THE CANADIAN LAW TIMES

Edited by

E. DOUGLAS ARMOUR, Q.C.,

Of Osgoode Hall, Barrister-at-Law

VOL. XVI.

TORONTO:

THE CARSWELL Co. (LTD.) PUBLISHERS.

1896.

TABLE OF CASES.

Those marked * are not reported in the regular or official reports of the Dominion and Provinces.

C.

D.

E.

F.

S.

T.

V.

W.

THE

CANADIAN LAW TIMES.

JANUARY, 1896.

RESTRAINT ON ALIENATION.

THE cases in Ontario on this subject are in a very unsatisfactory state. It is true that the law is, so to speak, in a state of flux on the subject, the modern English cases showing in the Judges a decided disposition to depart from the law as laid down by Coke; and we must not expect to find harmonious views on a subject so freely debated. But the difficulty in this Province is not that there is a variety of judicial opinion, but that there is judicial warrant for allowing a large amount of restraint in cases where it seems the condition against alienating would be held to be void in England. And these cases are binding authorities until the Supreme Court of Canada has the opportunity to express an opinion upon the limits of the doctrine.

In the Touchstone (*a*) a number of instances, too numerous to mention here, are given of good and bad conditions against alienation. They are susceptible of classification to some extent. Good conditions are, (1) that the feoffee shall not alien to certain persons; (2) that A. being seised in fee of Blackacre is enfeoffed by B. of Whiteacre, on condition that he shall not alien Blackacre; the penalty being, as put in Atherley's note, that a breach merely occasions the loss of Whiteacre; (3) that the feoffee shall not alien in mortmain, or being

(*a*) P. 129 *et seq.*

an infant, that he shall not alien during his minority—and others of the like kind, the condition being against an unlawful alienation; (4) that the feoffee in fee shall retain the land for twenty years. Bad conditions are, (1) that donee in tail shall not suffer a common recovery; (2) that a grant shall be for life if it shall please the grantor so long to suffer the estate; feoffment on condition that the feoffee shall not enjoy the land, or take the profits, or that the heir shall not inherit, or that feoffee shall not do waste, or that his wife shall not be endowed—as being totally repugnant to the estate or to law—and so on.

It will be observed that all conditions which make a particular law for the estate in attempted contravention of general laws of descent, dower, barring entails, etc., are void. Conditions which defeat the grant, as by prohibiting enjoyment of the thing granted, are void. But conditions imposing a partial restraint on the enjoyment—as to keep the land for twenty years, not to sell to certain persons, and not to contravene the law by alienating in mortmain, etc.—are good as not being totally repugnant, in some cases not being repugnant at all, to the nature of the estate.

The difficulty that arises on this classification is to determine what is a partial restraint on alienation. It may be partial (1) as to the persons to whom the land may or may not be conveyed; (2) as to the mode of alienation, as by prohibiting leases or mortgages or sales or a devise, or more than one of them; (3) as to time, by rendering the estate inalienable for a time. Of those conditions which are against law, such as that the heir shall not inherit, the widow shall not be endowed, tenant in tail shall not bar the entail, nothing need be said. But upon the question of partial restraint, i.e., the attempt to reduce the rights, privileges or enjoyment of the grantee with regard to his estate, there are many cases worthy of consideration. And it will be seen that partial restraint, so-called as being for a time only, has sometimes been treated as complete or absolute restraint.

In Re Macleay (*b*) the devise was "to my brother J., on the condition that he never sells out of the family." Sir George Jessel, M.R., after referring to Coke upon Littleton and the Touchstone, summed up the law by saying, "the test is whether the condition takes away the whole power of alienation, substantially. It is a question of substance and not mere form." That is to say, if any alienation is permitted at all, either as to mode, time or persons, the condition is good. It is obvious that if a man may confine the powers of alienation to a class, he may also determine the size or the number of persons forming the class. If it is validly restricted to "family," and there is but one in the family, he closes the door to alienation altogether; because if he does not alien at all it will descend to that member of the family. If he is not to alien except to one of his own name, the interpretation of the instrument depends not on its words, but upon an extraneous question of fact, viz., whether there is any one of his name. If not, the condition is void. If so, it is not. If that person lives, the estate is inalienable except to him; if he dies, perhaps, on this hypothesis, it becomes alienable. Similarly as to modes of alienation. If the grantor may restrict any mode of alienation, he may restrict all but one, the test being "whether the condition takes away the whole power of alienation." Notwithstanding this, the Master of the Rolls held that as some power of alienation was allowed the condition was good. Doe v. Pearson (*c*) was followed, where the condition was that the devisees should alien only to sisters or their children, if the devisees had no children, and this was held valid. And Attwater v. Attwater (*d*) was "distinguished," where the condition was not to sell the land out of the family, and was held void.

At this stage Earls v. McAlpine (*e*) was decided in Ontario in 1881. In that case land was devised to two

(*b*) 20 Eq. 186.
(*c*) 6 East, 173.
(*d*) 18 Beav. 330.
(*e*) 27 Gr. 161; 6 App. R. 145.

sons of the testator, who proceeded, "I also will that my above-named sons * * * do not sell or transfer the said property without the written consent of my said beloved wife during her life." The wife had the right to support from her sons, and some discussion took place as to the validity of the restriction in view of the fact that the land should be retained to answer this trust. But the case turned eventually upon the question of condition pure and simple, and a mortgage was held to work a forfeiture as being a breach of the condition. Re Macleay was relied on, and the cases which it did not agree with are attempted to be distinguished. The ground of the decision is succinctly stated by Blake, V.C., as follows:—"I considered it reasonably clear on the authorities that a condition not to alien to a particular person or for a particular time is good." This is adopted without qualification by the Court of Appeal.

This case forms the basis of all the succeeding decisions in Ontario. In Smith v. Faught (*f*), decided in 1881, a few days before the decision of the Court of Appeal in Earls v. McAlpine, the Court of Queen's Bench treated Re Macleay as the leading authority. The devise was that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper." The restraint was held to be valid, but a mortgage not to be within it.

Re Winstanley (*g*) was decided in 1884. The devise was to the testator's daughter, and it contained this restriction, "that she shall not dispose of the same only by will and testament." It was held that the restriction was valid. The Chancellor said, "The devisee may possess perfect freedom of enjoyment by leasing and the like during her life, but she cannot dispose of the remainder after her death except by testamentary instrument. If she does not choose to deal with it by

(*f*) 45 U. C. R. 484.

(*g*) 6 Ont. R. 315.

will, the estate will of course descend to her heirs. This is but a limited restraint on alienation not extending beyond the life of a person in being, and is not obnoxious to the law against perpetuity." Re Macleay, Smith v. Faught and other cases were referred to.

Re Watson & Woods (*h*) was decided in 1887. The devise was to the testator's son with the condition "that he never will or shall make away with it by any means but keep it for his heirs." This was held to be void on the ground that it took away all power of alienation, and Mr. Justice Robertson adopted Sir George Jessel's test in Re Macleay. We might observe at this juncture the really unsound, artificial, and unsubstantial distinction between this case and Re Macleay. A restriction that a man shall not sell out of the family; one that he shall never sell, but may devise to his children, or to his family, as the case may be; and one that he is never to sell to any one, but must keep the land for his heirs—all these have but one substantial result, viz., that the land is by the restriction not to be diverted from those who should or might inherit it. In the case of a gift to A., conditioned that he shall not grant to any but to his children (as in Smith v. Faught) it is said to be valid, and gives the donee the meagre satisfaction of going through the form of a grant to the person or persons who if he did not make the grant would take the land at his death. But if the poor satisfaction of making this grant to his heir is taken away, and the land is to descend, then that is said to be an unreasonable condition, repugnant to the nature of the estate, and void. Such a doctrine leaves the cases resting on a theory most unsubstantial both in its principle and in its application. The case, however, does not profess to infringe upon the rule laid down in Re Macleay and the cases succeeding it, but in fact comes within that case as being a complete restraint on alienation.

Heddlestone v. Heddlestone (*i*), decided in 1888, was an attempt to break away from the effect of Re Macleay,

(*h*) 14 Ont. R. 45.

(*i*) 15 Ont. R. 280.

and Mr. Justice MacMahon, when deciding it, had the benefit of the decision in Re Rosher, to which reference will shortly be made. The devise was subject to the condition that the land "shall not be disposed of by them either by sale, by mortgage, or otherwise, except by will to their lawful heirs." And the learned Judge, preferring Re Rosher and its reasoning to Re Macleay, held that the condition took away the whole power of alienation substantially, and was therefore void. This case is not in form a distinct disapproval of Re Macleay, because it professes to follow the principle of the decision in declaring that the restriction was substantially general. As a matter of fact it could have been as well determined that the restriction was valid, because, on the principle of Re Macleay, it allowed one loophole through which the land might have been disposed of, viz., by devise to heirs. The case must therefore be regarded as in substance a disapproval of the principle of Re Macleay.

The next case is Re Weller (*j*), decided in 1888. The devise there was in fee simple to the daughters of the testator, subject to the condition that the lands should not be alienated or incumbered until one of them should arrive at the age of forty years, the lands to be for the separate use of the devisees, who were married. The question arose in an application under R. S. O. cap. 132, sec. 8, to charge the property notwithstanding the restraint on anticipation. The Court held that the restriction was not a "restraint on anticipation," for it was a restraint that had no reference to the status of the devisee as a married woman, and would disappear on arrival at the age of forty years. But on the question of the validity of the restriction, the learned Judge held that he was bound by the decisions of the Ontario Courts rather than the decision in Re Rosher (*k*).

Following this in point of time comes O'Sullivan v. Phelan (*l*), decided in 1889. The testator devised land to

(*j*) 16 Ont. R. 318.

(*k*) *Infra*.

(*l*) 17 Ont. R. 730.

his two nephews, of the name of O'Sullivan, and declared that "neither of my said nephews is to be at liberty to sell his half of the said property to any one, except to persons of the name of O'Sullivan in my own family." There was also a provision that, if the nephews died without issue, or either of them did not dispose of his half of the land by will or otherwise, then his share was to go to the children of his brother Jeremiah O'Sullivan. Jeremiah O'Sullivan was said to be the only person of the name and family to whom the devisees could convey. Presumably, therefore, he had no children. And the curious result was that liberty was given to the devisees to sell to Jeremiah, inferentially also to devise to him, but if they did neither, then the land would go to Jeremiah at any rate by inheritance. They had therefore the poor satisfaction of being able to go through the empty form of passing the land on to a person who would get it at any rate. This is called a liberty to alienate. Mr. Justice Robertson, who decided Re Watson & Woods, held that the restriction was valid, because it was a partial only. It prohibited selling, but did not prohibit mortgaging.

In Re Northcote (*m*), decided in 1889, the devise was subject to a condition that the devisees "do not sell or mortgage the said lands or any part thereof during their lives, but with power to each of them to devise the same to their respective children as they may think fit, in such way as they or either of them may respectively desire." The Chancellor held, following Re Winstanley, that the restriction was valid, and that the devisees could not sell.

The Ontario cases may be thus classified. The first three, and Re Weller and Re Northcote are instances of restrictions as to time; and the restrictions were held valid. In Re Watson & Woods, and Heddlestone v. Heddlestone, the restrictions were total except as to devising; a case of mixed restriction as to time and

(*m*) 18 Ont. R. 107.

mode: held valid. And in O'Sullivan v. Phelan, the restriction was as to all persons but members of the family.

In Re Rosher (*n*) the devise was to the testator's son, with the condition annexed that the widow should have the option of purchasing the estate at £3,000 (the land being worth £15,000) if the devisee should desire to sell in the lifetime of the widow. It was held by Pearson, J., in direct contravention of the principle of Re Macleay, that the condition was absolute though limited to a particular time only, and therefore void. Here we have a new definition of the term "general" or "absolute restraint" in the consideration of this elusive subject. Hitherto absolute restraint has been regarded as extending over time as well as modes of alienation; that is to say the devisee must be totally prohibited from disposing of the land. It is true that this can last only for his own life, but not being so expressed it is considered absolute. Then, with a peculiarly irrational turn, it is held that when the total prohibition is expressed to be for a period only, it is said to be partial only, and therefore a valid condition. In Re Rosher we have the more rational view that the restraint or alienation, if complete as to modes of alienation, is complete for the purpose of adjudication, although limited to a certain period only. That is to say, the fee simple cannot for a time lose completely its characteristic of alienability, and regain it when the period of stagnation has elapsed. Although, in that case, the only compulsion was that the devisee should, if he desired to sell, offer the land first to the widow at a sum equivalent to one-fifth of its real value, Mr. Justice Pearson said: "I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been 'during the life of the widow you shall not sell,' because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of

(*n*) 26 Ch. D. 801.

the value of the estate is, to my mind, equivalent to a restraint upon selling at all." And after citing authority for this proposition, he proceeds, "The question, then, which I have to determine is this, is it or is it not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all?"

The learned Judge's reasoning is very convincing in dealing with this question, even when he criticizes the fountain of law, Coke upon Littleton. He first puts it that when a grant of land is made there is tacitly annexed to the gift the incident of power to alienate. Now, if this power to alienate were written out in full in the grant—as "with power to mortgage, lease, or sell the estate, or any part or parts thereof, from time to time, and at all times or at any time, in any market, to any person or persons, upon such conditions or terms as he shall from time to time in his own absolute will and pleasure determine," and were followed by a proviso that "he shall not sell either during his own life or during the life of B."—the proviso would be as repugnant to the express terms of the grant as it well could be. If, however, the power to alienate were not so expressed, it would nevertheless be as fully existent as if it had been expressed, and the proviso or condition would be just as repugnant to the grant as if it had expressed all. But one objection can be urged to this reasoning. Though his Lordship cites Coke for the proposition that the grantor gives tacitly the right to sell, it is rather a right given by law. For if the grantor had the right to give it, he had the right to withhold it, or qualify it (*o*). The value of the argument is enhanced if the right of alienation is regarded as one given by law, for it is then beyond the control of the grantor. But the argument is not impaired by this. If we treat the learned Judge's proposition simply as saying that when a grantor makes a grant he does so knowing that

(*o*) Cf. Ogilvie v. Foljambe, 3 Mer. 53; Hall v. Betty, 4 M. & Gr. 410; Ellis v. Rogers, 29 Ch. D. at pp. 670, 671, as to whether the right to a good title is a right given by law or is an implied term of the contract of sale.

the law will read such words respecting alienability into the grant, then he takes the consequences, and in a sense creates the consequences of his deed, and cannot contradict it.

The learned Judge admits that exceptions to the general rule have been introduced, but says that they have proceeded rather on the ground of policy than upon a bare consideration of the question whether the restraint is repugnant to the grant. And in dealing with the restriction to convey to a class or a member of a class, he points out that the validity of the condition will always be a question of fact, not of principle or interpretation. Thus, if the grantee or devisee is to sell only to his brothers or sisters or children or family, is there to be an enquiry whether they or any of them are able to buy? If not, the prohibition being complete, is the condition to be held bad? If able, is the condition to be held good if they will buy, bad if they will not? Quotations are then made from cases to show that Coke has laid down the same state of facts with precisely contrary holdings (*p*), and says that the differences of the learned professors of the law were occasioned by their departing from the first principle "that a condition which is repugnant to a gift is a void condition, and the exceptions have been made without any principle at all, and it is therefore perfectly impossible to say by any rule what exceptions are good and what are bad."

Then, as regards time, his Lordship points out that there is no decision in the books that such a condition is good if restricted to a particular period. Large's Case (*q*), cited in the note to the Touchstone (*r*) for that proposition, does not determine it. The devise was of a contingent remainder to the testator's son, on condition that he should not sell before he came into possession at the age of twenty-two. The son having sold he could not qualify himself to take the contingent remainder, and the estate passed away from him.

(*p*) Co. Litt. 223 b, contradicted by Mildmay's Case, 6 Co. Rep. 43 a; Co. Litt. 223 b, contradicted by Mary Portington's Case, 10 Co. Rep. 39 a.

(*q*) 2 Leon. 82; 3 Leon. 182.

(*r*) P. 130.

The reasoning of this case, as we have said, is most convincing. But there is another consideration, and that is, that a fee simple is always a fee simple, whether in the hands of A. or of B. Wherever it is, it must be alienable. And if, while A. holds it, it is not to be alienable, the result is that A. has and has not a fee simple at one and the same time. A. holding a fee simple holds an estate which he is not bound to let descend to his heirs, but may sell; and if the condition is that he must not sell it but must allow it to descend it does not answer the description of a fee simple.

Again, though it has been held that it is not a breach of a condition against selling to mortgage or lease the estate, this is open to objection. All the authorities agree that the grantee cannot do per obliquum what he cannot do directly. And if a man can lease for 999 years he evades the condition, and accomplishes indirectly what was forbidden. So, if he mortgages, can he mortgage with power of sale? In the argument of Re Rosher it was admitted or alleged by counsel that the mortgagee would take only such estate as the mortgagor had, namely, an estate which he could not sell except under the conditions that the mortgagor held it under. To hold that, would be to enlarge the prohibition and render it doubtful. To hold that he could mortgage with power of sale would be to hold that he could indirectly do what he could not do directly. On the whole the law is in a most unsatisfactory state, and the value of Mr. Justice Pearson's suggestion is apparent, that we should return to the rule that any repugnancy to the grant contained in the condition should be held void. Unfortunately, however, our Courts have concluded the matter for Ontario.

STATE TRIALS.

William Cobbett, in his preface to his Collection of State Trials, says: "I am convinced that there are readers, and readers enough, who wish to know from authentic sources what the facts of our history are; how our government really was administered heretofore; what sort of men our forefathers really were and how they really acted; and who will not be satisfied with the vague notions which alone can be collected from historical magic lanterns, like that of Hume for instance, in which no single object is plainly or distinctly presented to us, but where a multitude of images are made rapidly or confusedly to pass before our eyes, distorted and discoloured according to the taste of the showman."

The truth of these statements will not be denied. To the general student the value of a Collection of State Trials is great. But this value would not of itself be sufficient to warrant the reproduction of any part of these trials in a professional legal publication. While a knowledge of history, and especially political history, is useful to an advocate, it is not essential. But a knowledge of the rules and practice of evidence is not only useful, it is absolutely necessary to any person engaged in the practice of law. The law of evidence has been so much reduced to a code, and so many doubtful questions have been arbitrarily settled by statute, that an examination of these earlier cases may appear unnecessary. Such is not the fact, for, apart from the historical interest which the enquiry evokes, the legal reader can see the growth of rules now recognized, and can by witnessing the difficulties which occasioned the adoption of these rules appreciate their wisdom and necessity. Further, most important suggestions can be obtained as to the conduct of a case, the mode of dealing with

witnesses, and what is equally important—obtaining and holding the "ear of the Court." Then again, the relations which ought to exist between Bench and Bar can be properly understood by seeing the tyranny and injustice which have too often been occasioned by the disregard of that respect which is due not only from Bar to Bench, but also from Bench to Bar. To verify the truth of these statements it is necessary only to turn to the report of almost any of the well-known cases contained in these volumes. The vivid effect which is produced upon the reader will be at once acknowledged. It is as if one were to go to-day into Court, see the Judges enter, hear the crier call his oyez, listen to the indictment, hear the witnesses successively tell their story and stand cross-examination, hear counsels' addresses and the Judges' summing up. Then comes the jury's return to Court, and finally the dread sentence with all its horrors, or else, unfortunately much more rarely, the acquittal. We do not leave the prisoner even here. If he is convicted we accompany him to the scaffold and hear him commend his poor soul to God. All this drama is displayed before the reader. As the trials were taken down in shorthand the exact words of the witnesses appear. The interruptions of the crowd—the wrangling of the Judge with counsel—the protestations of the harassed prisoners—their appeals for fair play, or for mercy—are all set out. We see each case exactly as if we were reading it in to-day's paper, and we can enter into the feelings and passions of the time as if we were then living. It is getting behind the scenes of history. In many cases, owing to the method of compilation adopted by Cobbett and his successor Howell, much judicious "skipping" has to be done by a purely professional reader. A Macaulay or Hallam must study all the detail of the pamphleteering of the time to give a perfect picture. Much of this ephemeral literature is introduced in Cobbett's volumes in the shape of commentaries on the case in hand. The legal student need not delay over these parts of the work. He only need confine his study to the cases themselves, and we venture to say he will find no better

school to train himself in the points we have indicated, nor will he find anywhere as interesting professional reading.

It is our purpose in these papers to select some portions of the more prominent typical cases, digest them, and lay before our readers the evidence on both sides, with a notice of any principal theoretical points decided in the case, so that the successive layers of judicial treatment of questions of evidence may be disclosed. The main object to be kept in view is, as it were, to make each reader a judge in each case by furnishing him with a fair brief of the evidence on both sides and then submitting it to him for his opinion.

Before commencing any of the cases it is necessary to say something of the bibliography of the collections of State Trials. They are generally known as Howell's—but before Howell took them up there had been previous editors, *vixere ante Agamemnona fortes.*

The first edition of the cases at large appeared in 1719, and was comprised in four volumes folio. The editor of this edition was Mr. Salmon. Subsequent editors object to him, that being in his political principles apparently an inveterate enemy to the Revolution, he was unduly partisan. This criticism does not apparently apply to the reports themselves of the cases, but to his comments upon them. The second edition appeared in 1730, and was edited by Mr. Emlyn. It was succeeded in 1735 by two supplemental volumes. A third edition appeared in 1742, and in 1766 two further volumes appeared, being the 9th and 10th. All of these editions were folio volumes. In 1775 the fourth edition by Mr. Hargraves was published, still in folio, with a supplementary volume in 1781. In 1809 William Cobbett published the first nine volumes of the compilation referred to as Howell's State Trials. He carried out his project though at great loss to himself, and was succeeded by T. B. Howell, who brought the work down from 1684, where Cobbett stopped, to 1783. T. B. Howell's work was continued by T. J. Howell, who carried the Trials up to 1820.

The total number of volumes was thirty-three. The series was afterwards continued by the Government, and five volumes have been published, the last one containing Daniel O'Connell's trial, and bringing the work down to the end of 1844. This volume was published in 1894.

It is evident that the value of the Reports depends upon their authenticity The more famous cases were reported only by permission under the authority of the Court. These official reports must therefore be critically examined before they are accepted. This work was thoroughly done by the earlier editors, and any reader can acquaint himself with the relative authenticity of the reports.

It is somewhat of a surprise to any person who takes up these volumes to see that they contain verbatim reports. In this matter, as in so many others, there is nothing new under the sun. Shorthand reporting is a very ancient art, although we are apt to think it dates only from Pitman. It was well known to the Romans, as every student of Roman history is aware. During the middle ages the art was lost. In England, the revival dates from John Willis, whose Stenographie passed through thirteen editions between 1602 and 1644. His system was alphabetic, that is, each word had its own symbol. Between him and Pitman (1837), there were two hundred systems invented. Of these, only seven were phonetic. All the others were, like Willis', alphabetic. But, such as they were, they were used extensively, and thus we are able to read the *ipsissima verba* used by all the noted persons whose trial interests us subsequent to the death of Queen Elizabeth.

The first trial recorded by Cobbett is that of Thomas Becket, Archbishop of Canterbury, in 1163. Hubert de Burgh, Piers Gaveston, King Edward the Second, Roger Mortimer, John Wickliffe, Sir John Oldcastle, William de la Pole, George Duke of Clarence, and Sir William Stanley in succession bring us to the reign of Henry VIII. All of these names have been familiar to us since our school-boy days, and it is strange to meet,

as it were, the persons themselves in these records of their trials. The reign of Henry VIII. furnishes thirteen separate trials. Of these the most pitiful is that of Anne Boleyn. She and her brother, Lord Rochford, were in 1536 tried and condemned in the Court of the Lord High Steward. Their accomplices were tried before Commissioners of Oyer and Terminer. The charge in all the cases was the same—High Treason. The original proceedings are not forthcoming, but there are contemporary narratives from which the details may be gathered. Henry Norris, Groom of the Stole, Weston and Brereton of the King's privy chamber, and Mark Smeton, a musician (a forerunner of Rizzio), were accused of being the paramours of the Queen. They were twice indicted, and the indictments were found by two grand juries of Kent and Middlesex respectively. Smeton confessed the charge, the others pleaded not guilty. The jury found them guilty. Apparently the evidence laid before the jury consisted of a declaration sworn to on her death bed by Lady Wingfield, one of the Queen's ladies, charging the Queen with adultery. The declaration was proved by witnesses, who deposed what they heard Lady Wingfield swear. The admission of this evidence infringes that fundamental rule of evidence which excludes hearsay testimony. "The safest sort of forgery, to one whose conscience can swallow it, is to lay a thing on a dead person's name, where there is no fear of discovery before the great day." The Queen's own declarations were proved against her. After she was arrested, she was made to believe that Norris and Mark Smeton had accused her, and being under arrest and in a state of agitation, having just come out of an attack of hysterics, she did not "consider that ordinary artifice for drawing out confessions" and told all she knew both of Norris and Smeton. She said that she had had a quarrel with Norris, because she told Norris he was not behaving well to the woman he was engaged to marry. She stated that she had told Smeton he must not expect her to speak to him as if he were a nobleman, being as he was an inferior person, and that he had replied, "A look, madam, sufficeth me." Weston,

she said, had told her he loved her, and she had defied him. On Lady Wingfield's alleged declaration, and these statements by the Queen and Smeton's confession, the prisoners Norris, Weston, Brereton (whose name does not appear in any recorded incriminating statement) and Smeton were all found guilty and condemned to death. The Queen herself and her brother, Lord Rochford, were then tried before their peers. The crimes charged against were adultery with Lord Rochford and the other prisoners, that she had said to them "that the King never had her heart, and had said to every one of them by themselves that she loved them better than any other person whatsoever. Which was to the slander of the issue that was begotten between the King and her." This was treason under 26 Henry VIII. There was also a charge of "conspiring the King's death," but this head of the indictment does not appear to have been followed up. The other charge, if proved, was sufficient under 25 Edward III. to entail capital punishment. Smeton, who had confessed, was never confronted with the Queen, so the true value of his confession was not ascertained. If the prosecution had felt they could rely on it they would probably have confronted him with the Queen. The peers brought both prisoners in guilty. The punishment then, and for long afterwards—until 30 Geo. III. c. 48 (1790)—in cases of women found guilty of high treason was burning to death. The Lords in the case of Queen Anne Boleyn left it to the King to determine whether she should be burned or beheaded. The Judges complained of this mode of procedure, and said such a disjunctive in a judgment of treason had never been seen. Lord Rochford also was condemned to be beheaded and quartered. The King then insisted that his marriage with the Queen should be annulled, alleging a pre-contract between her and the Earl of Northumberland. Having been condemned to death for treason, she was worked upon to confess a pre-contract, and thereupon her marriage with the King was declared null and void. Then the curious dilemma presented itself. She was either the King's

wife or she was not. If she was, then the latter sentence could not stand. If she was not, then the former sentence was wrong. But the King wanted another woman, and out of the way poor Anne Boleyn had to go. So she was beheaded and that ended that difficulty. As to her innocence of the charge made against her it is not quite easy to speak with certainty. "Her carriage seemed too free, and all people thought that some freedoms and levities in her had encouraged those unfortunate persons to speak bold things to her, since few attempt upon the chastity, or make declarations of love to persons of so exalted a quality, except they see some invitations, at least in their carriage." Others thought that "a free and jovial temper might with great innocence, though no discretion, lead one to all those things that were proved against her; and therefore they concluded her chaste, though indiscreet."

The Queen's fellow-prisoners were all beheaded, but not quartered, except Smeton, who was hanged. He is said to have been promised his life if he confessed, but was hanged, and properly hanged, in spite of the promise. It is the only gleam of sunshine in the dark story that such a blackguard came to such an appropriate end.

As for the poor Queen, her behaviour after her sentence was edifying. If she had sinned she repented, and Sir William Kingston, the Governor of the Tower, writes thus of her: "And in the writing of this she sent for me, and at my coming she said, 'Mr. Kingston, I hear say I shall not die aforenoon, and I am very sorry therefore, for I thought to be dead by this time and past my pain.' I told her it should be no pain, it was so sottle (subtle—keen, sudden). And then she said, 'I heard say the executioner was very good, and I have a little neck,' and put her hands about it, laughing heartily. I have seen many men and also women executed, and that they have been in great sorrow, and to my knowledge this lady has much joy and pleasure in death."

R. E. KINGSFORD.

EDITORIAL REVIEW

The New Rule.

When, in 1888, it was proposed by the Committee of the Bar that the obstruction to business, occasioned by the division of the High Court into three Divisions, should be removed, and that all proceedings should begin, continue and be concluded in one office, it was thought impracticable. The traditions of the Courts were such that it could hardly be imagined that one Court could possibly perform the functions that had previously been performed by three. Although the rules were drawn with the view to bringing such a change into operation, they were suspended in order that such a radical alteration should not be made without more deliberation.

Now, however, opinion has crystallized, and the result is that the change then proposed has now been made. The old lines of cleavage between equity and common law jurisdiction long ago disappeared. Cases naturally thereafter divided themselves according to the mode of trial, and, as we pointed out at that time and subsequently, the proper division of cases for the purpose of the despatch of business was not into equity and common law cases, but into jury and non-jury cases. There was every reason thus why a Court of Chancery or a Chancery Division, as a distinct tribunal for the disposition of certain classes of cases, should disappear; and with this disappearance there was every reason why the keeping of separate records should also be dispensed with. We have now the rational idea of a central office in which all proceedings are to take place; Divisional Courts which are not marked by any judicial personnel; trials which pay no regard to the nature of the relief, save that in some cases a jury is required by law and in others when the Judge desires it.

We also urged some time ago that Divisional Courts were too infrequently held. It was impossible in many

cases to get an appeal from Chambers heard by a Divisional Court before the trial of the action actually took place; and we then suggested that a Divisional Court, held at the beginning of every month for the despatch of all existing business, would remedy this difficulty. Not only was there a grievance with regard to appeals from Chambers, but in a very large number of cases tried, no motion to a Divisional Court could take place for some months. The more frequent sittings of the Divisional Courts which take place under the new rules will dispose of all grievances with regard to delay, and it will now be the fault of the profession themselves if cases are not rapidly disposed of after trial. The time was very short which was allowed us to read the new rules before they came into actual operation, and we withhold any comments as to the rules themselves; but, from the composition of the committee which framed them, we have no doubt that they will carry out the wishes of the profession in every respect.

Gymnasium for the Law School.

We understand that a petition has been presented by the students of the Law School to the Benchers of the Law Society, asking that they utilize the third storey of the Law School as, and fit it up for, the purposes of a gymnasium. We trust sincerely that the petition will be granted. No more popular and worthy act could be done for the school than to provide the means of exercise and enjoyment for the students. The Benchers will readily see that the conditions of to-day are entirely different from those of a few years ago. Under the old system there was no compulsion to attend at Toronto except for examinations. Students who preferred to study in Toronto came here voluntarily. Under the present conditions it is compulsory on all students to spend at least two years in attendance at the Law School. They are gathered together in a small society by the Benchers, and we conceive that it will not be disputed that the responsibilities of the Benchers do not end with the mere instruction in law. The students themselves have done a great deal to earn the respect and admira-

tion of the public in athletic pursuits, and it behoves the Law Society to encourage the cultivation of that courage, patience and skill which are essential to a successful pursuit of athletics, and which, as absolute qualities, tend to the improvement of the man in every walk of life. We sincerely trust that the Benchers will see their way to establishing a gymnasium, if not as a complete work in one year, yet to take such steps that it may be made useful at once, and improved as time goes on.

The Venezuelan Question.

The attitude taken by the President of the United States, in his message to Congress touching the dispute between Great Britain and Venezuela, is the most extravagant extension of the "Monroe doctrine" that has ever yet been attempted. Mutterings were heard of the "Monroe doctrine" at the time of the Nicaragua dispute, but no official declaration was made, although, if the claim now made by the United States is a substantial one, they had as much right to interfere as in the present case. The doctrine itself, we have before taken occasion to point out, is nothing more than a declaration of the policy of the United States, and no more forms a part of international law than does their tariff policy. It is aimed aganst all European nations who have interests in this hemisphere, and being an attempt at a derogation of their rights it cannot be said to be a convention of the nations. In order to make it effective the United States must either base it upon treaty, the convention of all nations, or solely upon their ability to enforce it by arms. The fact that, after it had been resorted to in the diplomatic correspondence, a member of Congress thought fit to introduce a bill for the purpose of authorizing a meeting of representatives of all South American republics with the United States, to declare it to be a part of international law, indicates, in the first place, a curious notion as to the source from which international law proceeds, and secondly, a very strong suspicion, if not an admission, that it is not a part of international law as now understood by the United

States. It is worthy of comment also, that the proposer of the measure carefully left out the power most interested in this hemisphere, namely, Great Britain.

It is curious to compare the claim now made by President Cleveland and his Government with the declaration made by President Monroe. The latter's declaration was that an attempted extension of the European system in this hemisphere would be regarded as an unfriendly act to the United States. No mention is made of international law, nor could his declaration be at that date a part of such a code, and the mere promulgation of a statement that a certain act would evince unfriendliness can by no possible system of logic be tortured into a maxim of international jurisprudence. Nothing has ever occurred since between the interested powers to indicate any assent to the claim as thus made.

Apart altogether from the question of the Monroe doctrine as a proposition of international law, the President's message and the despatch of the Secretary are of such a nature that no independent power, whatever its rank might be in the scale of nations, could accede to it. The claim that the United States are "sovereign" in this hemisphere is so extravagant, and so contrary to principle and fact, that it cannot for a moment be entertained. A nation is sovereign within its own territory if it is independent; nowhere else. And the claim that the United States should exercise "sovereign" rights over all those European powers which have actual territorial jurisdiction in this hemisphere, if acceded to by those powers, would reduce them to the vassalage of the United States.

But even if the claim of sovereignty had not been made, the message is still open to criticism. Underlying the whole question there is the absurdity involved in the statement that Great Britain is intruding upon Venezuelan territory, followed by a request for a commission to ascertain whether this is the fact. This of itself is enough to condemn the message as being so entirely illogical as not to be regarded seriously. But even if the United States was apprised that, as an actual fact Great

Britain had overstepped her boundaries, on a mere dispute of fact as to the situation of a boundary line, it would come neither technically nor within the spirit of the so-called Monroe doctrine. Again, the action of the United States is based upon the hypothesis that extension of territory, or accretion of power, by any European nation is a menace to the United States. Considering that Great Britain has three thousand miles of frontier north of the United States, if our presence in this hemisphere is a menace to the United States at all, it is more of a menace in the possession of Canada than it is in the possession of Guiana, which is separated by miles of sea, and is inaccessible by land. It is difficult to conceive then how the accretion of a small quantity of land in South America, even if it were wholly without justification, could be any menace at all to the United States. We leave out of the question altogether the fact that British government is of a somewhat higher grade than that of Venezuela or any other South American republic, inasmuch as it is open to republicans to reply that the worst form of a republican government is better than the best system of monarchical government. If, however, the United States is, in fact, so interested in a boundary dispute that it must take an unfrendly attitude to one of the parties, it surely must be obvious to everyone that it is not the proper party to act as the arbiter of the dispute. Respectable and eminent though the commissioners may be, the source of their appointment being an interested one, their report cannot be received under any pretence as an adjudication. Indeed, it can have no more value than a letter from an official of the United States to the President. We have said before, and it is worthy of repetition, that we believe the people of the United States to have too much common sense, and too much anxiety for the welfare of their commerce, to enter upon the only means of enforcing their pretensions upon any European nation, namely, by war.

CORRESPONDENCE.

Malicious Corporations.

To the Editor of the Canadian Law Times.

Sir,—In connection with an article on "Malicious Corporations" in the last issue of your journal, I would like to call your attention to a Manitoba case, Wilson v. The City of Winnipeg, 9 Man. R. 193, which seems to have been overlooked by Mr. Mowat.

In this case, which was for malicious prosecution, the Full Court held that a municipal corporation was liable in an action of that kind.

Yours, etc.,

STUDENT.

28th December, 1895.

THE
CANADIAN LAW TIMES.

FEBRUARY, 1896.

MORTGAGOR'S EQUITY OF REDEMPTION.*

ITS NATURE.—Chancellor Boyd, dealing with the nature of an equity of redemption, says: "Now, an equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitations it exists as a right, and as an estate over which the Court has no discretionary power. The law of England is that which by legislation has been adopted in this Province touching the limitation of the right to redeem. One will search the English books in vain to find anything upholding the view that the Court exercises discretionary power in granting redemption to a person interested in the equity of redemption" (*a*).

This statement of the law is to a certain extent supported by the judgment of Lord Chancellor Hardwicke in Casborne v. Scarfe (*b*), where he says: "An equity of redemption has always been considered as an estate in the land; for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the per-

* This article consists of extracts from lectures on mortgages delivered before the students of the Law School at Osgoode Hall.

(*a*) Martin v. Miles, 5 Ont. R. at p. 416.

(*b*) 2 W. & T. Ldg. Cas., 6th ed., 1175.

son therefore entitled to the equity of redemption is considered as the owner of the land."

Authority, however, is not lacking in support of the view that the equity of redemption is a mere interest and not an estate. Thus Sir John Leach, V.C., speaking of a bankrupt mortgagor, says: "After a mortgage in fee no estate is in form left in the bankrupt. The equity of redemption is not an estate but an interest (*c*).

Vice-Chancellor Bacon deals with the question as follows: "Then what remains? The equity of redemption. It is said that that is an estate. But it is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that Gavelkind and Borough English may apply to it. All these are necessary consequences of the law which recognizes the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a misapplication of terms to call an equity of redemption an estate in the proper technical legal sense. That it is a right is beyond all doubt, a right which may be enforced in this Court" (*d*).

The only practical importance of the question arises from the fact that where a person is asserting a mere equitable right in a Court of Equity, the Court may so mould the whole matter, by the imposition of terms, as to do complete equity in the matter, on the ground that the right itself, being a mere creature of equity, may be so fashioned and modified by the Court as to prevent it from becoming an instrument of injustice under the particular circumstances of the case, in pursuance of the maxim that he who seeks equity must do equity; while a sort of notion appears to have influenced the minds of some Judges so as to lead them to think that although the Court may so mould its doctrines as to enable it to impose terms for the purpose of doing justice in a case where a party to an

(*c*) Lloyd v. Lander, 5 Mad. at p. 290.
(*d*) Paget v. Eade, L. R. 18 Eq. at p. 125.

action is asserting a mere equitable right, yet the Court is powerless to impose terms, or to stay its hand, when such party is relying upon an equitable estate and not upon a mere equitable right.

That the Court may impose terms as a condition precedent to the enforcement of a mere equitable right is clearly settled (*e*), and I am not aware of any English authority for the proposition that the Court may not also impose terms as a condition precedent to giving equitable relief to a person who is seeking to assert rights which are incident to an equitable estate.

Lord Justice Cotton says: "It is true that every Court now administers and deals with the rights of parties having regard both to law and equity; but the legal position and the equitable position are still different and distinct, so that it is a mistake to say that because this deed is operative in equity, so as to give the plaintiff a claim to crops which were not in existence at the time the deed was made, it must be treated since the Judicature Act as if for that purpose it were effectual at law" (*f*).

As to imposing terms upon a mortgagor seeking redemption, we find Sir John Leach, V.C., saying: "It seems at first sight a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, and made necessary parties by his act, but it is the constant course of the Court, and it is supported upon this principle, that at law after a mortgage is forfeited the estate is the absolute property of the mortgagee, and he may deal with it as his own; and that if the mortgagor comes for the redemption which the equity of this Court gives to him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts" (*g*).

Coming to the decisions in our own Province, we find that it was held to be inequitable to allow redemption

(*e*) Yorkshire Railway Waggon Co. v. Maclure, 19 Chy. D. at p. 484; Re Madderer, 29 Chy. D. 523; Blake v. Gale, 32 Chy. D. 571.

(*f*) Clements v. Matthews, 11 Q.B.D. at p. 814.

(*g*) Wetherell v. Collins, 3 Mad. 255.

under the circumstances set forth in the case of Skae v. Chapman (*h*), and in that case a bill for redemption was dismissed with costs. A mortgagee of lands had bought in the equity of redemption at a sheriff's sale, which was supposed by all parties at the time to be valid, though in fact it was invalid on technical grounds; but for seventeen years before the filing of the bill to redeem, sales and resales had been made from time to time of various portions of the property, upon the assumption that the sheriff's sale was good; buildings had been erected; some were burned down and new buildings put up; houses built for one purpose were altered to suit other purposes; fields and commons were converted into sites for shops, hotels, a bank, and other places of business, all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of or had reason to suspect the defect in the title of the parties, and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim and made defendants to the suit numbered nearly one hundred. This case was subsequently followed by the same learne Judge (Spragge, C.), in Kay v. Wilson (*i*), and it is referred to with apparent approval by V.C. Blake, in Dougall v. Dougall (*j*).

