defendant should pay, execution may be issued for the amount found by his report before confirmation thereof.

Lewis v. *Talbot Street Gravel Road Co.*, 10 P. R. 15, approved and followed.

G. G. Mills, for the plaintiff.

D. O. Cameron, for the defendant.

[29TH NOVEMBER, 1894.

CHRISTIE v. CITY OF TORONTO.

Assessment and taxes—55 V. c. 48, s. 124—Goods subject to distress—Occupancy.

The plaintiff appealed to the Divisional Court of the Common Pleas Division from the judgment of MACMAHON, J., the trial Judge, *ante* p. 449; 25 O. R. 425.

The appeal was by order transferred for hearing to the Divisional Court of the Queen's Bench Division.

Kilmer, for the plaintiff.

W. C. Chisholm, for the defendants, and *W. R. Smyth*, for Farquhar, a third party, not called on.

THE COURT dismissed the appeal with costs, agreeing with the judgment of the trial Judge.

CHANCERY DIVISION.

[STREET, J., 14TH NOVEMBER, 1894.

BRIDGEWATER CHEESE FACTORY CO. v. MURPHY.

Bank and banking—Promissory note—Improper signature by president for company—Discount—Repayment.

One S., president of the plaintiffs' company, kept an account with the defendants, private bankers, headed in their books,

" S., President of Bridgewater Cheese Factory," and upon which he drew cheques from time to time, signed " S., President." This account being overdrawn, S. made a note for $1,600 in favour of the defendants, signed, " S., President," and to which he attached the seal of the company. The defendant discounted this, placing the proceeds to the credit of the account. This covered the overdraft, and the balance was chequed out by S. to pay various creditors of the company. At this time S. was a defaulter to the company in an amount exceeding $1,600, and before this action he absconded. The notes were made without the authority or knowledge of the directors of the company, by whom under their by-laws the affairs of the company were to be managed, but they knew that the bank account was kept by S. in his own name as president, and that he issued cheques upon it as aforesaid. The note, not being paid at maturity, was charged by the defendants to the account, with the consent of S., though without any authority from the directors.

The present action was brought to recover from the defendants the amount of the note, on the ground that S. had no power to bind the company by such a note. The defendants did not allege any fraud, but said they had accounted to the plaintiffs for all moneys that had come to their hands.

It appeared that the defendants discounted the note in good faith, believing it was for the company's purposes, and authorized by the company, and so believed until long after they had charged it up to the account.

Held, that the plaintiffs were entitled to judgment. The defendants knew that the account to which the note was charged was a trust account, the moneys to the credit of which belonged to the plaintiffs, and not to S., and the note as a matter of law was not the note of the plaintiffs, but the individual note of S. The defendants could not, without assenting to a breach of trust on the part of S., permit him to pay his private debt to them out of the trust funds which they knew to be such.

E. G. Porter and *W. Cross*, for the plaintiffs.

S. Masson and *D. E. K. Stewart*, for the defendant.

IN CHAMBERS.

[MEREDITH, C.J., 13TH NOVEMBER, 1894.

PURCELL v. BERGIN.

Costs—Failure to establish will—Costs of person named as executor.

Where the person named as an executor in a written instrument failed, in the final result of this action, to establish it as the last will of the testator, and the Court of the last resort refused to order that his costs incurred therein should be paid out of the estate:—

Held, that the Court of first instance could not make an order for payment, out of moneys paid into that Court by the administrators *pendente lite*, of these costs as costs of the litigation, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs and expenses properly incurred by the applicant in the performance of his duties as executor, because he never was an executor.

W. H. Blake, for the applicant.

J. H. Moss, contra.

[19TH NOVEMBER, 1894.

In re DANIEL.

Evidence—R. S. O. c. 136, s. 12—Infants—Insurance moneys—Petition for appointment of trustee—Letters of guardianship—Certificate of foreign Court.

Where certain infants living with their mother in the Province of Nova Scotia were entitled to insurance moneys payable in Ontario, and their mother petitioned to be appointed trustee under R. S. O. c. 136, s. 12, to receive such moneys, letters of guardianship issued to her by a Probate Court of the Province of Nova Scotia and a certificate of the Judge of that Court showing that security had been given by her, upon her appointment as guardian, in respect of the insurance moneys in question, were received as evidence in support of the petition.

A. E. Hoskin, for the petitioner.

[23RD NOVEMBER, 1894.

COFFEY v. SCANE.

Security for costs—Delivery out of bond—Appeal to Court of Appeal—Execution.

Held, that the defendant was not entitled to have delivered out to him for suit a bond for security for his costs of the action filed by the plaintiff, after judgment in the defendant's favour with costs in the High Court, while an appeal by the plaintiff to the Court of Appeal was pending, notwithstanding that there was no stay of execution for the costs awarded to the defendant.

Hately v. *Merchants' Despatch Co.*, 12 A. R. 640, applied and followed.

H. L. Dunn, for the plaintiff.

L. G. McCarthy, for the defendant.

[29TH NOVEMBER, 1894.

GEORGIAN BAY SHIP CANAL AND POWER AQUEDUCT CO. v. WORLD NEWSPAPER CO. OF TORONTO.

Security for costs—Libel—Newspaper—R. S. O. c. 57, s. 9—Criminal charge—Incorporated company—Publication in good faith.

The words "involves a criminal charge" in R. S. O. c. 57, s. 9, s.-s. (1) (*a*), mean "involves a charge that the plaintiff has been guilty of the commission of a criminal offence."

And where the words published by the defendants in their newspaper of which the plaintiffs, an incorporated company, complained in an action of libel, alleged that the plaintiffs had tried to bribe aldermen by issuing to them paid-up stock in the company:—

Held, upon an application for security for costs under the above section, that the words did not involve a criminal charge, for a corporation cannot be charged criminally with a crime involving malice or the intention of the offender.

Mayor, etc., of Manchester v. *Williams*, [1891] 1 Q. B. 94, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, distinguished.

And where the defendants by affidavit showed publication in good faith and other circumstances sufficient under the above section to entitle them to security for costs, and the case made was not displaced by the cross-examination of the deponent on his affidavit, an order was made for such security.

J. F. Edgar, for the plaintiffs.

J. Baird, for the defendants.

MACDONALD v. WORLD NEWSPAPER CO. OF TORONTO.

Security for costs —Libel—Newspaper—R. S. O. c. 57, s. 9—Criminal charge —"Blackmail"—Criminal Code, s. 406—"Trivial or frivolous."

Upon an application under R. S. O. c. 57, s. 9, for security for costs in an action for libel, in which the words complained of, published in the defendants' newspaper, accused the plaintiff of attempted "blackmail:"—

Held, that the words might bear such a meaning as to charge the indictable offence defined by s. 406 of the Criminal Code, and the question whether they did so, when read with the context, was for the jury, and one which should not be determined upon this application; and the Master in Chambers having held that they "involved a criminal charge," his decision should not be interfered with.

An action cannot be considered "trivial or frivolous" within the meaning of s. 9 merely because the existence of a good defence on the merits is shown by the defendant's affidavits, and not contravened by an affidavit of the plaintiff. The latter may properly consider that upon an application for security for costs a denial on oath of the truth of the charges against him is unnecessary.

A. W. Ballantyne, for the plaintiff.

J. Baird, for the defendants.

[MacMahon, J., 3rd October, 1894.

REGINA v. DEFRIES.

REGINA v. TAMBLYN.

Criminal law—Conspiracy—Where offence committed——Affidavit evidence—R. S. O. c. 70, ss. 4, 5—Criminal Code, ss. 394, 752.

A judge cannot upon the return to a *habeas corpus*, when a warrant shows jurisdiction, try on affidavit evidence the question where the alleged offence was committed, and so get behind the warrant to contravene the return.

Sections 4 and 5 of R. S. O. c. 70 are not intended to apply to criminal cases where no examination has taken place.

Section 752 of the Criminal Code only applies where the Court or Judge making the direction has power to enforce it, and a Court or Judge in Ontario has no power over a Judge or justice in Quebec to compel him to "take any proceedings or hear such evidence," etc.

It is a crime under s. 394 of the Code to conspire by any fraudulent means to defraud any person. So if there was a conspiracy to permit persons to travel free on a railway, that would be a conspiracy against the railway company.

McCarthy, Q.C., for the prosecutors.