If I may be permitted to express an opinion upon the subject, it is that, where a person interested in the equity of redemption of mortgaged property is seeking relief in respect of that right of redemption, he is appealing to the purely equitable jurisdiction of the Court; and that although a Court of equity, like a Court of law, is in many cases bound to administer justice to parties according to their strict legal rights (i.e., according to such rights as would be recognized in a Court of law), yet where an appeal

(*h*) 21 Gr. 534.
(*i*) 24 Gr. 212.
(*j*) 26 Gr. 408.

is made to the equitable jurisdiction of the Court, whether such appeal is made with reference to an equitable estate, or with reference only to an equitable interest, it is not only within the power, but it is also the duty of the Court, to apply the maxims that he who seeks equity must do equity, and he who comes into equity must come with clean hands, and equity assists the vigilant, and not those who slumber upon their rights (*k*).

Applying these maxims we can conceive of many cases in which it would be the duty of a Court of equity to refuse to allow redemption, although the equity of redemption has not been extinguished by any of the regularly recognized methods.

Effect of Purchasing Equity of Redemption.—Where a person purchases land subject to a mortgage, for payment of which the vendor is personally liable, he will, in the absence of any express stipulation upon the point, be bound to indemnify the vendor as against his personal liability upon the mortgage.

The first case in our Courts in which this doctrine was acted upon was Thompson v. Wilkes (*l*), which followed the case of Waring v. Ward (*m*), where Lord Eldon, speaking of the position of a purchaser of an equity of redemption, says: "If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet the Court, if he received possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for being become owner of the estate,

(*k*) See Cumming v. Fletcher, 14 Chy. D. at p. 708; Mills v. Jennings, 13 Chy. D. at p. 646, and Re The Union Assurance Co., 28 Ont. R. at p. 642, which show that the equitable doctrine as to consolidation of mortgages is founded upon the maxim that he who seeks equity must do equity, and the doctrine is applied in those cases only in which the mortgagor has forfeited his estate at law and then comes into equity seeking equitable relief, whereupon the Court imposes equitable terms upon him as the price of according him the right to redeem.

(*l*) 5 Gr. 594.

(*m*) 7 Ves. 337.

he must be supposed to intend to indemnify the vendor against the mortgage." These cases have been followed by Canavan v. Meek (*n*) and Boyd v. Johnston (*o*).

The Ontario Court of Appeal has held that a married woman to whom land is conveyed, subject to incumbrance, whether by way of purchase or exchange, is not bound to indemnify her grantor against the payment of such incumbrance, unless she expressly contracts to do so; that is, that Court holds that the obligation, which in such a case is imposed upon a purchaser who is *sui juris*, is not a contract, express or implied, which will bind the separate estate of a married woman (*p*).

This decision is apparently in conflict with the subsequent judgment of the Queen's Bench Divisional Court in Beatty v. Fitzsimmons (*q*), where Chief Justice Armour gives reasons for holding that the obligation in question is one which arises from implied contract. This latter case has since been followed by the same Court in Oliver v. McLaughlin (*r*).

If the doctrine in question be based upon implied contract, it then follows as a matter of course, that the obligation of the purchaser is not in any way an equitable obligation, but is one which could always have been enforced against him by the vendor in a Court of common law, for there is no such thing as an implied contract binding in equity which would not be equally binding at common law.

Nobody has up to date been bold enough to assert that the obligation in question is one which could have been enforced at law.

This presumption of law may of course be rebutted by showing that it was not the intention of the parties that the purchaser should assume such an obligation, and it has

(*n*) 2 Ont. R. 636.
(*o*) 19 Ont. R. 598.
(*p*) McMichael v. Wilkie, 18 App. R. 464.
(*q*) 23 Ont. R. 245.
(*r*) 24 Ont. R. 41.

been determined that the real intention of the parties may be shown by parol evidence (*s*).

It has also been held by Mr. Justice Rose that a vendor not only has a personal remedy against the purchaser to secure indemnity against a mortgage, subject to which the property was sold, but that he also has a lien upon the lands, by way of security for such indemnity, which lien may be enforced as against the purchaser, and all persons claiming under him (*t*). It appears to me, however, that that decision is open to very grave doubt, if the obligation of the purchaser be based upon personal status, as assumed by the Court of Appeal, or upon implied contract, as held by the Queen's Bench Divisional Court, while it may be supported if the obligation in question be based upon the doctrine of trust, as is hereinafter suggested.

Where a mortgagor has sold the lands subject to the mortgage, and the mortgagee has then brought an action against the mortgagor and the purchaser, claiming a personal order for payment as against the mortgagor and foreclosure as against the purchaser, and the mortgagor in his defence prays that the purchaser be ordered to pay the mortgage debt direct to the mortgagee, it has been held that the Court will, for the purpose of protecting the mortgagor and preventing circuity of action, order the purchaser to make such payment direct to the mortgagee (*u*).

One reason which appears to lie at the bottom of the rule that a purchaser of an equity of redemption is bound to indemnify his vendor against all claims of the mortgagee, is this: when a man purchases land subject to a mortgage, he, as a matter of course, to the extent of the amount of the mortgage, pays less for the land than he would do if the mortgage were not in existence, that is,

(*s*) Corby v. Gray, 15 Ont. R. 1; Beatty v. Fitzsimmons, 23 Ont. R. 245; and Brit. Can. Loan Co. v. Tear, 23 Ont. R. 664; Walker v. Dickson, 20 App. R. 96.

(*t*) Hamilton Provident Loan Co. v. Smith, 17 Ont. R. 1.

(*u*) Campbell v. Robinson, 27 Gr. 634; but see contra. Williams v. Balfour, 18 S. C. R. at pp. 479-80; McMichael v. Wilkie, 18 App. R. at pp. 472-3, and Walker v. Dickson, 20 App. R. 96.

he usually merely purchases the interest of the vendor in the land, and retains out of the full value of the land a sufficient sum to pay off the mortgage. Where this is the state of facts, it is of course but reasonable that the purchaser should apply the money for the purpose for which it was retained, and thereby save the vendor from being called upon by the mortgagee to pay the same; for if the vendor had been paid the full value of the land, he would have received this money, with which he himself could have paid off the mortgage, and have saved himself from being further called upon in respect thereof, and it might reasonably be held that the said moneys are so retained by the purchaser upon a constructive or implied trust that the purchaser would apply them pursuant to the obligation assumed by him as between himself and his vendor.

The border line between contract and trust is not very clearly drawn (*u*). Lord Westbury tells us that "an obligation to do an act with respect to property creates a trust" (*v*).

One instance of the application of this principle has become crystallized into statutory form. Section 24 of the Execution Act (R. S. O. c. 64), provides that in the event of a person purchasing mortgaged lands at a sheriff's sale under execution, and the mortgagee then enforcing payment of the mortgage debt by the mortgagor, then the purchaser shall repay the debt and interest to the mortgagor, who shall have a charge therefor upon the mortgaged lands.

We have already seen that the general and well-settled rule is that wherever a person purchases an equity of redemption from one who is personally liable upon or in respect of the mortgage, he is *prima facie* bound to indemnify his vendor against all liability in respect of the mortgage; but there is a considerable conflict of judicial

(*u*) See article, *ante* Vol. 12, p. 249.

(*v*) Fleeming v. Howden, L. R. 1 Sc. App. 372; and see Legard v. Hodges, 2 R. R. 146, cited with approval in Tailby v. Official Receiver, 13 App. Cas. at. p. 546.

(*w*) 24 Gr. 537.

opinion upon the question whether in such a case the mortgagee may actively and directly enforce payment of his mortgage claim by the purchaser. In an article published in Vol. 2 of this Journal, at pp. 49, 109, 157, 217, I have given my reasons for thinking that he can, and this view is supported by Re Crozier, Parker v. Glover (*w*), and Canavan v. Meek (*x*), and the article in question is referred to with apparent approval by Mr. Justice Patterson in Norris v. Meadows (*y*). This view is also supported by the Supreme Court of the United States (*z*).

On the other hand, this view is opposed to Clarkson v. Scott (*a*); Aldous v. Hicks (*b*); Frontenac Investment Co. v. Hysop (*c*); Canada Landed, etc., Co. v. Shaver (*d*); and the Manitoba case of Real Estate Loan Co. v. Molesworth (*e*); and see Williams v. Balfour (*f*).

As a result of the cases lastly cited, it must now be taken as settled law, in so far as this Province is concerned, that a mortgagee is not entitled to bring an action against a purchaser of the equity of redemption for the purpose of enforcing the aforesaid obligation which the latter owes to his vendor, the mortgagor, to pay off the mortgage, or for the purpose of enforcing an express covenant given by the purchaser to his vendor to make such payment.

The Court of Appeal has even gone so far as to hold that it is not proper, in an action for foreclosure, to join as original defendants the intermediate purchasers of the equity of redemption and to order each one to pay the mortgage debt by way of indemnifying his predecessor in

(*x*) 2 Ont. R. at p. 646.
(*y*) 7 App. R. at p. 244.
(*z*) See 24 Am. L. Rev. 866.
(*a*) 25 Gr. 373.
(*b*) 21 Ont. R. 95.
(*c*) 21 Ont. R. 577.
(*d*) 22 App. R. 377.
(*e*) 3 Man. L. R. 116.
(*f*) 18 S. C. R. 472.

title, in the event of the latter being called upon to pay the same (*g*).

This decision proceeds upon the ground that as a matter of practice and procedure the mortgagee has no right to make any such intermediate purchasers parties to the action, but the Court takes no notice of the practice formerly well established in the Court of Chancery, and not dependent upon any written rule or order of that Court, that the plaintiff is entitled in the first instance to join as parties defendant, not only those persons against whom he seeks direct relief, but also those persons by whom the primary defendants are entitled to be indemnified against the plaintiff's claim (*h*).

There would seem to be no reason why this practice, depending, as it did, upon general principle, and not upon written rule, should not be embodied in our present practice.

The mortgagee may, however, maintain an action against the purchaser of the equity of redemption if he first procures from the mortgagor an assignment of the right to enforce the obligation which came into existence when the mortgagor sold the equity of redemption to the purchaser (*i*).

It is not quite clear whether the case of Ball v. Tennant supports the case of British Canadian Loan Co. v. Tear. At first sight it would seem that there is a distinction in principle between the two cases, for in Ball's case there was a covenant, not only that the purchaser would indemnify the mortgagor, but also that he would pay the mortgage debt, and it would seem quite clear that the latter part of the covenant was capable of being assigned. In the Loan Co. case, on the other hand, the equitable obligation of the purchaser was merely an obligation to indemnify his vendor against personal liability upon the mortgage,

(*g*) Walker v. Dickson, 20 App. R. 96.

(*h*) Ford v. Proudfoot, 9 Gr. 482; Totten v. Douglas, 15 Gr. 126; Owston v. G. T. R. Co., 26 Gr. 93, and S. C., 28 Gr. 428.

(*i*) British Canadian Loan Co. v. Tear, 23 O. R. 664.

and it might have been thought that such an obligation was incapable of being assigned until after the vendor had been damnified by being forced to pay the mortgage debt.

In the present state of the authorities, however, it appears that a person who holds a bond indemnifying him against payment of a liability has a right of action against the obligor before he (the obligee) is damnified by being forced to make actual payment of the liability in question. Thus, in Mewburn v. MacKelcan (*j*), there was a bond to "indemnify and save harmless from payment of all liability of every nature and kind," and it was held that an action on the bond could be maintained against the obligor by the obligee after judgment in respect of the liability in question had been obtained against the latter, and before he had made any payment in respect of such liability or such judgment.

The same principle was applied in the case of Wolmershausen v. Gullick (*k*). In that case it was held that a surety against whom judgment had been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, may maintain an action against a co-surety for the purpose of enforcing his equitable obligation to contribute towards the common liability.

In both of these cases it will be noted that, although the plaintiff had not paid any portion of the liability in question, yet judgment had been obtained against him in respect thereof, and in both cases this fact appears to have been treated as a necessary element in the case. It cannot, however, be said to be clearly settled whether or not the plaintiffs in those cases would have been entitled to the relief claimed by them if no judgment had been obtained against them in respect of the liability in question.

(*j*) 19 App. R. 729.

(*k*) L. R. 1893, 2 Ch. 514.

In Lindley on Partnership (*l*), it is said that "In the ordinary case of principal and surety, as soon as the creditor has acquired the right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed so as to relieve the surety from his obligation; and when one person has covenanted to indemnify another, an action for specific performance may be maintained before the plaintiff has actually been damnified; and the limit of the defendant's liability to the plaintiff is the full amount for which he is liable; or if he is dead or insolvent, the full amount provable against his estate, and not only the amount of dividend which such estate can pay."

If such an action can be maintained by an obligee (equitable or contractual) before he has paid anything in respect of the liability in question, and before judgment in respect thereof has been obtained against him, the judgment in the Loan Co. case would appear to be well founded upon principle; but if such an action cannot be maintained until the obligee has paid something in respect of the liability, or has suffered judgment to go against him in respect of the liability, then the decision in the Loan Co. case would appear to be questionable, as it would seem that the obligation of the purchaser of the equity of redemption was not assignable by the vendor, for how could a man assign his rights under an obligation so as to give to his assignee a right of action thereon before the assignor could have himself maintained such an action?

It may be that there are some cases in which a surety can, and some cases in which he cannot, maintain an action against the principal debtor to enforce the obligation of the latter to indemnify the surety before the surety has paid the liability and before judgment has been obtained in respect thereof against the surety, each case depending upon the question whether the creditor's claim was a liquidated or an unliquidated demand. In other words, the

(*l*) 5th Ed. 375.

surety may acquire such right of action (to use the phraseology of Lindley on Partnership), "As soon as the creditor has acquired the right to immediate payment from the surety," that is, the right to immediate payment of an ascertained amount.

This distinction was acted upon by the Court of Appeal in Sutherland v. Webster (*m*), in which Maclennan, J.A., apparently approves of the Loan Co. case: it was there held that a contract by an incoming partner to indemnify a retiring partner against the liabilities and contracts of the firm, did not give a cause of action merely because an action had been brought against the firm to recover unliquidated damages for an alleged breach of an agreement, and that this was not like the case where the liability to be indemnified against has been ascertained.

Marshalling of Incumbrances at Instance of Persons Interested in the Equity of Redemption.—Where several parcels incumbered by the same mortgage are successively sold to various purchasers free from incumbrance, the last purchasers are (in order) to be first charged to the full value of their parcels until the debt is discharged. If they purchase subject to the mortgage, then it is to be apportioned (*n*).

Judge Story doubts the soundness of this rule (*o*), but Chancellor Kent approves of it and explains it as follows: "Where there is no equality there is no contribution, as if a person seised of three acres of land charged with a judgment, sells one acre to A., the two remaining acres are first chargeable in equity with the payment of the debt; and if he should sell another acre to B., the remaining acre in his hands, or in those of his heir, is chargeable in the first instance with the judgment debt as against B. as well as against A., and if that prove insufficient, then the acre

(*m*) 21 App. R. 228.

(*n*) Jones v. Beck, 19 Gr. 671. See Renwick v. Berryman, 3 Man. L. R. 387; Fraser v. Nagle, 16 Ont. R. 244-5; Re Jones, L. R. 1893, 2 Ch. 461.

(*o*) Story's Equity, sec. 1233 a.

sold to B. ought to supply the deficiency in preference to the acre sold to A., for when B. purchased he took the land chargeable with the debt in the hands of his debtor in preference to the land already sold to A. Between purchasers in succession at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them (*p*)." This view of the law has recently been sustained by the Supreme Court of the United States (*q*).

This doctrine is based upon the same principle as the doctrine of marshalling, the application of which is thus defined by Lord Justice Cotton: "If A. has a charge upon Whiteacre and Blackacre, and if B. also has a charge upon Blackacre only, A. must take payment of his charge out of Whiteacre, and must leave Blackacre so that B., the other creditor, may follow it and obtain payment of his debt out of it; in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whitacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go. There was also another class of cases in which the doctrine was applied, namely, where under the old law creditors by simple contract had no claim upon real assets, unless charged with or devised for the payment of debts, a Court of equity would compel specialty creditors who might resort in the first instance to the personal estate, in priority of creditors by simple contract, and to the real assets, in exclusion of them, to recover satisfaction, in the first place, out of the real assets as far as they went" (*r*).

If the creditor has made his claim out of that portion of the estate covered by his security, which, as between the owners of the several portions of such estate, is only

(*p*) 4 Kent's Com. 179, note a.

(*q*) National Savings Bank v. Creswell, 21 Alb. L. J. 431.

(*r*) Webb v. Smith, 30 Chy. D. at p. 200.

secondarily liable to such claim, the owner of the estate so realized upon will be entitled to be subrogated to the position of the creditor, so as to exercise the rights of the creditor, and realize the claim out of that portion of the estate which is primarily liable therefor (*s*).

Lord Westbury says: "The doctrine of marshalling is no more than this, that where one person has a clear right to resort to two funds, and another person has a right to resort to only one of those two funds, the latter may say that as between himself and the double creditor, that double creditor shall be put to exhaust the security upon which the single creditor (if I may so call him) has no claim" (*t*).

No person can enforce the doctrine of marshalling so as to prejudice a third person *who has a higher equity than himself.*

A. H. MARSH.

(*s*) Ex. p. Salting, 25 Chy. D. 148.

(*t*) Dolphin v. Alyward, L. R. 4 H. L. at p. 505.

(*u*) See Webb v. Smith, 30 Chy. D. at p. 202; Ex. p. Salting, 25 Chy. D. 148; Jones v. Beck, 18 Gr 671: Clark v. Bogart, 27 Gr. 450; but as to the latter part of the proposition, see *contra* Flint v. Howard, L. R. 1893, 2 Ch. 72-73, which appears to be questionable.

STATE TRIALS.—II.

The first trial in Cobbett's collection which is reported *verbatim* is under the reign of Queen Mary. The report is said to be found in Somers' Tracts, also in Foxe's Book of Martyrs. The reason I refer to it is, that as the date of the case is 1553, some system of shorthand must, if the report is genuine, have been practised in England before the date commonly assigned to its re-introduction, as stated in Paper I. The subject is obscure, and I have not had materials on which to satisfy myself as to how far the reports of the cases before the reign of Charles I. are genuine. As printed, they read as if they are true reports, and some of the dialogues are curious. In Throckmorton's case (1554), Bromley, Lord Chief Justice, Hare, Master of the Rolls, and other commissioners, were appointed to try the prisoner. Throckmorton wished to address the Court before pleading to the indictment, and the following dialogue took place:

Hare—You must first answer to the matter wherewith you are charged, and then you may talk at your pleasure.

Throckmorton—But things spoken out of place were as good not spoken.

Bromley—These be but delays to spend time, therefore answer as the law willeth you.

Throckmorton—My lords, I pray you make not too much haste with me, neither think not long for your dinner, for my case requireth leisure, and you have well dined when you have done justice truly. Christ said, "Blessed are they that hunger and thirst after righteousness."

Bromley—I can forbear my dinner as well as you, and care as little as you, peradventure.

Shrewsbury—Come you hither to check us, Throckmorton? We will not be so used; no, no; I, for my part,

have forborne my breakfast, dinner and supper to serve the Queen.

Throckmorton waived the point and pleaded before he talked; but his very human anxiety about the impatience of Justice when she is hungry, and his belief in her good nature when she is full, were not without foundation, in spite of the Chief Justice's angry repudiation. There are Judges living this day who have the same weakness. Thockmorton's case was singular in this respect, that he was acquitted by the jury. The Queen's attorney thereupon moved the Court that "they and every of them be bound in a recognizance of £500 apiece to answer such matters as they shall be charged with in the Queen's behalf." They were committed to prison and subsequently called before the Court in Star Chamber. They were fined sums varying from two thousand pounds each to one thousand marks, and committed to the Fleet Prison. From this den they emerged on paying their dues, which were two hundred and twenty pounds apiece. The result of this salutary example was that the next jury convicted the brother of Sir Nicholas Throckmorton on the very same evidence that Sir Nicholas had been acquitted on.

Throckmorton's case was followed as a precedent on the point that the Crown can challenge jurymen without assigning any cause. The prisoner objected during the trial to the admissibility of the evidence of one Vaughan, on the ground that the witness was a condemned man and therefore unreliable, because if he swore to what would suit the purposes of the prosecution he might be respited. The evidence in question was not taken orally in presence of the prisoner, but was a confession obtained out of Court. No objection was made to it on this ground by the prisoner, and the Court allowed it to be used against him, as well as several other confessions obtained in the same way. They even went further, and refused to hear a statement offered in Court by one Fitzwilliams, who had the courage to come forward and volunteer to contradict on oath, if necessary, a statement in one of these confessions implicating the prisoner.

There was in the argument between Throckmorton and the Crown counsel an appeal to St. Jerome's definition of what constitutes a false witness.

The distinction between the admissibility of evidence and the competency of witnesses was ignored for a very long time. The restrictions imposed by the civil law were alluded to by Throckmorton, but he admitted that they were not in force in England. The exclusion of certain classes of witnesses enforced by the common law was first relaxed by the Imperial Act, 6 & 7 Vict. cap. 85. The changes in the Canadian Law have been as follows:

1. *Parties to the Suit.*—By 12 Vict. cap. 70 (1849), all incapacity by reason of crime or interest was abolished, but parties to the suit were expressly excepted.

By 14 & 15 Vict. cap. 66 (1851), they were rendered admissible as witnesses on their own behalf.

By 16 Vict. cap. 19 (1853), this last mentioned Act was repealed, and parties were allowed to be called only as witnesses for the opposite party. This Act was incorporated in C. S. U. C. cap. 32.

By 33 Vict. cap. 13, sec. 2 (Ont.), (1869), the law was again changed, and since that Act they have been, and are now, competent and compellable witnesses on their own behalf. This section is now R. S. O. cap. 61, sec. 2.

2. *Husband and Wife.*—By 36 Vict. cap. 10 (Ont.), (1873), the husbands and wives of the parties to any suit, and of the persons in whose behalf any such suit may be brought or defended, became (except as therein excepted) competent and compellable. The exceptions were: (1) Sec. 2. But no husband or wife shall be compellable to disclose any communication made during coverture. (2) Sec. 3. And no husband or wife shall be competent or compellable to give evidence for or against the other in any proceeding instituted in consequence of adultery. These exceptions were consolidated in the revision of 1877 as sections 7 and 8.

Therefore, in 1877 it stood that the husbands and wives were competent and compellable to give evidence except as

to questions of adultery and communications made during marriage.

The next change was by 45 Vict. cap. 10 (Ont.), (1882), which, as to exception, (1) laid down the rule by sec. 4, now contained in R. S. O. cap. 61, sec. 7, which makes the husband and wife competent to give evidence in such proceeding, with the proviso mentioned in that section In 1877 they were not competent witnesses on questions of adultery. In 1882 they became so, and are now. As to the second exception, communications made during marriage, there was no change made. Communications made during coverture or marriage have been protected through all changes.

3. *Parties Interested.*—By 12 Vict. cap. 70, all incompetency from interest was abolished. But this was not to render competent parties to the action, nor any person for whose immediate or individual benefit any action may be brought or defended either wholly or in part.

By 14 & 15 Vict. cap. 66, this proviso was repealed, and therefore they became competent witnesses.

By 16 Vict. cap. 19, sec. 1 (consolidated as C. S. U. C. cap. 32, sec. 5), they once more became incompetent on their own behalf, but might be examined at the instance of the opposite party.

This was changed again by 33 Vict. cap. 13, sec. 4 (1869), and they became competent and compellable witnesses, and have remained so ever since. See R. S. O. cap. 61, sec. 4.

4. *Parties in Actions for Breach of Promise of Marriage.*—Previous to 1882 they were not competent to give evidence. By 45 Vict. cap. 10, sec. 3, they became so. They had been specially excepted by 33 Vict. cap. 13, sec. 5 (b).

Taking the Revised Act of 1887, we find the sections as follows: Sec. 2 dates back to 33 Vict. cap. 13, sec. 2. (Imp. Act, 6 & 7 Vict. cap. 85). Sec. 3 dates back to *ibid.*, sec. 3. (Imp. Act, 6 & 7 Vict. cap. 85). Sec. 4 dates back to *ibid.*, sec. 4, and 36 Vict. cap. 10, sec. 1. (As to parties, Imp. Act, 14 & 15 Vict. cap. 99, sec. 2; as to hus-

band and wife, Imp. Act, 16 & 17 Vict. cap. 83, sec. 1). Sec. 5 dates back to *ibid.*, sec. 5 (d). (Imp. Act, 14 & 15 Vict. cap. 99, sec. 3). Sec. 6 dates back to 45 Vict. cap. 10, sec. 3. (Imp. Act, 32 & 33 Vict. cap. 68, sec. 2). Sec. 7 dates back to 45 Vict. cap. 10, sec. 4. (Imp. Act, 32 & 33 Vict. cap. 68, sec. 3). Sec. 8 dates back to 33 Vict. cap. 13, sec. 5 (c), 36 Vict. cap. 10, sec. 2. (Imp. Act, 16 & 17 Vict. cap. 83, sec. 3). Sec. 9 dates back to 36 Vict. cap. 10, sec. 4. Sec. 10 dates back to 36 Vict. cap. 10, sec. 6. Sec. 11 dates back to 36 Vict. cap. 10, sec. 7.

In Throckmorton's case, also, the prisoner claimed the benefit of the Statute 5 & 6 Edward VI. cap. 11 (1552), which provided that no person shall be indicted or convicted of treason "unless the offender be accused by two lawful and sufficient accusers." This enactment remained untouched until 1695, when by an Act of William III., doubts as to the construction of the Act were finally removed. In Canada under the Code (sec. 684), no one can be convicted of the offences enumerated as treason in sec. 65 on the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the prisoner. Offences, treasonable in their nature, but not coming within sec. 65, do not require corroborative testimony.

Exactly two hundred years before the Statute of 1552, namely, in 1352, the offence of treason had been defined in England by 25 Edward III. c. 2(*a*). In the reign of Queen Anne (1 Anne c. 17; 6 Anne c. 7), persons questioning or hindering the operation of the Act of Settlement were also declared guilty of treason. In 1817 (57

(*a*) Of the offences enumerated in the Statute of Edward III., four remain in the Code as treason, viz.:

1. Compassing or imagining the death of the King or Queen or their eldest son: C. C. 65 (a), (b), (c). The Code requires an overt act. (See also sec. 614).

2. Violating the King's companion, or King's eldest daughter unmarried, or the wife of the eldest son or heir apparent: C. C. 65 (j).

3. Levying war against the King in his realms: C. C. 65 (*f*).

4. Being adherent to the King's enemies (alien enemies) in the realm or elsewhere: C. C. 65 (i).

The other three offences mentioned are not treason under the Code, namely:

5. Forgery of the King's seal or money.

6. Bringing in counterfeit money.

7. Killing the Chancellor or Judges.

Geo. III. cap. 6), the offences enumerated in 25 Edward III. were increased by the addition of two more. Finally, in 1848 (11 & 12 Vict. cap. 12), the offence of compassing the deposition of the King or of levying war within the realm, are to be held to be treason, even if the compassing be only speaking of words.

During the reign of Elizabeth, the trial of Campion and his brother Jesuits, the conspiracies of Babington, and of the friends of Mary Queen of Scots, furnished occupation to the Criminal Courts.

Campion's Case.—In this case the charge was that outside the jurisdiction the prisoners (eight in number) had conspired the Queen's death and the overthrow of the established religion, and had stirred up strangers to invade the realm. Further, that they had come into England to seduce the Queen's subjects from her allegiance. They were indicted all together, but arraigned severally and pleaded each not guilty. Campion asked that the indictment be severed and that they be tried severally. If A. and B. are tried together for a crime, and a witness swears that A. confessed to him that he, A., together with B committed the offence, the Judge may tell the jury that B. is not affected by this confession, but A. is. How far may the jury be affected to the prejudice of B. in spite of this direction? This was Campion's argument. It was overruled of course. In our time there is less danger than in Campion's of prisoners being prejudiced by being tried together, but the objection is entitled to consideration.

The evidence for the prosecution was the proved refusal of some of the prisoners, especially Campion, to answer in the negative the question, whether, if the Pope excommunicated the Queen, her subjects were thereby relieved from their allegiance. One Elliot proved a sermon by Campion in which the preacher grieved over the heresy of England and prayed for a change. Munday, a witness, swore to conversations which Campion and others had with Allen, who had been made Legate. Munday also swore that one of the prisoners, Bristow, told him "he, Bristow was cunning in fireworks, and that shortly he would

make a confection of wildfire wherewith he would burn Her Majesty when she were on the Thames in her barge."

Sleidon gave evidence against Kirbie, another of the prisoners, by telling what Tedder, a friend of Kirbie's, had said about the Queen.

The case obviously rested upon the prisoners' refusal to commit themselves to their line of action in case of excommunication. The report thus concludes:

"Lord Chief Justice (Sir Christopher Wray).—You that be here indicted, you see what is alleged against you. In discharge whereof, if you have any more to say, speak, and we will hear you until to-morrow morning. We would be loth you should have any occasion to complain on the Court, and therefore, if ought rest behind that is untold, that is available for you, speak, and you shall be heard with indifference."

They all thanked his Lordship, and said they could not otherwise affirm, but that they had found of the Court both indifference (*b*) and justice. Then Campion addressed the jury. They retired, and after an hour, returned and pronounced all guilty.

L. C. J.—Campion and the rest, what can you say why you should not die?

Campion—It was not our own death that ever we feared. We knew that we were not lords of our own lives, and therefore, for want of answer, would not be guilty of our own deaths. The only thing we have now to say is, that if our religion do make us traitors, we are worthy to be condemned, but otherwise are and have been as true subjects as ever the Queen had any.

The prisoners were hanged and quartered with the usual cheerful ceremonies, 1st December, 1581.

R. E. KINGSFORD.

(*b*) Compare the prayer in the Prayer Book for the Church militant: "Grant unto her whole council and all that are put into authority under her, that they may truly and indifferently minister justice,"—a prayer which is answered sometimes not at all in the sense intended by the Prayer Book. Indifferent justice is not uncommon, but is not as satisfactory as if administered according to the primary meaning of the adjective.

EDITORIAL REVIEW

Sir H. P. Pellew Crease.

Sir Henry P. Pellew Crease, one of the Justices of the Supreme Court of British Columbia, has retired, after a service on the Bench of more than a quarter of a century, and on his retirement has received the honour of knighthood.

When the full Court met, on 17th January, to deliver judgments, Chief Justice Davie said, after the business of the Court was concluded:

"Before the Court adjourns I wish to allude to the fact that this is the last occasion upon which we shall sit with Sir Henry Crease, who has been honoured by Her Majesty, and whose resignation takes effect upon Monday next. The delay arose by request of myself, so that Sir Henry could be in a position to deliver judgments upon the cases in which he was engaged." Turning to Sir Henry Crease the Chief Justice proceeded:

"It must be a source of great satisfaction to you, Sir Henry, as I am sure it is to your brother Judges, and the profession and public at large, that at the termination of an honoured and useful judgeship you should have been enabled, in the short time which has elapsed between your retirement and its coming into effect, to wind up and finally adjudicate upon all matters which have been submitted to you for judgment, and that on this, the last practical day of a judicial career of more than twenty-five years, when you have decided to retire and enjoy the well-earned repose to which a life of activity and usefulness entitles you—crowned by the distinction which has been conferred upon you by Her Most Gracious Majesty herself

—you bring to bear upon your last decisions, faculties as sound as you possessed when Her Majesty, after first summoning you to her councils as Attorney-General, called you to the high judicial office which you have now so long adorned. During all this time your good counsels have never been wanting at the proper moment, whilst your unvarying kindliness of disposition has endeared you to those who have known you.

"That yourself and Lady Crease may live for many years in the enjoyment of health and prosperity is the earnest desire of all your friends; and in now parting with you, permit me to add the assurance of your brother Judges that we shall never forget all your excellent qualities of heart and of mind, and that you will always carry with you our sincere good-will and esteem."

Sir Henry Crease, who was visibly affected at taking leave of those with whom he had been so long associated, said he could hardly find words to express his gratitude for the kindly expressions he had heard. At parting from his brother Judges he desired to thank them for the good offices of which he had been the object at their hands, for their forbearance, their assistance, and the active aid they had always been ready to extend when required to assist in administering justice so that what was right might be done. He had to thank all the senior members of the bar, without whose aid and wise counsel the Courts of this Province could never have arrived at the wise conclusions which characterized them. He also thanked the junior members of the Bar for their many acts of forbearance, for which all Judges must occasionally ask. There was still a younger branch who had not yet assumed the toga—the students, for as the boy is father of the man, so the student is the father of the coming Judge. He had also to extend his thanks to all the registrars who had served during his term on the Bench, from the time of Hon. Mr. Pooley to the present day, for the assistance they had given him by the efficient discharge of their duties.

He would also thank the under officers of the Court for the cheerfulness and alacrity with which they had always

performed their duties, especially Mr. Evans and Mr Bland. In concluding his remarks, he bade them all good-bye, and hoped that the high tone which now distinguished the administration of law in the Province would be sustained.

Hon. D. M. Eberts, Attorney-General, on behalf of the Bar, expressed the regret that was felt at the retirement of Sir Henry from the Bench. He was sure he voiced the feeling of the Bar and the people of the Province in saying this. During his honourable career of twenty-five years as a Judge Sir Henry had fairly and justly administered the law. He would take this opportunity of offering his congratulations to Sir Henry on the honour which had been conferred on him by Her Majesty, and hoped he would long enjoy it.

Sir Henry Crease, in expressing his thanks, modestly remarked that he was not vain enough to consider the honour had been conferred so much for any merits of his own as an expression of compliment by Her Majesty to the Province.

Sir Henry is the last of the Judges of British Columbia who was appointed under the Royal Sign Manual when the Province was a Crown colony.

HAMILTON LAW ASSOCIATION REPORT FOR 1895.

The number of members at the date of last report was 72; two members have resigned, two left the county, and three have been added during the year. The present membership is 71. The annual fees to the extent of $342.50 have been paid. The number of bound volumes in the library is 2,836, of which 65 were added during the past year. A large order was recently sent to the publishers, but the books ordered have not yet arrived. The following periodicals are received, namely, "The Law Times," "The Times Law Reports," "The Law Journal Reports." "The Solicitors' Journal," "The Albany Law Journal," "The Canada Law Journal," "The Canadian Law Times," "The Western Law Times," "The Green Bag," "The Law Quarterly Review."

The Treasurer's report is submitted herewith, giving a detailed statement of receipts and expenditures in the form required by the Law Society. All the liabilities of the association have been paid except the loan due to the Law Society, the balance yet to be paid amounting to $400.

During the past year representatives of the different law associations met from time to time at Osgoode Hall to consider amendments to the Statutes and Rules of Court affecting practice and procedure. Subsequently the "Judicature Act, 1895," and "The Law Courts Act, 1895," were passed. Under the former Acts rules of Court have been issued to come in force on 1st Jaunary, 1896. At the meetings above referred to your representative proposed an amendment to the "Devolution of Estates Act" providing that land might be sold with the approval of the Judge of the Surrogate Court or Local Master without the necessity of an application to the official guardian. The resolution was carried, but we

regret to say that no steps have been taken by the proper authorities to carry the proposal into effect. We note that in other places a movement in the same direction is being pressed. Agitation will be continued till a proper remedy is provided. During the last session of the Legislature an amendment was passed to the Act respecting Landlord and Tenant, making the relation of landlord and tenant contractual only. Owing to the difference of opinion as to the effect of this Act this association would submit to the Legislature the desirability of passing an explanatory Act at the next session. The association would strongly recommend that an effort be made to procure the free distribution of the Ontario statutes to members of the profession, and that the co-operation of other associations be invited to bring the matter under the consideration of the Government, and also to supply the Ontario Gazette gratis to all law libraries.

EDWARD MARTIN.
President.

THOMAS HOBSON,
Secretary.

Hamilton, 31st December, 1895.

CORRESPONDENCE.

When Will the Sittings Be Held ?

To the Editor of THE CANADIAN LAW TIMES:

SIR,—Every situation has its solaces, and even the practitioner struggling under the avalanche of statutes and rules which has just descended from the upper heights, will smile wearily at this legislative gem:

Judicature Act, 1895, sec. 81 (3). "In the County of York, there shall in every year be held at the county town of such county not less than three of such sittings, and also a fourth such sittings, *unless the same is required for the administration of justice*, but if the said Judges, on enquiry, ascertain that such fourth sittings for any year is not required for the administration of justice, it shall not be necessary to hold the same or to appoint a day for holding the same."

Yours, etc.

BARRISTER.

THE
CANADIAN LAW TIMES.

MARCH, 1896.

QUALIFIED PRIVILEGE IN SLANDER AND LIBEL.

PRIVILEGE is a defence. This is often obscured by the fact that the circumstances under which the slander was spoken are developed in the cross-examination of the plaintiff's witnesses. But the theory of it is that after proof of the slander or libel and of its publication, the defendant gives in evidence the surroundings and relation of the parties, showing sufficient to raise this defence, and that the plaintiff in reply proves express malice, i.e., malice in fact. In practice, however, the plaintiff usually finds himself unable to close his case without adducing evidence to show malice, thus meeting the state of facts which he fears may have established privilege. This can only be done in some instances by the dangerous expedient of putting the defendant in the box, but reliance is usually placed on the incidents which frequently attach themselves to the defendant's conduct.

This defence is commonly called privilege, but often privileged occasion, and much has been said about whether it is the occasion or the language that is privileged. Both expressions are somewhat inaccurate. The point of the defence is that the person publishing the slander or libel has an interest in the subject matter of it, and that the person to whom it is published has also an interest in its communication to him. It is the

subject matter of the slander or libel [the topic, as it were,] that is,—by reason of the interest in it of both parties,—one which the defendant has the right of discussing. That right being used upon an "occasion," and by the medium of "language," gives rise to the expression quoted.

Perhaps the phrase "privileged occasion" expresses the situation better than anything else, but the right which arises does not come from it nor from the words in use. It all centres in the subject matter and in the interest in it of the parties concerned. The head note in the case of Todd v. Dunn (*a*) is inaccurate. It reads, "It is the occasion of publishing the alleged libel which constitutes the privilege." Mr. Justice Osler's remarks, which it thus assumes to epitomise, are as correct as one would expect. He had been discussing the amount of interest in the defendants, and in rejecting one aspect of it said: "I prefer to rest the privilege in the special occasion already alluded to, which I think was *a priori* a privileged one." But that he did not intend to convey the idea that it was the occasion that constituted the privilege, is evident from his language on p. 98: "The occasion being privileged, to use that term," etc.

The cases which speak of the defendant acting under a sense of duty, social or moral, in making such a communication merely extend the meaning of the word interest. They do not refer to a different condition of things, but merely express another attitude with regard to the subject matter. The duty to speak on a subject argues an interest in it, and implies such a relation to it as compels the person to speak about it. Underlying the duty is the interest, and broadly speaking, the latter term includes it while disclosing the impelling force which results in the words being uttered.

And yet some elaborate discussions may be read in the cases as to whether the defendant had an interest in the subject matter or had a duty to act as he did (*b*).

(*a*) 15 A. R. 85.

(*b*) See Stuart v. Bell, L. R. 1891, 2 Q. B. 341, at p. 349.

In that case, however, the word interest occurs in the phrase "in which his interest was concerned" (quoted from Baron Parke's well-known exposition of privilege in Toogood v. Spyring (*c*), and is confined to a personal interest and not to such an interest as embraces that moral one which is the foundation of the duty.

It used to be said at one time (*d*) that it was sufficient if one of the parties had an interest in the communication. This was looked at askance in Stuart v. Bell, and was exploded in Hebditch v. McIlwain (*e*), in which Mr. Justice A. L. Smith says: "Therefore, in order that the occasion may be privileged, there must be an interest or duty in the person to whom the libel is published corresponding with that of the person publishing it." This is only a later emphasizing of the same statement in Harrison v. Bush (*f*) by Lord Campbell. The case of Ross v. Bucke (*g*) is open to criticism on this point. There the interest alleged to exist in the defendant was only that which he, as medical superintendent of an asylum, might be supposed to have in an ex-employee who had left the asylum three years before. The Court, while of opinion that an intimate friend, who was not a relation, had no such interest in, or duty towards, the person spoken to as would justify the making of a defamatory statement, held the defendant protected on account of the relation in which the receiver of the information stood to the person who was the subject of it. This is not supported by the case relied on by the learned Judges (*h*), and is certainly opposed to Hunt v. Great Northern Railway (*i*), decided by the same Court four days earlier, where Lord Esher says (p. 191): "The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made

(*c*) I C. M. & R. 181.

(*d*) See Whitely v. Adams, 15 C. B. N. S. 418, and Thompson v. Dashwood, 11 Q. B. D. 43.

(*e*) L. R. 1894, 2 Q. B. 54.

(*f*) 5 E. &. B. 344.

(*g*) 21 Ont. R. 692.

(*h*) Stuart v. Bell.

(*i*) L. R. 2 Q. B. 189.

it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things coexist, the occasion is a privileged one."

Mr. Justice Lopes in a later case (*j*) lays down the same doctrine in these words: "It was proved that the circular complained of was sent to some twenty persons who were customers of the defendant's, and therefore there was that corresponding interest between those who sent and those who received the communication, which constitutes a privileged occasion."

Besides, in Stuart v. Bell, the Court decided that it was the defendant's moral or social duty to make the communication, and that as Mr. Stanley was clearly interested there was privilege.

Another idea, which received its quietus in the Hebditch case, was that an honest belief in the person making the statement, that the party to whom it was made had an interest, was sufficient. The interest must exist in fact and not merely in reasonable and honest belief. This point was decided in this Province in 1881 by Mr. Justice Osler in Roberts v. Clinie (*k*) in almost the same language as is found in the case just quoted.

The Judge alone must decide whether this interest in both parties does or does not exist; in other words, whether the shield of privilege is extended over the defendant or not (*l*), but it will be found that the opinions expressed from the Bench upon this question vary as much as do the circumstances which give rise to it.

Recent examples of rulings on this point may be found in the following cases: Gorrst v. Barr (*m*), where a statement to a father as to his daughter was held privileged, probably for the reason, more fully expressed in Cannon v. Orr (*n*), of the discharge of a social duty

(*j*) Nevill v. Fine Arts and General Insurance Co., L. R. (1895) 2 Q. B. 156, at p. 171.

(*k*) 46 U. C. R. 264.

(*l*) Pullman v. Walter Hill & Co., L. R. (1891) 1 Q. B. 524, at p. 529.

(*m*) 13 Ont. R. 644.

(*n*) C. P. Divisional Court, 26 Nov. 1895.

to the head of the house. So in Wells v. Lindop (*o*), to the wife of an employee; in Williamson v. Freer (*p*), to a legal guardian of an infant; in Colvin v. McKay (*q*), to a ratepayer and councillor about the treasurer of a township; in Andrews v. Nott Bower (*r*), to persons having business at the Sessions; in Pittard v. Oliver (*s*), to fellow-guardians at the B. Union; in Howarth v. Kilgour (*t*), to an assignee and an inspector of the estate; Hanes v. Burnham (*u*), to a surety of a postmaster; in Ross v. Bucke (*v*), to an ex-employee.

Some of the more interesting cases on the law of privilege in libel and slander may be referred to with profit.

In Brown v. McCurdy (*w*) a shopkeeper in whose window an artist had obtained permission to display a photograph of the plaintiff, was informed by a practical joker that the portrait was that of an improper character, which information the defendant gave to the artist, using more definite language. The plaintiff sued for slander. The Court (Ritchie, J., dissenting,) held the occasion privileged because the defendant had a right, believing the statement to be true, to communicate it to the artist, who had, as the defendant thought, placed him in a false position and exposed his business to injury, and that the artist had an interest in ascertaining why his work had been removed from the window.

In Williamson v. Freer (*x*) it is decided that the transmission unnecessarily by telegram of libellous matter, which would have been privileged if sent in a sealed letter, avoids the privilege.

(*o*) 15 App. R. 695.
(*p*) L. R. 9 C. P. 393.
(*q*) 17 Ont. R. 212.
(*r*) L. R. (1895) 1 Q. B. 888.
(*s*) L. R. (1891) 1 Q. B. 474.
(*t*) 19 Ont. R. 640.
(*u*) 26 Ont. R. 528.
(*v*) 21 Ont. R. 692.
(*w*) 21 N. S. 201.
(*x*) L. R. 9 C. P. 393.

Pittard v. Oliver (*y*), where it was held that the presence of reporters at a meeting of a Board of Guardians did not take away the privilege which attached to the occasion. The ground was broadly that the defendant, being justified in making a statement where guardians were present, was not bound to abstain because persons whom he did not bring in, and could not order out, were present.

The case of Boxius v. Goblet Freres (*z*) decides that a solicitor writing on behalf of a client a defamatory letter to the plaintiff is protected on the ground of privilege in publishing it to his clerks by dictating it to one and giving it to another to copy. The reason given was that in the discharge of his duty to his client, the publication of such matter to clerks was necessary and usual in his business.

This case forms a sharp contrast to the case of Pullman v. Hill (*a*), where the same Court had held that a merchant dictating to a clerk a libellous statement about a customer was not protected, as it did not fall within the ordinary business of a merchant to write defamatory statements.

That a solicitor may make defamatory statements in his client's interest, is involved on the decision of Baker v. Carrick (*b*), the reason being that as the client might make the statement in protecting his interests, his solicitor in making it for him drew to himself his client's privilege.

In the Royal Aquarium v. Parkinson (*c*), as important a step in the direction of limiting the practical value of the defence of privilege is taken, as was made in the other direction of extending it in Stuart v. Bell (*d*).

In the Parkinson case the defendant was a member of the London County Council, and was opposing at a meeting of that body the plaintiff's application for a

(*y*) L. R. (1891) 1 Q. B. 474.
(*z*) L. R. (1894) 1 Q. B. 842.
(*a*) L. R. (1891) 1 Q. B. 524.
(*b*) L. R. (1894) 1 Q. B. 838.
(*c*) L. R. (1892) 1 Q. B. 431.
(*d*) L. R. (1891) 2 Q. B. 341.

licence. He made a speech, violently denouncing their performances. He claimed privilege, both as having acted in a judicial capacity, and also in the discharge of a duty involving the consideration of matters of public administration. Lord Esher, while holding that in the latter view the occasion was privileged, made an emphatic ruling, that when a person charged with such a duty allows his mind to fall into such a condition of gross and unreasoning prejudice that he makes statements, careless whether they are true or false, he loses his privilege.

In Stuart v. Bell the social or moral duty which justified the defendant in his statement was defined by Lindley, L.J., as meaning a "duty recognized by English people of ordinary intelligence and moral principle, but at the same time, not a duty enforceable by legal proceedings, whether civil or criminal." The plaintiff, Mr. H. M. Stanley's valet, was suspected of theft in Edinburgh, and the defendant, the Mayor of Newcastle, into whose house Mr. Stanley and his valet had come, having being informed of the suspicion in very guarded language, told Mr. Stanley about it as he was leaving Newcastle. The chief contest was as to Mr. Bell's interest or duty. Two Judges, Lindley and Kay, L.JJ., considered that Mr. Bell had a social duty cast upon him to make the communication to Mr. Stanley, while Lopes, L.J., held it to be "an officious and uncalled for act."

The case of Hunt v. Great Northern Railway (*e*) affords an interesting view of the subject. The defendants dismissed a guard for gross neglect of duty, and published his name in a monthly printed circular addressed to their servants, stating in it that he had been dismissed and the ground of his dismissal.

The circular was held to be privileged, as the railway company had an interest in stating to their servants, and the latter had an interest in knowing what would be treated as misconduct by the company.

It is to be noted that the same circumstances had given rise to an action for libel in Canada in 1873, in

(*e*) L. R. (1892) 2 Q. B. 189.

which the Court came to the same conclusion on the same grounds (*f*).

The latest case on privilege is noted without a name in the Saturday Review of 14th December, 1895. Kennedy, J., at Nisi Prius, is reported to have ruled that it is the duty of a ratepayer to report a drunken policeman to the Watch Committee or to a superior officer, and though the policeman may not have been drunk, yet, unless the ratepayer spoke maliciously, his communication was privileged.

The facts were that a clergyman, who was secretary to the Temperance Society, had told one of the Liverpool Watch Committee that he had seen a certain police superintendent driving in a cab in a drunken condition between two prostitutes. The charge was investigated and found to be false. Kennedy, J., said that the statement of any ratepayer about a police officer is, however slanderous, privileged and not actionable, unless it can be proved to be malicious. How far this case, which well illustrates the reflection, "that a policeman's lot is not a happy one," is consistent with Alexander v. Jenkins (*g*), cannot be determined until the report is seen. In the latter case, charging a town councillor is apparently not libellous unless there is special damage, as the office is not one of profit, and the charge, if true, afforded no ground for dismissing him from office.

It has been seen that privilege is a defence. Its existence, determined by a judicial ruling, confers a right upon the defendant to make under protection his deliverance upon the subject matter as to which the reciprocal interest exists. But, like every other right conferred by law, it must be exercised with due regard to the concerns of others. The making of a communication under the auspices of privilege carried with it this responsibility. From the nature of the case the words must be libellous, but they should not descend into calumny. This distinction was well pointed out by a French statesman in introducing into the Chamber a

(*f*) See Tench v. G. W. Ry. Co., 32 U. C. R. 452; 33 U. C. R. 8.
(*g*) L. R. (1892) 1 Q. B. 797.

bill dealing with actions of libel and slander. To apply the words of the present Chief Justice of the Supreme Court in Dewe v. Waterbury (*h*) : "Good faith, belief in the truth of the reputed misconduct and honest motive," are the assumed possession of the speaker, and these form the touchstone whereby we can determine whether or not the occasion has been properly used. But it is in the application of this test that criticism by the jury, as judges of the fact, becomes an element in the result.

The phrase used by a well-known Judge in Pullman v. Hill (*i*), "It is for the jury to say whether a communication was privileged," expresses very well the general idea. But the use of it is apt to involve a misunderstanding of what is really meant. A communication which does not go beyond what is necessary to be said in the exercise of the right conferred by privilege must, of course, be "privileged," that is, "justified." But if it be justified, and in that sense privileged, it logically involves the conclusion that there is in it nothing which can be laid hold of to justify its discussion by a jury. What is really meant is that, assuming privilege to have transpired by reason of the co-relative interest existing in the parties to the communication, that situation gives certain limited rights of speech which may be exceeded, and if those boundaries may have been overstepped then there is a question for the jury. But to use the word privileged in describing a communication admittedly doubtful is only to obscure the question. This issue has been stated simply by Lord Esher thus: "Is he using the privileged occasion for the proper purpose, or is he abusing it?" or more technically by Hawkins, J., "Has the statement complained of been made with express malice ?"

Before this question reaches the jury, however, the Judge has to rule whether there is anything to make it questionable whether the communication is within the limits stated and is justified by the privilege, and it has

(*h*) 6 S. C. R. 143 App. 158.
(*i*) L. R. (1891) 1 Q. B., at p. 529.

been stated by Odgers that if the evidence is equivocal, i.e., equally consistent with malice or bona fides, the Judge should nonsuit the plaintiff, a remark which has in this country authority in the case already cited of Brown v. McCurdy (*j*).

The proving of express malice, or malice in fact, is in the nature of a reply to the defence of privilege. But, as already pointed out, this evidence, and that looking to privilege is frequently, and in fact, usually, developed in the course of the plaintiff's case in chief. It is of interest to consider briefly what may be evidence of it. The indications showing that the right conferred by an occasion or situation known as privileged has been overstepped may be summed up under a few leading heads. Absence of good faith and honest motive, knowledge of the untruth of the statement, gross excess of language, anger, and more recently gross and unreasoning prejudice, are states of mind or outward manifestations, affording the most usual and generally speaking the true evidences of malice. The presence of third parties, if their association at the time might and ought to have been avoided, is often relied on, and affords some evidence of malice, while the publication of the libel to them necessarily destroys the privileged state, which requires the existence of an interest in the hearer.

No general rule can be laid down for the decision of what is a question of fact arising out of the varying circumstances in which people find themselves, but some examples may serve to elucidate some of the points which arise.

The knowledge by the defendant of the untruth of what he states is always considered evidence of malice in fact. But it is the knowledge and not the untruth that is important, and the fact that the statement is untrue does not in itself make its use malicious (*k*). Lord Justice Davey, in Baker v. Carrick (*l*), puts this point

(*j*) 21 N. S. R. 201.

(*k*) See Todd v. Dun, 15 App. R. 85; Hart v. Gumpach, L. R. 4 P. C. 439; Neville v. Fine Arts & Gen. Insce. Co., L. R. (1895) 2 Q. B. 156.

(*l*) Best reported in 9 R. 283, p. 286.

with great clearness: "The question here is therefore not whether the words were true, but whether they could have been used honestly and bona fide, and indeed this question of privilege only arises when the words are in fact untrue."

It was suggested in Colvin v. McKay (*m*), that in considering the question of malice the jury might consider the means of knowledge of the defendant. But this is the very thing in the charge of Huddleston, B., in Clark v. Molyneux (*n*), that was dissented from by the Court of Appeal. The trial judge asked the jury to consider whether the defendant honestly believed the statements he made, "which," he said, "means that he had good ground for believing them;" but, as the Judges in Baker v. Carrick (*o*) say, the question of whether reasonable ground is an issue is negatived by Clark v. Molyneux. Pittard v. Oliver (*p*) is in the same direction, for there a finding by the jury that the words were spoken "carelessly" was held immaterial.

The decision in the case of Royal Aquarium v. Parkinson (ante) is not founded upon an untrue statement known to be false by the defendant. That portion is expressly disclaimed by Lord Esher at pp. 443-4, where the case is rested upon an abuse of the occasion arising from gross and unreasoning prejudice, from which it was to be inferred that the defendant was not acting from a consideration of his duty in the matter. The decision of the Common Pleas Division in Hanes v. Burnham (*q*) (affirmed on the 14th January, 1896, by the Court of Appeal), is largely founded upon the Parkinson case, though it may be open to question whether submitting malice to a jury because evidence was given of a denial of the truth of the statement just before its reaffirmance by the defendant is not, in fact, leaving to them the question of whether the defendant had reasonable grounds for his belief.

(*m*) 17 Ont. R. 212.
(*n*) L. R. 3 Q. B. D. 237.
(*o*) 9 R. 283.
(*p*) L. R. (1891) 1 Q. B. 474.
(*q*) 26 Ont. R. 692.

Most of the other limitations on the right to libel conferred by privilege have been incidentally considered in discussing the foregoing cases. Excess of language is not in itself malice, but the jury, guided by the well-known rules laid down in Laughton v. Bishop of Sodor and Man (*r*), and Spill v. Maule (*s*), may find from the vigour or zeal of unwarrantable language that the defendant is guilty of malice.

It has, too, been gravely decided in our own Courts that pleading justification in an action of slander is not in itself evidence of malice.

Malice has been referred to as an unfortunate word, needing explanation to a jury in every case. Many definitions of it exist, and the best known of them may be found in Clark v. Molyneux (*t*) and Neville v. Fine Arts Association (*u*), but perhaps the simplest, and therefore the most satisfactory, will be found in the words of Lord Esher in Baker v. Carrick (*v*). "He abuses the occasion if he does not use it fairly, but uses it to gratify some personal motive of his own. That is what is meant by malice in fact."

FRANK E. HODGINS.

(*r*) L. R. 4 P. C. 495.
(*s*) L. R. 4 Ex. 332.
(*t*) L. R. 3 Q. B. D. 237.
(*u*) L. R. (1895) Q. B. D. 156.
(*v*) 9 R. 283, at p. 284.

ON CHANGES IN THE LAW.

In most, if not all, the other branches of human science any change, however great, in doctrine or method, is justified by any gain, however slight, thereby resulting to mankind; but in the province of the law to justify a change the need must be of so great and pressing a character as to offset the risk, inherent in all change, of rendering the law of the land a matter of doubt and uncertainty to litigants. It is less harmful to the interest and happiness of a nation that its legal system should be something lacking in logical arrangement or even in practical wisdom, than that by constant amendment the public mind should be unsettled and confused as to the existing state of the law. An uncertain and inaccurate legislation is as potent to create discontent and mistrust in any country as an uncertain and fluctuating tariff in business or an uncertain policy in government.

This is what Sir Henry Maine says in his work on popular government: "Neither experience nor probability affords any ground for thinking that there may be an infinity of legislative innovation at once safe and beneficent. On the contrary, it would be a safer conjecture that the possibilities of reform are strictly limited."

However, though the sense of this proposition has been laid down as undoubted by statesmen and lawyers for many years, yet in this country the constant and often trivial amendment of the law has been proceeding unchecked until it has reached an extraordinary extent.

Of course all the amendments which yearly take place in our statutes are not necessitated by the mistakes or omissions of the Legislature. When by the progress of modern ideas and science and the discovery of new methods, new branches of legislation are required,

such for instance as the Ontario Assignments and Preferences Act, it could not be expected that Parliament could all at once build up a system of law which would completely meet the requirements of the public. Many amendments are, of course, required before the legislative control is properly adjusted to regulate and protect the new inventions and methods of business, and to restrain the ever-new schemes to which dishonesty resorts. This, of course, is unavoidable, and it is not with this that we are dealing, but with the much more numerous cases where the amendments are required merely from the want of care and legal knowledge in the passing of the original Acts. A few instances taken from the statutes of this province will show the complete lack of stability which characterizes the statute law of Ontario.

The Married Women's Property Act, passed in 1859, was amended in 1872, 1877, 1884 and 1887; the Chattel Mortgage Act, first passed in 1857, has been amended nine times, viz., in 1877, 1878, 1880, 1881, 1885, 1890, 1892, 1894 and 1895; the Judicature Act, passed in 1881, was amended in 1884, 1885, 1886, 1887, 1889, 1891 and 1893, and now in 1895 has been largely amended and added to by the Law Courts Act; the Municipal Act, first enacted in 1866, has been amended in every subsequent year except in 1870 and 1878; the law as to Execution, since the Revised Statutes of 1877, has been amended in 1880, 1886, 1887, 1888, 1893, 1894 and 1895; the Registry Act, passed in 1868, has since been amended some fifteen times; the Landlord and Tenant Act, as passed in 1874, has been added to and amended in 1877, 1886, 1887, 1892, 1894 and 1895; the Mortgage Act, as given in the C. S. U.C., has been added to and amended in 1861, 1868, 1869, 1876, 1877, 1879, 1884, 1887, 1888, 1890, 1894 and 1895; the Ontario Insurance Act, passed in 1876, has since been amended thirteen times, and has also been supplemented by the Insurance Corporations Act of 1892, and the Acts amending it.

While, however, the Legislature is thus vainly struggling to correct the errors and supply the omissions

in their former Acts the time of our Courts is largely taken up in determining from day to day the meaning to be put upon the ill-expressed intentions of the Legislature.

This brings up another important consideration in favour of greater care in the framing of our laws, viz., the immense cost entailed on litigants, who are dragged from Court to Court according as the opinions of the various Judges differ as to the vague or carelessly expressed enactments of the Legislature, until the amount of costs incurred, to be paid ultimately by one side or the other, is entirely out of proportion to the matter in dispute.

This cannot better be shown than by quoting the list of cases carried to the Privy Council in England from the Courts of this country up to the year 1894, as given in C. H. Masters' "Canadian Appeals":

From Supreme Court to P. C.	65
From Ontario Courts to P. C.	27
From Quebec Courts to P. C.	164
From Nova Scotia Courts to P. C.	30
From New Brunswick Courts to P. C.	9
From Manitoba Courts to P. C.	3
From Prince Edward Island Courts to P. C.	2
Total	300

If in each case we make the total cost $4,000, a rather low estimate, the whole amount is $1,200,000, a pretty large sum to pay for imperfections in the law. As these questions were almost entirely questions of law, the issues of fact being generally settled in the Courts of first instance, the importance of insisting that the Legislature shall be as exact as possible in promulgating the laws for which it is responsible is at once seen.

There are several means suggested of securing a greater degree of care and accurate knowledge in the passing of our statutes. In England, on many questions, as for instance in all criminal matters, bills for the

amendment of the law are subjected to careful revision by the Judges. In Canada Sir John Thompson on several occasions consulted the Judges. If this were made a regular, though perhaps informal step, in the passing of the more important Acts to amend the law the result would be valuable in that the judicial expounders of the law, in addition to the care they would exercise over the framing of the Acts, would be furnished with the aims and intentions of the Legislature in making the enactments. There would at least be no doubt in the minds of the Judges as to the "spirit" of the Acts.

The presence of more and better lawyers in public life would undoubtedly result in an increased stability in our legal system. The tendency to experimental legislation among laymen, resulting from their inability to foresee properly the effects of a legal amendment, would unquestionably be checked by their presence.

The appointment of an eminent parliamentary counsel, who should be retained to advise on the effect of all bills for the amendment of the law and to perfect the drafts, would be a step in the right direction. He would be able to give to the framing of the Acts that quiet consideration and legal skill, impossible in the hurry of a parliamentary debate, which would render his advice and experience of the greatest possible value to the Legislature. And in all radical changes a commission of expert lawyers (and business men where occasion required it) would be of the greatest benefit in making suggestions.

To show how far the attention of the Canadian Legislatures, both Dominion and Provincial, is taken up in amending their own previous Acts, I append a table showing the number of amending Acts passed each year in the Dominion and in the several provinces since the last revision of the statutes in each case (if any). It was found difficult in some instances, particularly in the case of New Brunswick prior to 1893, to decide which Acts are public Acts, and so within the scope of this inquiry. The following figures cannot, therefore, claim

the merits of complete accuracy, but as a considerable amount of care was used in their compilation it is probable that they are sufficiently correct to serve as an illustration, and to add force to the plea for greater accuracy in legislative enactments put forward in this article.

Year.	No. of Public Acts.	No. amending last R. S. and subsequent Acts.	No. of amending Acts of same or previous year.	Per cent. of amending Acts yearly.
* Dominion R. S. 1886.				
1887	52	32	..	62
1888	47	33	1	70
1889	47	25	2	53
1890	38	23	2	60
1891	56	31	1	55
1892	29	17	4	59
1893	37	24	5	65
1894	60	37	4	62
1895	44	32	12	73
† Ontario R. S. 1887.				
1888	First 40	21	..	52
1889	" 54	38	6	70
1890	" 78	53	7	68
1891	" 60	42	5	70
1892	" 63	46	8	73
1893	" 56	43	9	77
1894	" 60	48	12	80
1895	" 60	46	14	77
‡ Manitoba R. S. 1891.				
1892	49	31	..	63
1893	39	22	3	56
1894	38	25	4	66
§ Quebec R. S. 1888.				
1889	First 62	44	..	71
1890	" 66	46	5	70
1892	" 46	25	3	54
1893	" 44	28	7	64
1894	" 53	32	6	60
‖ New Brunswick R. S. 1877.				
1878	23	10	..	43
1879	21	10	1	48
1880	19	11	..	58
1881	19	9	..	52
1882	32	15	1	47

* 63% of Acts since 1886 have been Amending Acts.
† 72% of Acts since 1887 have been Amending Acts.
‡ 62% of Acts since 1891 have been Amending Acts.
§ 65% of Acts since 1888 have been Amending Acts.
‖ 46% of Acts since 1877 have been Amending Acts.

YEAR.	No. of Public Acts.	No. amending last R. S. and subsequent Acts.	No. of amending Acts of same or previous year.	Per cent. of amending Acts yearly.
New Brunswick N.S. 1877.—*Cont'd.*				
1883	15	6	..	40
1884	16	5	1	31
1885	21	10	3	48
1886	12	4	..	33
1887	19	8	1	42
1888	16	6	1	37
1889	25	13	..	52
1890	20	10	1	50
1891	20	7	1	35
1892	24	12	2	50
1893	37	21	2	57
1894	37	13	2	35
1895	41	22	3	54
* Nova Scotia R. S. 1884.				
1885	41	22	..	54
1886	58	37	2	64
1887	46	34	10	74
1888	45	33	3	73
1889	66	51	7	77
1890	59	45	7	76
1891	57	43	3	75
1892	56	40	3	71
1893	51	33	4	65
1894	30	21	1	70
1895	42	30	2	71
† British Columbia R. S. 1888.				
1889	29	15	..	52
1890	48	25	..	52
1891	46	22	4	48
1892	47	25	5	53
1893	44	29	7	66
1894	51	22	6	43
1895	58	32	8	55
‡ Prince Edward Island, no Revision of Statutes.				
1888	12	5	..	42
1889	13	7	2	54
1890	11	3	..	27
1891	10	3	1	30
1892	12	7	1	58
1893	10	4	..	40
1894	21	6	..	29

* 71% of Acts since 1884 have been Amending Acts.

† 53% of Acts since 1888 have been Amending Acts.

‡ 39% of Acts since 1887 have been Amending Acts.

It will be noticed that Ontario heads the list in the number of changes, 72 per cent. of her yearly Acts being amending Acts, while Prince Edward Island shows the greatest stability, only 39 per cent. of her Acts being employed in amendments. For the purposes of a better comparison, if we take the number of amending Acts in each case, except Manitoba, during the last five years, we find the per cent. of amendments as follows: Dominion, 62 per cent.; Ontario, 75 per cent.; Quebec, 65 per cent.; New Brunswick, 47 per cent.; Nova Scotia, 71 per cent.; British Columbia, 53 per cent.; Prince Edward Island, 36 per cent.; almost the same as for the longer periods. Ontario still leads with 75 per cent., while Prince Edward Island brings up the rear with only 36 per cent. of amendments.

W. MARTIN GRIFFIN.

EDITORIAL REVIEW

The Result of the Law Courts Act.

Two months has sufficed to verify the predictions of those who foresaw that the result of limiting the right of appeal would be not to decrease appeals, but to divert them into another channel. The present list in the Court of Appeal of course represents what would have been the list of two Divisional Courts under the old system. More cases have been set down for the present sittings (so the Registrar informs us) than were set down for the whole of 1895. This is but the beginning. After the Spring Sittings are over another batch, probably as large, will be set down on motions for new trials and against judgments.

In the meantime, the Divisional Courts have practically disposed of the remains of all such work, and are now engaged almost solely in hearing appeals from masters and referees, from Chambers, from County and Division Courts, from taxations, et hoc genus omne. The Judges of the High Court who take the trials are never to hear new trial motions; while the Judges of the Court of Appeal, who never take trials, are to hear all motions or judgments pronounced at trials.

Although this is not so laid down in the Act. it is the natural result of it. The right of appeal is limited. Litigants apparently desire it to be unlimited. They do not care to economize in costs at the expense of their substantial rights. They therefore, instead of going to a Divisional Court, where they may be defeated without right of appeal, prefer to go to the Court of Appeal,

whence there is another appeal in case of defeat. It seems to be plain that appeals are being simply diverted into another channel, and not by any means decreased. As these changes are supposed to be in the interest of the litigating public only, and the litigating public appear not to want them, a reversion to the old state of affairs would be eminently satisfactory.

In connection with this must be taken into consideration the doctrine that a Court from which there is no appeal has a very large discretion, which sometimes comes actively into play, in dealing with the rights of litigants. This is a factor which no legal adviser can either neglect or provide against. Hence, he will run no risks. It is exceedingly doubtful whether this attempt to discourage appeals will produce any beneficial effect whatever.

YORK LAW ASSOCIATION REPORT FOR 1895.

There are at present 372 members of the Association; 22 members have not paid their fees for the year. During the year 16 practitioners became members, and 49 members severed their connection with the Association by removal from the county, resignation, and under the operation of the rules.

There are now 2,903 volumes in the library, 292 volumes having been added during the year, made up as follows: Reports, 136 volumes; Texts, Digests and Statutes, 77 volumes; Bound Periodicals, 53 volumes; Donations, 26 volumes; total, 292 volumes.

The President, Mr. J. A. Worrell, Q.C., has presented to the library a portrait of Mr. J. J. Foy, Q.C., his predecessor, which will shortly be hung in the library.

After a vigorous representation made in each year since 1888, a series of rules has been promulgated, embodying many of the suggestions made by this Association. The trustees desire to call the attention of members to the course which this Association has followed in endeavouring to bring about a harmonious consolidation of the rules relating to practice. At the annual meeting of the Association, held on the 7th of February, 1887, upon the recommendation of the trustees, a Committee on Legislation was appointed, composed of members in active practice, whose suggestions would have weight with the Attorney-General of Ontario, and with the Judges of the Supreme Court of Judicature, in the consideration of required legislation and proposed amendments of the rules relating to practice, and a resolution was passed, directing the Board to bring about a meeting of delegates of the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession.

Before the details of this arrangement had been completed, a draft of the proposed Revised Rules was laid before the Committee on Legislation, which was so

imperfect that the committee at once invited the other Associations to send representatives to its meetings, and a Joint Committee thus formed, composed principally of members of the Hamilton, London and Barrie Associations, and of this Association, at once entered upon the work of preparing a proper code of rules. With the aid of a liberal grant from the Law Society, a draft consolidation was prepared after great labour on the part of the Joint Committee, which was practically adopted and embodied in the consolidation of the rules promulgated on the 9th of June, 1888. The scheme set forth in this consolidation was, as is well known, not completely put into force. This Association has from year to year continually agitated for the adoption of the suggestions contained in its original report, and in addition, the Committee on Legislation has from time to time embodied in reports suggestions for the amendment of the rules, based upon the suggestions of the late Master in Chambers, Mr. R. G. Dalton, Q.C., and upon the experience of those in active practice. The suggestions of the Committee on Legislation were last embodied in a valuable report published and printed in the early part of the year 1893.

Under the provision of the Law Courts Act, 1895, a commission was appointed to frame rules for giving effect to the provisions of that Act, and upon its reports a series of rules was promulgated on the 1st of January, 1896. In the appointment of this commission, the labours of the Committee on Legislation were entirely ignored, no one of its members having been appointed to the commission, with the result that many needed changes in the rules suggested by the Committee on Legislation were not adopted, and which would in all probability have been adopted had an opportunity been afforded of presenting the reasons for the suggested changes.

The rules lately promulgated have provided for the establishment of a central office, in accordance with the original suggestions made in the report upon which were based the Consolidated Rules of 9th June, 1888, a suggestion postponed from year to year, notwithstanding

the repeated representations of the Association, and many changes have been made in the practice in the interest of litigants and the public.

The form adopted in promulgating the late rules has, however, left the whole body of rules in such a state of almost inextricable confusion, that it is now a work of great labour for the practitioner to ascertain what the practice is, and this state of confusion will exist until a proper consolidation is made of all the Rules of Practice. The trustees suggest that the attention of the Attorney-General be called to this state of affairs, and that it be suggested that a report be prepared, setting forth, as was done in 1887, a complete consolidation of all the rules, the preparation of such report to be entrusted to men in active practice. The trustees are of opinion that, if this course be adopted, a consolidation can be prepared, following fairly the course of late legislation, and which will be as harmonious and as valuable as was the consolidation prepared by the joint Committee on Legislation in the year 1887.

Following the suggestion of the trustees of the Hamilton Law Association, the trustees suggest that the Law Society be requested to take steps to supply the profession with the Statutes at a reduced rate.

The librarian has performed her duties during the past year with great satisfaction to the Board.

The trustees suggest that By-law 111 of the Association be amended by providing that the Board shall consist, in addition to the President, Vice-President, Treasurer and Curator, of seven other members of the Association. The present rule provides for five other members of the Association.

All of which is respectfully submitted.

(Sgd) J. A. WORRELL,
President.

(Sgd) WALTER BARWICK,
Treasurer.

January 27, 1896.

NOTE.—We understand that the Attorney-General has put in hand the consolidation of the rules rendered necessary to the amendments and alterations.—ED.

THE
CANADIAN LAW TIMES.

APRIL, 1896.

MARITIME WAR RIGHTS.

THE most important transactions of recent years regarding British maritime war rights are four in number. They are, first, the arrangement in 1817 between Great Britain and the United States, restricting the building and use of armed vessels on the Great Lakes; second, the Declaration of Paris in 1856; third, the Conference of Brussels in 1873; fourth, the new edition of the Monroe doctrine.

The first two conventions bind English interests, the remainder do not, though these latter have some effect, indirectly it is true, upon the mode and conditions of warfare.

After the Franco-German war of 1870, all the powers assembled at Brussels, a neutral capital, to discuss the lessons learned a few years previous from that gigantic struggle; but there had been really no naval strife, and England declined to take part in framing a code of war morality, which would emasculate her naval strength and hamper her in putting stress on her enemies. Her refusal was due to the insistence that naval war should be included in the scope of the proposed convention.

Notwithstanding her abstention, the regulations suggested by the European powers give form and weight to many ideas which are in themselves beneficial and humane, and may therefore be expected to influence

public opinion. Thus is prepared the way for modifications in international law.

The new American doctrine is an abnormal growth. It was not a new principle in its earlier manifestations, nor is it an unreasonable one. It springs from the same desire which all nations have, to keep powerful intruders from their neighbourhood, and it need not have been clothed in spread-eagleism. Those who profess to worship a government by the people, but stuff ballot boxes, may well admire the military dictator who can manipulate a plebiscite and proclaim himself the chosen one. But the influences that have brought about the extension of a pardonable dislike to the increase in the western hemisphere of the territory of the eastern powers, may bring into existence a navy. In the meantime, too, it must alter the naval requirements of the great sea powers in their operations near the equator.

The legal obligations which Great Britain has taken upon herself by the arrangement of April, 1817, and the Declaration of Paris must be reckoned with as present factors in case of a war with the United States. The repression of armed vessels on the Great Lakes is constant, and, let us hope, only to be broken when war is actually upon us. To a power as strong in small gunboats as Great Britain the bond means a great loss of power, though it is to be observed that the blockade of the Welland Canal is not to be compared in effect with the gaining of the command of Lake Champlain and the Hudson, from the Richelieu River to New York. At present each government is restricted to one vessel of not more than one hundred tons, and with an armament of only one eighteen-pound cannon on Lakes Ontario and Champlain, and to two similar ships on the Upper Lakes, and it is expressly stipulated that no other vessels of war "shall be built or armed" upon the lakes.

It is more interesting, however, to discuss the effect of the Declaration of Paris and the incidents of war which it leaves untouched. It really only covers two points, and is important because these modify most of

the conditions usually confronting belligerents. Privateering is abolished, and the principle of exempting goods not contraband of war from capture is conceded when, as enemy goods, they can claim protection from the neutral carrying flag or as goods belonging to neutrals they escape even if in an enemy bottom.

Spain and the United States have never assented to the Declaration of Paris, nor has the latter power declared its adhesion to it, except when it was to its own advantage in the Civil War. It follows, therefore, that in an Anglo-American war or in a Spanish-American war privateering may be indulged in. But the recognition by Great Britain of the sanctity of neutral flag and goods is for the benefit of those who remain neutral in such a contest. It seems inevitable that the commerce of England will seek to ply under the protection of those states which are outside the actual hostilities. The United States are not, however, bound by convention to respect their flags, and there is nothing to protect English commerce and goods even when so guarded, except the fact that the American Government will have to settle accounts with those powers who are strong enough to say they will avenge any disrespect shown to their national colours. This wholesome restraint may have weighty influence with the aggressor.

The incidents of naval warfare are very varied and form the basis of some interesting decisions.

It is recognized that in the event of war the subjects of a belligerent power in the hostile country are held to be enemy subjects. Their duty is to return at once. Goods shipped by them before the war are subject to capture as enemy goods. This rule is founded on the domicile of the owner, but it is subject to the modification pointed out by Sir W. Scott in "The Ocean" (*a*), where forcible detention of a British subject was held to excuse his apparent domicile (*b*).

(*a*) 5 C. Rob. 90.

(*b*) See also "The Gray Jacket," 5 Wall. 342.

But now the neutral character of goods being recognized, they would be exempt unless contraband, and the same rule applies to the trade of such a subject residing in a neutral country. Before the Declaration of Paris (and in some cases since its adoption) many questions arose as to the national character of both goods and ships. In case of a joint venture in goods by a neutral and an enemy, in case of capture the enemy's share was confiscated and the neutral's abandoned; but if a ship be owned jointly the neutral's share meets the same fate as the enemy's, as he runs the risk of sailing under the enemy's flag (*c*).

The Declaration of Paris makes no provision for compensation to a neutral owner of goods when destroyed by the burning or loss of an enemy ship. A case occurred in the Franco-German war, where neutral goods owned by a British subject were burnt in two German vessels captured by a French cruiser. The owner was denied compensation.

The ownership of a ship by an enemy rendering it liable to capture, there has always been a tendency to transfer it to a neutral owner. Such sales are the object of the keenest scrutiny, and as the Prize Court of the captors is the forum where bona fides must be established, it is not strange that colourable transfers are rarely successful. There must be the utmost good faith, and it has been held that if a ship be in the trade and under the control of the former owner, the change of ownership is immaterial (*d*).

In the Franco-German war a ship registered in Germany was bought at Singapore by a British subject after the declaration of war. It was captured by the French. The owner petitioned the English Government to intervene, but Lord Granville refused to interfere, and stated that the French Prize Courts would be justified in not recognizing the sale of an enemy vessel in

(*c*) "The Primus," 24 L. Jour. 15.

(*d*) "The Jemmy," 4 C. Rob. 31; "The Omnibus," 6 C. Rob. 71, per Sir W. Scott.

a neutral port after the declaration of war, if the object were to avoid capture (*e*).

The domicile of the owner determines the national character of the ship, and an American owner domiciled in England owns, therefore, an English ship (*f*).

The English and American Prize Courts are divided upon the question as to whether goods of neutrals are protected if shipped in an armed belligerent vessel. The English Courts assert (*g*) the right to condemn such goods, while American Judges have decided that they are exempt from confiscation (*h*) unless they participate in the resistance to the right of visit and search. Upon this point the Declaration of Paris is ambiguous, as the doctrine that neutral goods are free is not expressly limited to those conveyed in an unarmed enemy vessel.

Actual seizure is not essential to the legal capture of vessels. If the ship strikes her colours or is sunk or driven on shore or into a neutral port she is deemed a captured ship. In Powell v. Hyde (*i*) an abandoned vessel sunk by the enemy was treated as a capture by the latter. A French rowboat full of armed men, being driven into Ostend, a neutral port, by a small British vessel armed with swivels, was held captured, and in the "Edward & Mary" (*j*), a merchantman obliged to lie to by a French lugger, was held to occupy a similar position. But upon the captor lies the onus of proving a legal seizure, and in order to prevent undue oppression salutary rules have been adopted. Captured vessels must be brought into port without unnecessary delay and with due care, and the port must be a convenient one, which convenience must generally be that of the owners in presenting their claims in the adjudication (*k*).

(*e*) See also in America, "The Sarah Starr, and cargo," Blatch Pr. Ca. 69.

(*f*) Tabbs v. Bendelack, 4 Esp. 108.

(*g*) "The Fanny," 1 Dods 443.

(*h*) "The Nereide," 9 Cranch 388, Story, J., dissenting.

(*i*) 25 L. J. N. S. Q. B. 65.

(*j*) 3 C. Rob. 306.

(*k*) "The Wilhelmsberg," 5 C. Rob. 143; "The Washington," 6 C. Rob. 275.

In the "Nicholas & Jan" (*l*), it was argued and conceded as a general principle that a captor must not wilfully expose property to danger of capture by the other belligerent by bringing it to England when he might resort to the Admiralty Courts in the colonies. If from scarcity of men, stress of weather or because his ports are blockaded he cannot bring the ship in, the captor may, and indeed is in duty bound to destroy, but in doing so he takes whatever risk attaches to a possible decision that his capture was not warranted, in which case he will be ordered to make compensation (*m*). If the capture is made in good faith, the Courts are reluctant to grant compensation, but if there is no reasonable care and the capture is lost the captor is responsible (*n*). The captor de facto is responsible, not the captor de jure. Hence an admiral is not liable, but the person in charge of the capturing vessel. The principle underlying this rule is exemplified in the case of Baird v. Walker (*o*), where the captain of H. M. S. "Emerald" was held personally liable for taking and keeping possession of a lobster factory on the "French shore" of Newfoundland and preventing its use by the plaintiffs.

A joint capture may be made by the presence of a claimant belligerent ship during the seizure by another or by joint chase, but this rule does not apply to a privateer in sight, unless it actually takes part in the overt act. It is lawful to sail and chase under false colours, but not to fire except under the national flag (*p*).

The result of the adjudication gives, in America, an absolute title, but in England the right is divested by recapture. In the former country, if a prize crew be put on board the captured vessel and she nevertheless escapes, she is deemed condemned and confiscated without trial, but in England this does not hold.

(*l*) 1 C. Rob. 96.

(*m*) "The Felicity," 2 Dods 381.

(*n*) Story on Prize Courts, 37.

(*o*) L. R. 1892, A. C. 491.

(*p*) "The Peacock," 4 C. Rob. 185.

In the case of the "Emily St. Pierre," a British vessel in charge of a prize crew from a French cruiser escaped into an English port, the master, cook and steward overpowering the Frenchmen. Lord Russell declined to restore the ship to the captors, declaring that the offence, however punishable by the law of nations, i.e., on the high seas, was no breach of the English municipal law, which alone would govern a British vessel in the port of Liverpool.

No capture can properly take place in neutral waters, but if it is there effected the right of the strongest rules, because only the power whose territory is thus invaded can object. In the war between France and England, Admiral Suffren attacked the British fleet in a Portuguese port, but that power was too weak to effectively protest. Neutral waters generally are within three marine miles of the mainland of a non-belligerent, but the limit may be, and indeed was, measured from a little mud island at the mouth of the Mississippi in the case of "The Anna" (*q*), as a natural appendage of the coast on which it bordered.

The cutting out of the "Caroline" in 1843 was, with a fine disregard of the violation of Canadian rights in which it had just been the instrument, regarded by the United States Government as an invasion of their territory.

The right of a power to seize enemy goods within its limits on war being declared is undeniable, but it is not now enforced without compensation except where they are contraband or are of national importance, i. e., fleets of ships. This action is technically called "arrest" or "embargo," and in America it has been declared that while the right to confiscate exists, it must be preceded by a notification by the Government. British timber seized as prize of war was liberated by the United States Supreme Court, on the ground that no declaration of intention by the state had been given. Confederate cotton was, during the Civil War, freely confiscated by the Federal Government, on the ground

(*q*) 5 C. Rob. 385 *b*.

that it was the mainstay of the former, but the Confederates went further, and their action elicited a protest from Lord Russell, who declared that the right was now obsolete. In 1854 Russian trading vessels were given six weeks to clear from English ports, and in 1870 the French and German Governments gave their opponents thirty days and six weeks respectively. Private debts are held in suspense during war, because an alien enemy has no locus standi in the Courts, but in peace the right revives to all claims arising before the war. But contracts made during war are void (*r*).