W. Mortimer Clark, Q.C., and *E. F. B. Johnston*, Q.C., for the prisoners.

[Street, J., 19th November, 1894.

GIBB v. TOWNSHIP OF CAMDEN.

Costs—Third party—Rules 329, 332.

Where in an action for negligence the defendants served a third party, under Rule 329, with notice of a claim for indemnity, but he did not appear thereto, and no order was made or applied for under Rule 332:—

Held, that he was under no obligation to take any proceeding, and was not bound by the result of the action; and his subsequently appearing at the trial and asking to be made a

defendant was gratuitous, and he was not entitled to costs against the defendants.

M. Wilson, Q.C., for the defendants.

E. W. J. Owens, for the third party.

[29TH NOVEMBER, 1894.

In re ARMACOST v. SMITH.

Prohibition—Division Court—Increased jurisdiction—Ascertainment of amount.

Motion by the defendant for prohibition to the second Division Court in the county of Leeds and Grenville to prohibit further proceedings in a plaint for $200, which sum the plaintiffs alleged they had deposited with the defendant as security, and were entitled to the return of.

The plaintiffs wrote to the defendant asking for this sum, and the defendant wrote in answer, "If you will just keep your shirt on, I will pay you your $200 in a very short time, but I can't do so just at present."

Held, that the acknowledgment being after the liability accrued, the amount was ascertained by the signature of the defendant.

In re Smith v. *Grant*, 10 Occ. N. 190, specially referred to.

Motion dismissed with costs.

Masten, for the plaintiffs.

Walter Read, for the defendant.

In re VILLAGE OF PRESTON AND KLOTZ.

Costs—Scale of—Arbitration—Direction of arbitrators—Municipal Act, 1892, s. 399—Reference back.

Where upon an arbitration under s. 885 *et seq.* of the Municipal Act, 1892, the arbitrators made their award and directed that the costs should be paid by the land-owners, but did not fix the amount nor direct on what scale they should be taxed, as required by s. 399:—

Held, that there was no authority for their taxation either upon the High Court or County Court scale.

But *semble*, that upon a proper application the award would be referred back to the arbitrators to complete it in the matter of costs.

J. H. Moss, for the land-owners.

DuVernet, for the corporation.

[MEREDITH, J., 1ST NOVEMBER, 1894.

MOORE v. DEATH.

mnity—Third party notice—Rules 328, 1313—Counter-claim.

In an action by the assignee of a mortgage against the mortgagor and the purchasers from him of the equity of redemption, the latter alleged that they had been induced by the mortgagee to purchase the lands by his promise to discharge the mortgage and accept in its place an assignment of a mortgage from the same mortgagor on another property, which agreement he had failed to carry out, and had afterwards assigned the mortgage to the plaintiff, his wife.

Held, that the purchasers of the equity were not entitled to claim "indemnity" against the mortgagee, within the meaning of that word as used in Rule 328, as amended by Rule 1313; and a third party notice served upon him was set aside.

Semble, a proper case for a counter-claim against the plaintiff and the third party jointly to enforce the alleged agreement or for damages.

J. A. Paterson, for the defendants.

W. H. Blake, for the third party.

MANITOBA.

In the Queen's Bench.

[DUBUC, J., 30TH OCTOBER, 1894.

SCHMIDT v. DOUGLAS.

Attachment of debts—Moneys deposited in bank—Claim by assignee of deposit receipt—Interpleader application by bank—Delay in making.

The plaintiff recovered judgment against the defendants D. and W., trading as D. & Co., and obtained an order attaching

moneys due to the defendants or either of them by the Bank of British North America, which had on deposit certain moneys placed there by the defendant D. under two deposit receipts taken in his name. The moneys were claimed by his wife, E. D., under an assignment of the same from D. Before the issuing of the attaching order E. D. had requested the bank to pay the money over to her, and payment having been refused, she had instituted an action against the bank to recover the same. After being served with the garnishee order, the bank took out an interpleader summons under R. S. M. c. 64, s. 13.

E. D. opposed the granting of an order absolute, on the ground that the bank, by not acting promptly, and by showing partiality towards the plaintiff against the interest of the claimant, had disentitled themselves to interplead.