A privateer is not a national vessel, but is nevertheless regarded as a vessel of war, being one intended to undertake hostile operations under the national flag. A vessel with letters of marque has not any other character than that of a private vessel intended for a particular service, and is only authorized to redress its owner's private wrongs against ships of a power refusing to make reparation for injuries to individuals by its subjects. Many examples of this will be found in Froude's "English Seamen of the Sixteenth Century," and in 1511 James IV., King of Scotland, issued letters of marque to the family of Barton to retaliate upon Portuguese vessels for the capture of John Barton, a Scottish mariner, for which the Government of Portugal refused to make private amends.

The subject of blockade is a most intricate one, and the law of nations that a blockade must be effective gives rise to many curious questions. The enforcement of the right to condemn for breach where the vessel is neutral has been the occasion of decisions which show how constant must be the vigilance of the blockading squadron.

Temporary absence from stress of weather, or in chase of the enemy, when not unduly prolonged, are the

(*r*) Alcinous v. Nigrieu, 4 E. & B. 217.

only excuses for absence (*s*), and if once raised notice to neutrals is necessary (*t*).

Vessels seized, however, after proof of the blockade, are put on the defensive in the Prize Courts, and everything is presumed against them, and sailing with knowledge of the blockade warrants condemnation (*u*). Where there is no such knowledge, the instructions to the British navy (usually followed in practice by other nations) is that notice must be inscribed in the ship's books.

The non-adhesion of the United States to the Declaration of Paris would not enable the British Government in case of war to revert to commercial blockade, e.g., declaring a blockade along the whole Californian coast while military operations were being conducted on the Atlantic seaboard, for the other signatory powers could justly insist on the observance by Great Britain of the principle of effective blockade. The rule of war of 1756 (by which is meant the throwing open to one neutral nation only the coasting trade of the mother country or its trade with its colonies) found in the United States a strong upholder. What will be their attitude on the subject now will depend no doubt on whether they are strong enough on the sea to enforce the view formerly held by England.

Pacific blockade is something that only a few months ago was resorted to by Great Britain against Nicaragua. It does not involve a state of war, but aims at putting stress on a recalcitrant state which refuses to right the private wrongs of subjects of the blockading state. England blockaded Greek ports in 1827, and in the time of Lord Palmerston pressure was put on the same state in aid of Don Pacifico's claims. These astonishing demands were afterwards fixed by a commission at only one hundred and fifty pounds.

Contraband of war is an elastic term. Of necessity its definition varies with changing circumstances. The declaration that certain goods are contraband of war

(*s*) "The Columbia," 1 C. Rob. 154; "The Eagle," 1 Acton 65; "La Melanie," 2 Dod. 130.

(*t*) "The Hoffnung," 6 C. Rob. 112.

(*u*) "The Columbia," ante.

is not necessarily conclusive on neutral powers, and when it is made it is usually based on conditions which cannot readily be denied. Great latitude is allowed with regard to prohibiting goods which are calculated to increase or prolong the resistance of the enemy. The old list of goods thus barred included the equipment of vessels depending on sailing power and to which hemp, cordage, sails, masts, etc., were necessary parts. Coal, iron, steel and even nickel have now replaced them in importance. It is evident, therefore, that the question of contraband always involves some question of fact, the solution of which is not easy. An interesting example has been given of the proposition that use makes otherwise harmless goods liable as contraband, in the use of hides to cover the floating batteries in the Bay of Algesciras during the attack on Gibraltar in 1801. Arms, ammunition and their component parts, horses, harness and the outfit of a modern warship fall undoubtedly within the term; electric wire and appliances, marine engines, boilers and shafts are treated as equivocal in their nature. In 1870 the British Government stopped some telegraph cables as being probably contraband, but their destination and use having been shown to be purely commercial, they were released (*v*) although it was probable that the line when complete would be used for effecting communication between the armies of France. Mr. Justice Story has decided in "La Santissima Trinidad" (*w*), that it is no breach of neutrality for subjects of the neutral state to send armed vessels and munitions of war to foreign ports for sale, the penalty of capture and confiscation being the risk they run. It would appear that such vessels, provided they have not received a commission, may clear from a neutral port for a belligerent port, without any infraction of neutrality having been committed.

The articles which are most debated are provisions, coal, and money. As to these the modern method seems to be to warn off provisions and not allow them to be

(v) "The International," 3 A. & E. 321.
(*w*) 7 Wheaton, 283, 340.

landed, or to hold them subject to paying compensation (*x*); but the Declaration of Paris making free goods because carried in neutral vessels, much weakens the right to stop the transit of provisions, and in general their destination has great weight in settling their right to free carriage.

Coal may now be contraband as being an essential to modern naval warfare, but the question cannot be said to be settled, as it has not come up in modern warfare except in one case. In 1859 and 1870 France declared it not to be contraband. In 1870 the German and English Governments indulged in a correspondence in which the German Government expressed a desire for an agreement that coal was contraband of war. Lord Granville suggested the difficulty which might arise in determining that a specific article was prohibited, and mentioned that in the American war, cloth, leather, and quinine would have been more useful than coal. He referred to the fact that the treaty between France and England provided that the export of coal was not to be prohibited. Great Britain, however, acted on the principle that the destination of the coal was a determining factor, and declined to permit the supply of coal to the French fleets. In 1894 the proclamation of the British Government in reference to the Japanese-Chinese war, limited the supply of coal which any belligerent vessel could take in British ports to an amount just sufficient to carry her to her nearest home port; nor was she to coal again in the British port for three months.

The converse of this rule is not conclusively true. A neutral destination, if the goods are really intended for a belligerent, will not save them from confiscation.

There was a curious difference between the United States and English Courts on this very question. In the "Peterhoff" case (*y*), following "The Stephen Hart" (*z*) and "The Springbok" (*a*), the United States District

(*x*) 5 Wall. 28.
(*y*) "The Haabet," 2 C. Rob. 174.
(*z*) Blatch. Pr. Ca. 387.
(*a*) 5 Wall. 1.

Court held that the ulterior destination was really for a belligerent. This case was carried to the Supreme Court, where the ship and part of the cargo was restored but part was confiscated.

Before the latter decision the English Courts in Hobbs v. Hemming (*b*), an insurance case arising out of the "Peterhoff" seizure for loss of goods therein, refused to accept the American Prize Court decision on the question of fact, and in a subsequent case on a policy on the same ship, the Court adhered to the English view (*c*). The effect of contrabrand of war being found on board is not that such contrabrand alone is forfeited, but that all other goods belonging to the same owner aboard are confiscated.

Carrying despatches for military persons is held to be a very serious offence and involves confiscation (*d*). The modern practice respects the sanctity of the sealed mail bag. In the "Peterhoff" case a sealed post bag found on that vessel was, after some objection, ordered to be given up to the British authorities unopened. The United States Government attempted to justify the "Trent" outrage on the ground that the persons seized were carrying despatches which were contraband of war. The English reply correctly stated the position. It was first, that universal admiralty practice required the captor to bring the vessel into port for adjudication, and not to extract from it the obnoxious matter or to seize the persons of those on it; second, that these despatches were under a neutral flag and to a neutral and not a belligerent power; and, third, that ambassadors or public officers, non-combatants, were not contraband of war. The sincerity of the American argument may be determined by the action of that Government in 1870. Nearly 1,200 Frenchmen embarked at New York in two French ships for the purpose of joining their armies at home.

(*b*) 17 C. B. N. S. 791.

(*c*) Seymour v. L. & P. Ins. Co., 41 L. J. N. S. C. P. 193; 42 L. J. N. S. C. P. 111, note.

(*d*) "The Atalanta," 6 C. Rob. 440; "The Susan," 6 C. Rob. 461, note; "The Rapid," Edw. 228; "The Friendship," 6 C. Rob. 420.

Mr. Fish, the Secretary of State, asserted that the ships could not be looked at as intended to be used for hostile purposes against Germany, the men not being in an efficient state and the 96,000 rifles and eleven million cartridges on board were legitimate subjects of commerce.

The right to requisition the property of neutrals is one that is recognized in war, but it is subject to the liability of compensation to the owners.

An example occurred during the war of 1870. Eleven merchant vessels lying in the Seine were seized and sunk by the Germans to block the channel against the French warships. Six were English colliers. Prince Bismarck justified this action by the rule of necessity and raised the novel contention that the vanquished power should compensate their owners. This position, however, he waived out of regard, as he expressed it, for the friendship of Great Britain, and paid the owners for their loss after an adjudication.

Neutral powers generally permit the warships of belligerents to enter their ports, but not to use them for any warlike purpose, nor to obtain any facilities for action. If one of each of the nations at war arrive, the rule followed by British captains is that the ship going out first shall have twenty-four hours' start. This rule was proclaimed by Great Britain in the recent war between China and Japan. It is generally adhered to in practice, but the Americans adopted an amusing expedient of keeping the letter and breaking the spirit of the rule. The Confederate ship "Nashville" having arrived at Southampton, the Federal corvette "Tuscarora" anchored off the port but in neutral waters. As soon as the "Nashville" got ready to weigh anchor, the "Tuscarora" was privately advised from the inner harbour, and at once got to sea, and this was repeated on every occasion that the Confederate warship attempted to leave. In the result the "Nashville" was unable to get out till the war was over.

FRANK E. HODGINS.

STATE TRIALS.—III.

The trial and execution of Mary Queen of Scots are described in the State Trials at full length. There is also printed a letter from Mary to Elizabeth, which probably sealed Mary's fate. It is not easy to recognize in the writer of this letter—and it appears genuine—the Mary of Scott's novels. There is no greater example of the difference between romance and reality.

In the volumes of State Trials are also printed Scotch trials, but it requires a very enthusiastic Scotchman to wade through them. A few sentences of the original jargon go a long way. The trial of the murderers of Darnley and of the Gowrie conspirators are not within the scope of these papers.

The administration of criminal justice in England was barbarous. The following account of the scene on the scaffold at the execution of Babington and his accomplices is not without parallel. "Ballard was first executed. He was cut down and bowelled with great cruelty while he was alive. Babington beheld Ballard's execution without being in the least daunted: whilst the rest turned away their faces, and fell to prayers upon their knees. Babington being taken down from the gallows alive, too, and ready to be cut up, he cried aloud several times "Parce mihi, Domine Jesu!" Savage broke the rope, and fell down from the gallows, and was presently seized on by the executioner, and his bowels taken out while he was alive. Barnwell, Tichbourne, Tilney and Abington were executed with equal cruelty. The next day Thomas Salisbury and others were drawn to the place of execution. The Queen being informed of the severity used in the executions the day before, and detesting such cruelty, gave express orders

that they should be used more favourably; and accordingly they were permitted to hang until they were quite dead before they were cut down and bowelled." At the execution of the regicides after the restoration of Charles II. similar scenes were enacted. Harrison, one of Cromwell's major-generals, was "turned off and cut down alive, for after his body was opened, he mounted himself and gave the executioner a box on the ear." The sentence of death for treason, with all its horrors, was not altered until 54 Geo. III. cap. 146 (1814), when it was enacted that the prisoner should be hanged until he was dead, and afterwards the beheading and dividing into quarters should take place. The beheading and quartering were dispensed with in 1870, when hanging was declared sufficient punishment.

The case of Nicholas Udall furnished a precedent in the law of libel. Udall was a Puritan minister, and was prosecuted for libel at Croydon Assizes in 1590. The Judge (Clarke) directed the jury as follows: They need not trouble themselves to find the prisoner guilty of the felony, but only whether he was the author of the book. Then the jury said, "What can we find?" The Judge said, "Find him author of the book and leave the rest to us." This division of labour in libel cases continued until Fox's Libel Act, 32 Geo. III. cap. 60 (1792). Thus for two hundred years any man with anything to say about the powers that were said it very much at his peril. Udall was convicted and died in prison of a broken heart. The Judges tried to get him to confess the offence, but all they could get him to say was that if what he had done was against the laws he was sorry. Justice then ran its course in spite of many efforts to free Udall.

The first trial reported in the reign of James I. is that of Sir Walter Raleigh. He was tried in 1603 and executed in 1618. At the time of his death Raleigh was the most notable man left of the worthies who had scattered the Spanish Armada, and the King sacrificed him to the vengeance of Spain. At his trial Coke prosecuted, and the following dialogue took place:

Raleigh—I do not hear yet that you have spoken one word against me; here is no treason of mine done. If my Lord Cobham be a traitor, what is that to me?

Attorney (Coke)—All that he did was by thy instigation, thou viper; for I thou thee, thou traitor.*

The Chief Justice interposed soon after with the truly Falstaffian remark,

C. J. Popham—Sir Walter Raleigh, Mr. Attorney, speaketh out of the zeal of his duty for the service of the King, and you for your life; be valiant on both sides.

The principal trials during this reign were those of the Gunpowder Plot conspirators (1606), and the Somerset trials for the murder of Sir Thomas Overbury (1615, 1616). In civil matters there were four important trials. The first was the case of mixed money in Ireland (1605). Irish currency, like a good many other Irish questions, was always giving trouble. This case of 1605 preceded by more than a century Swift's attack on Wood's halfpence. There is in it a great deal of information for numismatists. "Articuli cleri" were articles exhibited by the clergy in 1605 against the lay Courts complaining of the encroachments by the lay Courts on the clerical. The answers of the Judges to those articles are the basis of the supremacy of lay jurisdiction in England over ecclesiastical. In 1606 the King commenced the system of taxation without consent of Parliament, which ultimately led to the civil war in his son's time. Mr. John Bates, a London merchant, was prosecuted for refusing to pay a duty on foreign currants imposed by a mere act of the Crown. The Court of Exchequer unanimously gave judgment in favour of James, and thus inaugurated the struggle which lasted through nearly the whole of the seventeenth century. The case of the Postnati (1608) was of great importance until the modern alien laws were enacted. It decided

* Shakespeare in Twelfth Night, Act, 3, Scene 4, probably alludes to this scene when he makes Sir Toby advise Sir Andrew Aguecheek as follows: "If thou thou'st him some thrice it may not be amiss."

that a subject of King James born in Scotland before the accession of James to the Crown of England became on that accession a subject also in England, and therefore entitled to hold land. The doctrines laid down in the case are still appealed to in cases of newly acquired territory, but aliens are now in most civilized countries in matters of property as liberally dealt with as natural born subjects, and therefore the practical value of the distinction is not as important as it was.

A case of suffering for opinion's sake was that of Whitelocke. He was brought before the Council in 1613 on a charge of contempt of the King's prerogative. His offence was that he had given a client a verbal opinion adverse to a proposed Royal commission. Lord Bacon (then Sir Francis Bacon, Attorney-General) prosecuted. His argument is well worth reading in the first place because it is short, and in the next place because one wonders what he could find to say to sustain the prosecution, and it is surprising what a plausible argument he works up. The profession now-a-days would not agree with him.

The trials of the Earl and Countess of Somerset for the murder of Sir Thomas Overbury throw a lurid light on the state of fashionable society in the reign of King James. Perhaps it was neither better nor worse than it is to-day. Lady Somerset, who had procured a divorce from her first husband, the Earl of Essex, to marry the Earl of Somerset, consulted one Forman, a wizard. This Forman had also many other clients, ladies of the court, and always made them write their names in his books before he would supply them with the information or drugs they required. On Lady Somerset's trial Lord Coke presided, and Forman's books were produced. On turning over the leaves the first name Lord Coke found was that of his own wife. The imputations laid upon the King's character in these trials, and the obvious power Somerset had over James present the King in an abominable light. That high and mighty prince appears to have been a high and mighty scoundrel. The

impeachment of Lord Bacon (1620), Sir Henry Yelverton, Attorney-General (1621), and Sir John Bennett, (1621), all for bribery and corruption, show the general decay of political and judicial morality. The Archbishop of Canterbury, Abbott, also was proceeded against. He had the misfortune to kill a keeper by accident while shooting at a deer. The question was raised whether a clergyman, who had even though by inadvertence killed a man, could continue to exercise sacerdotal functions. The right of a bishop to hunt was recognized, and by 13 Ric. II. cap. 13, any clergyman who has £10 per annum or upwards may keep greyhounds or hounds to hunt. "Hunting parsons" were therefore quite within their legal rights, and the archbishop was not doing an illegal act when the accident happened. As to the disqualifications caused by the homicide, curious precedents were cited. Thus, among others, a priest tolling a bell to prayers, the same fell and killed a boy. The bishop is commanded to suffer the priest to execute his functions. Archbishop Abbott had incurred the King's displeasure by his honourable refusal to consent to the iniquitous judgment by which Lady Essex was divorced in order, as above mentioned, to become Lady Somerset. He was afterwards proceeded against by Charles I. in 1627 for refusing to license a sermon preached to justify the King's attempts to impose taxes without consent of Parliament. In those days, between the Puritans on the one hand and the King on the other, an Archbishop of Canterbury's lot was not a happy one.

The Courts in their trials of prisoners were aided behind the scenes by the rack. Torture was not declared illegal until Felton's case (1628). The Gunpowder Plot conspirators were racked, and Campion, whose fate was described in Paper II., under its compulsion divulged the names of persons who had received him. The signatures of Guy Fawkes before he was racked and after he was racked are suggestive of the course of treatment he received. The Privy Council was the authority which ordered the application of the rack,

but depositions so obtained were used at trials to convict the accused.

When one reads the proceedings in the criminal trials of James I. and his successors, it is not easy to understand the turn of mind of the gentlemen who lately attempted to celebrate the memory of "St. Charles." They must have forgotten all they ever learned, if they ever learned anything. James I., the wisest fool in Christendom; Charles I., the tyrant; Charles II., who never said a foolish thing and never did a wise one, and James II., the incarnation of all the faults of the family, form a group of as unsatisfactory Kings as ever country was cursed with. Any man with a predisposition in favour of the Stuarts and against the Revolution of 1688 should read the State Trials, and his opinions will rapidly change. The evil effects of a subservient bench are too evident in all these reports. The trial of Lord Bacon, as he is usually called, although it ought to be Lord Verulam or St. Albans, contains some examples of petty meanness which it is hard to credit, if they were not admitted by the accused.

His sentence was heavy, but the King pardoned him. This great lawyer seems to have ended his days in poverty. He named six executors in his will, but they all renounced, and administration with will annexed was granted to two of his creditors. Before he died he was in great want, "living obscurely in his chambers at Gray's Inn, where his lonely and desolate condition so wrought upon his melancholy temper that he pined away; and after his height of abundance was reduced to so low an ebb as to be denied beer to quench his thirst: for having a sickly stomach and not liking the beer of the house he sent now and then to Sir Falke Greville, Lord Brook, who lived in the neighbourhood, for a bottle of his beer, and after some grumbling the butler had orders to deny him." This treatment was very different to the days when once, the King having sent him a stag, he sent up for the under-keeper and having drunk the King's health to him in a great silver

bowl he gave it to him for a fee. He wrote a letter to King James shortly before the King died, in which he begged the King to help him, so that "I who desire to live to study, may not be driven to study to live." The tableau of Lord Brook's butler denying Lord Verulam a bottle of beer has its ludicrous side, but it was probably only one of many slights, one of those scorns that patient merit of the unworthy takes, and after all Bacon brought it on himself.

R. E. KINGSFORD.

EDITORIAL REVIEW

A Belligerent Number.

Other magazines have their Christmas, Easter and Midsummer numbers. We furnish our readers this month with a belligerent number. War between Great Britain and the United States is the last thing in the way of warfare that is likely to happen. Apart from Mr. G. H. D. Gossip (whose contributions to the Fortnightly Review would lead one to believe that Great Britain cannot win a yacht race without infringing on the modern Monroe doctrine) we believe that there is too much common sense amongst the people of the United States to permit them to embroil themselves in war for such a doubtful sentiment as was recently given expression to. But in these stirring times, when the next day's events may bring the British fleet into action, a resumé of the laws affecting maritime rights and liabilities may be interesting.

Mr. Marsh omits one significant remark that might be made concerning the extract which he exhibits, and that is that the principle that might is right and that any nation may raise itself above international law, may some day recoil on those who assert it.

A Provincial Law Association.

We have received a communication recommending that the various Law Associations should form a central association for the treatment of matters connected with the profession. We do not think that there would be sufficient cohesion amongst the various members to justify the effort. When the rules were revised in 1888 it was found impossible to obtain complete representation of all the associations on the general committee. But a few associations responded—the others either declined or neglected the opportunity. And yet this was

an occasion which (if anything would) ought to have brought them together.

Speaking of the rules, now that the work has commenced it seems as if it would not stop. New experiments are likely to be abandoned, and we prophecy a return to old courses in many cases. The publication of suggested rules and alterations from time to time, which is no doubt intended to invite discussion, is not the way to do so. It is no one's business, and therefore it will not be done. If the course so often suggested were adopted, viz., inviting a committee such as that which was convened in 1888 to revise the work and make suggestions, we feel confident that a code of rules would be produced that would last for years without material alteration.

Illness of Judges.

The news that the Chancellor was compelled for a time to cease work on account of illness induced by overwork will be received with regret. Mr. Justice Ferguson's illness, though it does not keep him altogether from work, is also matter of regret. While we must express our deep sympathy, we must also be permitted to use the fact as an illustration of the weakness of our judicial system. If one Judge becomes ill, or is unable from any cause to keep his regular appointments, the whole machine is thrown out of gear. The scheme for the trial Courts, the weekly Courts and the sittings of Divisional Courts fills up the whole time of every Judge. If the salaries were adequate there would be some compensating advantage. But as an increase seems to be beyond the horizon altogether, an addition to the number of Judges would be a relief.

Since writing the above both the learned Judges have been able to sit in Divisional Court.

CORRESPONDENCE.

The United States and Cuba.

To the Editor of THE CANADIAN LAW TIMES:

Sir,—I send you the following gem from the New York World, giving the latest American doctrine on international law. The world has recently witnessed an attempt on the part of our American cousins to magnify and distort a matter of domestic policy known as the Monroe doctrine so as to make it take on the semblance of a doctrine of international law. At this all the world wondered, but then all the world had not been educated up to the point of understanding what are the possibilities of development in that codeless science of the law known as international law. The latest development is crystallized in the following extract:

"In the matter of our national attitude toward Cuba all talk about international law is apart from the purpose. This is an act of sovereignty, and there is no international law that binds our sovereignty.

"It is well to bear this in mind and to emphasize it. International law is a secondary matter. A sovereign nation can obey or disregard it at will, subject only to conscience and consequences. The primary law is the will of the American people. If they want to aid Cuba they can do so in any way and to any extent that seems to them proper, and no international law can restrain them so long as they are ready to take the consequences. If their self-interest, their dignity, their honour, their sense of humanity, or their sympathy with the cause of liberty moves them to any course of action they can do what seems good in their eyes and justify their course with the strong arm against the challenge of any questioner. . . .

"What Congress has done the people have desired, and they are willing to answer for it. There is a higher law than any international code, and one that is more binding upon the conscience of a free people."

I send you this gem of purest ray serene in order that it may be embalmed in your pages for the benefit of the society which is promoting the codification of international law. Just think of an individual talking in that sort of style about a matter which is not dignified with the name of international law, but which is private and personal, and which he, therefore, probably understands; he says, "I know there is a conventional law which regulates and governs the relations of people in polite society, but that is a secondary matter. I can obey or disregard it at will, subject only to conscience and to consequences, namely, that I may be kicked out of that society, and if my self-interest, dignity or honour moves me to infringe upon that law, I can justify my course with the strong arm against the challenge of any questioner." I do not question the right of such an individual to adopt such a course any more than I question the right of any person to become a pariah and an outcast, or an Ishmaelite, with his hand against every man, and every man's hand against him. I regret that your adoption of linotype printing has circumscribed your capacity for presenting the extract in question with all the accessories of the printer's art; my first impression was that it should all go in italics, but immediately afterwards I saw that certain passages in the extract deserved at least small caps, while others could not be adequately presented without Great Primer.

Yours, etc.,

A. H. MARSH.

Toronto, 18th March, 1896.

THE
CANADIAN LAW TIMES.

MAY, 1896.

RESTRAINTS ON THE ALIENATION OF PROPERTY IN THE ROMAN LAW.

THE subject of such restraints in English law has recently excited a good deal of attention; and so so far, at least, as such restraints have been imposed by will, the English Courts, and the colonial Courts that follow the English law, have gradually trenched, bit by bit, on what was long considered as undoubted law in regard to precatory trusts, until the law has almost been reversed.

I have thought that a sketch of the Roman Law on the subject might prove interesting if for nothing else than as a study of comparative law. Where the restraint is found in testaments, I have given a rough translation of the cases. For the mere statement of the restriction without the circumstances connected with it would be of but little interest, and to abridge one of the Roman decisions is a task that few would venture to undertake—not an unnecessary word is to be found in them, they are models of brevity and precision.

The restraint might arise from dispositions in a testament, or by agreement between living persons, or by a positive enactment, "lege," or by the general or common law, "jure." The restraint arising from dispositions in testaments, I will notice after mentioning the others.

A prohibition to alienate may be made by agreement between living persons. For instance, when a person conveys property with a provision that it should not be sold, or should not come to certain persons, the agreement is valid, but not to the extent of preventing alienation. For the grantee in this case is made owner by the delivery to him, so in selling the property, or in giving it, or by delivering it in like cases, he transfers the property to his grantee. The ownership is really transferred; and the remedy of the person imposing the restraint is by action against the person agreeing not to sell; either a condiction in which is sought the recovery of property given for a purpose which has not been complied with (*a*); or, if a stipulation has been entered into that the property should not be sold, an action on the stipulation for the interest of the stipulator (*b*).

Where a positive enactment, "lex," prohibits alienation, without controversy, the prohibition is valid: so that nothing can be transferred contrary to it (*c*). And generally all residents in a state must obey it, and the penalty on those who do not obey it is that whatever is done contrary to what the law forbids is considered of no effect and absolutely void (*d*).

There are four classes of cases in which alienation is prohibited, one where the benefit of the owners is consulted; a second, in which the benefit of the owners and the character of the property is consulted; a third, where the interest of others, e.g., the state is involved; a fourth, where the property is of a kind prohibited to be alienated.

In the first class are those who cannot manage their own affairs; madmen, lunatics, infants, cannot do anything requiring an act of the will, for they have no will (*e*). Husbands and wives, though in other respects capable of managing their affairs, are not allowed to

(*a*) D. 12, 4.
(*b*) C. iv. 6, 3; D. xlv. 1, 135, 3.
(*c*) D. xxvii. 10, 10.
(*d*) C. i. 14, 5.
(*e*) D. l. 17, 40.

alienate the property given as a dowry. Prodigals interdicted by the Prætor from squandering their property cannot transfer it (*f*). Pupils cannot alienate without the authority of their tutor (*g*). In some cases it requires a decree of a magistrate to authorize the sale of a pupil's property (*h*). The case of youths having curators is the same as pupils in respect to all immovable property, and movable property that may be preserved without injury; none of them can be sold without a decree, unless for causes for which the property of pupils might be sold (*i*).

Those who on account of some bodily defect or disease cannot manage their affairs, such as the blind, the dumb, the deaf, or subject to any perpetual malady, to whom curators were wont to be appointed, are unable to transfer their property without the authority of the curator (*j*).

The alienation of ecclesiastical property was prohibited (*k*), but with variations; it was entirely prohibited to some, to some it was permitted, and to some with moderation if necessity required. One reason for this was the interest of the state that the property of the church should be preserved to furnish the expenses of the ministers, to support the poor, to maintain the buildings for divine uses, to which the property has been designed.

Sons under the paternal power could not alienate, without the consent of those under whose power they were, the property of which the parent had the usufruct (*l*).

There are some owners who are prohibited from alienating for their own sake. They are spouses between whom the conveyance of every thing is prohibited. The

(*f*) D. xxvii. 10. 1.
(*g*) D. xxvi. 8, 9.
(*h*) C. v. 37, 22.
(*i*) D. xxvii. 9, 1.
(*j*) Inst. i. 23, 4; C. ii. 22, 3.
(*k*) Nov. 120.
(*l*) C. vi. 61, 8, 5.

reason assigned for this was that an honourable love was founded upon the inclination alone that the spouses had for each other; and to consult their reputation, lest their union should appear to be acquired for money, and lest the better of the two might fall into poverty and the worse be enriched (*m*).

A second class to whom alienation is prohibited is that in which the prohibition is made for the sake of the property as well as of the person. This occurs when the alienation of everything is not prohibited, but of some certain property. Of this kind is prohibition to alienate the "dotal" property, i.e., property granted to the husband for the purposes of the marriage, "dos"; and gifts to the wife during the marriage, "donatio propter nuptias," and property in litigation.

As to the dotal property, the husband during the marriage was deemed the owner by the civil law (*n*); the wife was deemed the owner by natural law (*o*); but first by a Julian law (*p*); and afterwards by a constitution of Justinian (*q*) the dotal property could not be alienated either by the husband without the wife's consent, or by the wife against the will of the husband, or by both, nor could it be pledged.

In the same position are immovables given to the wife during marriage, "propter nuptias," the wife is owner, as the husband is, of the dotal property, and it is to be managed in the same manner, and could not be sold (*r*).

Property in litigation could not be sold, both for the protection of the property and that the condition of the claimant should not be prejudiced (*s*).

Another class of cases is that where alienation is prohibited, not for the sake of the owners, but of others,

(*m*) D. xxiv. 1, 3.
(*n*) C. iii. 32, 9.
(*o*) C. V. 12.
(*p*) D. xxiii. 5, 1.
(*q*) C. V. 23.
(*r*) C. V. 12, 29; Nov. 97.
(*s*) C. viii. 37, 2, sqq.

e.g., the state. Thus Vespasian prohibited the demolition of houses to carry off the marble to sell it (*t*). The Senate decreed that an owner should not destroy either a town or country house to sell separately the land and the materials of the house for a better price (*u*).

The sale of property to assist the enemies of the state was prohibited. Among the prohibited things were gold, eatables and drinkables, arms and materials for arms or for sharpening them (*v*). By another law it was forbidden on penalty of death to transfer to enemies food products, as corn, salt, wine, oil, or whetstones for sharpening weapons (*w*).

Decurions (town councillors) were prohibited from alienating their property unless by a decree of a magistrate after investigating the matter and ascertaining that from the condition of the decurion's family a sale was necessary (*x*). The office of decurion was a very troublesome and costly one. Among their other duties one was to collect the taxes imposed on the municipality, and they were responsible for those who did not pay (*y*). This was the reason for prohibiting them from selling their own property, as they might by selling escape the burden imposed on them.

The most interesting class of restraints of alienation is that imposed by testament. The interpretation of cases of this kind engaged the attention of the ablest jurists of the classical period of the Roman Law.

When a testator forbids certain property to be alienated by the heir, and adds that it might remain in the family, then, if anything is done contrary to this, an action is given to enforce the trust, to whom the testator wished to benefit. The law regarding a prohibition of this kind of alienation is declared thus: If the testator simply forbids the property to be alienated, and assigns

(*t*) C. viii. 10, 2.
(*u*) D. xviii. 1, 52.
(*v*) C. iv. 63, 2.
(*w*) D. xxxix. 4 11; C. iv. 41, 1.
(*x*) C. x. 34, 1 & 3.
(*y*) Fustel de Coulangeo, La Gaule Romaine, p. 251.

no reason for it, such a command is held to be of no effect. The Emperors Severus and Antoninus declared that if a testator in his testament simply prohibited something to be alienated, without giving a reason for this disposition, it was of no effect, as being a naked command, which it is not permitted to him to do. But if a testator signified his desire to benefit his children, or posterity, or freedmen, or heirs, or some other person, that desire was to be observed (*z*).

When a father, having instituted his son as heir, by whom he had three grandchildren, directed that an estate should not be alienated, and should remain in the family; and the son dying instituted two of his sons his heirs and disinherited the third, and bequeathed the estate to a stranger, these emperors decided that the son had not obeyed the will of the testator (*a*).

In this last case, according to Marcellus, if the son had instituted only one of his children his heir, and disinherited the other two and bequeathed the estate to a stranger, the disinherited children could enforce the trust. It would be the same if the son had emancipated his children in his lifetime, and afterwards had alienated the estate (*b*). But if the son had instituted all his children his heirs for unequal portions, those who were instituted for the smaller shares could not require the trust to be enforced so as to make all the shares equal; for if he had given it to one only, it would still be left in the family (*c*).

A bequest by these words: I desire that you give; I wish that you give; I believe that you will give; constitutes a trust (*d*).

Many other words, all in the form of request, such as, "Rogo, Volo, Mando, Fidei tuo Comitto, Exigo, Desidero," constitute a trust (*e*).

(*z*) D. xxx. 114, 14.
(*a*) D. xxx. 114, 15.
(*b*) D. xxx. 114, 16.
(*c*) D. xxx. 114, 17.
(*d*) D. xxx. 115.
(*e*) Brisson, De verb. sig. under the word Fidei-commissum & D. xxx. 118.

Down to a late period the law of England was to the same effect. In Malim v. Keighley (*f*), Sir R. Arden there says, "I will lay down the rule as broad as this: wherever any person gives property and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressly is to be controlled by the party; and that he shall have an option to defeat it." How much the inclination of the English Courts varies from this now may be seen in the case of In re Hamilton, Trench v. Hamilton (*g*).

A testator instituted his brother his heir, and requested that his house should not be alienated but should be left to the family. If the brother has not complied with this request, but has alienated the house, or has died having instituted a stranger his heir, all who were in the family might seek to enforce the trust. What if they are not all of the same degree (of relationship)? Papinian decided that those nearest in degree were to be first called to the trust. But this was not to prejudice the right of the remoter relatives to the trust at a later time, but the nearest is to be admitted to the trust if ready to give security to restore the house to the family. If that security has not been required from him who was first admitted, no action will be given to compel it; but if the house should pass to a stranger the relatives may enforce the trust. But security may justly be required from the relative put in possession (not to transfer the house to strangers), even if there should be no relative of a later degree (*h*). The last clause seems strange, but other relatives might be born before the death of the person in possession.

If a testator has left an estate to his heir, wishing it not to go out of the family, and an involuntary alienation has been made by a forced sale of the heir's property, the purchaser may keep it as long as the debtor might have kept it had his property not been sold; after

(*f*) 2 Ves. p. 333, 529 a; 2 R. R. 229.
(*g*) 12 R., or in the monthly No. for August 1895, p. 49.
(*h*) xxxi. 69, 3.

the death of the debtor the purchaser must restore the estate (*i*). If the involuntary sale were made for the debts of the testator, the restraint is extinguished (*j*).

A testator bequeathed a farm to his freedmen and requested that they should not alienate it, and that it should remain in their family. If, one excepted, the others have sold their shares, he who had not sold may claim the entire shares of the others who had not the power of alienating; for the testator appears to have invited to the trust those who should comply with his wishes. Otherwise it would be very absurd that there should be reciprocal actions, viz., that one should sue another alienating party when he had lost his own share by alienating it. But that could only take place if all had sold their shares at the same time. Moreover, as each prior one sold he shall not be numbered among the others to share in a part sold later. But he who had sold last is understood to have made him who had not sold entitled to the shares of those who had sold. If none of them have sold and the last of the freedmen dies without children the trust is extinct (*k*).

This is confessedly a law of difficult interpretation. Cujas has returned to it more than once (*l*). He says, in purport, assume that there were four freedmen, and the first sold his share, the three others who had not sold were equally entitled to the share of the first. Then the second sold, and the third and fourth were equally entitled to that share. Then the third sold, and the fourth was entitled solely to his share; but that the second and third were entitled, "optimo jure," with perfect justice, to retain the shares in the first and second that they had acquired before selling their own. The result would seem to be that the second, third and fourth had each one-third of the share of the first, that the third and fourth had each half of the share of the second, that the fourth had the entire share of the third,

(*i*) D. xxxi. 69, 1.
(*j*) D. xxxi. 69, 4.
(*k*) D. xxxi. 77, 27.
(*l*) Vol. 4, 2339, and Vol. 7, 2010, ed. Prati.

and the fourth retained his own share. The fourth then would be entitled to two and five-sixth shares, the third to five-sixths of a share, and the second to two-sixths of a share. This is not without difficulty, but it is probably correct.

If among the freedmen a freedwoman was also admitted to the legacy of a farm which the patron requested should not go out of the family, and she dies leaving a son her heir, it has been decided that this son should keep the share that his mother had (*m*).

The term family includes all the persons who are under the power of one person by natural or civil law, e.g., father, mother, son, daughter, and all who descend from them, as grandson, granddaughter, and so on, and all the agnates (*n*).

A father by words of trust prohibited a farm to be alienated from the family of his children. The last of the children who could claim the trust dying without children leaves this action (to enforce the trust) in his succession, and it will pass to his heir though a stranger (*o*). The prohibition is narrowed to the family of the children, and the last of these dying he might leave the property to a stranger, as if the trust were finished, as it did not go beyond the persons of the children.

A testator bequeathed a house to his enfranchised slaves of both sexes, so that of the rent of it the males should take two parts, the females one, and he forbade the alienation of it. With the consent of all it was sold by the heir. A question arose whether the males should take the same share in the price as they took in the trust. It was decided that there was no action to enforce the trust on the price, unless the sale had been consented to with the intention that the males should have two shares for the females' one (*p*).

(*m*) D. xxxi. 77, 28.
(*n*) D. l. 16, 195, 2.
(*o*) D. xxxi. 78, 8; Cujas 7, 2012.
(*p*) D. xxxi. 88, 14.

A testator instituted his son and his emancipated grandchildren by the son his heirs, and thus requested: I wish that my houses shall not be sold by my heirs, nor money borrowed upon them; but that they remain not alienated nor encumbered to my sons and grandchildren forever. But if any of them shall wish to sell his share or to borrow upon it he may sell to his co-heir, or borrow on it from him. But if any of them shall go beyond this, what he shall have done shall be useless and void. A question arose, when the son of the deceased borrowed money from Flavia Dionysia (a stranger), and leased to her his share of the houses and assigned to her the rent owing to him for his share, whether the condition of the testament had happened causing a nullity of the act. It was decided that it had not (*q*).

A lease for a short time seems not to have been considered an alienation. Gloss—Cujas, 7, 2060, says that only a sale and mortgage (pignoratio) was prohibited, not a lease, otherwise the use of the house would have been prohibited.

A father (who had instituted his son his heir) prohibited his son to alienate or pledge the land, but entrusted it to him to preserve it for his children by a lawful marriage, and to his other cognates. The son paid a mortgage with which the father had encumbered the property, and to satisfy the creditor borrowed money from a new creditor to pay the mortgage, and assigned to him the security held by the first creditor. It was decided that the pledge was validly contracted. And if the son had sold the land of the succession which had been mortgaged, to satisfy the creditors of the succession, the purchaser, who was ignorant of the trust, would have made a valid purchase, if there were no other means in the succession to pay the debt (*r*).

A testator instituted his two freedmen, Stichus and Eros his heirs, and thus disposed: "I forbid the Cornelian estate to be disposed of out of the family of my freedmen." Stichus, one of the heirs, manumitted his

(*q*) D. xxxi. 88, 15.
(*r*) D. xxxii. 38, Pr.

female slave Arescusa, and bequeathed to her his share of the estate. It was doubted whether Eros and the other fellow-freedmen of Stichus could on the ground of the trust claim the share of the estate from the heir of Stichus, and it was decided that the manumitted slave was not included in the trust. And, therefore, it would seem that the fellow-freedmen of Stichus could enforce the trust (*s*).

A testator instituted his daughter his heiress, and made this disposition: "I forbid that my house be disposed of out of my family; but I wish it to belong to the slaves born in my house whom I have enfranchised in this testament." A question was asked, whether on the death of the heiress and the slaves born in the house except one, the whole trust belonged to that one who remained. It was decided that the trust belonged to that one slave born in the house who survived, not the whole trust, but a part proportioned to the number enfranchised (*t*).

A testator forbade his son to sell, give or pledge a certain farm during his life, and added these words: "And if he shall do anything contrary to my wish the Titian farm shall go to the Treasury, for this is so done that the Titian farm shall never depart from your family." The son retained the farm during his life according to the wish of his father, and died bequeathing it to a stranger, when a question arose whether the farm belonged to the son's heirs or to those who were of the family. It was decided that it might be collected from the will of the testator that the son while he lived should not alien or pledge the farm, but that he might dispose of it by testament even to extraneous heirs (*u*).

Cujas, 8, 92, comments on this decision as follows, in effect: This direction that the land should go to the Treasury if the son did not comply with his wish was not a penalty but a desire to prefer the Treasury to all buyers or creditors. A doubt was suggested whether

(*s*) D. xxxii. 38, 1; Cujas 8, 90.
(*t*) D. xxxii. 38, 2; Cujas 8, 91.
(*u*) D. xxxii. 38, 3.

the son had transmitted the land to the extraneous heir, or whether the members of the family should exclude the extraneous heir, because, in the first place, the testator said during his life, and afterwards, shall never depart from your family, whence he seemed to point to the whole family and thus to benefit the whole, and in that way they who were of the family would exclude the extraneous heir. These last words, never depart, should be connected with during his life, and from your family are to be understood from thy family. For testators often use language improperly. And hence has arisen the question whether he intended to benefit the whole family or only the son. But these words are directed to the son, not to the family. Never, i.e., during his life.

Julianus Agrippa, a commissary, made this provision in his testament: "I do not wish that my heir should pledge or in any manner alien the property in which there is a burying ground, or the suburban land or my large house." His daughter, whom he had made his heiress, left her daughter, a granddaughter of the testator, who after having for a long time possessed these properties, dying left them to strangers her heirs. It was questioned whether these properties belonged to the strangers, or to Julia, grandniece through males of Julianus Agrippa. It was decided that this was a bare command, and therefore the strangers were entitled to the property (*v*).

A testator bequeathed to fifteen freedmen, whom he named, a small piece of land with a workshop, and added these words: "I wish that my freedmen shall keep this property with this condition, that none of them shall sell or give his share to a stranger in any manner whatever. If anything shall be done contrary to this, then these shares or the land with the workshop shall belong to the Tusculan republic." Some of these freedmen sold their shares to two of their fellow-freedmen of the number of the fifteen. The purchasers died leaving Gaius

(*v*) D. xxxii. 38, 4; Cujas 8, 93.

Seius, a stranger, their heir. It was questioned whether the sold portions belonged to Gaius Seius or to the other freedmen who had not sold their shares. It was decided that they belonged to Gaius Seius. Another question was whether the sold portions did not belong to the Tusculan republic. It was decided that they did not. Claudius saying that it was not the person of the actual possessor, who was a stranger, that was to be considered, but that of the purchasers, who, according to the will of the testator, were of the number of those to whom it was permitted to sell, and consequently the condition under which the property was to pass to the Tusculans had not arisen (*w*).

A father instituted his sons his heirs, and added, "The land that shall come to them of my property, they shall for no reason alienate but preserve it for their succession, and for that purpose they shall give security to each other." A doubt arose whether the lands were left upon trust. It was decided that there was no trust (*x*).

Bartolus says there was an implied trust from the intention of the testator. Pothier, that a trust arises from the rescript (*y*). Cujas, 8, 95, says that though there were no words of trust, yet from the intention of the testator a trust was created. In another place he says it is not a trust, but a contract, as the sons were to give reciprocal security (*z*).

Lucius Titius provided in his testament that his heiress should not in any manner alienate his suburban land or his house. His daughter, whom he made his heiress, left a daughter her heiress, who had long possessed these properties, and dying bequeathed them to strangers. It was questioned whether the lands should belong to Julia, a greatniece of the testator L. Titius. It was decided that the disposition in the will of L. Titius was a simple command, and did not make a trust.

(*w*) D. xxxii. 38, 5; Cujas 8, 94.
(*x*) D. xxxii. 38, 7.
(*y*) D. 30, 114, 14, ante.
(*z*) Cujas, 4, 2377.

and the giving the property to strangers was not contrary to the will of the deceased (*a*).

An heir ought to choose one of the family in fulfilment of a trust to leave the property to one of the family at his death; when he has chosen one he cannot bequeath the property to the person so chosen in his own testament, which he might demand from the testament of another (the original testator). Whether, therefore, is what is so given of no effect as given to a creditor; or while the choice may be changed the person so chosen is not to be considered a creditor? Either the choice will not be changed and the person chosen will be a creditor, or it may be changed, and in that case the person chosen will have no claim under either testament (*b*).

"I request my heir at his death to give a certain property to such one of my freedmen as he shall choose." Under these terms the choice belongs to the heir, and none of the freedmen can demand the property, as another may be preferred to him. If the heir die without making a choice all may sue for the property. Therefore, it happens that what is given to one, he cannot sue for it while the other freedmen live, but all may sue for what was not given to all. In only one case can one sue, i.e., if at the death of the heir he alone of the freedmen survive (*c*).

That is, the survivor in such case may take the whole. Cujas says, 7, 1927, that this is opposed to D. xxxii., 38, 2 ante, where in a similar case the decision was that the survivor should only take a share proportionate to the number of those entitled to the benefit of the trust; but he reconciles the two laws by saying that in the last mentioned case the testator named, i.e., manumitted, the freedmen who were to benefit, so that each had at first an equal share, so in the present he bequeathed to one, and if one alone survives he takes the whole.

(*a*) D. xxxii. 93 Pr.; Cujas 4, 522.
(*b*) D. xxxi. 67 Pr.; Cujas 7, 1917.
(*c*) D. xxxi. 67, 7.

We have seen above who are included in the family.

What is included in the word alienation? Justinian decreed that an alienation forbidden by the law, or by the agreement of the parties, or by the will of a testator, included not only the alienation of the ownership of property, or the emancipation of slaves, the grant of a usufruct, or a hypothec or a pledge; or the imposition of a servitude or perpetual lease, unless the authority of the constitutions, or the will of the testator, or the tenor of the agreements which prohibited alienation, permit it (*d*). When a testator forbids property to be alienated out of the family, he forbids the appointment of an extraneous heir (*e*), and the bequest to a stranger (*f*). In Novel. 7, c. 1, Justinian construed alienation to include sale, donation, exchange, and a perpetual lease. The word, however, has various meanings, receiving sometimes a wide, sometimes a narrow construction, according to the subject to which it applied. But the foregoing instances show the construction placed upon it in a testament forbidding it.

I take the following classification of the cases in which the restraint upon alienation ceases from Huber. Praelec. vol. 3, 1366.

1. On account of the form of prohibition:
   (*a*) If but a bare command without any reason assigned for it: D. xxx. 114, 14; D. xxxii. 93, Pr.
   (*b*) If made in favour of persons who are dead: D. xxx. 38, 2, 5.
   (*c*) If limited to a certain time and it has elapsed: Inst. I. 22, 5.
2. On account of the cause of alienating:
   (*a*) To the extent necessary to pay the debts of the dead man who imposed the restriction: D. xxx. 114, 14; Inst. 2, 22, 3; C. vi. 50, 16; C. viii. 28, 1.
   (*b*) For expenses necessarily incurred on other restricted property: D. v. 3, 53.

(*d*) C. 4, 51, 7.
(*e*) D. xxxi. 69, 3.
(*f*) D. xxx. 114, 19.

(*c*) For debts of the possessor, while he lives, to the extent of his interest in the property, if otherwise he has not the means of paying : D. xxxi. 69, 1.

(*d*) For the legitim and Trebellian portion: Nov. xviii. c. 1, D. xxxvi. 1.

(*e*) For the endowment and aliment of children: C. vi. 43: Authen. l. 3, Nov. xxxix. c. 1.

3. In respect of the person seeking to enforce the trust:

(*a*) Because he is unworthy of the benefit of the deceased: D. xxxiv. 9, 1.

(*b*) Because he has alienated his own share: C. vi. 42, 11 (or if all sell or some with the consent of all).

(*c*) Because he has consented to the alienation he impeaches: d. l. 42, 11; D. xxx. 120, 1; D. xxxi. 88, 14.

(*d*) Because he has renounced the trust in his favour: C. ii. 3, 29.

(*e*) If he is the heir of the seller or of him who has consented to the sale: D. l. 17, 149.

4. On account of the possessor:

(*a*) If he is of the number of those in whose favour the prohibition was made: D. xxxii. 38, 5.

(*b*) If he has possessed for 30 years, for then usucaption is completed.

W. PROUDFOOT.

ANIMUS FURANDI.

A recent article in the Canada Law Journal on this subject, written by a learned and accurate contributor, expressing the opinion that a similar act to that in R. v. Ashwell (*a*) could probably not "by any possible construction be held to be theft under the Criminal Code," seems to call for some remark. There is no doubt that under the Code, just as under the previous law, there must be in all cases of theft "the animus furandi, that guilty intention which makes the difference between a trespass and a theft."

But the object of doing away with the word "larceny" in the Code, and of defining "theft" (which covers the former offence), as is done in section 305, was to do away with the numerous technicalities and minute distinctions of the former law; and previous cases are not now much in point on this question.

The Imperial Commissioners say: "The immediate consequence of the doctrine, that a wrongful taking is of the essence of theft, is, that if a person obtains possession of a thing innocently, and afterwards fraudulently misappropriates it, he is guilty of no offence. We have defined theft in such a manner as to put wrongful taking and all other means of fraudulent misappropriation on the same footing. The definition, properly expounded and qualified, will, we think, be found to embrace every act which in common language would be regarded as theft, and it will avoid all the technicalities referred to as arising out of the common law rules" (*b*). But, if the law is as suggested in the article in question, the commissioners would seem not to have accomplished what they aimed at.

(*a*) 16 Q. B. D. 190.

(*b*) Report of Imperial Commissioners.

In Reg. v. Ashwell the facts were these: Drinking together one evening at a public house, Ashwell asked Keogh to come into the yard. There he requested Keogh to lend him a shilling. Keogh consented, gave Ashwell what both thought was a shilling, and went home. Ashwell soon discovered that Keogh had made a mistake, and that the coin was not a shilling but a sovereign. Instead of returning it he fraudulently appropriated it to his own use, changing it the same night at another public house, and afterwards giving false and contradictory accounts as to how he had got it. On these facts (after conviction by a jury) it was held that the prisoner had not been guilty of larceny as a bailee, and the Judges (14) were equally divided in opinion as to whether he had been guilty of larceny at common law. The conviction therefore stood. In the case of R. v. Flowers (*c*), the Ashwell case was explained, and it was said that "the difference of opinion amongst the Judges in that case was founded upon the facts of the case, and on the application to those facts of the settled principle of law, that innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny" (per Manisty, J.). "The Judges were of opinion that to justify a conviction for larceny the receipt and appropriation must be contemporaneous" (per Lord Coleridge, C.J.).

The old law required a wilfully wrongful taking—that is, the taker must know that he is wrongfully taking the property and must intend to do so.

Larceny is defined by Harris (p. 206) as "the wilfully wrongful or fraudulent taking possession of the goods of another with felonious intent to deprive the owner of his property in them." Where the person receiving the money or property did so innocently, and was at the time under the same mistake as the person who handed it to him, he could not, under the then existing law, be convicted of larceny, although when he subsequently discovered the mistake he fraudulently retained the money or property.

(*c*) 16 Q. B. D. 643.

The case of Reg. v. Hehir (*d*) was very like the Ashwell case. The prosecutor owed the prisoner the sum of £2 8s. 9d. for work done in his employment. The prosecutor, intending to discharge the debt, handed to the prisoner 9s. in silver and two notes, both of which were believed, alike by prosecutor and prisoner, to be £1 notes. One of these was a £10 note. There was evidence that after receiving this note the prisoner discovered its true value, and fraudulently appropriated it to his own use. On this evidence the jury convicted the prisoner of larceny. But it was held by a majority of the Court (5 to 4) that the subsequently fraudulent misappropriation of the £10, previously innocently acquired, did not amount to larceny, and that the conviction should be quashed.

Now, apply to the previous rule of law the provisions of the Code on the subject, and it is submitted that in similar cases arising here the prisoner should be convicted. The Code, section 305, defines theft as follows: "Theft, or stealing, is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent (*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely, of such thing or of such property or interest.

"(3) It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

By this provision the former doctrine, that the original taking of the property must have been wrongful, is abolished. It is now as much stealing for one who has lawfully and innocently received a chattel to afterwards fraudulently appropriate it, as it is to take it wrongfully for the purpose of stealing it. In the one case the sovereign, in the other the £10 note, came, no doubt, innocently into the possession of the prisoner, but

(*d*) 1895, 2 Ir. 709.

without the least wish or intention on the part of the true owner to part with them, as the prisoner very well knew as soon as he discovered the mistake made. Although in each case the money may be said to have been "at the time of conversion in the lawful possession of the person converting," yet it would seem clearly a case in which he was guilty of "fraudulently and without colour of right converting it to (his own) use, with intent to deprive the owner absolutely" of it, and therefore, in each of the above cases the prisoner would seem under the Code to be guilty of theft, in the one case of the sovereign, and in the other of the £10 note. It would not seem to make any difference that the prosecutor in each case intended to give something to the prisoner; the specific coin or note he never intended to give, and the prisoner well knew it, and in converting it to his own use came within the Code definition of theft.

N. W. HOYLES.

EDITORIAL REVIEW.

The New Benchers.

The election of Benchers has resulted in a very slight change in the personnel of the Bench. Three Toronto Benchers, Messrs. J. K. Kerr, Q.C., Lash, Q.C., and Walter Barwick, and two from outside, Messrs. Mackelcan, Q.C., and Magee, Q.C., were not returned. The following is the list of Benchers elected:

H. H. Strathy, Q.C., Barrie; Charles Moss, Q.C., Toronto; B. M. Britton, Q.C., Kingston; William Douglas, Q.C., Chatham; Hon. A. S. Hardy, Q.C., Brantford; Christopher Robinson, Q.C., Toronto; D. B. Maclennan, Q.C., Cornwall; John Idington, Q.C., Stratford; John Hoskin, Q.C., Toronto; Colin McDougall, Q.C., St. Thomas; B. B. Osler, Q.C., Toronto; D. Guthrie, Q.C., Guelph; M. O'Gara, Q.C., Ottawa; Geo. C. Gibbons, Q.C., and R. Bayly, Q.C., London; A. B. Aylesworth, Q.C., Toronto; J. V. Teetzel, Q.C., Hamilton; Geo. H. Watson, Q.C., Toronto; Alex. Bruce, Q.C., Hamilton; William Kerr, Q.C., Cobourg; Geo F. Shepley, Q.C., Toronto; A. H. Clarke, Windsor; John Bell, Q.C., Belleville; E. Martin, Q.C., Hamilton; D'Alton McCarthy, Q.C., Charles Ritchie, Q.C., and W. R. Riddell, Toronto; W. H. Hogg, Q.C., Ottawa; E. B. Edwards, Peterborough; Æmilius Irving, Q.C., Toronto. They are given in the order in which the votes placed them. Messrs. Gibbons, Wm. Kerr, Hogg, Clarke and Edwards are the new choice.

It is much to be regretted that Mr. Barwick was not returned, as he was by far the most energetic and industrious committee man on the Bench; and it is a poor return for his industry that he was left off the present Bench. The mistake is no doubt due to the fact that the profession in general do not see the work done, and

have no conception of the amount done. An attempted explanation is that two other members of his firm were elected, and the agitators were for "one firm, one Bencher." That, however, is plainly not the reason, for not only were two of this firm elected, but three of another firm were also elected. It certainly does not account for the dropping of Messrs. J. K. Kerr and Lash. There is in reality no explanation of the result of the Benchers' elections except blind chance, which is as good as any we have yet heard.

A good deal of surprise was manifested at such a small change being made after such a large amount of agitation. But a moment's thought will show that the agitations are in comparatively small localities, and the rings of disturbance do not meet. Any general agitation will always have its effect.

The result of all Benchers' elections shows that the profession are very conservative in their views, and make but few changes. And rightly so. The interests and business of the Society are large, and continuity of office is essential in order that the business may be intelligently disposed of.

BOOK REVIEWS.

A Treatise on the Railway Law of Canada. Embracing Constitutional Law, the Law of Corporations, Railway Securities, Eminent Domain ; Contracts, Common Carriers, Negligence, Damages, Master and Servant, Text of Dominion and Provincial Railway Acts, etc., Forms of Proceedings in Expropriation. By HARRY ABBOTT, Q.C., of the Montreal Bar. Professor of Commercial Law, McGill University. Montreal: C. Theoret. 1896.

While Mr. Abbott's book is most comprehensive in its scope and full in its treatment of the subject, we miss a good deal of English law from it. For this apology is made, but it nevertheless strikes the practitioner in Ontario that there is a want. It will be noticed that Mr. Abbott adopts the purely American phrase for expropriation, which to very many not familiar with the expression will convey no meaning whatever. We must apologize, however, for giving expression to the first impressions received on opening the book. The subject of negligence, as carriers and otherwise, is fully and ably treated of, and will be of great use to practitioners generally. The remainder appeals to a limited class.

Draft Revised Statutes of British Columbia. First Report. 1896.

The revision of statutes, if well done, is a ponderous and withal an uninteresting task. The present draft of the Revised Statutes of British Columbia has been prepared by the present Chief Justice, and unusual care seems to have been taken to indicate by type the process of consolidation and alteration, so that a mere glance will show how the statutes have been treated.

Valuable suggestions are made as to amendments. It is curious to notice that Magna Charta is printed in the draft but not the B. N. A. Act.

Digest of Insurance Cases. Embracing all decisions of the U. S. Supreme, Appellate, and Circuit Courts, and of the Appellate Courts of the various states and foreign countries, in any manner affecting insurance companies upon whatever plan their business may be conducted. Also reference to annotations and to leading articles on insurance in law journals. Vol. VIII. For the year ending October, 31, 1895. By JOHN A. FINCH, of the Indianapolis Bar. Indianapolis and Kansas City: The Bowen-Neville Co. 1896.

As usual, this Digest will be well up to its former issues. In addition to the digest of subjects there is an index to the Digest, which makes it exceedingly easy of reference.

THE
CANADIAN LAW TIMES.

JUNE, 1896.

PROHIBITION: THE LATE PRIVY COUNCIL DECISION.

THE recent judgment of the Judicial Committee of the Privy Council in respect to powers of prohibitory liquor legislation in Canada is full of general constitutional interest, and their lordships have given in it an authoritative answer to more than one moot question in respect to the law of legislative power in Canada and the proper interpretation of the British North America Act.

In the first place they have determined the application and effect of those concluding words of section 91, which have been the subject of such various and contradictory views, and which say: "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces."

With respect to the application of these words their lordships had observed in the case of Citizens' Insurance Company v. Parsons (*a*), that they had reference only to No. 16 of section 92, which places within provincial jurisdiction "generally all matters of a merely local or private nature in the provinces." They had, indeed, indicated that this was their view in the prior decision of

(*a*) 7 App. Cas. at pp. 107-8; 1 Cart. at pp. 271-2 (1881).

L'Union St. Jacques de Montreal v. Belisle (*b*), and in the argument before them in Hodge v. The Queen (*c*), in November, 1883, Sir Arthur Hobhouse observed that if the clause in question referred to all the classes of subjects in section 92 and not merely to Class 16, "such a view of the Act as that would support the Dominion Legislature in almost anything," and declared distinctly that the words referred only to Class 16. In the course of the argument in this very case just decided by their lordships, Lord Herschell said: "At the end of section 91 there is a provision which only applies to item 16 in section 92, and that provision is that you cannot get in under the words 'local or private nature' anything which is in one of the enumerated classes of section 91" (*d*). However, their lordships now state that it is not strictly accurate to say that the clause in section 91 under consideration applies only to No. 16, and that it appears to them that it "was meant to include and correctly describes all the matters enumerated in the sixteen heads of section 92 as being from a provincial point of view of a local or private nature," and thus they have entirely confirmed the view taken by Mr. Justice Gwynne in the Court below, as they have also in the general construction they have now put upon the clause (*e*). The misconception thus corrected arose, it may be conjectured, from overlooking the fact that the clause in section 91 does not say "within the class of matters of a merely local or private nature." It treats all the classes enumerated in section 92 as comprising one large generic class of matters of a local or private nature in the respective provinces.

(*b*) L. R. 6 P. C. at pp. 35-6; 1 Cart. at pp. 68-9 (1874).

(*c*) Dom. Sess. Pap. 1884, Vol 17, No. 30, at p. 29.

(*d*) Transcript from Marten & Meredith's shorthand notes, second day, p. 68.

(*e*) See *per* Gwynne, J., 24 S. C. R. at pp. 212-13. The view that the words could not be restricted in their application to No. 16 of section 92, but applied to all the classes of subjects in that section, was also expressed by Ritchie, C.J., in City of Fredericton v. The Queen, 3 S. C. R. at p. 537; 2 Cart. at p. 35 (1880); Gwynne, J., in R. v. Robertson, 6 S. C. R. at p. 64; 2 Cart. at p. 119 (1882); *per* Henry, J., in Sulte v. Corporation of Three Rivers, 11 S. C. R. at p. 36; 4 Cart. at p. 315 (1885); and by several other Judges in other cases.

As to the general effect of the clause their lordships say that its intention is to derogate from the legislative authority given to the Provincial Legislatures by section 92 to the extent, but only to the extent, of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerated heads of section 91. They indicated that such was its general purport in Citizens' Insurance Company v. Parsons (*f*), by referring to it there as "this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers"; and in the present case, in the Court below Gwynne, J., held (*g*): "The true effect of this provision in section 91 is plainly, as it appears to me, to give expressly to the Dominion Parliament, for the purpose of exclusive legislation upon all matters coming within the several subjects enumerated in section 91, legislative power, if required, over all of the subjects enumerated in the sixteen items of section 92, every one of which relates to matters of a purely provincial, municipal, private or domestic character, that is to say, 'of a local or private nature.'" Their lordships have entirely confirmed this interpretation, but at the same time it is the fact that if this is the sole intent of the clause it appears open to the charge brought against it by Dunkin, J., in Cooey v. The Municipality of the County of Brome (*h*), of having been "added unnecessarily," for, as Gwynne, J., himself observes in City of Fredericton v. The Queen (*i*), "The previous part of section 91 in the most precise and imperative terms declares, that 'notwithstanding anything in the Act'—notwithstanding, therefore, anything whether of a local or private nature or of any other character enumerated in section 92—the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the class of

(*f*) 7 App. Cas. at pp. 107-8; 1 Cart. at p. 271-2.

(*g*) 24 S. C. R. at pp. 212-3.

(*h*) 21 L. C. J. at p. 185; 2 Cart. at p. 386 (1877).

(*i*) 3 S. C. R. at 1. 566; 2 Cart. at p. 58.

subjects enumerated in section 91." And in Tennant v. The Union Bank of Canada (*j*), which their lordships say in their present judgment states and illustrates the view that the Dominion can deal with matters local or private where such legislation is necessarily incidental to the exercise of its powers enumerated in section 91, they did not refer to or rely upon this clause, but wholly upon the clause "notwithstanding anything in this Act"; nor did they either in Cushing v. Dupuy (*k*), or in Attorney-General of Ontario v. Attorney-General of the Dominion (*l*), the other cases to which they also refer as illustrating the same view, make any reference to the clause on which they now rest it.

We have seen above that Lord Herschell in the course of the argument stated the effect of the clause to be that you cannot get in, under the words "local or private nature," anything which is in one of the enumerated classes of section 91, and in the argument in Hodge v. The Queen (*m*), Mr. Davey, as he then was, argued in like manner, that what the clause means is that "the Provincial Legislature cannot legislate on a matter which is expressly mentioned in the enumeration in section 91, confining their legislation to the provinces, and say that that is of a local or private nature." He argued again for a similar interpretation before the Privy Council in the Matter of the Dominion Liquor License Acts, 1883-4 (*n*), namely, "That the Legislatures of the provinces cannot legislate on any of the enumerated matters for their own provinces under the pretence or under the contention that the legislation is of a provincial or local character"; and in Quirt v. The Queen (*o*), Strong, J., expressly holds this to be the meaning of the clause. And the clause, it is clear, will

(*j*) L. R. 1894, A. C. at p. 46.

(*k*) 5 App. Cas. at p. 415; 1 Cart. at p. 258.

(*l*) L. R. 1894, A. C. at p. 200.

(*m*) Dom. Sess. Pap., 1884, Vol. 17, No. 30, at p. 100.

(*n*) See transcript from Marten & Meredith's shorthand notes. And see *per* Fisher, J., in Robertson v. Steadman, 3 Pugs. at p. 637 (1876), and Steadman v. Robertson, 2 P. & B. at pp. 593-4 (1879).

(*o*) 19 S. C. R. at p. 516.

bear this rendering as well as that the Board now put upon it, and perhaps it may not be overbold to surmise that their lordships may even yet hold that it is its primary intent and purport. The distinction, after all, is merely between reading it as saying that the Dominion Parliament can exclusively legislate on the enumerated subjects in section 91, notwithstanding the matters assigned to the provinces in section 92, and reading it as saying that the Legislatures cannot legislate on any of the enumerated subjects in section 91, notwithstanding the powers exclusively assigned to them in section 92. But the latter seems to be the more important significance of the clause, for without it, it might have been supposed that although section 91 says that Parliament may exclusively legislate upon the matters therein enumerated, this only means that it alone may legislate upon these subjects for the whole Dominion, but does not prevent the provinces legislating upon them within the limits of each province.

Proceeding with their lordships' judgment we next come to a passage of very great constitutional interest and importance. The Board had occasion to deal to some extent with the subject of the general residuary legislative power of the Dominion Parliament in Russell v. The Queen (*p*), but they now deal with it very explicitly. In a report to the Executive Council of the province upon the decision of the Privy Council in Hodge v. The Queen (*q*), Sir Oliver Mowat says: "It is clear that an alleged or supposed expediency of the law being uniform throughout the Dominion on any subject which is otherwise within the exclusive jurisdiction of the Provincial Legislatures does not give jurisdiction to the Federal Parliament to create uniformity"; and several of our Judges have enunciated the same principle (*r*). The Judicial Committee, also, incidentally

(*p*) 7 App. Cas. 829; 2 Cart. 12 (1882).

(*q*) Dom. Sess. Pap. 1884, Vol. 17, No. 30, at p. 143.

(*r*) So, *per* Taschereau, J., in Citizens' Insurance Co. v. Parsons, 4 S. C. R. at p. 310; 1 Cart. at p. 329 (1880); *per* Burton, J.A., in In re Local Option Act, 18 A. R. at p. 589 (1891); and in Regina v. County of Wellington, 17 A. R. at pp. 433-4 (1890); *per* Gwynne, J., in In re Prohibitory Laws, 24 S. C. R. at p. 223 (1895).

implied as much in Russell v. The Queen (*rr*), where they said: "There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local, or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. . . . The present legislation is clearly meant to apply a remedy to the evil which is assumed to exist throughout the Dominion." In their present judgment, however, their lordships distinctly affirm the principle and explain it in a most interesting manner. They say that in legislating with regard to matters which are specified among the enumerated subjects of legislation in section 91, the Dominion Parliament has no authority "to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by section 92" (*s*). But the important question arises, what is meant by "encroaching"? It is quite clear that their lordships do not mean, as Judge Travis in his somewhat involved Treatise on Constitutional Law appears to think should be held, that Parliament must not when exercising their general residuary legislative power in any way touch or interfere with such matters as property and civil rights in the various provinces, or with the powers of the various provinces to raise a revenue from licenses, for the Canada Temperance Act, 1878, which they held in Russell v. The Queen to be intra vires under that general residuary power, unquestionably did interfere with the powers of the Provincial Legislatures to raise a revenue for provincial purposes by means of tavern licenses, and undoubtedly affected property and civil rights in the provinces; and indeed such a rule would probably render all Dominion legislation under its general power impossible, and denude the opening words of section 91 of all practical

(*rr*) 7 App. Cas. at pp. 841-2; 2 Cart. at pp. 25 6 (1882).

(*s*) In his argument in Regina v. Wason, as published by The Budget Printing and Publishing Co. of Toronto, at p. 6, Mr. Edward Blake says that we must recognize "as an inconvenience inseparable from the federal system, a lack of power anywhere to make uniform regulations, co-extensive with the whole Dominion, on subjects relegated to provincial authority."

effect as conferring legislative power. What their lordships mean they proceed to explain, namely, that any such legislation by Parliament "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance"; and ought not to be passed "in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion." Parliament, they say, does not derive jurisdiction from the introductory provisions of section 91, "to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole."

This of course by no means necessarily implies, and their decision in this very case shows the contrary, that a subject matter of legislation may not have a provincial and local aspect under which it might be dealt with by a Provincial Legislature in a merely local and private way, and as a merely local and private matter, and yet also have a Dominion aspect in which it might be open to the Dominion Parlament to deal with it in the general interests of the Dominion. And so in the argument in this case, Lord Herschell is stated to have said with reference to the suggested subject of the sale of firearms in any particular province: "It was difficult to see why a province might not itself deal with such a subject as a local subject. He did not suggest that the Dominion might not also deal with it as much more than a merely local matter. A sanitary regulation might be passed by a local Legislature, but that would not prevent a general sanitary regulation of a similar nature necessary for the safety of the whole Dominion being enacted by Parliament" (*t*). To hold otherwise would, it is submitted, be to ignore the significance of the word "merely" in No. 16 of section 92, which it will be observed does not occur in the description of any of the other classes enumerated in that section. Thus the meaning of No. 16 of section 92—which their lordships in their present judgment say "appears to them to have the same office which the

(*t*) Times, August 6th, 1895.

general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91"—would seem to be that over and above the fifteen classes of subjects previously named in the section, and subject, of course, to the exclusive Dominion jurisdiction over the enumerated classes in section 91, a Provincial Legislature may legislate in a merely local or private way in the province on all other matters of a nature admitting of such local or private treatment, and may exclusively so legislate. But inasmuch as this residuary power is given over such other matters only qua their merely local or private nature, if they partake also of a general nature, or, in other words, if in another aspect they assume the form of matters affecting the peace, order and good government of the whole Dominion, there is nothing to prevent Parliament legislating upon such matters in this latter aspect; and this is in no wise inconsistent with the provision of section 91, that the general Dominion power of legislation does not extend to matters coming within the classes of subjects enumerated in section 92.

But what lends special interest to their lordships' judgment is that they point out that "some matters in their origin local and provincial may attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion; but," they add, "great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, so as to bring it within the jurisdiction of the Parliament of Canada. They illustrate their meaning by suggesting that the carrying of weapons of offence, the regulation of which within the province would be for the provincial jurisdiction to deal with, might nevertheless, by a suspicion arising that they were to be used for seditious purposes, or against a foreign state, assume a phase in which the matter might

be competently dealt with by the Dominion Parliament. It is difficult to see how any different view could be taken, but at the same time it is clear that this may bring before the Courts very difficult questions, and questions of a very political character, one party in the Dominion perhaps contending that a given matter is of a purely provincial character and interest, and another party that it has assumed a general and Dominion character and interest, and should be dealt with by Parliament.

Proceeding with their lordships' judgment, they next dispose of any doubt which has lingered in the minds of anybody, as to whether the concluding passage of their judgment in Russell v. The Queen, meant that they thought that the Canadian Temperance Act might be supported as an Act for the "regulation of trade and commerce" within No. 2 of section 91; and, as might be expected, they confirm their recent decision in the Virgo case (*u*), holding that "The power to regulate naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation," whereas the Canada Temperance Act was not to regulate but to abolish the retail transactions in liquor therein dealt with within every provincial area in which its enactments had been duly adopted. Thus their lordships agree in the view expressed by Osler, J.A., and Maclennan, J.A., in the Virgo case in our own Court of Appeal (*v*), and dissent from any such view as that expressed by Dunkin, J., in Cooey v. The Municipality of Brome (*w*), that "prohibition is an incident of regulation."

Next their lordships disperse, as it may be hoped once and for all, a cloud of doubt and perplexity which has darkened the interpretation of No. 8 of section 92, whereby the exclusive power is given to the provinces to deal with "municipal institutions in the province." All the difficulty has arisen from the view expressed by

(*u*) L. R. 1896, A. C. 98.
(*v*) 20 A. R. at pp. 438-9, 441.
(*w*) 21 L. C. J. at p. 186; 2 Cart. at p. 390 (1877).

many Judges that to interpret this clause regard must be had to the powers which were exercised by municipalities before and at the time of confederation in the different provinces (*x*). Thus it has been held, in the words of Burton, J.A. (*y*), that if there was no inherent connection between the liquor traffic and municipal institutions, there was at any rate in Ontario a "constitutional connection" between them. The obvious difficulty of such a view has not been overlooked, namely, that the state of things existing in respect to municipal institutions in some of the provinces prior to the confederation was different from that which existed in others (*z*), a difficulty which could hardly be got rid of except by taking the bold and comprehensive position assumed by Dorion, C.J., in Cooey v. The Corporation of the County of Brome (*a*), that municipal institutions "must be understood to comprise all those matters which at the time the union was effected had been considered by the existing Legislatures as belonging to municipal institutions." Possibly some confusion has existed between "institutions," properly so called, and the powers exercised by such institutions. At any rate their lordships now decide that according to its natural meaning No. 8 of section 92 simply gives a Provincial Legislature the right to create a legal body for the management of municipal affairs, the Legislature having of course the power to delegate to the municipalities any

(*x*) Thus, *per* Wilson, J., in Regina v. Taylor, 36 U. C. R. at p. 212; *per* Gwynne, J., in Three Rivers v. Sulte, 11 S. C. R. at p. 43; *per* Armour, J., Re Harris and Corporation of the City of Hamilton, 44 U. C. R. at p. 644; *per* Henry, J., in City of Fredericton v. The Queen, 3 S. C. R. at p. 554; 2 Cart. at p. 49. See, also, *per* Gwynne, J., in In re Prohibitory Liquor Laws, 24 S. C. R. at pp. 223-5; *per* Sedgewick, J., S. C. at p. 243.

(*y*) In re Local Option Act, 18 A. R. at p. 586.

(*z*) Thus, *per* Strong, J., in Severn v. The Queen, 2 S. C. R. at pp. 109-10; 1 Cart. at p. 453, who, however, curiously expressed a change of mind in his recent judgment in In re Prohibitory Liquor Laws, 24 S. C. R. at p. 151; *per* Ritchie, C.J., in Severn v. The Queen, 2 S. C. R. at p. 99; 1 Cart. at p. 442, who objects to the Act being read by the light of an Ontario candle alone; *per* Taschereau, J., in Attorney-General v. Mercer, 5 S. C. R. at p. 669; 3 Cart. at p. 52; *per* King, J., in In re Prohibitory Liquor Laws, 24 S. C. R. at pp. 259-61. See, also, *per* Richards, C.J., in Slavin v. The Village of Orillia, 36 U. C. R. at p. 175; 1 Cart. at p. 703.

(*a*) Cited Lepine v. Laurent, 17 Q. L. R. at p. 229.

of its own powers which it sees fit under the other classes of subjects in section 92. Such a view had been contended for by Mr. Jeune for the appellant in Hodge v. The Queen (*b*), where he argued that, "The meaning of 'municipal institutions in the province' would obviously be, I think, the constitution of the municipal institutions, how they are to be elected, and so on. It could not be held, I should venture to think, to extend the power over anything not given to the province." And again in the argument before their lordships in respect to the Dominion License Act (*c*), Sir Farrer Herschell referring to No. 8 argued, in accordance with what he has now held as a member of the Board, "That cannot mean you may establish municipal bodies, and give them any and every power you please, or even give them every power which has ever been exercised by municipal bodies in Canada. . . . I should submit that the exclusive legislation in regard to municipal institutions enables Provincial Legislatures to create municipal institutions, and to give those municipal bodies any powers which come fairly within the subjects with which they are entitled to deal, but that unless you can find from some other provisions here that it is a subject with which they are entitled to deal, the power to create municipal institutions cannot give them the power to enable those municipal institutions to deal exclusively with a subject of legislation which is nowhere else exclusively committed to them"; whereupon the then Lord Chancellor observed that he thought it meant "the creation of municipal institutions, how many they were to consist of, and how they were to be elected." Such is now the holding of the Board.

At this point it will be well to attempt concisely to state the general course of reasoning of their lordships in their present judgment. It appears to be as follows: The Dominion Parliament has certain powers of legislation for the peace, order and good government of Can-

(*b*) Dom. Sess. Pap., 1884, No. 30, p. 68.

(*c*) See transcript from Marten & Meredith's shorthand notes.

ada, over and above its enumerated powers specified in section 91, but whereas in the case of its latter powers it is free to deal with any of the matters assigned to the provinces in section 92—all of which are from a provincial point of view of a local or private nature—wherever such legislation is necessarily incidental to the exercise of its said enumerated powers, when legislating under its general power it may not encroach upon any class of subject which is exclusively assigned to the Provincial Legislatures by the said section 92. If, then such prohibitory liquor legislation as was that of the Canada Temperance Acts of 1878 and 1886, fell within the enumerated Dominion power for the "regulation of trade and commerce," the Dominion Parliament would have the exclusive power so to legislate, although in so doing it should interfere with the jurisdiction of the provinces. But this is not so, for "regulation" does not cover "prohibition." As held in Russell v. The Queen, it is under its general residuary power of legislation that the Dominion Parliament can so legislate. But this being so, such power of legislation does not detract from any provincial power there may be under section 92 to pass a restrictive liquor law. Such a power there is, for "a law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or foreign countries, concerns property in the province which would be the subject matter of the transactions, if they were not prohibited, and also the civil rights of persons in the province," and such legislation probably falls within No. 13 of section 92, "property and civil rights in the province;" but if not it would certainly come within No. 16 of section 92, "matters of a merely local or private nature in the province." Such an enactment was section 18 of the Ontario Liquor License Law, 53 Vict. cap. 56. But, as is now settled law, the enactments of the Dominion Parliament, in so far as they are within its competency, override provincial legislation; and therefore if, and in so far as the said Provincial Liquor License Law comes into collision with the pro-

visions of the Canada Temperance Act, it must yield to the Dominion Act, and remain in abeyance until such Dominion Act is repealed. Now the provisions of these two pieces of legislation do so conflict that it is obvious that their provisions could not be in force within the same district or province at one and the same time; and therefore if the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, it might have been necessary to hold that the jurisdiction of the Ontario Legislature to pass the Act above referred to had been superseded. But by reason of the system of local option embodied in the Canada Temperance Act, this necessity is removed as to districts which have not adopted the Canada Temperance Act, for "The Parliament of Canada has not either expressly or by implication enacted that so long as any district delays or refuses to accept the prohibitions which it has authorized, the Provincial Parliament is to be debarred from exercising the legislative authority given it by section 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a great question whether it would be lawful."

Such appears to be the gist of their lordships' judgment, and in addition to the points already referred to, it is of much interest and importance as throwing light on the way they view the proper interpretation of No. 13 of section 92, "property and civil rights in the province," which has given rise to a good deal of perplexity. Within that class was the Ontario Act which their lordships held valid in Citizens' Insurance Company v. Parsons (*d*), whereby conditions were imposed on the business of fire insurance as carried on in the province. But Parliament is not debarred from legislating under its general power for the peace, order and good government of Canada, although such legislation must necessarily in some way affect property and civil rights in the different provinces. There is nothing in conflict here with their lordships' decision in Russell v. The

(*d*) 7 App. Cas. 96; 1 Cart. 265.

Queen (*e*). What they there held was (1) that the Provincial Legislatures could not even by concerted action have passed the Canada Temperance Act, the objects and scope of which are general, namely, to promote temperance by means of a uniform law throughout the Dominion; and (2) that the principle of local option embodied in that Act did not make it legislation upon a matter of a merely local nature. For, although Parliament's general power of legislation is restricted to "matters not coming within the class of subjects assigned exclusively to the legislatures of the provinces," it must always be remembered, as already remarked, that what No. 16 of section 92 gives to the provinces is power over matters of a "merely local or private nature in the province"; and their lordships seem to interpret property and civil rights in the province as carrying a similar strictly local interpretation.

Many other points of interest in the late judgment of the Privy Council, including their answers to the first six "academic rather than judicial" questions submitted to them, might be dwelt upon. Their lordships have forever disposed of the notion which has sometimes appeared in arguments of counsel, and even in some judicial utterances (*f*), that there is something so peculiar in legislative power over the liquor traffic that either its prohibition or its regulation or both must necessarily fall exclusively within the jurisdiction of the Dominion

(*e*) 7 App. Cas. 829; 2 Cart. 12 (1882). It will be remembered that in Russell v. The Queen, their lordships held the Canada Temperance Act, 1878, not to belong to the class of subjects, 'Property and Civil Rights,' being legislation not primarily in relation to property and its rights, but to public order and safety. As in the present case their lordships find it unnecessary to decide "whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads," it is unnecessary to discuss how it could be held within the former compatibly with the distinction taken in Russell v. The Queen.

(*f*) So, *per* Fournier, J., in Molson v. Lambe, 15 S. C. R. at p. 265; 4 Cart. at p. 343 (1888); *per* Gwynne, J., in In re Prohibitory Liquor Laws, 24 S. C. R. at p. 228; *per* Lynch, J., in Lepine v. Laurent, 17 Q. L. R. at p. 215 (1891); *per* Palmer, J., in Ex parte Danaher, 27 N. B. at p. 90 (1888); *per* Townsend, J., in R. v. McDougall, 22 N. S. at p. 490; *per* Weatherbe, J., in R. v. McKenzie, 23 N. S. 6 (1890).

Parliament, or exclusively within the Provincial Legislature. They have decided that neither one nor the other is exclusively assigned to either, but in certain aspects and in a certain manner, and under certain circumstances, both may have at different times, or even at the same time, power so to legislate. They also seem to give the death-blow to the idea that the essential difference between wholesale and retail trade lies in the quantity sold, or at any rate that any such distinction gives a line of separation between the legislative powers of the Dominion Parliament and those of the Provincial Legislature.

The limits of a single article do not, however, permit further comment, and it is hoped that none of the principal points calling for notice have been omitted.

A. H. F. LEFROY.

STATE TRIALS.—IV.