E. D. made the demand of the money held by the bank on 17th August, 1894. The manager refused to hand over the money, and stated for his refusal a reason which was not a valid one, that he intended to appropriate the money on the indebtedness of D. & Co. to the bank. He subsequently gave other reasons; that the money was deposited in the name of D., and was then claimed by E. D. under an assignment; that he did not know whether the assignment was in proper form and valid; and, besides, that the deposit receipts made in the name of D. had on the face thereof the words "not transferable;" that, on account of these difficulties, he wanted time to obtain advice and consider the matter. The claimant commenced her action against the bank on the same day, the 17th August, and on the 22nd August the attaching order was served on the bank. The summons to pay over was taken out by the plaintiff on the 30th August, and the bank obtained the interpleader summons on the 6th September.

Held, that the interpleader order should go. The five days intervening between the demand of the money and the service of the attaching order could not be said to be an unreasonable time, and the rights of the claimant were not prejudiced thereby, nor by the attaching order. The evidence failed to establish that the bank had acted with partiality towards the plaintiff, or had colluded with him against the interest of the claimant. Costs reserved until the determination of the issue.

Elliott, for the plaintiff.

Mulock, Q.C., for the defendants.

Phippen, for the garnishees.

[KILLAM, J., 3RD NOVEMBER, 1894.

REGINA v. KENNEDY.

Justice of the peace—Summary conviction—Warrant of commitment—Jurisdiction of Indian agent—Habeas corpus.

The defendant was convicted before an Indian agent for that he "did give intoxicants, whiskey, to R. S., a treaty Indian, contrary to the form of the statute," etc., and was sentenced to pay a fine of $300 and costs, and in default of payment to be imprisoned for six months. The defendant, not having paid the fine, was imprisoned under a warrant of commitment following the conviction, and an application was made for writs of *certiorari* and *habeas corpus*.

Held, that the warrant of commitment was clearly bad as not showing the jurisdiction of the Indian Agent at the place where the offence was committed. The statute 57 & 58 V. c. 32, s. 8, defines the limits of the jurisdiction of an Indian agent as a justice of the peace. Under that provision this agent would have jurisdiction all over Manitoba. But this conviction was under a Dominion statute, and there was no ground for intendment that the offence was committed in Manitoba, even if that could be presumed. The warrant did not sufficiently show that the agent had jurisdiction to convict or commit.

Such a warrant would be bad without special legislation: *In re Peerless*, 1 Q. B. 475; *In re Beebe*, 8 P. R. 270.

An order was made for the issue of a writ of *habeas corpus*; and on its return an order was made for the release of the prisoner.

McMeans, for the defendant.

Aikins, Q.C., contra.

[12TH NOVEMBER, 1894.

McEWAN v. HENDERSON.

Pleading—Demurrer to pleas—Action on covenant in assignment of mortgage.

Action on a covenant contained in a deed of assignment of a mortgage of lands. The declaration alleged that by that deed the assignor (the defendant) covenanted with the assignee (the plaintiff) that the deed of mortgage thereby assigned was a good

and valid security; and the breach assigned was that the mortgage was not a good and valid security, and that the defendant never had a good title to the lands comprised in the deed.

Two pleas were pleaded to this declaration, to which the plaintiff demurred. On the argument of the demurrer the defendant's counsel contended that the declaration disclosed no cause of action. On behalf of the plaintiff it was contended that the covenant should be construed as if it warranted that the mortgagor and the mortgagee had a good title to the mortgaged lands, and it was admitted by the declaration that the mortgage had been duly executed by the mortgagor, and that it had been given to secure the payment of the moneys mentioned therein.

Held, that the covenant set out in the declaration could not be construed as a covenant that the mortgagor had a good title to the land or that the mortgage was effective to charge the land with payment of the mortgage moneys.

Demurrers overruled, without considering how far the pleas could be deemed to answer the declaration if the covenant were construed as the plaintiff asked.

Ewart, Q.C., and *Bradshaw*, for the plaintiff.

Howell, Q.C., and *Machray*, for the defendant.

MORRISON v. CHAMBERS.

Partnership—Agreement—Construction—Master and servant—Interpleader.

Interpleader issue to determine the right of the plaintiff as against the defendant to have certain goods taken in execution of a judgment recovered by the plaintiff against one William Bateman.