The great trials during the reign of Charles I. are chiefly political. They are instructive reading for students of constitutional history and contain many curious passages, but are not so interesting to students of general law. They afford an insight into human nature as it then existed which can be got from no other source. The cruel sentences of the Star Chamber betray inhumanity which was subsequently well avenged. Prynne, who was an Oxford man and a barrister, was an instance of how the whirligig of time brings its revenges. Burned in the hand, his ears twice cropped, fined, disbarred, degraded in his university, exiled and imprisoned, he suffered every indignity a human being could suffer, and yet lived to be recalled in triumph and to prosecute his former tyrants. Lilburne was fiercely punished for liberty's sake, and lived to avenge his wrongs as an officer of Cromwell's army. Laud, Strafford, Finch, all had their day, and all suffered in their own persons for the wrongs they inflicted on others. Charles I., himself the chief offender, was also punished for his misdeeds, but in the last days of his life behaved with a dignity which won admiration even from his opponents. The full account of the proceedings against him, his trial with his remonstrances, and the answers of Bradshaw, the president of the High Court of Justice, may be read word for word as it all happened. His sentence was "That the said Charles Stuart, as a tyrant, traitor, murderer and a public enemy, shall be put to death by the severance of his head from his body." In those days the use of strong, forcible English was understood, and the application of drastic remedies was the rule, not the exception.

All through the reign of Charles I. the trials show the political struggles which were going on. The Parliament in 1626 impeached the Duke of Buckingham.

In 1627 the King began to use the Courts against those who opposed him. He endeavoured to raise loans by royal letters sent to the Lord Lieutenants. Many persons were imprisoned for not complying with the demands contained in these letters. Five of them applied for their habeas corpus to ascertain why they were imprisoned, and whether their punishment was not illegal. The return made to the Court was that they were held per speciale mandatum regis. The Chief Justice Crew was not compliant enough to suit the King, and he was removed and Sir Nicholas Hyde was appointed in his place. The cases were argued by counsel for the prisoners and by the Attorney-General (Sir Robert Heath). The proceedings as they took place in Court read fairly enough. The counsel for the prisoners were allowed just as much latitude as they would have to-day. But the Court decided that the habeas corpus is not to return the cause of the imprisonment, but of the detention in prison, that the return was sufficient and the Court would not examine into its truth. The result of the decision was the Petition of Right and the obstinate contest between King and Commons, ending in the King's giving his assent to the Commons' petition. Since that time no freeman can be imprisoned or detained without cause shown to which he may make answer according to law. The King, defeated in this move, next tried to use the Courts to prevent freedom of speech in the House. The Attorney-General laid informations against Elliot, Hollis and Valentine, charging them with seditious speeches in Parliament. The defendants pleaded to the jurisdiction of the Court that the alleged offences were "done in Parliament." The Court overruled the plea and fined the defendants. This decision was not questioned until 1641—eleven years afterwards—when the Long Parliament declared these proceedings to be a breach of privilege. In 1667 the House further declared the judgment to be "illegal and against the freedom and privilege of Parliament."

From 1627 to 1640 the decisions of the Courts were uniformly in favour of the Crown. The most important

was that on ship money in 1637. Attorney-General Noy was the man who hit upon the plan of calling upon inland counties to furnish ships, and as they could not furnish ships to furnish money instead—hence ship money. What Noy began, was on his death completed by Sir John Finch. He was made Chief Justice of the Common Pleas, so as to secure a judgment in favour of the Crown. The legal methods adopted were as follows: The King issued a writ under the Great Seal, among other similar writs, directed to the sheriff of Buckingham, ordering him to levy ship-money on lands in that county. It was returned by the sheriff that Hampden was liable for one pound, and that he had not paid. The King then sent a writ of mittimus to the Exchequer reciting these facts, and commanding the Court to levy the amount. The Attorney-General thus became plaintiff in Exchequer and Hampden defendant. The defence was that the writs were not sufficient in law to make him liable. The majority of the Court were in favour of the Crown, and judgment was awarded accordingly. In 1640 the Long Parliament vacated this judgment also. The process by which the Court arrived at a plausible conclusion in favour of the Crown is fully set out in the judgment of Chief Justice Finch. It is strange to read the protestations of the Judges that all they wanted to do was justice, while they were really sapping the foundations of the constitution. They protest so earnestly that the reader cannot help believing them. Evidently their contemporaries did not, for they were all heavily fined. The impeachment of Strafford (1640), of Finch (1640), and of Laud (1640-1644), showed that the House of Commons was in earnest. All the prominent men who opposed the parliamentary party were impeached or driven from the kingdom. In 1647 the army and the House commenced to wrangle, and from that date until Cromwell became Protector both sides suffered. It is curious to learn that in 1645 in the very middle of all these exciting times at Chelmsford proceedings were instituted against witches. During the reign of James I. (1616) one Mary Smith had been burned as a witch, and in these volumes of trials are recorded

similar cases up to 1712. The last punishment in England for witchcraft was in 1716. Mrs. Hicks and her daughter, aged nine years, were hanged at Huntingdon for witchcraft, for selling their souls to the devil, tormenting and destroying their neighbours by making them vomit pins, raising a storm by pulling off their stockings and making a lather with soap so that a ship was almost lost. The statutes against witchcraft (33 Hen. VIII. cap. 8, 1 Jac. I. cap. 12) were repealed in 1736 (9 Geo. II. cap. 5). In Scotland this repeal was denounced in 1743 by a sect called Seceders, who claimed that the repeal was contrary to the express law of God, and that the evils of the time were due to that repeal. By Scotch law time ran against every crime (including murder) except witchcraft. The doctrine there was "once a witch, always a witch." It cannot be said that the evidence in these witchcraft cases is edifying. It is doubtful whether it is more absurd than it is indecent. A curious foot note gives the items of an account paid in 1649 for the burning of a witch—the actual operation cost six pounds Scotch.

The execution of Charles I. (30th January, 1649) had been preceded by the establishment of a Republic (4th January, 1649). The King had been deprived of his power after Naseby (14th June, 1645), four years before. His alliance with the Scotch in 1648 made his death a necessity. Pride's Purge was administered to the House of Commons on the 5th December, 1648, and the Rump took matters into their own hands. The House had very strong opinions on Law Reform, and created a commission, of which Sir Mathew Hale was chairman, for the making of a code. The Court of Chancery was to be abolished and the High Court of Justice was constituted. The King's Bench became the Upper Court. The Barebones Parliament alienated the legal profession by their zeal in legal reform. They were two hundred years too soon. Cromwell did not become Protector until 16th December, 1653, nearly four years after the execution of Charles I., and he died 3rd September, 1658, so that his nominal reign lasted nearly five years. The administration of justice during this period

seems to have been equitable enough. When Hale was appointed Judge by the Protector he refused to take the oath acknowledging the legality of Cromwell's Government. Cromwell told him that all he would be required to do would be to administer justice, and it was not the particular government he would be required to support, but civil order itself. For political trials power was given by Cromwell's Parliament to him to issue special commissions to try and also pronounce sentence. Such commissions were in fact issued and acted upon, and could only be excused by the tyrant's plea—necessity. The ordinary tribunals were presided over by men of first-rate capacity and high reputation. But the discontent at Cromwell's assumption of supreme power was very great, and juries could not be trusted to convict in political cases. Therefore Cromwell was forced, in self-defence to use the power committed to him and establish tribunals under the Act of 1656 above referred to, and in that manner try offenders for high treason. The case of Don Pantaleon Sa, a brother of the Portuguese Ambassador, tried before the High Court of Justice, was peculiar. The suite of the Ambassador ran amuck with sword, pistol and dagger at the Exchange. They murdered Mr. Greenway and wounded several other gentlemen. They were brought to trial before a jury of six denizens and six aliens. The Portuguese Ambassador's brother pleaded that he, having a commission to act as ambassador in his brother's absence, was protected by the law of nations. He also demanded counsel. At that time and until 7 William III. c. 3 (1695), prisoners charged with capital crimes were not allowed counsel, so his request was refused. The theory then was, "the Judge shall be counsel for the prisoner." This phrase was misleading, and meant only that the Judge should see that the prisoner did not suffer for want of counsel. Some late trials in Ontario seem to demonstrate the necessity for insisting on the legal construction of the maxim. What appears to have been lately overlooked is that the Judge is not counsel for the prisoner, but counsel only for public justice. The most extreme instance of the application of the rule

that counsel could not be allowed a prisoner charged with a capital offence was that of Earl Ferrers (1760). His defence was insanity. In spite of that defence he was himself compelled to examine and cross-examine the witnesses, and the Solicitor-General (Yorke) argued for the conviction of the prisoner on the ground, among others, of the ability with which the defence was conducted. If, during the course of the trial, a point of law arose the prisoner was allowed to state it and counsel were then assigned to argue it, but no question of fact could be brought out except by the prisoner himself. In the case of Sir William Parkyns, on 24th March, 1695-6, the Act 7 William III. cap. 3, allowing counsel in cases of treason (now in all cases), had been passed, but did not come into force until the next day. The prisoner begged the Judge to postpone the trial only for one day, so that he might have the benefit of counsel. Holt, the Chief Justice, replied, "We must decide according to what the law is, not according to what it will be." The statute said that it was "declaratory of the common law," and the prisoner argued that therefore the right did exist independently of the Act, but his application was refused and he had no counsel. The modern rule dates from 6 & 7 William IV. cap. 114 (1837). Don Pantaleon Sa was condemned and beheaded. The execution was, by some authorities, supposed to be contrary to the law of nations. But it was not so. Even if the Don had been the ambassador himself, he would have been punishable for murder. The Act of Queen Anne (7 Anne, cap. 12), subsequently enacted extends to civil process. It does not protect ambassadors from the results of any offence against reason and nature. The Act was passed as a concession to Peter the Great, who was very indignant that the Queen of England would not instantly decapitate the wretches who had dared to arrest his ambassador for a paltry debt of fifty pounds.

One great improvement was made by Cromwell. The language of the law Courts was English, not the barbarous jargon, a mixture of bad French and worse Latin, which makes the records of proceedings in those

days so hard to understand. At the Restoration the old unintelligible gibberish was again insisted upon. The statute 4 Geo. II. cap. 26 (1730), restored Cromwell's reform, but it required another statute, 6 Geo. II. cap. 14, to permit of the retention of Latin technical terms such as fieri facias, habeas corpus, etc.

In the cases of Love (1651), Gibbons (1651), Streater (1653), Lilburne (1653), and Sir Henry Vane (1656), the prisoners were all former supporters of the party of Parliament. Streater raised a new point. He had been arrested by warrant signed by the Speaker. He got out a habeas corpus, and the return specified this warrant. After argument the return was judged sufficient, and Streater was recommitted to prison. When Streater argued that Parliament could not arbitrarily imprison a man, and cited the cases which led to the Petition of Right, the Judge (Rolle) laid down this distinction: "The King was plaintiff against them, and he was but a feoffee in trust; the Parliament is plaintiff against you, and they are a legislative power." In the vacation between the term when this judgment was given and the next term, the Parliament was dissolved. Streater then got out another habeas corpus. He was allowed counsel, and this time the Court decided that the order was void, Parliament being dissolved. The prisoner was then released. Whatever the form of the supreme power in the state happened to be in those days, it always succeeded in finding pliant tools who carried out its wishes. The doctrine laid down by Rolle in favour of Parliament, quoted above, was just as dangerous to liberty as any laid down by Finch or Berkeley in favour of the King. Cromwell's power was too strong to be shaken even by its abuse, and on the whole the trials in his time present a striking contrast to those after the Restoration.

Lord Clarendon tells a story that on one occasion Cromwell sent for the Judges and reprimanded them. They with all humility mentioned the law and Magna Charta. Cromwell told them with words of contempt and derision, "their Magna F. should not control his actions, which he knew were for the safety of the

Commonwealth." He asked them, "Who made them Judges? Whether they had any authority to sit there but what he gave them? and if his authority were at an end they knew well enough what would become of themselves; and therefore advised them to be more tender of that which could alone preserve them. He then dismissed them with the caution that "they should not suffer the lawyers to prate what it would not become them to hear." This opinion of a man of action on the proper sphere of influence of law Courts is not generally accepted in peace time, and the language imputed to Cromwell is not exactly what one would have expected from one of the saints. If Lord Clarendon himself had used it one would not be surprised, but that it was spoken by Cromwell is probably a base invention of the enemy.

R. E. KINGSFORD.

EDITORIAL REVIEW.

Appeals Under the Amended Judicature Act.

After the experiment of appealing from Masters and Chambers under the provisions of the Judicature Act of 1895, the necessity of the reversion to the old system being apparent, the result was an attempted amendment of the Judicature Act by the Act of 1896 in order to restore the old practice. The amendment, however, was so carelessly made that confusion instead of simplicity is the result.

By section 71 of the Judicature Act, 1895, it was enacted that an appeal should lie to a Divisional Court, "instead of, as heretofore provided, by any statute or rule of Court." This was taken from the Law Courts Act of the same year, section 11, which was consolidated in the Judicature Act. The result was that as soon as this portion of the Act came into force, the appeals from Chambers, Masters, and so forth, instead of being to a Judge of the High Court, sitting in Court or Chambers, went to the Divisional Court. The amendment is made by section 3 of the Act of 1896, which repeals clauses 1 and 2 of section 71, and declares that the appeals from Masters and Chambers, etc., shall be prosecuted in the manner provided before the passing of the Judicature Act of 1895. The result is that an appeal is now taken under the Judicature Act from a Master or Chambers to a Judge in Court or in Chambers, as the case may be. Unfortunately, the Law Courts Act, 1895, section 11, was not similarly treated, with the result that we have, in one Act, the declaration that an appeal shall lie to a Divisional Court instead of as theretofore provided, and in the other that the appeal shall be as before the Acts of 1895.

At the threshold of the appeal the practitioner has apparently a choice of the statutes. He may either

take the benefit of the Act of 1896 and appeal to a Judge in Court or Chambers, or he may prefer the Law Courts Act of 1895 and appeal to a Divisional Court, instead of the former method, which has been restored by the Act of 1896. That is upon the hypothesis that both Acts are in force. No doubt, technically, both are in force. But a way out of this initial difficulty seems to be that the repeal by that clause of the Act of 1896 which deals with the matter of how such appeals shall be prosecuted, entirely supersedes previous legislation, and by implication also repeals section 11 of the Law Courts Act of 1895.

If an appeal is taken to a Judge in Court or Chambers, the next question that arises is, what is the practice with regard to an appeal from his decision? If we look again at the Law Courts Act, we see that one appeal only shall lie. This has also been transcribed into the Judicature Act, 1895, section 70. And the result is that if an appeal is taken to a Judge in Court from a Master's report, the appellant has apparently exhausted his right of appeal. If, however, there is an appeal from the Judge sitting in a case of this kind, the question is, is the appellant bound to elect as to another appeal between the Court of Appeal and the Divisional Court. By section 72 of the Judicature Act, an appeal lies to the Court of Appeal from the judgment, order or decision of the High Court where the Judge is sitting in Court, and apparently, on an appeal from a Master's report to a Judge in Court, an appeal will lie to the Court of Appeal under the revived practice. But the sub-section (3) of section 71 gives an appeal to the Divisional Court from any order of a Judge of the High Court. If an appeal lies under this to the Divisional Court, apparently there is no appeal to the Court of Appeal. Altogether the amendment, instead of simplifying the matter, has seemed to throw it into utter confusion.

The Supreme Court.

The Week, in dealing with the proposition of Mr. McCarthy's, which we had not seen, to abandon the appeal

to the Judicial Committee of the Privy Council, speaks as follows: "Nobody knows better than Mr. McCarthy the utter failure of the Supreme Court of Canada to command respect. It has been an unmitigated failure. Its composition is radically wrong. Quebec Judges have to decide questions of English law of which they are entirely ignorant. English-speaking Judges have to deal with points of civil law of which they know nothing. There never has been any discipline in the conduct of the Court that counsel could observe. Finally, the requirement that the Judges of that Court must live in Ottawa or within five miles of it is a fatal obstacle to getting the best men to go there. What really eminent man, who has his associations, his interests, his life-long friends and acquaintances, say, in Halifax, or Montreal, or Toronto, or Winnipeg, will abandon them all and go to Ottawa to live? It means rooting up every interest a man has. Without any disrespect to Ottawa, it is too much to ask. If, then, the Supreme Court of Canada is unsatisfactory, is it not a satisfaction to have a tribunal to appeal to whose decisions pace, Mr. McCarthy, are recognized as satisfactory the world over."

While there is a great deal of truth in the editorial remarks of The Week, that journal is hopelessly wrong in some matters. The Court has not been "an unmitigated failure," although a good deal of dissatisfaction has prevailed with regard to it. Its composition is a necessity; and while we can by no means agree with the statements that the Quebec Judges are entirely ignorant of English law, we would perhaps not be wrong in saying that the English Judges are not, with one exception at least, as well versed as their Quebec brethren in the principles of the civil law. The English-speaking provinces can hardly complain of this, as they have four out of six Judges thoroughly conversant with their laws. If complaint should be made at all, it should come from Quebec, which has on the Bench but two persons skilled from their youth in its system of jurisprudence. Many matters are common to all provinces which have been most satisfactorily dealt with

by the whole Bench, without distinction as to early training.

With regard to the residence in Ottawa, it is absolutely essential, if the Court is to have a habitation at all. All those who have been brought up under the English system regard the solidarity of the Courts and the Bar as an essential factor in strengthening both. Where the Judges live apart and meet occasionally, they have no opportunities for consultation or conference; nor do they acquire that inexpressible adhesiveness which gives a character to the Court otherwise unattainable. It has been charged against the Supreme Court that the Judges do not meet in conference over their judgments. That, of course, is a domestic matter, which is of importance to the public, no doubt, but as to which one cannot speak without absolute knowledge of the facts. It is an open secret that in Ontario the Judges are in frequent consultation, and wherever one judgment is written for the Court, undoubtedly it is the result of a conference.

With regard to the personal experience of those who accept commissions in the Supreme Court, we have never heard it alleged that it was an objection that the Judge had to live in Ottawa.

With regard to what The Week calls the discipline of the Court, no doubt a great deal of fault has been found. It is a painful subject to refer to, but we had ourselves thought it necessary recently to mention the subject, as the idea had spread abroad (a conclusion at which it appears we were justified in arriving) that the public had lost confidence in the Court because counsel did not get as good a hearing as in the provincial Courts. Attention had only to be called to the fact in order to produce a change. The habit of interrogating counsel is not confined to the Supreme Court of Canada. Complaints are constantly appearing in the English journals that the remarks from the Bench take up more time than the argument at the Bar.

With regard to the decisions of the Privy Council, while they command and should command a great deal

of respect, they have never been entirely satisfactory. It is quite possible to compare decisions, which though on diverse subjects, depend upon the same principle, and find that the judgments are so contradictory that it is almost impossible to explain them. The result is that case after case has to be taken to the Privy Council in order that there may be some discovery made of the principle on which their decisions proceed. To give a familiar instance, it has been found necessary, after two Privy Council decisions upon the question of the control of the liquor traffic, to take a case specially prepared to get a decision as to where the jurisdiction lay. We mention this case, as it is of greater public interest than any other, and has attracted more attention in the press. Perhaps the whole difficulty with regard to Courts is summed up in saying that no human tribunal can ever give complete satisfaction.

Recent Books.

We have received several recent books for notice, but for want of space, having already overrun our usual allowance, they are necessarily held over for the next number.

THE
CANADIAN LAW TIMES.

JULY, 1896.

WAIVER BY SURETY OF ALL BENEFITS.

LAW School judgments, like judgments delivered in foreign jurisdictions, are more or less valuable according to the cogency of the expressed reasons upon which such judgments are based.

Law School Lecturers, sitting in Moot Court, have an unique jurisdiction, inasmuch as they are able to transform themselves into a Court of Appeal whenever such course appears to be desirable for the purpose of considering what would otherwise be the coercive authority of some particular decision.

By way of variety, and for the purpose of presenting to the profession some views upon an interesting topic, which appears to have been but little discussed, we print a case which was recently argued in the Law School at Osgoode Hall, together with the reasons for judgment given in connection therewith.—ED. C. L. T.

CASE.

Frederickson v. Jameson.

One Fitzpatrick, when about to enter into the plaintiff's employ as a clerk, procured the defendant to join with him in a bond to the plaintiff whereby Fitzpatrick and the defendant became jointly and severally bound to the plaintiff, to the extent of $5,000, to make good to the plaintiff any default or miscarriage of Fitzpatrick in connection with the performance of his duties as such clerk.

At the same time Fitzpatrick executed a chattel mortgage to the plaintiff upon certain property of his own to further secure the faithful performance of his duties as such clerk, which mortgage was for the sum of $2,000, and was made in respect of property worth $2,000.

The said bond contained the following provision:—"And I, the said Jameson, do hereby waive and renounce all the rights, benefits and advantages which, by law or equity, are usually accorded to sureties, and I hereby agree to be bound to the said Frederickson as a principal debtor."

Within a year from the time of the making of such chattel mortgage, Fitzpatrick made default in accounting for moneys of the plaintiff which came to his hands as such clerk, and the plaintiff became aware of this default, which amounted to $2,000, and forthwith dismissed Fitzpatrick from his employ.

The plaintiff had a friend Macpherson, who was an execution creditor of Fitzpatrick, and with a view to benefit this friend the plaintiff failed to renew his chattel mortgage under the provisions of the statute, and the chattel mortgage expired, and Macpherson procured the said goods to be sold under his execution, and the proceeds of such sale were applied for his benefit.

The plaintiff thereafter sued the defendant upon his said bond for recovery of $2,000, the amount of Fitzpatrick's said default.

The defendant relies upon the defence that he is a surety, and that upon the above facts, which are set forth in the pleadings, he has been released from the liability in question.

The plaintiff moves for judgment.

1st counsel for plaintiff—Mr. Reycraft.
2nd " " —Mr. Thompson.
1st counsel for defendant—Mr. Tiffin.
2nd " " —Mr. A. Martin.

Judgment.

I think that unless the defendant has by his bond effectively waived and renounced his rights as a surety, the plaintiff was under such an obligation to preserve his mortgage security by renewal thereof, under the provisions of the statute relating to Chattel Mortgages, that the plaintiff would be bound to account to the defendant as such surety for the value of such security, obtained by him from the principal debtor and lost by allowing the same to expire for want of renewal (*a*).

The question, therefore, arises whether the person who is in fact a surety, to the knowledge of the creditor, by inserting in the instrument whereby he becomes bound a clause such as that in question herein, can effectively waive and renounce those rights and privileges which are according to law possessed by a surety.

Counsel for the plaintiff rely upon certain passages in DeColyar on Guarantees, and Brandt on Suretyship, and the cases there cited, in support of their contention that such renunciation may be effectively made. The passage in DeColyar which is relied upon runs as follows :—" The rights which the surety possesses of standing in the creditor's place as regards all the latter's securities and equities, and on the bankruptcy of the principal, may, however, be waived. The waiver may be made by express agreement in the contract of suretyship. Thus it may be agreed between the surety and creditor that the receipt by the latter of dividends in the bankruptcy of the principal debtor shall not diminish the liability of the surety to pay in full. But it need not of necessity be express " (*b*). It is undoubtedly true that a surety may by the contract of suretyship expressly waive specified rights which, apart from the terms of his contract, would be accorded to him by law. Thus, where a surety becomes bound to the creditor

(*a*) See Watson v. Alcock, 4 DeG. M. & G. 242; and Wulff v. Jay, L. R. 7 Q. B. 756.

(*b*) DeColyar on Guarantees (2nd ed.) 301.

to pay the floating balance due by the principal debtor from time to time up to a certain limited amount, he may waive the rights which would otherwise be accorded to him by law, by inserting a provision in the contract that in the event of the bankruptcy of the principal debtor and in the event of the amount due exceeding at that time the fixed limit, any dividends received under the bankruptcy should be applied exclusively in payment of the excess, without the surety being entitled to credit for any part of the dividends until the whole of such excess is paid (*c*). The cases cited by Mr. DeColyar in support of the passage above quoted are all cases in which the surety has expressly renounced some specific and defined right which the law would otherwise have accorded to him, and he fails to cite any case in which the surety has by one general sweeping clause purported to deprive himself of all those rights which are by law and equity incidents of his status.

Mr. Brandt states the rule to be that, "Where a surety binds himself in terms as a principal in the obligation which he signs, he will be held as a principal, and will be entitled to none of the rights of a surety. 'There is no rule of law which prohibits a surety from waiving the right which belongs to him as such. Such a waiver has nothing in itself offensive to the policy of the law.' The express terms of the obligation in such case exclude the idea of suretyship, and the creditor has a right to avail himself of the contract his vigilance has obtained" (*d*). Mr. Brandt in support of his text goes on to cite a number of American cases in which it has been held that even in a case in which a person is in fact a surety to the knowledge of the creditor, yet, if by the bond, promissory note or other instrument creating the obligation, he contracts expressly as a principal debtor, he shall afterwards be estopped from saying that he is only a surety, and is

(*c*) Ex p. National Provincial Bank of England, In re Rees, 17 Chy. D. 98; Ex p. Hope, 3 M. D. & DeG. 720; Midland Banking Co. v. Chambers, L. R. 4 Chy. App. 398; Ex. p. Midland Banking Co., in Re Sellars, 38 L. T. 395; Ex. p. Miles, DeG. 623.

(*d*) Brandt on Suretyship (2nd ed.), sec. 41.

entitled to the rights of a surety; but no English authority is to be found in support of Mr. Brandt's text. Mr. Brandt's book probably states the law as it is settled in the States of the American Union, but it does not state the law of this Province, for it has been determined by the House of Lords that, "When two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, inter se, one of them shall only be liable as a surety, the creditor, after he has notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtors" (*e*). And the operation of this doctrine is not confined to restricting the creditor to such a course of action that he shall merely not prejudice the interests of the surety in any question with his co-surety, or with the principal debtor, for it has been stated by the Court of Appeal in this Province to be the result of the authorities that two persons who were originally both principal debtors may as the result of subsequent dealings, to which the creditor is not a party, become, as between themselves, principal and surety, and the creditor who has notice that such relationship has arisen is bound to observe it, in default of which he will release the surety who was originally a principal debtor (*f*).

It is probable that the new obligations imposed upon the creditor in such a case do not become fully operative against him until after the indebtedness to himself has become due and payable, after which time he has to pay full respect to the new relationship which has arisen between those who were originally both principal debtors to him (*g*). The only reported case in this Province dealing with the operation of a clause such as that in question

(*e*) Per Lord Watson in Rouse v. Bradford Banking Co., L. R. (1894) A. C. at p. 598, stating the law as settled by the House of Lords in Oakley v. Pasheller, 10 Bli. N. S. 548; 4 Cl. & F. 207; and Overend, Gurney & Co. v. Oriental Financial Corporation, L. R. 7 H. L. 348.

(*f*) Blackley v. Kenney, 29 Can. L. J. at pp. 110, 111.

(*g*) See Duncan Fox & Co. v. North & South Wales Bank, L. R. 6 App. Cas., at pp. 13-15.

herein is Citizens Insurance Co. v. Cluxton (*h*). In that case the suretyship contract contained the following provision :—"And the said sureties, in consideration of the premises, hereby agree to waive any notice of any default the said A. B. may at any time make in his duties as such agent, and to renounce to (sic) the benefits of division, discussion and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." Chief Justice Cameron dealt with the question of the operation and effect of this provision as follows:—"I have not been able to find any decision in which the effect of such a provision as that contained in the bond in question has been considered. But as there is no principle of law which prevents a person making any contract he chooses, I do not see why these defendants could not stipulate as they have done, that they should be liable as principals, nor why that stipulation should not be enforced against them in the same manner as if they were in fact as well as by their own agreement principals (*i*).

It now becomes necessary to consider the validity of the reasons upon which the judgment in the lastly mentioned case is founded. We have already seen that the mere fact that a surety enters into a covenant as if he were a principal debtor does not deprive him of his rights as a surety if he be a surety in fact. Although he may have joined as a joint and several covenantor, and the instrument may not disclose that he is a surety, yet if it be proven that he is to the knowledge of the creditor a surety in fact, he will have all the rights of a surety, at the least after the debt has become due and payable (*j*). From very early times the Courts of Equity have applied the equitable doctrine relating to sureties to a person who on the face of the instrument appeared to be a principal debtor, and it was in this favour which the Court of

(*h*) 13 O. R. 382.

(*i*) 13 Ont. R. at p. 399.

(*j*) See Rouse v. Bradford Banking Co., L. R. (1894) A. C. at p. 598; Blackley v. Kenney, 29 Can. L. J. at pp. 110, 111; Duncan Fox & Co. v. North and South Wales Bank, L. R. 6 App. Cas. at pp. 13-15.

Equity extended to mortgagors who were sureties in fact, although principal debtors in form, that the equitable doctrines relating to the mortgagor's equity of redemption, and his right to redeem even after the legal estate was forfeited at law, had its origin (*k*). The mere fact that the instrument expressly states that one of the parties thereto is a principal debtor cannot change the rule upon this point if the facts show that he was really a surety. The express declaration cannot have any greater effect than would be produced by the form of the instrument, where the surety joined as a joint and several covenantor, and nothing further than that appeared on the face of the instrument. The rights of a surety are given to him by the doctrines of equity, and it is submitted that he cannot, by any general, sweeping clause, contract them away; they are equitable incidents which attach to the status of the surety, just as the common law rights of an heir-at-law, or of a husband with respect to his wife's property, were incidents of status, which were inalienable by any instrument purporting to waive or renounce the same generally. Many rights conferred by Statute cannot be contracted away: for example, a married woman could not now make an effective contract with her husband whereby she waived and renounced generally all of the property and personal rights which have been conferred upon her by the Married Women's Property Acts, although she might by a contract dealing with specific rights estop or otherwise prevent herself from relying in a particular instance upon any one of those specified rights. So also there are many common law rights which are inalienable, e.g., that of freedom: no man can by contract assume the status of a slave. "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

(*k*) 1 Spence's Equitable Jurisdiction of the Court of Chancery, 602-3.

to transmit a contract of service to his issue. In other words, it will not permit the servant to incorporate in his contract the ingredients of slavery" (*l*). So also an employee is unable to enter into a contract whereby he in advance relieves his employer from liability from injuries which shall thereafter result to him from the employer's negligence (*m*).

There are also many equitable rights which are inalienably attached to status; e.g., no mortgagor can, by the same instrument which creates his mortgage, bargain away by any form of contract or device his equity of redemption (*n*). "It is a maxim in equity that an estate cannot at one time be a mortgage and at another time cease to be so by one and the same deed; a mortgage can no more be irredeemable than a distress for rent can be irrepleviable; the law itself will control that express agreement of the party; and by the same reason equity will let a man loose from his agreement and admit him to redeem a mortgage. So it was said by Mr. Vernon in East India Co. v. Atkins (Com. Rep. 349), that if a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far as in Stisted's Case to take an oath that he will not redeem, yet he shall redeem" (*o*). Many other instances of the inability of the mortgagor to deprive himself by contract of the rights which are accorded to him by a Court of Equity are set forth in James v. Kerr (*p*), Mainland v. Upjohn (*q*); and Marquess of Northampton v. Pollock (*r*).

It cannot be supposed that a man could effectually debar himself by contract from thereafter availing himself of the equitable doctrines which would give him relief against his future accidents or mistakes.

(*l*) Per Mr. Hargrave arguendo in Somersett's Case, 20 St. Tr. 1.

(*m*) See 40 Cent. L. J. p. 428.

(*n*) See Price v. Perrie, 2 Freem. 258; Toomes v. Conset, 3 Atk. 261; Newcomb v. Bonham, 1 Vern. 8.

(*o*) 2 W. & T. L. C. (6th ed.) 1183.

(*p*) 40 Chy. D. 459.

(*q*) 41 Chy. D. 136.

(*r*) 45 Chy. D. 190.

No cestui que trust, while continuing to occupy that position, could make an effective contract with his trustee that he, the cestui que trust, should not thereafter be enabled to call the trustee to account for malfeasance in office; and even though the instrument should go on to provide that the cestui que trust should not thereafter be deemed to be a cestui que trust, or to have any of the rights peculiar to a cestui que trust, but that he should be deemed to be a mere creditor, and that the trustee should not thereafter be deemed to be a trustee or to have imposed upon him any of the obligations peculiar to a trustee, but that he should be deemed to be a mere debtor, yet if the Court found that in truth and in fact the status of one was of cestui que trust and the status of the other that of trustee, the contract would be wholly ineffective. Yet it might be that a sole cestui que trust, being *sui juris*, could by contract waive some specific right as against the trustee; for example, he might authorize the trustee to invest in securities the investment in which would otherwise involve an actionable breach of trust.

Where a contract under seal contained an agreement between the parties that one of the parties had not by any statements or representations induced the other party to enter into the contract, which the Court said was equivalent to an agreement on the part of the plaintiff that, however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction or complain of it, but would forever after hold his peace, it was held that the plaintiff was not precluded from proving fraudulent misrepresentations whereby he had been misled (*s*).

A person cannot enter into a contract providing for the infliction of a penalty or forfeiture, and by that contract deprive himself of the right to rely upon the equitable doctrines as to relieving against penalties or forfeitures.

By far the greater portion of the rights possessed by a surety are rights which are incident to his status and are

(*s*) Bridger v. Goldsmith, 38 N. E. Rep. 453.

independent of contract. They are incident to his status because the Court holds that it would be inequitable if they were not so incident thereto. It is but reasonable then that the Court should look with jealousy upon any contract which would bring about the inequitable results that would follow from depriving the surety of the benefit and protection of these incidents.

Lord Redesdale touches upon this matter as follows:— "The principle established in Dering v. Lord Winchelsea (*t*) is universal that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound" (*u*).

Take the case of a person, who (to the knowledge of the creditor) is surety in fact, agreeing with the creditor that he shall be bound as a principal debtor and that he waives and renounces all the rights of a surety; could it be supposed for a moment that he would thereby lose the right given to him by equity that upon default being made in payment by the principal debtor, he, the surety, could forthwith maintain an action against the principal debtor and the creditor to compel the principal debtor to pay and to compel the creditor to accept payment from the principal debtor of the indebtedness in question?

Could there, moreover, in such a case be any doubt about the right of the surety to pay off the creditor and to force the

(*t*) 1 R. R. 41.

(*u*) Stirling v. Forrester, 22 R. R. (3 Bligh, 590) at pp. 76, 77; and see note at p. 76.

creditor to assign to him all securities held by the creditor from the principal debtor? Can there in such a case be any doubt about the right of the surety, after having paid the indebtedness, to force the creditor to account for any such securities which were originally held by him and have been wilfully discharged or destroyed? If these rights, or any of them, would still remain to the surety as against the creditor, then it is clear that a blanket contract of the character mentioned would not divest him of all the equitable rights pertaining to his status as surety; and if it would not, in accordance with its terms, divest him of all those rights, is there any reason to think that it would divest him of any of them?

Doubtless a surety by his contract can expressly waive or renounce certain specified and defined rights which the doctrines of the Court would confer upon him in the absence of any such contract; for example, he might agree that he should not be released from his obligations by reason of the creditor entering into a binding contract with the principal debtor to give the latter an extension of time for payment; or that he should be responsible for all acts, defaults and miscarriages of the principal debtor as a servant of the creditor so long as he remained a servant of the creditor, in any capacity whatever, notwithstanding that the nature of such service should be different in character from that in which he was engaged at the time of the making of the contract; but, it is submitted, a surety cannot, by any form of general renunciation or waiver, alienate, or deprive himself of, those rights which by the doctrines of equity pertain to his status, any more than an heir at law could by any general form of renunciation or waiver deprive himself of those rights which by law pertain to his status.

Freedom of contract and the right of a person to renounce those privileges which the law confers upon him for his own benefit, are the ideas which underlie the doctrine of Citizens' Insurance Co. v. Cluxton (*v*), but it is

(*v*) 13 O. R. 382.

quite evident from what has already been said that there are many limitations upon the freedom of contract and upon such right of renunciation.

It may be useful as further illustrating this point to collect some cases in which the freedom of contract has been restrained upon the ground that the contracts were contrary to public policy. A person cannot by contract deprive himself of that right to protection to which he is by law entitled. Thus, apart from statutory provision, a defendant is not to be called upon to discover the principal fact, or any one of a long series of facts, which may contribute to establish a criminal charge against himself, and he cannot by any agreement deprive himself of the benefit of the protection so extended to him by law (*w*). A contract by which a defendant in a criminal case agrees to indemnify his bail, who has become surety for the defendant's good behaviour during a specified period, is illegal and void (*x*). A father cannot by contract deprive himself of the right to the custody of his children (*y*). I cannot effectually contract with any one that he shall charge himself with the faults which I shall commit; and so if a policy of insurance contains a contract to indemnify the insured against "all perils and fortunes which may happen in what manner soever and which can be imagined," yet, "the reason of the thing ingrafts an implied exception even upon these words, general as they are, that is, the case of damage occasioned by the fault of the assured" (*z*). "The law will not permit a person who enters into a binding contract to say in another clause that he will not be liable to be sued for a breach of it" (*a*).

Where the legislature confers powers upon a corporation, whether one which is seeking to make a profit for shareholders or one acting solely for the public good, to

(*w*) Lee v. Read, 5 Beav. at p. 385.

(*x*) Herman v. Teuchner, 15 Q. B. D. 561.

(*y*) Re Andrews, L. R. 8 Q. B. at p. 158.

(*z*) Cullen v. Butler, 5 M. & S. at p. 466.

(*a*) Per Martin, B., in Kelsall v. Tyler, 11 Exch. at p. 534

take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good, and a contract purporting to bind such corporation and their successors not to use these powers is void (*b*). "A grantor when he conveys an estate in fee cannot annex a condition to his grant not to alien nor when he conveys an estate tail not to bar the entail" (*c*). "There being a difficulty in enforcing the payment of calls by the shareholders in cost book mines, the adventurers, in order to get rid of that difficulty, agree among themselves that the amount of calls due from any one of them shall be considered as a debt due to the purser, who shall have power to sue for it,—thus violating the law in two respects; first, by agreeing that one partner may sue his co-partner; secondly, by agreeing that an action shall be brought upon a contract by one who is no party to it, and between whom and the person sued there is no privity. They might as well agree that no plea shall be pleaded except payment" (*d*). A provision in a contract that a party thereto will not seek to enforce by action or suit the legal and equitable rights which he acquires under the contract cannot be enforced. "If I covenant with A. to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals" (*e*). "If parties to a contract agree to a stipulation in it, which imposes as a condition precedent to the maintenance of a suit or action for a breach of it, the settling by arbitration the amount of

(*b*) Ayr Harbour Trustees v. Oswald, 8 App. Cas. 623; and see Walker v. London Tramways Co., 12 Chy. D. 705; 7 Ruling Cases, 587.

(*c*) Per Lord Kenyon, C.J., in Doe d. Mitcheson v. Carter, 8 T. R. at p. 61.

(*d*) Per Williams, J., in Hybart v. Parker, 4 C. B. N.S. at pp. 213-4

(*e*) Per Lord Chancellor Chelmsford, in Scott v. Corpn. of Liverpool 3 DeG. & J. at p. 360; and see Horton v. Sayer, 4 H. & N. 643.

damage, or the time of paying it, or any matters of that kind, which do not go to the root of the action, i.e., which do not prevent an action at all from being maintained, such stipulation prevents any action being maintained until the particular facts have been settled by arbitration; but a stipulation in a contract which in terms would submit every dispute arising on the contract to arbitration, and so prevent the suffering or complaining party from maintaining any action or suit at all in respect of any breach of the contract, does not prevent an action from being maintained; it gives at most a right of action for not submitting to arbitration, and for damages, probably nominal" (*f*).

These cases show that freedom of contract is not nearly so universal as is assumed by the learned Judge whose reasons for judgment in the case of Citizens Ins. Co. v. Cluxton have been quoted.

For the reasons above stated, judgment will go for the defendant dismissing the action.

Since the above was written, a judgment has been delivered by the Divisional Court, consisting of Mr. Justice Ferguson and Mr. Justice Robertson, in the case of Lee v. Ellis (*g*), throwing some light upon a cognate point.

In that case the party of the first part (the husband) and the party of the second part (his wife) jointly and severally covenanted with the party of the third part to repay a loan which the party of the third part made to the wife, and the husband's covenant was made by him as surety for the wife, who was the principal debtor. The instrument in question contained the following clause:—"It is expressly understood and agreed by and between the parties hereto that none of the provisions in this indenture shall in any wise affect or prejudice the ordinary legal rights of the party of the third part to recover and enforce payment of the said principal sum and interest."

(*f*) Per Brett, J., in Edwards v. Insurance Co., 1 Q. B. D. at p. 596; and see Caledonian Insurance Co. v. Gilmour, L. R. (1893) A. C. 85.

(*g*) Not yet reported.

The trial Judge held that in the action brought by the creditor against the husband and wife upon the covenant for repayment, in which action the wife allowed judgment to go against her by default, this clause prevented the husband setting up the following defence; that he was a mere surety for his wife, and that the plaintiff was a trustee having in his hands securities for moneys held by him in trust for the wife, which were sufficient to repay the indebtedness owing by the wife to the plaintiff in respect of the loan aforesaid, and that he (the husband) was as such surety entitled in equity to set off against the plaintiff's claim in the same way that the wife as principal debtor would have been entitled to set off her claim against the plaintiff's claim, had she chosen to do so, and that the instrument in question had expressly given to the plaintiff a charge upon the said trust property in his hands by way of security for the repayment of the said loan, and that the plaintiff had thereafter paid certain of the trust moneys to the wife whereby he had depreciated his said security to the detriment of the husband in the event of the trust property in hand being insufficient to satisfy the plaintiff's claim, and that the husband was entitled to call the plaintiff to account for the moneys so paid over by him.

The Divisional Court reversed this judgment, and Mr. Justice Ferguson dealt with the said clause as follows: "Having read and re-read this clause, and taking it in its setting, I am of the opinion that it cannot have the effect contended for, and that notwithstanding its existence the husband is liable only as a surety for his wife. Even if the clause were read by itself and given its widest possible range of meaning, the conclusion would, I think, be the same, for it is not, as I think, affecting or prejudicing ordinary legal rights to say to one holding a document on which a principal and surety are liable, 'You shall recover against them as principal and surety and not otherwise!'"

A. H. MARSH.

EDITORIAL REVIEW.

The Court of Appeal.

A wholly unjustifiable attack has recently been made on the Court of Appeal for its manner of disposing of business. The Court, as becomes the final Court of Appeal in the Province, invariably gives a most patient and exhaustive hearing to every case by whomsoever argued, and does not engage in the argument, as some Courts are prone to do. No one was ever heard to complain of a want of courtesy in hearing to the fullest extent all that could be urged for or against an appeal. And it must be admitted on all sides that no greater justice can be meted out to suitors than to hear with patience all that can be said on their behalf.

The mode of disposing of cases by hearing a considerable number, and then adjourning for the purpose of considering the arguments, is admitted by the profession to be the best. Nothing is gained, either by hastening the argument, or by hearing cases wholesale. A case is better disposed of by a consideration of the arguments whilst they are fresh in the minds of the Judges, than by reserving them until the minds of the Judges are encumbered with a multitude of arguments in other cases. Nor would it hasten business for the Court to adopt any other procedure. It would be just as aggravating for suitors to wait an indefinite time for judgment as it is to wait for a case to be argued. The actual fact is that the Court is in constant operation. It never adjourns but to prepare judgments—vacations of course excepted.

Law Reform and Appeals.

The real difficulty is in the system. Before the late Act dealing with appeals, the Court of Appeal had an inconsiderable number of cases on its list unheard, and would probably have overtaken all the work the next sittings. The effect of the Law Courts Act was to throw into that Court almost all appeals from trials. Given a choice between a Divisional Court without further appeal, and the Court of Appeal without extra expense or security required, and suitors chose the latter as a matter of course. The result was immediately to bring into the Court of Appeal nearly all the business formerly transacted in the Divisional Courts. The restriction as to the number of appeals was entirely relaxed by making the appeal to the Court of Appeal inexpensive and unhampered, and the fear that no appeal would lie from a Divisional Court to the Supreme Court aided materially in bringing about a plethora of business in the Court of Appeal. The Judges of that Court now are expected to dispose of what ten Judges of the High Court in three divisions formerly disposed of, with the very natural result that the business lags.

The suggestion that the Court of Appeal should call in the services of the High Court Judges and create another Court, is a lame one. It is true that that is permissible, but the very provision for such a proceeding shows the weakness of the system. That Divisional Courts should, in another capacity, as integral portions of a Court of Appeal, hear cases which are deliberately taken past the Divisional Courts is somewhat absurd. The fault is in the change. It may be taken as demonstrated beyond peradventure that suitors will not give up a right of appeal for the sake of costs, and once that is established, the paternal care of the Legislature, in endeavouring to prevent suitors from spending their money on appeals, is thrown away. A complete reversion to the old state of affairs, which was partially

entered upon last session, is the only reasonable solution of the difficulty.

That some measure will have to be adopted is clear. The temptation to appeal in every case is very great. When there is known to be a long list of cases waiting for argument, which cannot readily be overtaken, the unsuccessful litigant gets a long respite at a small expense by simply lodging an appeal, and so out of the so-called reform comes one of the worst features of litigation—a misuse of the Courts for the purpose of delaying justice.

Appeals from Divisional Courts.

Whether or not an appeal will lie from a Divisional Court to the Supreme Court of Canada, since the Law Courts Act, has not yet been tried; but general opinion seems to be against it. In Corporation of Ste. Cunegonde v. Gougeon, ante, Occ. N. p. 31, where an Act of the Province of Quebec gave a motion to quash a municipal by-law to the Superior Court without appeal, and an appeal was taken through the otherwise regular course to the Supreme Court of Canada, it was held by that Court that no appeal would lie to the Queen's Bench, and consequently that none would lie to the Supreme Court. From the note of the Reporter in that case, one might infer that the Supreme Court had interpreted the expression in the Supreme Court Act, "the highest Court of final resort now or hereafter established in any Province of Canada," to mean the highest Court absolutely, and not the highest Court to which a particular case may be brought under the provincial law. In that case, a Province, by keeping in existence a Court of Appeal, and denying the right of appeal to it, could prevent any appeal whatever to the Supreme Court, except by leave of that Court under section 26. Until, however, the case is reported in full, one cannot speculate upon that. The phrase in section 26, "the highest Court of last resort having jurisdiction in the Province in which the action . . . was originally instituted," would seem to cover the case of a Divisional Court where no appeal

lies therefrom to the Court of Appeal. But the provision in sub-section 3 of that section, giving an appeal from a lower Court by consent or leave would, on the other hand, seem to indicate that both the phrases which we have quoted refer to the highest Court in the Province, whether an appeal lies to it or not. One thing is clear. The Act never contemplated such a thing as the cutting off of appeals midway, and the expressions used evidently were intended to describe the Court of Appeal in Ontario as the only Court from which an appeal would lie, except by consent or leave. Whether a Divisional Court comes within the phrase "hereafter established" will be an interesting question.

BOOK REVIEWS.

Political Appointments, Parliaments, and the Judicial Bench, in the Dominion of Canada, 1867 to 1895. Edited by N. OMER COTÉ (of the Department of the Interior, Canada). Ottawa: Thorburn & Co. 1896.

This is, in the main, a very careful compilation of all the appointments since the Union It is well tabulated, so as to make reference easy, and the matter of each section is well arranged. Of such works it may be said that their only value is in their correctness. We have tested Mr. Coté's accuracy in many respects without disappointment. In one respect, however, accuracy has been sacrificed to space. Vice-Chancellors of the old Court of Chancery in Ontario are classed as "Justices" of the Chancery Division of the High Court. It is true there is an explanatory note at the beginning of the section as to Courts; but it looks peculiar to see "Mr. Justice Mowat" in cold type as the saying is. We would recommend the necessary alteration in a future edition. We would also recommend the addition of Provincial Queen's Counsel, as their status is recognized in all Courts. On the whole, this is the best work of the class to which it belongs that has yet been issued, and with the prior work by Mr. J. O. Coté, N.P., father of the present editor, affords a complete history of the public appointments in the Province and Dominion of Canada from 1841 to 1895.

Ontario Assignments Act, with notes. By R. S. CASSELS, of Osgoode Hall, Barrister-at-Law. Second Edition. Toronto: The Carswell Co. 1896.

We cannot add anything to what we said respecting the first edition of this work, except that the arrangement of type is somewhat improved. It is a most useful and handy little work, and gives with accuracy, perhaps also with a little too much brevity, the effect of all the decisions upon this Act.

Bills, Notes and Cheques. The Bills of Exchange Act, 1890, Canada, and Amending Acts, with notes and illustrations from Canadian, English and American decisions, and references to ancient and modern French Law. By J. J. MACLAREN, Q.C., D.C.L., LL.D., member of the Bar of Ontario and of Quebec; author of "Banks and Banking," etc. Second Edition. Toronto: The Carswell Co. 1896.

Banks and Banking. The Bank Act, Canada, with notes, authorities and decisions, and the law relating to Warehouse Receipts, Bills of Lading, etc. Also the Savings Bank Act, the Winding Up Act, and extracts from the Criminal Code, 1892. By J. J. MACLAREN, Q.C., D.C.L., LL.D., etc., etc. With an introduction on Banking in Canada, by B. E. WALKER, Esq., General Manager of the Canadian Bank of Commerce. Toronto: The Carswell Co. 1896.

Mr. Maclaren's success with the first edition of the Bills of Exchange Act ensures the hearty reception of his present work on the Bank Act. The fact that the first edition of the Bills of Exchange Act was sold out within a year was a sufficient indication of its usefulness.

The new work on Banks and Banking in no way falls behind its predecessor. The Acts are fully treated of in notes following the sections or groups of sections, and at the end of a subject matter or division thereof wherever it permits are placed illustrations in the way of notes of

cases decided upon the subject matter. Altogether, these books must go one with the other, and the practitioner cannot well do without either.

Commentaries on the Law of Ontario. Being Blackstone's Commentaries on the Laws of England, adapted to the Province of Ontario. By R. E. KINGSFORD, M.A., LL.B., formerly one of the Lecturers of the Law Society of Upper Canada, author of "A Manual of Evidence in Civil Cases," Deputy Police Magistrate, City of Toronto. Vol. I. Rights of Persons. Toronto: The Carswell Co. 1896.

The inability of the student to find some substantial basis upon which to found his studies of the law, and to get some comprehensive notion of what law is, has always hitherto been a serious matter. Those who have gone to the original Blackstone have complained that they had to unlearn too large a proportion of their acquisitions; while those who have gone to modern editions of the Commentaries have complained even more loudly on account of the modern statute law therein incorporated which is not in force in Ontario. Mr. Kingsford's work will therefore be of the greatest assistance in leading the student gently from rude and ill-formed conceptions of law generally to a scientific apprehension of its general characteristics, and thence to its application in detail. The general scheme of this volume is that of Blackstone, modified by the local colour of our laws. At the outset, however, we regret that Mr. Kingsford should have discarded the term "Municipal Law" on account of an erroneous use of that phrase to define the law of municipalities. The phrase is correct and is to be found in all systems of jurisprudence, and we should prefer to have seen the author's contribution given to correcting the error rather than to perpetuating it.

Following the general remarks as to law in its abstract sense, we have the sources of our own particular laws dealt with, and then the specific matters which have become the subject of statutory enactment. At the end of each section there has been collected a table of the various statutes in force affecting the subject matter of the section. So that, in addition to the usefulness of the book as a student's text, it will be found extremely useful to the practitioner. Altogether, Mr. Kingsford is to be congratulated on the effort to systematize the laws of Ontario, and his effort has been duly recognized by the Law Society's having put this volume on the curriculum of the Law School.

Commentaries on the Constitution of the United States, Historical and Juridical, with observations upon the ordinary provisions of State Constitutions, and a comparison with the constitutions of other countries. By ROGER FOSTER, of the New York Bar, author of a treatise on Federal Practice, etc. Volume I. Boston: The Boston Book Co. Toronto: The Carswell Co. 1896.

Mr. Foster, like a true citizen of the United States, has a fondness for written constitutions; but the difficulty of amendment which now exists in the United States makes progress in constitution building a slow process. That democracy requires the imposition of checks, and that these checks have been effectively imposed in the case of the United States, is true, and their existence is regarded as a mark of perfection rather than a defect. The fact remains, however, that they are to-day almost prohibitive. An unwritten constitution, or a constitution, as the Canadian, unwritten, except as to the distribution of legislative and executive functions, is more responsive to popular will, and therefore more progressive. Any study, however, of the wonderful instrument of government created

by the independent states is of world-wide interest. Mr. Foster is thorough in his treatment of the subject from the very origin of the constitution, and from the comparatively small proportion covered by the first volume, the work when completed promises to be a large one. An index to each volume would be a valuable addition, as it is somewhat difficult to find what is wanted from consulting the table of contents.

THE

CANADIAN LAW TIMES.

AUGUST, 1896.

ONTARIO LEGISLATION, 1896.

THE Statutes of Ontario are revised and consolidated every ten years. During the five years succeeding the revision, the Legislature is usually occupied in amending the revision. And during the five years preceding the next revision, it is occupied in amending the intermediate Acts in preparation for a new revision. Altogether there have been amended this past session one hundred and three statutes, including the revised and statutes of every year since. Some have been amended in several sections, making in all one hundred and fourteen amendments.

> "We must not make a scare-crow of the law,
> Setting it up to fear the birds of prey,
> And let it keep one shape till custom make it
> Their perch and not their terror."

The Succession Duties Act, 1892, which, when it came into operation, disclosed that there were not only difficulties in the way of working it out, but also that there were numerous cases which were not within it, has been largely amended. The first important amendment is that which affects the property subject to taxation. The whole of section 4 of the original Act has been repealed and a new section substituted. Inasmuch as the new section includes a great deal of property which was not comprehended in the original Act, and inasmuch as the amending section refers to the date of "this Act" for the commencement of

its operation, a question has been mooted as to whether or not the amendment is not retrospective. That is to say, gifts and dispositions of property, which were not subject to succession duties under the original Act, are now subject to duty under the amending Act; and as the express wording of the amendment refers to the coming into force of the original Act, it has been asserted (although no question has formally been raised) that all property coming within the comprehensive wording of the amendment is retrospectively affected in this respect. Of course, no Court would be astute to make the Act retrospective; as it is against all principles of construction, if there is any ambiguity, to interpret an Act imposing a tax in favour of the tax; and the easy solution of the question is that "this Act" in the amendment may be interpreted as "this Act as amended." That is to say, the Act as amended commences on the day of the coming into force of the amendment.

With regard to the subject matter of the amendment, an attempt has been made to cover every possible way by which property may devolve upon the death of the owner. Dispositions made while the original Act was in force, designed to prevent the property from becoming subject to succession duty, were treated by the Crown as "evasions" of the Act, although most unjustly so. Such dispositions were no more an evasion of taxation than is residence in a township adjacent to a city for the purpose of avoiding city taxes.

The original Act covered two classes of property only. Property passing by will or intestacy, and property disposed of in contemplation of death, or to take effect after death. A peculiarity of the original Act was that, while property passing by death was undoubtedly subject to taxation, the same section which rendered it dutiable, only rendered subject to taxation "any interest therein or income" from property which should be voluntarily transferred by deed, grant or gift made in contemplation of the death of the grantor, bargainor, etc." Whether this was

careless drafting, or whether the real intention was that, not the property itself, but only any income received therefrom which should be transferred voluntarily by gift, etc., should be subject to taxation, it is impossible to say. The actual wording is that only the interest therein, or income derived therefrom, when transferred, should be dutiable. However, the whole section has been repealed, and a new one substituted therefor.

The first sub-section (*a*) of the substituted section makes all property situate in the Province passing by will or intestacy taxable. The next class is under sub-section (*b*), "all property in the Province, or any interest therein, or income therefrom, voluntarily transferred by deed, grant bargain, sale or gift, made in contemplation of the death of the grantor, etc., or made or intended to take effect in possession or enjoyment after such death, to any person, in trust or otherwise, or by reason whereof any person shall become entitled in possession or expectancy to any property or to the income thereof." The class affected by this section is all property which is disposed of by the donor in contemplation of death. The evident intention as to what it shall include is very broad, and if literally interpreted, will include property, not only the subject of a voluntary gift, but an actual sale. The words "bargain" and "sale," used in the clause must be interpreted either in the technical sense of "bargain and sale," which necessarily implies a money consideration, or as two different unconnected words descriptive of two distinct transactions. If we adopt the first interpretation, the word "voluntarily" is so contradictory to the sense expressed by "bargain and sale" that the two cannot subsist together. We must either completely reject bargain and sale, or we must treat an actual bargain and sale as included in the forbidden modes of transfer. If, on the other hand, we take the two words "bargain" and "sale" as indicating separate transactions, the word "voluntarily" qualifying both, we are still in the difficulty that a "bargain" cannot be a gift, neither can a "sale." Is the clause

then to be paraphrased as including every "voluntary gift," "voluntary bargain" and "voluntary sale," or must we reject altogether the word "voluntary"? Of course, it is not within the scope of such enactments that, where a person converts his property into cash, which cash will be subject to duty upon his death, the property conveyed should also be subject to duty; but such pains have been taken to include every gift in contemplation of death, that it leaves it open for interpretation as to whether or not an actual sale made in contemplation of death would not render the property disposed of liable as well as the consideration which was received. If this is really an open question, we can only avoid it by an interpretation which would make the words "voluntary bargain, voluntary sale" absolutely without any meaning distinct from the phrase "voluntary deed, voluntary grant or gift." The concluding addition of the sub-section is somewhat obscure, but the probable intention is that any beneficial enjoyment of property by reason of a gift or transfer made in contemplation of death renders the property subject to the duty.

The next sub-section (*c*) introduces three new classes of property: (1) *donationes mortis causa;* (2) gifts *inter vivos*, "which shall not have been *bona fide* made twelve months before the death of the deceased;" (3) property taken under any gift, of which possession and enjoyment has not been assumed immediately by the donee, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

In class 1, clearly any gift made before the Act, in contemplation of death, where the death occurs after the Act, falls within the words of the section. One would have supposed that a *donatio mortis causa* would have fallen within the phrase "a gift made in the contemplation of the death of the donor" under sub-section (*b*). It will be an interesting enquiry to ascertain and distinguish what gifts made in contemplation of death do not fall within the term *donationes mortis causa* and *vice versa* so as to make both clauses operative.

Under the second class, gifts *inter vivos*, made within twelve months of the death, are subject to taxation. If they are *bona fide* made twelve months before the death of the deceased, they are not subject to taxation. If they are *mala fide* made twelve months before the death of the deceased, *ex hypothesi* they will be subject to taxation. What is the distinction between a gift made *bona fide* and one made *mala fide* with regard to time? We should not like to venture an opinion. If it means a gift made more than twelve months before the death, not to take effect until later, then it is already covered by sub-section (*b*). The intention, however, is to include a class of property not covered by clause (*b*), and therefore an arbitrary period of twelve months before the death is fixed, during which time the donor cannot make a gift, whether or not in contemplation of death, which will be free from taxation. If the purpose was to include the case of an instrument ante-dated, the particularity of the clause is surely not required; for a gift made a month before the death by an instrument dated thirteen months previously, is surely not a gift made twelve months before the death of the deceased.

The third class under this sub-section is the subject of a gift made at any time, where the possession is not taken by the donee immediately after the making of the gift, and thenceforward retained to the entire exclusion of the donor. The purpose of this clause is to prevent the actual making of the gift, with the intention that the donor shall, notwithstanding the gift, remain in possession and enjoy the property, and part with it only upon his death. The wording, however, is unfortunate; because, in the first place, this class of property, which is entirely different from any other heretofore mentioned, is introduced by the word "including," as if it were part of the second class. And in the second place, by its generality, it includes property which evidently should not be included therein. A gift made ten years before the death of the owner, and not taken possession of by the donee, say for one month

after the gift is made, falls literally within the meaning of the Act, and remains subject to taxation, because possession was not immediately assumed and thenceforward retained to the entire exclusion of the donor. Such a case might easily arise. Suppose that a parent desires to make a gift to a child upon marriage of $1,000 worth of stock, but does not make the transfer until he has received the ensuing dividend, which may not be due for four or five months. Upon receipt of the dividend, the stock is transferred. This gift is not assumed by the donee immediately upon its being made and thenceforward retained to the exclusion of the donor, and therefore it falls within the literal wording of the section. It may be said that such cases are not within the Act, but if they are literally within the Act, there seems to be no reason for excluding them. It is not a matter for judicial discretion, but a matter for strict definition.

Another case might be instanced. Assuming that a husband, without any intention whatever of avoiding the Act, makes a gift of a house to his wife. Possession is immediately taken by the wife, and the husband enjoys possession with her jointly until the time of his death. Here, although the property is actually taken possession of by the wife upon the gift being made, it is not thenceforward retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." It falls within the very words of this part of the clause, and yet, if made more than twelve months before his death, ought, according to the policy of the prior part of the same section, to be free from taxation. We cite these instances to show that the evil to be remedied by the Act has not only been remedied, but, by a wording which is too general, the Act has been enlarged to include that which is not at all an evil.

The next sub-section (*d*) deals with joint tenancies. As there seems to be an opinion that tenancy by entireties has been abolished since the Married Women's Acts, we need not deal with that subject, but confine ourselves strictly to

joint tenancies, which are the only species of ownership whereby property passes or accrues by survivorship. In this case, where the property, being the sole property of the deceased person, has been transferred to or vested in himself and another jointly, then, upon his death, that beneficial ownership which passes by the survivorship is subject to taxation. As far as we have gone, the clause applies only where a person is in the first place solely entitled, and makes a transfer to himself and another jointly, and applies apparently only where the settlor himself dies. Thus, if A., owning a piece of land, makes a grant to another and himself to hold as joint tenants, and A. dies, the property falls within the clause; but if the other joint tenant dies the property does not fall within the clause. This surely was not intended. Furthermore, property is jointly purchased and conveyed to the purchasers to hold in joint tenancy, it does not fall within the clause. The feeling of the draughtsman evidently was that he had not covered all cases; for, in sub-section (*g*), the generality of sub-sections (*a*) and (*b*) is not to be affected by the specific provisions of the following sections. But as the *jus accrescendi* does not depend either on devise or intestacy, the case is not covered by sub-section (*a*). The concluding words of this clause are very obscure, and seem almost impossible of elucidation. They are, "including also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person." We noticed that a distinct class of property in sub-section (*c*) was introduced by the word "including," which evidently was not included in the previous part of the section at all. Being excluded, it was to be specially legislated for, and the word "including" is wrongly used. So the word "including" in this clause, in introducing the following clauses, does not embrace a species of property which might by possibility be rejected from the prior part of the section, but, apparently, is intended to add a new class of property. What does the clause mean? It may mean that, where A. buys a piece of

property, or invests money for himself alone, and he takes the property or security in the name of himself and another jointly, then if he dies such property is to be included in the meaning of this section. If that is not the meaning of it, it is very difficult indeed to give any meaning to it. A purchase or investment effected by a person who "was" absolutely entitled to the property does not convey any meaning at all, because he becomes for the first time entitled by his purchase or his investment. And certainly it is difficult to conceive how the settlement of property by a person solely entitled on himself and another jointly can include a purchase effected by a person who was absolutely entitled to the property.

The next sub-section (*e*) deals with property settled; but there is some difficulty with this clause also. The clause does not declare that whenever any property passes in consequence of death under the provisions of a settlement it shall be liable to duty; but what it does declare is, that when a settlement is made by any person dying on or after the passing of the Act, whereby an interest in the property for life, or any other period determinable by reference to death, is reserved to the settlor, the property passing under that settlement is subject to taxation. But if the settlor does not choose to reserve a life estate to himself, or to retain a power to resettle the property, then it is not within the wording of the section. It would seem, therefore, that where property is settled by a father upon his daughter at her marriage, and he reserves no life estate to himself, nor any right to resettle the property, the settlement is not within the Act. The property, it is true, passes from one person to another under the settlement; but it is only property which passes under a settlement made by a settlor dying after the passing of the Act, when he has reserved a life estate or a power to resettle, that is dutiable. Such property as we have suggested, is apparently free from the duty altogether; for it does not fall under class (*a*) as passing by will or intestacy; nor under class (*b*) by voluntary transfer in contemplation of death;

nor under class (*c*) as a *donatio mortis causa*, a gift *inter vivos*, made within twelve months before death, or a gift where possession is retained by the donor; nor under class (*d*) by survivorship, and therefore it would appear to be completely removed from liability for duty. Why it should have been necessary to limit this clause to settlements whereby the settlor should retain certain rights is not quite clear. The clause does not expressly say that the interest of the settlor shall, upon his death, become subject to taxation, but apparently makes the whole property liable to succession duty, as soon as he dies. Thenceforward the property is free from duty, and both in this case and where no rights are reserved, it may pass from one to another under the settlement without being rendered subject to a tax.

The next important amendment is that which is made to section 8 of the original Act. Curiously enough, by the original Act, although the executor, before obtaining probate, had to value the property passing, he was under no obligation to value the various interests created by the testator for the purpose of fixing the duties. Under section 6, if the Treasurer of the Province were not satisfied with the value sworn to by the executor, he might have a valuation made by the sheriff, and, upon receipt of such valuation, the Registrar of the Surrogate Court was then obliged to value all the estates, interests, and so on, which were created by the testator, for the purpose of levying the tax. An attempt has been made to remedy this by a slight amendment of section 8, which directs the Surrogate Registrar to fix the cash value of all such estates as a primary duty, and not, as under the old law, upon receipt only of a report made in consequence of the Treasurer's request.

The next amendment of importance is that which is made to sections 11 and 12. By section 11, the duty upon an interest which does not come into actual enjoyment until after the expiration of one or more life estates or a period of years, is made payable when the person entitled

to the future interest comes into actual possession thereof. By section 12, duties imposed by the Act, unless otherwise provided, are payable within eighteen months after the death. That is to say, all present interests are subject to duty, payable immediately. All future interests are subject to duty, payable when legatee comes into actual enjoyment thereof. Section 11 is amended by providing that where no person is entitled to present enjoyment, the duty becomes payable within eighteen months under section 12. That is to say, suppose a testator provides that his estate shall be accumulated for ten years and shall then be distributed amongst certain legatees. Under the original Act, the duty became payable only upon distribution; under the amended Act, it becomes payable within eighteen months. An old difficulty remains, however. Under section 8 of the Act, the cash value of the future estate is the value upon which the tax is to be computed. If the Act intended that the property passing should be subject to the duty to be levied on its present value and payable immediately, it falls lamentably short of saying so. The duty still is to be ascertained as of a future estate, but is to be payable immediately. Another amendment is made by sub-section 3, which provides for commuting future payments of duty. Commutation of future payments must, however, be made upon a correct basis, and where the Act has been obscure hitherto, as to how such future payments are to be computed, it has been left in this state of obscurity. For instance, according to section 8, the present value of future estates is the basis for the computation of the tax. By section 11, the payment of the tax on future estates is postponed until they become estates in enjoyment; but, with exasperating inconsistency, the clause goes on at the end to say, that the duty shall be assessed upon the value of the estate at the time the right of possession accrues. In case, therefore, an executor desires to commute the tax upon a future estate, he finds that under section 8 the mode of commutation is to take the present value of such future estate, which is the value upon which the tax is to be assessed. He then turns to

section 11, and finds that he has not to pay that tax until the future estate becomes one in possession; and he then also finds that the tax is to be assessed, not upon the present value of the future interest, but at the value when the future estate becomes an estate in possession. He then turns to the Act of 1896, and he finds that he may commute the future payment. How he is to do this, without prophetic knowledge of what will be the value of the estate at the time when it becomes an estate in possession, the Act does not assist him in. The opportunity of amending section 11, so as to make it clear how the tax on a future interest is to be computed and paid, has passed away, and the privilege of commutation without any sound basis upon which to commute has been made a salient feature of the amending Act. Probably sections 8 and 11 may be reconciled by treating section 8 as the direction to ascertain the tax, and section 11 as the direction as to time of payment merely. Thus the present value of a future interest is computed under section 8. It is not payable until the estate becomes an estate in possession. Now, a remainder is no longer a remainder when the life tenant dies. The remainderman is now tenant in possession. Section 11 says the tax shall be "assessed" on this estate. If we regard the tax as already ascertained by assessment of the future estate, and treat the word "assessed" in section 11 as meaning "levied," then we can reconcile the two sections. The fee simple in possession which the sometime remainderman acquires by the death of the tenant for life, is "assessed" or rendered liable for the tax which was ascertained under section 8. If the fee simple, in the possession of the remainderman, is to be assessed for the full tax, when the remainderman gets possession, then, on one death, the Crown would collect, first, a tax on the life estate, and second, a tax on the fee simple in the land when the life drops. But, if one tax is ascertained upon the value of the life estate, and another on the present value of the remainder, and the first is paid immediately and the second when the remainder becomes an estate in possession,

then but one tax has been exacted; *i.e.*, a tax on a life estate, plus a remainder, the whole making a fee simple.

Sub-section 4 is an adoption of the principle of the Imperial Act as to paying the duty on annuities. The original Act required the payment to be made by the annuitant upon the whole value of his annuity. This might conceivably exhaust his first year's payment, and if he died during, or at the end of, the year, his whole annuity would have disappeared in a tax. The amending Act now extends the payment over four years; and if the annuitant dies within that period, a proportionate amount only is exacted.

The purpose of section 7 is past comprehension.

The Judicature Act, 1895, which has been in force but a few months, receives, by chapter 18 of this session, no less than thirty-six amendments.

In the schedule to this Act, the Quieting Titles Act, R. S. O. c. 113, sec. 42, is amended by the 41st amendment, and the same Act is treated to a special amending Act, chapter 28, which (section 3) again amends section 42, thus giving a pleasing variety to the legislation, and a piquancy to the study of it, which it would not otherwise possess. The revised Act gives an appeal from a Judge, either to a Divisional Court and thence to the Court of Appeal, or to the Court of Appeal direct, "as in the case of actions." Chapter 18, amendment 41, strikes out the whole section and substitutes a new one, which in reality only substitutes for the phrase "as in the case of actions" the following: "In the same manner and subject to the same restrictions as in the case of appeals from a judgment or order of the High Court in an action." This is probably intended to mean that where the Divisional Court affirms, there will be no further appeal. Chapter 28 then takes up the section, and strikes out all the words after the words "Divisional Court." In the first place, it does not clearly appear whether it is the original section which is intended to be amended, or the amended section enacted by chapter 18. But in each of these the words "Divisional

Court" appear twice, thus imposing no despotic trammels, but giving freedom of choice as to where the substituted words will be placed. Fortunately, however, in this case the grammatical sense requires the amendment to be placed after the words "Divisional Court," where they first appear in the section. This, however, still leaves a doubt as to which section is amended. If we take the later Act as the governing one, repealing in effect the amendment just made by chapter 18, then the appeal from the Divisional Court to the Court of Appeal is abolished; that is to say, two alternative appeals are allowed, either to a Divisional Court or to the Court of Appeal. No further appeal is given. The appeals which are permitted are to be subject to the same restrictions as appeals in actions, but the amendment falls short of saying that any appeal will lie to the Court of Appeal from a Divisional Court. Now, by the 41st amendment of chapter 18, it is distinctly provided that an appeal shall lie from a Divisional Court to the Court of Appeal, subject to the same restrictions as in the case of an action. If there can be two sections 42 of the Quieting Titles Act, then an appeal will lie from a Divisional Court to the Court of Appeal. But it would seem reasonably clear that there cannot. The latter Act amends either the original Act or the amending Act. In either case the privilege of appealing to the Court of Appeal from a Divisional Court seems to have been superseded by the last amendment.

An extremely useful provision of chapter 18 is that which enables the High Court to remove an executor or administrator upon the same grounds as it can remove a trustee, and appoint some other person to act in his place. It is, of course, a peculiarity that the Court should be able to appoint an executor, if indeed he is to be called an executor, as is probable from sec. 4, s.-s. 5, of the Act; but Parliament, as Blackstone said, can do anything but make a woman a man or a man a woman; and they are coming perilously near the former now that women may become solicitors. By sub-section 5 of sec. 4 the executor of any person appointed executor under the Act does not

thereby become executor of the original estate. Presumably, however, he may become so by express direction in the will of his testator. It would have been well to make that perfectly clear by the Act. By chapter 20 the Surrogate Courts are granted similar powers when the estate does not exceed $1,000; with a similar provision as to the non-succession by the executor of the executor appointed by the Court. A number of other minor matters are dealt with in this chapter.

Perhaps the most important of the enactments of this session is chapter 19, whereby the County Courts are invested with a large amount of jurisdiction hitherto withheld from them. The advisability of this is questionable, perhaps more than questionable. For instance, a question of law may arise in an action to recover lands of the value of $200 or less, just as important as in an action to recover land of one hundred times the value. Indeed, it goes without saying that the importance of the questions at issue are not determined by values at all. By this enactment all rights of appeal, except to a Divisional Court, are absolutely cut off if the action is brought in a County Court. The same remarks apply to actions by legatees. Actions to foreclose and redeem mortgages ought not, under any circumstances, to be brought in a County Court. The machinery is not adapted to them, and the questions involved are, on the whole, of such a special nature that they are better taken care of in the High Court. Again, titles depend upon the proceedings, and in making a search for a title there is no knowing where to go to look for the proceedings until the particular Court is found.

The authorship of sub-section 14 of section 20 of the Act, as well as chapter 21, is distinctly traceable to certain cases to be found in the proceedings of the Courts by any one who knows where to look.

A necessary feature of giving equitable jurisdiction to the County Courts is that they must exercise many of the rights conferred by means of injunction. If any doubt existed as to this, it is dissipated by section 6 of the Act,

which requires the Courts so to act. Experience has shown that some very curious injunction orders have been granted by local Judges. A few may be cited: (1) An interlocutory injunction to restrain the defendant from keeping up a mill dam for eight days, or until, etc. (2) An interlocutory injunction to restrain a defendant from leaving a consignment of apples unpaid for, for eight days, or until etc. (3) An interlocutory injunction to restrain a master from discharging a servant. Of course, where the injunction is granted by a local Judge in a High Court action, the provisions as to continuing in and appealing to the High Court prevent very grave injustice being done. But when the same Judges, as County Court Judges, in actions in their own Courts are liable to grant such injunctions, it is fearful to contemplate what may be done by way of interlocutory orders.

By chapter 20, sec. 5, a very useful provision is enacted. Heretofore, though it has been the constant practice, and is, or at least was for a time, compulsory for executors to pass their accounts in the Surrogate Courts, this was not final, but the whole matter might have been gone over again in the High Court. By this enactment, where an executor or administrator has filed his accounts, and the Surrogate Judge has approved thereof in whole or in part, if the executor or administrator is subsequently required to pass his accounts in the High Court, the approval by the Surrogate Judge is binding on every person who was notified of the proceedings in the Surrogate Court, or was present thereat, and every one claiming under such persons, except he can show fraud or mistake. It would appear that the onus is on the person alleging the mistake or fraud, and that the jurisdiction of the High Court would be exercised only in the same way as in the case of stated accounts.

A quiet amendment of the Surrogate Courts Act, section 6, is probably designed to place the appointment of Surrogate Court Judges henceforth in the gift of the Province. The first two lines of the section declare that

the Senior Judge of the County Court shall be *ex officio* Judge of the Surrogate Court. These two lines are repealed. The British North America Act requires that County Court Judges, but not Surrogate Court Judges, shall be appointed by the Governor-General. Hitherto the County Court Judges have, by this clause, been statutory Judges of the Surrogate Courts. Now, they are no longer so, and the gift is in the Province. Another instance of carelessness appears in this amendment. The two lines repealed formed part of a sentence and were connected with it by the word "and." It now reads, "and in case of the illness, etc." Unless the amending power was spent in this effort the Legislature might have struck out the word "and."

Chapter 21 was passed for the purpose of referring boundary disputes to surveyors. Section 8 was unnecessary, as parties may agree to a line without it. Indeed, where parties agree upon a surveyor to fix their line, they are bound by their agreement if in proper form; whereas this enactment puts the agreement and report only upon the basis of an award, and therefore renders it possible to move against it. The rest of the Act is useless and may become pernicious. In all boundary disputes reference to a surveyor is made compulsory. Why the Legislature should think a surveyor better able to determine such a question than a Judge would be past comprehension, if there were not other samples of such legislation extant. The whole dispute may depend upon occupation and the Statute of Limitations, questions entirely unfitted for reference. Even if the case should depend upon the correctness of surveys, or the finding of a surveyed line, this procedure cannot be beneficial. Such questions arise either from faulty surveys or lost monuments. Surveyors, it is notorious, differ in their modes of procedure. They are opposed to each other as witnesses at trials. And it not unfrequently happens that the Court cannot adopt the work of any of them. Now, it goes without saying that if a correct survey can be made, which, of course, would render the line indisputable, there is no necessity for referring the

question to a surveyor. While, if the dispute arises because surveyors disagree (which is a common source of boundary disputes) it is entirely useless and improvident to refer it to another surveyor who is equally with the others without data for a correct survey. The Referee is first to make a "proper survey" under the Surveyors' Act. If he is satisfied with his own work (and what average man is not?) he is apparently to stake out the line. If not, then (though the Act is rather obscure on this point, and the grammar execrable) he is to take evidence, "but only where he shall deem it necessary." This is a heroic method, and arbitrary. One can imagine the indignation that would find vent in words if a Judge should read a record and say he did not think there was any need of hearing evidence. But if a surveyor runs a line where his brothers have failed, because he may happen to be in love with his work, and does not think it worth while to hear any evidence, the parties are at his mercy. The only escape from these compulsory references is that given under section 6. If from the nature of other issues, or for other "good cause," "it would be a saving of expense, or otherwise to the advantage of both parties not to direct a reference," then it may be dispensed with. What can be good cause against the application of the Act, if the purpose of the Act is a good one? Questions of law on the deeds, or on the interpretation of a doubtful description, undoubtedly would be. But where doubtful questions arise in mortgage and redemption suits, it very frequently happens that the Court refers the account and postpones the consideration of the points raised until further directions. If this course is adopted under this Act it would seem that every case must go to a surveyor. There is no doubt that all such litigation will be, on account of the Act, more expensive than before, if evidence is taken. The motion is an additional expense. The Referee is to make a survey himself; that is an additional expense. The evidence before him will be the same as before a Court; but common experience teaches us that the cost of a reference is above that of a trial though the evidence is the same. And finally a motion for judgment

has to be added to the costs. Unless, therefore, Referees summarily make their own surveys, and decide accordingly, boundary disputes bid fair to become more expensive than formerly.

Chapter 22 applies to the administration of the estates of insolvent deceased persons, the principle of valuing securities held by creditors.

By chapter 34, the practice of taking agreements for chattel mortgages and bills of sale, which are not within the Chattel Mortgage Act, and are therefore secret, is put an end to. All such agreements are put upon the same basis as the completed transaction; and all existing agreements must be registered within three months after the passing of the Act. As registration is required, it is a corollary, that every such agreement must now be in writing. And where an existing agreement is not in writing, it must be reduced to writing for the purpose of preservation by registration.

The Mechanics' Lien Act is amended and consolidated by chapter 35. A tremendous advance is made in the scope of the measure. Liens may now be acquired on railways, wharves, piers, etc., and, strange to say, on sidewalks, drains, sewers, aqueducts, road-beds, ways, fruit and ornamental trees (why not shrubs also?) or (why not and?) the appurtenances to any of them. Section 6 declares that the lien shall attach on the estate or interest of the owner in the objects mentioned "and [not or, this time] the appurtenances thereto." So, if a "mechanic" supplies and plants a tree, he has a lien on the estate of the owner in the tree "and the appurtenances thereto . . . and the lands occupied thereby and enjoyed therewith." Is an estate in fee simple in the land to be considered as appurtenant to the tree, or does appurtenances extend only to the fruit? Insurance money, where the property subject to the lien is destroyed by fire, becomes subject to the lien. The lien is to have priority over "judgments, executions, assignments, attachments, garnishments and receiving orders, issued or made after such lien arises." It is a little

difficult to see how a garnishee order can affect an estate in land, but no doubt a way of disposing of this section will be found. A lien may include "claims against any number of properties" (*quære*, if owned by different persons), and any number of lienholders may unite therein. The taking of security, a promissory note, or giving of time, or the recovery of personal judgment, is not to merge, waive or pay the lien unless the lienholder agrees in writing to that effect. Lienholders are entitled to information from the owner, and if he neglects or refuses to inform them or misleads them, the owner is to be liable for the loss occasioned! A number of provisions follow as to proceedings.

Chapter 40, an Act relating to Dower, is a gem in its way. Hereafter, for the purpose of dower, there must be a distinction drawn between a "rightful" or "official" wife, and a *de facto* wife, or, to use a patriarchal word, a concubine. By section 2, if the wife of a vendor or mortgagor has been living apart from him for five years or more (and without any fault of her own, apparently), and the husband conveys, or has conveyed, then the purchaser or mortgagee, having no notice at the time of the conveyance that the husband had a wife living, may apply to a Judge for the same relief as if the wife was confined as a lunatic, *i.e.*, may procure an order dispensing with bar of dower. The order, under R. S. O. cap. 135, section 10, can only be made upon the dower being valued and secured on the property "or otherwise." Where the sale or mortgage has not been effected, this can be done at the expense of the husband. But where the conveyance has been made, the grantee having no notice of the deceit practised on him (the case apparently aimed at by the Act), it is poor consolation to him to be able to obtain his order only upon securing the dower. Better leave it alone.

Section 3 makes the rule and practice the same "where the husband is living with or recognizing another woman as his wife, the purchaser or mortgagee having no notice of her not being his wife and no notice that the

grantor or mortgagor had a rightful wife, with whom he is not living." If every husband was a woman, it would be grammatically correct for the legislature to say "where the husband is living with another woman," though physical difficulties might arise. But as long as husbands have to be men, it is not grammatically correct to speak of their living with "another woman." Grammar and morality both being sacrificed, then, "another woman" must have a sinister significance and be synonymous with the "strange woman" of the Preacher. The strange woman having presented herself to bar dower, it is clear that no order can be made antecedent to the conveyance; for the purchaser or mortgagor would then have notice. The section only applies therefore where a purchaser or mortgagee has been defrauded. And he has the grim satisfaction of being enabled to bar the dower, on condition that he secures its value to the "rightful wife" with whom the husband is not living. Of course he may get an order that the husband shall secure the dower to his "rightful wife;" but it will be even more unsatisfactory to him, for husbands of that kind will not be on the alert to render justice to their wives.