Previously to the recovery of the judgment, Bateman had been carrying on business under the style of W. Bateman & Co., and the plaintiff lent to him for use in the business the money for which the judgment was recovered. Long before this loan Bateman and Chambers had entered into an agreement that Chambers should be employed as Bateman's servant in the business for a period of five years at a salary, and should receive also a bonus equal to one-fourth of the profits of the business; that Chambers should lend to Bateman a sum of $2,000 to be used in the business, and in the event of a loss Chambers would

indemnify Bateman against one-fourth part thereof; it was expressly agreed that Chambers was not a partner in the business.

Instead of advancing the $2,000 in cash, Chambers brought into the business a quantity of machinery and appliances valued at $1,500, a portion of which were the goods in question, and he was credited in the books of the concern with this amount as stock. The business was carried on for a considerable time under the style of W. Bateman & Co.; Chambers conducting himself as a servant in the employ of Bateman, and claiming and receiving from the sheriff, after seizure of the property of the concern under executions against Bateman, arrears of wages as such servant. Chambers claimed he was a partner in the concern and entitled to oppose the seizure of the goods under Morrison's execution.

Held, that the part of the agreement which dealt with the relations between the parties was distinctly directed to placing them respectively in the position of master and servant and to exclude the relation of partners. The clause excluding the position of partner in Chambers should be construed as excluding that relationship to the extent to which it was not necessarily involved in the other provisions of the agreement. That a distinct provision against a partnership does not prevent the existence between the parties, or towards others, of some of the rights or obligations of partners, is clear.

Adam v. *Newbigging*, 13 App. Cas. 308, followed.

It was evidently intended that Bateman should continue to carry on the business as his own, subject only to the rights which the agreement expressly gave the defendant Chambers, who was to lend his money to Bateman, and when he substituted the machinery for money, he did not lend that machinery to be returned *in specie*, but to be repaid in money.

Chambers had no title, legal or equitable, to prevent the property being taken under the plaintiff's execution.

Verdict for plaintiff.

Andrews and *Pitblado*, for the plaintiff.

Wilson, for the defendant.

[BAIN, J., 19TH NOVEMBER, 1894.

UNION BANK OF CANADA v. McBEAN.

Pleading—Action on promissory notes—Equitable pleas—Striking out for embarrassment—Collateral issues.

Appeal from an order of the referee striking out the 13th and 14th pleas of the defendant. The plaintiffs sued to recover the amount of two promissory notes made by the defendant to McBean Bros. or order, and indorsed by them to the plaintiffs. The pleas in question alleged in effect that the notes sued on were made by the defendant for the accommodation of the payees, McBean Bros.; that the plaintiffs had notice that they were so made; and that the plaintiffs were indebted to McBean Bros. in certain sums of money, which the defendant and McBean Bros. desired to set off against the plaintiffs' claim against the defendant; that McBean Bros. were not parties to the action, and the Court had no power to make them parties. The referee struck out the pleas, on the ground that, as McBean Bros. were not parties to the action, the Court could not try the issues raised by the pleas.

Held, that the appeal must be dismissed but without costs. A defendant can advance a defence like the one set up only on equitable grounds, and in the 13th plea it was not stated that it was pleaded on equitable grounds. At law what was stated in the plea was no answer to the action, and the Administration of Justice Act required that pleas setting up equitable defences should begin with a statement to that effect. This might seem a trivial omission, but on an appeal the Court could not make amendments, and must take the pleadings as they stood when they were before the referee. As regarded this plea, the order of the referee striking it out must stand.

The 14th plea began with the statement that it was pleaded on equitable grounds, but, in addition to the statement of the set-off, it contained allegations relating to a deed or agreement that had been made between McBean Bros. and the plaintiffs, which were matters of evidence and raised issues altogether collateral to the main question of the set-off. The plaintiffs could not but be embarrassed in knowing how to reply to the plea and it should not be allowed to remain on the record in its present form.

Wilson, for the plaintiffs.

Howell, Q.C., and *I. Campbell*, Q.C., for the defendant.

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NOTE:—Where a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1894.

Occ. N.—*Canadian Law Times Occasional Notes.*
S. C. R.—*Supreme Court (of Canada) Reports.*
Ex. C. R.—*Exchequer 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.*
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