Section 4 has even more sparkle in it than the others. It defines who, in addition to the purchaser or mortgagee, may apply for such an order. First, any person claiming under the grantee or mortgagee; secondly, the owner himself! Assume an application to be made by an owner. He proves first, absence of his wife; secondly, that he is living with another woman; thirdly, that he had no notice of it, or that the purchaser had not (the Act is not quite clear); fourthly, that he deceived the purchaser or mortgagee, and he gets "like relief." A section should have been added enabling the "rightful wife" to get some relief She appears to be the only one morally entitled to any consideration. The Act is said to have been passed on account of frauds practised on loan companies by borrowers who have represented their concubines to be their wives. A step in advance would be to pass an Act to validate forged mortgages for the protection of the same companies.

By section 5 the husband of a lunatic who is confined in a public lunatic asylum in this Province, may buy and sell land without dower attaching. Suppose a man sends his afflicted wife to an asylum in the State of New York. Dower would appear to attach. *Quære*, if A. buys land while his wife is confined in an asylum, and she is discharged, but the recovery is temporary, and she is again confiined, can the husband sell free from dower? Apparently not, on the wording of section 5.

By section 6, where an infant wife purports to bar dower in a conveyance, the conveyance will be effectual if the purchaser had no notice of the minority, unless (1) she brings an action of dower four years after the conveyance, or (2) unless she within that time gives to the owner written notice of her claim. This section is retrospective as well as prospective. Though not so expressed, the meaning of the condition probably is that the action of dower must be brought within four years if the wife becomes a widow; if not, she must give notice in order to preserve her claim. All through the Act, mortgagees, as well as purchasers, are specially legislated for. But in this section the word "purchaser" alone is used, raising at once the hypothesis that mortgagees are not to have the benefit of it.

The inordinate length of this article must be our present excuse for leaving other Acts untouched. We propose considering, at another time, the new Landlord and Tenant Act, which is intended to declare the meaning of the old one.

EDITORIAL REVIEW.

Appointment of Queen's Counsel.

The retiring Government left a number of names under recommendation for appointment to the office and dignity of Queen's Counsel, which attracted a good deal of interest amongst the profession. Some of the gentlemen named were distinguished by their talents, some by their politics, and some by their post office address. One gentleman whose name appeared in the list is a solicitor, not a barrister. It has been irreverently said that the appointments were the last expiring effort made by the Government in the interests of trade. All speculations as to the list have been set at rest, however, by the semi-official announcement that the present Attorney-General will not instruct the issue of the patents. Indeed, since his removal from the position of Attorney-General of Ontario to that of the Dominion, it would be impossible for him to recognize the appointments without destroying the record of all that he had done with regard to Queen's Counsel as Attorney-General of the Province. His own view has been that the Province had the right, to the exclusion of the Dominion, to appoint Queen's Counsel under the British North America Act, which allots the administration of justice and the appointment to provincial offices to the Province. Those who are interested will find the subject discussed in Vol. 10 of this journal at page 25, on behalf of the Dominion view, and at page 58 on behalf of the provincial view; and in Vol. 12 at page 142 will be found the questions to be submitted to the Court of Appeal in the case which has been so long standing for argument as to the right to appoint Queen's Counsel.

It is rumoured that this case, which has remained in abeyance for a number of years, will now be argued. The late Government of the Dominion always proceeded upon the principle that unless the revenue was affected it would take no part in the argument of stated cases. Since the change of Government and the translation of the Premier of the Province to the Department of Justice in the Dominion, all those questions which affected provincial rights will now with ease be brought before the Courts upon a case prepared by both sides. There is no doubt that this method of preparing a case savours somewhat of the setting up of a devil's advocate to argue the opposite side to that upon which the real opinion lies. We have no doubt, however, that the gentleman whose name has been suggested to argue the Dominion side of the question will argue to the best of his ability, which is very great. Still, the case, which has lain in abeyance so long, cannot but be regarded as being prepared on both sides by a person whose strong opinion lies upon one only. No real advantage can arise to the public from the settlement of the question, if indeed it is not already settled, and to ask gentlemen to argue before a Court as to the validity of their own appointments, which have been already recognized in all Courts, savours somewhat of cruelty. No one has anything to gain, but many have a great deal to lose. It must be invidious to ask a Court which has always recognized patents from both sources to pass upon the validity of its own unquestioned action.

One would have supposed that most of the questions propounded by the case submitted were disposed of by the decision of the Privy Council in Maritime Bank v. Receiver-General of New Brunswick, 8 T. L. R. 677. In this case it was held that the Lieutenant-Governor of a Province represented the Crown directly in all matters relating to provincial matters. The administration of justice is without doubt a provincial matter, and if it is within the power of the Lieutenant-Governor, as an executive act, to retain counsel in an individual case to appear before any

provincial Court, surely it must be within the power of the same officer to retain counsel for the Crown generally, which is, in fact, to appoint Queen's Counsel. There remain then but two questions. One, the right of the Dominion, which has under the British North America Act a reservation of rights as to administration of justice, and whose executive officer, the Governor-General, must, as the representative of the Sovereign, also have the right to appoint counsel to represent the Sovereign; and the other question of the precedence of those who hold patents, as amongst themselves, when appointed by two representatives of Her Majesty. We have already shown, in the articles alluded to, that the Supreme Court is not committed to any opinion as to the validity of the appointments, and it is possible that the matter may be reconsidered there rather than go direct from the Court of Appeal to the Privy Council. The latter course, however, is the one that will probably be taken.

Appointments to the Judicial Committee.

It is stated in the cable dispatches that the Imperial Government has already undertaken the nomination and appointment of Colonial Judges to the Judicial Committee, and the same dispatches state that it is probable that Mr. Edward Blake will be appointed for Canada. We have already expressed our opinion upon the value of these appointments. It will be agreed at once, at any rate in Canada, that the value of the decisions in Canadian cases will not be at all enhanced by the introduction of Judges from other colonies to sit upon them; and on the other hand, if the Judges from other colonies are not to sit in Canadian cases, the value of the opinion of the Canadian Judge sitting in England is no greater than its value when he is sitting in Canada. Although the suggestion has a certain glamour about it, and the honour, upon whomsoever conferred, will undoubtedly be a great one, it is difficult to see that any economic, political or judicial advantages will accrue from the scheme.

A Dominion Law Society.

We have been favoured with a newspaper report of a meeting held in Halifax by the Bar Society to receive the report of a committee appointed to ascertain the views of leading members of the Canadian Bar as to the propriety of founding a Dominion Bar Association or Law Society. It is a report of the same meeting referred to by our correspondent, Mr. Marsh, at which the views respecting education were enunciated.

The proposition has often been mooted in this Province; but the present movement has been carried on so quietly that we think we are right in saying that it was not generally known in Ontario. We heartily concur in the proposal, and shall be glad to do what we can to hasten the formation of such a society. One of the chief beneficial results would be to bring together the members of the Bar in the various Provinces, who see and know too little of each other, and of the provincial systems of law. The first meeting would either remove the erroneous notion that legal education in Ontario is below that in Nova Scotia or would by the contact of the Ontario Barristers with the members of the Nova Scotia Bar, set the current in motion toward a higher standard in this Province. It is lamentable thing that Nova Scotia, with its superior legal attainments, should not find a vent for them; while Ontario, with its lower standard, should have a well organized Law Society, a beautiful building, an immense library, a Law School with a staff of a principal and four lecturers on a salary list of $11,000 per annum, maintained at the expense of the Society; a staff of reporters on a salary list of $8,000 or $9,000 per annum, also maintained at the expense of the society; county libraries in all the chief county towns; numerous text books written by members of the Bar; and last, but we hope not least, two law journals. Thus the wicked prosper, while the virtuous are neglected. While we may lament our own condition, let us tender a word of advice to our Nova Scotia brethren. Don't hesitate to

raise the standard in Nova Scotia still higher, even if the other Provinces are behind her.

As to the subjects that a Dominion Law Association might deal with, such as law reform and the assimilation of provincial laws, no better means could be devised for their advancement than their discussion in a Dominion society.

We trust that the movement will proceed, and that the Province of Ontario will benefit greatly by it. In establishing this journal we made a first attempt to bring the Provinces nearer to each other in legal matters; and by the publication of notes of cases from the various Provinces, and of such contributions as we could get, we hope that we have succeeded, to some extent at least, in our effort.

CORRESPONDENCE.

Prohibition.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—I notice at p. 130 of my article on "Prohibition; The late Privy Council Decision," in your number for June last, there is an error, though whether it is fair to call it a misprint, or whether it was in the copy, I cannot say, but I would like to correct it. As printed, the passage states that the Judicial Committee say, that "in legislating with regard to matters which are specified among the enumerated subjects of legislation in section 91, the Dominion Parliament has no authority 'to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92.'" The important little word "not" has been left out, and the passage should read "with regard to matters which are not specified," etc. I think that any reader of the article will probably have detected the slip, but at the same time, I would be glad if you would publish this correction and oblige,

Yours truly,

A. H. F. LEFROY.

31st July, 1896.

Legal Education.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—I have cut some extracts from this day's issue of the *Mail and Empire*, which I hasten to lay before you, as I am certain that they contain news for that numerous body of the benighted members of our profession, who have, in their ignorance, been peacefully resting under the delusion that we have a system of legal education which is worthy

of the Province and of the Bar thereof. This idea, however, is but a vanished dream. *Voila* :—

"A DOMINION LAW SOCIETY.

"A special meeting of the Nova Scotia Bar was held at Halifax on Monday, to receive the report of the committee appointed at the annual meeting to ascertain the views of leading members of the Canadian Bar as to the propriety of founding a Canadian Bar Association. The report approved of the project, and submitted letters from the leaders of the Bar in all the provinces of the Dominion, warmly commending the project, except Manitoba. The two law societies in British Columbia have passed resolutions endorsing it. A paper was read by J. T. Bulmer, setting forth the advantages of the proposed society, and pointing out the work done by the American Bar Association and the Incorporated Law Society of England. He said that provincial societies have exerted a good influence on the profession, but they are not doing the work of a national association. . . . *Legal education was in a most unsatisfactory condition, and in all the provinces below the standard in Nova Scotia. It was not much use trying to raise the standard in Nova Scotia with the low average about us of New Brunswick, Prince Edward Island, Quebec and Ontario.*"

The man who wrote that was, of course, well informed upon the subject-matter of his discourse, because he is a member of the Nova Scotian Bar; and who should be better informed than he is about the superiority of their legal education? I have heard it not infrequently said that megalocephalus is epidemic down by the sea. Here is an outward and visible symptom of the disease which would enable it to be diagnosed by a tyro.

A. H. MARSH.

1st August, 1896.

THE
CANADIAN LAW TIMES.

SEPTEMBER, 1896.

ESTOPPEL, AND PRINCIPAL AND AGENT.

ALL authorities seem to agree that in treating of cases in which it is sought to bind a principal by an unauthorized act of his agent, a division of the subject ought to be made into:—1. Cases of general agents; 2. Cases of special agents. The authorities are not, however, by any means agreed as to the definition of these two terms. They are, moreover, sometimes used interchangeably with general *authority* and special *authority*; and sometimes not only without reference to the character of the authority, but in a way antagonistic to that which would be suggested by that character. The writer is of opinion that much of the confusion in the law which at present exists is due, first, to the lack of a proper definition of terms; secondly, to the lack of a proper classification of the cases; and, thirdly, to the lack of a proper application of the law of estoppel.

Definition of General and Special Agency.—Hazarding definition, in opposition to overwhelming authority, the writer would say, that general and special agency may best be described, not with reference to its object (as is frequently contended), nor with reference to its subject, but with reference to its extent—with reference to the instructions given to the agent: that special agency is an agency to perform duty in prescribed, or special, method; and that general agency is an agency to perform duty, using discretion as to method. In other words it may be said that where the instructions

are *general* (Sell my horse), the agency is best described by using the term *general*; and where the instructions are *special* (Sell my horse for £100, and give no warranty), the agency is best described by using the term *special*—that where the authority is special the agency is special; and that where the authority is general, the agency is general. It would militate strongly against the value of any definition of the terms, and almost certainly lead to confusion of thought, were any distinction made which would sanction the frequent statement that a certain agency was general, although the instructions were special; or that a certain other agency was special, although the instructions were general.

Conflicting Use of Terms.—A very few examples will suffice to illustrate this double use to which the words are sometimes put, not with advantage, as the writer thinks:—

In Story on Agency (9th ed., sec. 133) is the following:—

"The law in such a case would hold *the authority* to purchase to *be general* upon the face of the letter, and the agent to possess authority to bind his principal in regard to such purchase or sale, *as much as if he had been a general agent* accustomed to make purchases in numerous cases of the same sort for the principal."

This clearly indicates that sometimes the authority may be general, and yet the agency may be special.

We read in Baines v. Ewing (*a*) that "there may be a general agent for a special purpose, for example an agent to sign all bills of exchange."

In Attwood v. Munnings (*b*) is the following:—

"It does not come within the special *power*. Then as to the *general powers*. These instruments do not give *general powers* speaking at large, but only where they are necessary to carry the purpose of the *special powers* into effect."

There must, surely, be some better terminology than that which would require us to say that this was a case of general *agency* (as we must if plurality of acts be the description of general agency), and yet that it was a

(*a*) L. R. 1 Ex. 324 (1866).

(*b*) 7 B. & C. 284 (1827).

case of special *authority* with general *powers* in aid of the special powers—that the agency was general, while the authority was primarily special.

It is, too, in the last degree confusing to read (*c*):—

"From the mere relation of principal and factor, the latter derives an authority to sell at such times, and for such prices, as he may in the exercise of his discretion, think best for his employer; but if he receives the goods subject to any *special* instruction he is bound to obey them; and *the authority whether general or special* is irrevocable;"

and yet have to bear carefully in mind, as we must, that no reference is intended to cases of general and special *agency*, but only to cases of general and special *authority*.

Take the case, too, of Alexander v. McKenzie (*d*). A manager of a bank had authority to draw, accept and endorse bills on account of the bank. In doing so he always signed "per proc." This is a case of general *agency*, (according to current definition, for there is plurality of acts); and yet Coltman, J., makes it a case of special *authority*:—

"But in every instance the endorsement by the form of it, bears an intimation to the public that the manager acts under a *special authority*."

Again in Cox v. Bruce (*e*), Lindley, J., said as to the authority of a master of a ship (a case, heretofore, of general agency, there being plurality of acts):—

"Then what is the master's authority? Has he such a *general* authority as would include an authority to give bills of lading with quality marks inserted, or has he a *special* authority in this respect?"

And in Erb v. G. W. R. (*f*), one Judge, speaking of the master of a ship, used this language:—

"whose agency is held to be only *special* and limited;"

while another Judge spoke in this way:—

"The master is said to be the *general* agent to perform all things relating to the usual employment of a ship" (*g*).

(*c*) Smart v. Sanders, 3 C. B. 399 (1846).
(*d*) 6 C. B. 766 (1848).
(*e*) 18 Q. B. D. 153 (1886).
(*f*) 42 U. C. R. 105 (1877).
(*g*) 3 App. Rep. 481; and see S. C. R. 90.

It is confusing, we repeat, to have to bear in mind that although the master is a general, and not a special agent (although sometimes called both), his authority may be either one or the other. The writer has been utterly unable to obtain any clear view of the subject while continuing to classify agency, and its most frequently discussed element (its extent) by means of the same adjectives, and yet to use those adjectives with ofttimes opposing significance.

Difficulties of the Definition.—The writer is quite aware that in assigning the terms *general* and *special*, according to the character of the authority given, he is substituting these phrases for those already used for a somewhat similar purpose, namely, *limited* and *unlimited*. But he does so because, (1) the phrase *limited* does not sufficiently imply that all the powers to be exercised are defined—that no discretion is given to the agent; (2) because the phrase *unlimited agency* describes better that sort of agency usually styled universal, than the grant of discretionary power; (3) because the phrase *unlimited* is too wide; for, as says Story (*h*):—"Even if a general discretion is vested in the agent it is not deemed to be unlimited"; and (4) because, if we ask, What is a limited agency, according to the old definitions? we must answer, One limited by special instructions; which shows that the word *special* is, in reality, the distinguishing term, even when hidden within some other expression.

The definition proposed has furthermore this difficulty to contend with, that it seems to necessitate the introduction of a third class of cases, namely, cases of a mixed character—cases of general agency, limited upon some points by special instructions. But this cannot be escaped by adopting any other method of dividing the subject; and it is, indeed, a just complaint against previous classifications, that no provision at all is made by them for this very usual sort of case. Edmunds v. Bushell (*i*), and Bryant v. La Banque du

(*h*) On Agency, 9th ed., § 83.
(*i*) L. R. 1 Q. B. 97 (1865).

Peuple (*j*) are examples of this mixed character. They could not be catalogued under any simple division of agency into general and special.

Some Authority for the Definition.—The writer is the more emboldened to urge the above considerations that Mr. Justice Story (*k*) says that,

> "There would be no just logical objection to such distinctions."

And although he adds:—

> "but the cases in the books do not make them. And if they did, the distinctions would not be meet to solve the difficulties in the authorities,"

the writer is not without hope that the distinction will be found to be of some service. That they are not without authority may be seen by reference to sections 18 and 19 of the same work; and also to the case of Howard v. Braithwaite (*l*), where Lord Eldon spoke of an auctioneer as a general agent, apart from the frequency or infrequency of his employment. Chitty on Contracts (*m*) approaches somewhat closely to the suggestions of the present writer; but the definitions are vitiated (it is thought) by the old language:—"*All* his business" on the one hand, and "a particular purpose," on the other.

Other Definitions.—The writer is quite aware that it would be altogether improper to attempt to supersede the usually accepted definitions of general and special agency, without giving further reasons than those already mentioned; and that it is incumbent upon him to show that much greater practical inconvenience results from the present method of using the phrases, than that which would be entailed by the change. For this purpose some further remarks are now offered, first, to point out that there is no present agreement as to definitions; and, secondly, to shew that the distinction in the law, which the present definitions are used to mark off, does not exist. In short, as the writer thinks, (1) the present

(*j*) [1893] A. C. 170.
(*k*) On Agency, 9th ed., § 128, n.
(*l*) 1 V. & B. 210 (1812).
(*m*) 12th ed. pp. 301-2.

definitions are confusing and contradictory; and (2) the purpose which they are supposed to subserve has no validity.

The most usually adopted distinction between general and special agents is a construction of the language of Lord Ellenborough (*n*), quoted everywhere:—

> "When that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances, whereas the former is confined to an individual instance."

It is hard to comprehend this language. It seems to imply that there can be no case of general authority, unless preceded by "a multitude of instances." But instances of what? It cannot be instances of general authority, for that can only (ex hypothesi) be at the end of the chain. And if the instances be those of particular authority, we are left in doubt as to how many instances of particular authority will result in one of general authority; or what change has been effected by the transition. The outcome of the instances can be nothing different from the instances themselves. And if so, it is useless to say that anything is effected by the transition, or to watch for its appearance.

To a present day lawyer familiar with classes of cases either unknown, or very limited in 1812, the most obvious criticism of Lord Ellenborough's dictum is that a general authority is often derived from distinct grant, and not "from a multitude of instances." It is impossible, therefore, at the present day to describe general authority "as that which is derived from a multitude of instances." This further must be observed that his Lordship spoke of "particular and general *authority*"; and that he might object to the substitution of the word *agency* for *authority*.

The distinction between "an individual instance" and "a multitude of instances," however, being once raised (or by construction suggested) it has continued to influence the text writers to the present day. The

n Whitehead v. Tuckett, 15 East, 408 (1812).

difference, in fact, between "an individual instance," and "a multitude of instances" is, of course, very apparent; and, as we shall see, very useful, when you desire, as a matter of evidence, to prove that agency exists —useful in the same way as in proving a custom. But if the authority of an agent (when thus proved) be identical with the authority (when proved by a distinct grant) for a single occasion, it is denied that there is any difference in the law applicable to the two cases, or any advantage to be derived from giving different names to them. Previous instances may prove authority. They cannot change its effect. The distinction in language, and in fact, between employing a master of a ship for one voyage, and for two, is quite obvious; but nothing could possibly be gained by so classifying shipmasters in any treatise upon their powers.

Mr. Justice Story's definition is as follows (*o*):—

"A special agency properly exists when there is a delegation of authority to do a single act; a general agency properly exists when there is a delegation to do all acts connected with a particular trade, business or employment."

It will at once be seen that this definition, although influenced by, is widely different from, that of Lord Ellenborough, in which there is nothing about "a particular trade, business or employment (*p*)." It can hardly, however, be deemed to be a great improvement, for it takes no account of all those numerous cases in which there is more than "a single act," and yet in which there is not "a delegation to do all acts connected with a particular trade, business or employment." For example, suppose that I employ a broker to purchase all the stock of company A. that he can obtain; but insist upon his acting in some unusual method. Here I employ him to do more than "a single act"; and yet there is no "delegation to do all acts connected" with his business.

We shall, incidentally, meet with other definitions.

(*o*) On Agency, § 17; Paley on Agency, p. 2; and Stephen's Com. 9th ed., II., 65, are to the same effect.

(*p*) Story, nevertheless, in § 19, gives Lord Ellenborough's definition as containing "the true distinction."

Reasons for these Older Definitions.—Moreover, there seems to be nothing gained by dividing agency into cases, upon the one hand, of employment upon one occasion; and upon the other, of employment on more occasions than one, or in "a particular trade, business or employment." For the law applicable to all these classes is identically the same. In all the agent is bound to act within the scope of his authority—alike on the first, as on the second, occasion, and as when he is employed in a "trade, business or employment." In all the principal cannot be bound by the act of the agent, if the agent exceed his authority. And in all the principal may be estopped, not from saying that he is bound, for he is not, but from setting up the fact by which it would appear that he is not bound, namely, the fact that the agency is of narrower character than that which to the world it appeared to be.

The writer is well aware that the weight of dogmatic authority is much against this statement of the law, but he believes that a critical view of the cases leads necessarily to it. In the oft-quoted case of Fenn v. Harrison (*q*), Butler, J., said:—

"I agree with my brother Ashhurst that there is a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say that one man may bind another against his consent."

To the first part of this rule we must object that the factor *cannot* bind his principal, unless he is acting within the apparent scope of his authority; in which case can also an agent constituted for a particular purpose. There is no distinction there. The second part of the rule, too, is not correct. Indeed the learned Judge himself refers to a class of cases which contradicts it, namely, those cases in which a master is liable for the misfeasance of his coachman; and he distinguishes in this way:—

(*q*) 3 T. R. 762 (1790).

"But those cases have been determined on the ground that it must be presumed that the servants have acted under the orders of their masters."

This, however, is to presume something exactly contrary to the fact—that is, to change the facts in order to apply to them some rule of law, which would be properly applicable to the case were it other than that which it really is. We must find some solution more satisfactory than that.

Mr. Broom (*r*) says:—

"An important difference is to be noted between a 'general' and a 'particular' agency; for, if a particular agent exceeds his authority, his principal is not bound by what he does; whereas, if a general agent exceeds his authority, his principal is bound, provided what he does is within the ordinary, and usual, scope of the business which he is deputed to transact."

Smith's Mercantile Law (*s*) has the following:—

"The authority of an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order, or direction, not known to the party dealing with him. The rule is directly the reverse concerning a particular agent, that is, an agent employed in one single transaction; for it is the duty of the party dealing with such an one to ascertain the scope of his authority; and if he do not he must abide the consequences."

The first part of this latter rule is open to the observation that it is nothing but the most patent truism; for it is plainly impossible to give authority to an agent "to perform *all* things usual," and yet to withhold from him the power to do *some* of those things. The second part of the rule cannot be maintained, as we shall have much occasion to observe. Taking the two parts together, it may well be objected that they not only leave many cases untouched; but sometimes both apply to the same case. For the supposed classes are not alternative, and it is clear that an agent may be employed "to perform all things usual in the line of business in which he is employed," "in one single transaction"—a broker employed to sell one parcel of stock for example. This would be a case within *both* branches of the rule, and would, therefore, by it, have to be decided both ways.

(*r*) Com. Law, 8th ed., p. 575.

(*s*) 10th ed. 140.

Mr. Dicey properly criticises these statements of the law, as follows (*t*):—

"But the distinction thus laid down is not, it is submitted, maintainable, since, if even a particular agent (though the term itself is not a very happy one) (*u*) *is held out* to other persons as having an authority beyond that which his principal intends him to possess, the principal will be bound *up to the extent of the agent's apparent authority* (*v*). The true rule seems to be, that an apparent authority can *never* be restrained by private orders from the principal which are unknown to the third party; but that a particular agent as being employed *in one instance only*, can rarely have any apparent authority whatever, and third persons, therefore, must as a general rule, trust to his real or actual authority."

Mr. Dicey clearly sees that the same law must be applied to all sorts of agencies, but retains the "one instance only," because in such cases, he says, the agent "can rarely have any apparent authority whatever." But the cases are far from rare. On the contrary, they are multitudinous. Every day there are thousands of brokers plying their vocation. If I send one of them into the market he has "an apparent authority," namely, that authority which a broker usually exercises in the line of his business; and not any the less is this the case, that he is "employed in one instance only." It would be better to leave by itself Mr. Dicey's statement,

"that an apparent authority can never be restrained by private orders from the principal, which are unknown to the third party."

But this, too, cannot be strictly accurate, for Mr. Dicey himself says, and indisputably (p. 240):—

"The principal is always bound by the acts of the agent up to the extent of the agent's authority; and is *never bound beyond the extent of that authority.*"

If this be true, and it indisputably is, the extent of the real authority must be everything, and the extent of the "apparent" authority must be wholly immaterial. And so it would be, but for the law of estoppel, the force of which the text writers, almost unanimously, overlook. The principal cannot be bound by an unau-

(*t*) Dicey on Parties, 243, n.
(*u*) Byles on Bills, 8th ed. 29
(*v*) Story on Agency, § 127

thorized act; but if the principal has enabled the agent (any sort of an agent) to appear as having greater authority than he really has, the principal is estopped from asserting that such authority did not exist. This, and not single and multitudinous instances, unlocks all the difficulties (*w*).

Although Mr. Justice Story at one part of his work (sec. 21) says that the distinction which he makes between general and special agents is very important,

"as the doctrines applicable to the one, sometimes wholly fail in regard to the other;"

at others (sec. 133) he shows that,

"properly considered *the same principle pervades and governs each of the cases*";

and again (sec. 70):—

"Principles very similar may be traced back to the Roman law; for in that law where the authority was express or special, the agent was bound to act within it; and where it was of a more general nature, *still the agent could not bind the principal* beyond the manifest scope of the objects to be accomplished by it."

See also secs. 71, 73, 83; and the longer note to sec. 127, in which he says:—

"It has been already suggested, *ante* § 73, that the same general principle pervades all cases of agency, *whether the party be a general, or a special agent.* But, nevertheless, the distinction between general and special agents is not unfounded or useless. It is sufficient to solve many cases."

So far as the writer can see, however, the very able author makes no such use of it; and if it be true that "the same general principle pervades all cases of agency," it is difficult to see what can be obtained from a division of them into an employment on one occasion, and an employment on more than one?

Mr. Justice Story, therefore, may be said to agree, that in considering the contractual relation between the

(*w*) The distinction is very important. The Court does not say: The agent has no authority, nevertheless the principal is bound: which would be absurd. But it does say: Upon the facts proved the agent had authority—apparently he had such authority; the principal permitted, and sanctioned, this appearance; *this is good evidence against the principal that such is the fact;* the principal will not be allowed to prove any fact inconsistent with those on the faith of which the contract was made; the evidence, therefore, proves the existence of the authority.

principal and the third party, the same general principles are applicable whether the agency be general or special. Those principles, in the language of estoppel, are: (1) that an agent cannot bind his principal unless he has authority to do so; and (2) that nevertheless the principal may by his conduct be estopped from asserting the lack of authority. Not observing the estoppel feature of the case, and substituting therefor (as the writer thinks), an erroneous principle, Mr. Justice Story (sec. 127, n.) puts it in this way:—

"The principle which pervades all cases of agency, whether it be a general or a special agency, is this: The principal is bound by all acts of his agent, within the scope of the authority which he holds himself out to the world to possess; although he may have given him more limited private instructions, unknown to the persons dealing with him. And this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it. It will at once be perceived that *this doctrine is equally applicable to all cases of agency, whether it be the case of a general, or of a special, agency.*

This paragraph, translated into the language of estoppel, declares the law in accordance with the present writer's contention. If it be correct, there can be no reason for continuing the old division into single, and multitudinous instances.

True Value of Old Definitions.—As has already been intimated, there *is* an enquiry, in which it may be of some importance to observe the number of occasions upon which an agent has been employed. There is this benefit in inquiring into first, or second, or multitudinous instances, that we may thereby ascertain *whether agency exists.* Can we ascertain that upon a previous occasion A. was B.'s agent with certain powers, it may help us to show that he is so upon this occasion also; but when that is done, we apply the same principles to the case as if we had proved, in any other way, the nature and extent of the agency. Previous, and multitudinous, instances then are matters of evidence—methods by which agency may be proved. They have nothing to do with distinctions between different kinds of agency—distinctions between express and implied powers, nor between these, on the one hand, and apparent power on

the other; nor with the principles which the law applies to the facts of any case when these facts are proved.

Reasons for New Definitions.—It may well be asked, Why the writer urges his definitions of general and special agency, if the principles of law, applicable to all cases of agency, are alike? It may be answered that the purpose is threefold: First, it has seemed to be necessary to come to an understanding as to some consistent use of the words *general* and *special*, for they are in well-established use. Of all conflicting definitions, these have been selected, because, although not the most popular, they are, it is thought, for the reasons already suggested, the best. Second, the popular definitions have been usually applied to mark a distinction in the law which does not exist; they seem to subserve no other purpose; a change of definition will help to remove this misapprehension. Third, the phrases with the suggested definitions urged, mark off from one another classes of cases which are clearly distinguishable, and ought to be distinguished. Although the law says in all cases of agency, that the agent's authority is that alone by which the principal can be bound; yet in practice two cases are found, the one in which the authority is special, and the other those in which discretionary power is given. The words, then, supply short terms for these different classes; and may be used with much advantage, as the following pages may help to show—the law is always the same; but short terms for different sorts of *powers* are useful in treating of it.

JOHN S. EWART.

(To be continued).

OPTIONS.

When the owner of real estate grants to another the privilege of purchasing the property at his election, the owner becoming bound to convey if called upon to do so, but no corresponding obligation to purchase being imposed upon the other party, the right thereby created is commonly called an option.

Although such an option is frequently loosely spoken of as a contract of purchase, and is no doubt often regarded as such, it in reality partakes far more of the nature of an offer; and it has been said by Lord Herschell, L.C., in a very recent case, that an option is not an agreement to sell in the strict sense of the words, but merely an offer which cannot be withdrawn (*a*).

When one person offers to sell another his property, the offer can be converted into a binding contract of sale by acceptance within a reasonable time, provided that notice of revocation is not received by the proposed purchaser before acceptance (*b*); and similarly, if the offer is expressed to be open for a stated period, it may be accepted at any time during its currency before notice of revocation (*c*).

In other words, if the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived (*d*). But even though the parties express themselves as both agreeing that the offer shall remain open and shall not be withdrawn for a stated period, in the absence of consideration moving from the person to whom the offer is made, this is *nudum pactum*, for until both are

(*a*) Helby v. Matthews, L. R. (1895) A. C. at p. 477.

(*b*) Dunlop v. Higgins, 1 H. L. C. 381.

(*c*) Byrne v. Van Tienhoven, 5 C. P. D. 344.

(*d*) Stevenson v. McLean, 5 Q. B. D. 351.

bound neither is bound, and the offer may be withdrawn before acceptance (*e*).

There is, however, nothing to prevent two persons *agreeing for a valuable consideration* that one of them shall have the right to purchase property from another at his option, and such a subsidiary contract is, of course, binding in the same manner as any other valid agreement (*f*), and this is what is meant when we speak of an option. It will thus be seen that while from one point of view an option is merely an offer, in another aspect it is a complete and binding contract; and it is this dual nature that makes it of interest to consider the legal doctrines which have been propounded in relation to transactions of this class.

The great majority of cases on this branch of the law have arisen in connection with a right of purchase reserved to a lessee in a lease for a term of years, the acceptance of the lease forming a sufficient consideration to make the option irrevocable by the lessor; but the connection of the option with the lease is without effect upon its legal quality, and the relations and obligations arising out of it will be precisely the same whether it is conferred by a lease or created in any other way for a valid consideration (*g*).

1. *Conditions precedent must be strictly complied with.*—In Weston v. Collins (*h*), the plaintiff, the assignee of a lessee of the defendant, was given by the lease the option of purchasing the demised premises at the expiration of his term, upon giving six months' notice in writing and paying the purchase price, *after* receipt of which (as the contract was construed by the Court) the defendant was to prepare an abstract of title and furnish evidence in support thereof at the plaintiff's expense. The plaintiff

(*e*) Dickinson v. Dodds, 2 Ch. D. 463; Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. at p. 625.

(*f*) Reichel v. Bishop of Oxford, 35 Ch. D. at p. 68.

(*g*) See Henrihan v. Gallagher, 2 E. & A. 338.

(*h*) 11 Jur. N. S. 190.

contended that he was not bound to pay the purchase money until after the title had been investigated, and a lengthy correspondence took place between the plaintiff's and defendant's solicitors, during the currency of which the time for payment of the purchase money under the provisions of the lease expired. In commencing his judgment Lord Westbury makes the following lucid statement of the law: "The covenant by the defendant upon which this suit is founded is so worded as to impose on the lessee or his assigns the obligation of doing certain things, as precedent conditions to any obligation arising on the part of the lessor. If the lessee chooses to comply with the conditions, the lessor is bound; but previously there is no mutuality of contract, for whilst the lessor is bound to accept the requisition of the lessee if the conditions are fulfilled, there is no obligation on the part of the lessee to fulfil them, or to avail himself of the lessor's engagement. It is, in fact, a conditional offer by the lessor, and the condition must be observed before the offer becomes binding. It is a mistake to apply to a stipulation of this kind the rules which are applicable in this Court to ordinary contracts for the sale of real estate. In the ordinary contracts of purchase both parties are at once bound, and unless there be some special stipulation, or some peculiar circumstances, the time for payment of the purchase money or for conveyance of the estate is not deemed of the essence of the contract; but here, from the very form of the stipulation, certain things must be done before a binding agreement can arise. If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it shall be first done on the one side before any obligation arises on the other. The things required must be done in the order of sequence which is stipulated." And having found against the construction of the contract contended for by the plaintiff, his Lordship dismissed the bill with costs.

In this province the law governing contracts of this nature had been already laid down in substantially the

same terms by Spragge, V.C., in Forbes v. Connolly (*i*), in which case the plaintiff was the defendant's lessee, and was given by the lease the right to purchase upon payment of a stated sum, and upon his having paid all the rents and observed all the covenants provided for in the lease. The rent being in arrear, the defendant had written to the plaintiff that he considered the lease void and offering to sell the property on new terms. The bill was brought for specific performance of the original agreement to sell, and the Court being of opinion that the plaintiff had by non-payment of rent failed to comply with one of the conditions precedent to his right to enforce the contract, dismissed his bill with costs.

In Ball v. Canada Company (*j*), a very similar case to Forbes v. Connolly, both the latter case and Weston v. Collins are quoted at considerable length by Blake, V.C., who held that the option given to the plaintiff, depending as it did upon the observance of the covenants contained in the lease which had admittedly been violated by the plaintiff, could not be enforced.

This doctrine was again applied by the Court of Appeal in Coventry v. McLean (*k*). The plaintiff, who was a lessee of the defendant for a term of years, had an "option to purchase the demised property at any time during the term." The plaintiff, having made default in payment of rent, the defendant re-entered before the expiry of the five years, thereby forfeiting the term. Two actions were brought, one for relief against the forfeiture, and the other for specific performance of the agreement to sell, which were commenced before, but not tried till after the effluxion of five years from the granting of the lease. It was held that, upon the construction of the agreement, the option could only be exercised during the currency of the lease, and was put an end to by the forfeiture; and it was doubted whether, after

(*i*) 5 Gr. 657.

(*j*) 24 Gr. 281.

(*k*) 21 A. R. 176.

the lapse of the time for which the term had been created, the Court would relieve against a forfeiture for the collateral purpose of allowing the lessee to exercise his option, it not being necessary to expressly decide the point, inasmuch as on the evidence the plaintiff had disentitled himself to the specific performance by reason of misrepresentations.

And however obscurely the conditions may be expressed in the document creating the option, the would-be purchaser must observe them according to the true construction of the agreement or his right will be gone (*l*).

The parties to a lease, however, may express themselves in such a way that the option will be independent of the continuation of the term, and in such a case the lessee's right to purchase will be unaffected by a forfeiture of the lease (*m*). And, even if the currency of the option is only co-existent with the continuation of the term, it will not be forfeited by non-performance of a covenant in the lease, unless the observance of the latter is a condition precedent to its exercise (*n*).

The case last cited is a very striking illustration of this proposition, inasmuch as the observance of the same covenant was held not to be a condition precedent to the exercise of an option in regard to a portion of the demised premises, while it was held to be such in regard to the residue.

In this case, the plaintiffs leased oil lands from the defendants, and covenanted during the term to sink a test well upon the demised premises to the depth of 1,000 feet. They were to have the right to purchase a certain five acres *at any time* during the continuance of the term, and the whole premises (with certain specified exceptions) at the end of the term. The well was commenced, but, owing to unforeseen circumstances beyond the plaintiff's control,

(*l*) Riddell v. Durnford, (1893) W. N. 30.

(*m*) Green v. Low, 22 Beav. 625.

(*n*) Hunt v. Spencer, 13 Gr. 225.

was not completed to the required depth. It was held that, in so far as the five acres were concerned, they could under the terms of the lease have been purchased by the plaintiff immediately after its execution, and the parties could not have intended that the well should be sunk before the right was to arise and specific performance was granted as to this portion of the land; but as to the residue no such inference could be drawn, and the bill as to it was dismissed.

Even in the case of a condition precedent, an exception was said by V. C. Blake, in Ball v. Canada Co. (*o*), to exist where, through no default on the part of the person having the option, the condition becomes impossible of performance; but this dictum was not necessary to the decision, and would seem to be scarcely reconcilable with the cases.

2. *The granting of an option creates an interest in the land.*—A person to whom an option of purchase is granted has something more than a mere contract with his grantor, He has an equitable interest in the land. The correctness of this proposition will appear from a perusal of London and South Western Railway Co. v. Gomm (*p*). In that case the plaintiff company conveyed certain lands, the purchaser covenanting with the company that he, his heirs or assigns would, at any time thereafter, whenever the land might be required for the purposes of the company, and upon notice, reconvey the land at a stated price, and it was held that the transaction was void under the Lands Clauses Consolidation Act, 1845, and was also void as giving the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness. Jessel, M.R., says at p. 581, "The right to call for the conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase, there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his

(*o*) *Supra*, at p. 287.
(*p*) 20 Ch. D. 562.

intention to purchase, and to pay the purchase money; but, as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land" (*q*).

3. *Upon the death of the grantee the right to purchase passes as realty.*—This proposition would seem to follow from the preceding one, and the point was expressly decided in Henrihan v. Gallagher (*r*), where it was argued that, inasmuch as the option was contained in a lease and the leasehold interest passed to the personal representatives of the lessee, the right to exercise the option must go in the same way. But the Court held that the option was a right given to the individual quite independent of the term, and that it descended to his heirs at law.

It may, however, be the intention of the parties, as gathered from the lease, that the option to purchase shall be attached to the lease and pass with it, in which case it would pass as part of the lessee's personal estate to his administrator (*s*). And now, under the Devolution of Estates Act, it would pass to the personal representative.

4. *If the option is exercised after the death of the grantor the property comprised in it is converted as of the date of the contract.*—A right of pre-emption is as much a conditional contract as if it depended on any other contingency than the exercise of an option by a third person, such as for example, the failure of issue of a particular person (*t*), and when the condition is fulfilled the contract becomes absolute. If the grantor have died before the exercise of the option, it nevertheless relates back to the time of the formation of the contract, and by the application of the equitable doctrine of conversion the proceeds are treated as

(*q*) See also Nevitt v. McMurray, 14 A. R. 126.

(*r*) 9 Gr. 488, and 2 E. & A. 338.

(*s*) *Re* Adams v. Kensington Vestry, 27 Ch. D. 394.

(*t*) Weeding v. Weeding, 1 J. & H. at p. 430.

personalty, and are administered as such (*u*). The principle upon which Lawes v. Bennett was decided was very recently applied by Chitty, J., in the case of an intestacy, even where the option was only to be exercisable upon the death of the grantor (*v*), and a specific devise of property subject to an option will be adeemed by its exercise after the death of the testator, and the proceeds of the land will not go to the devisee (*w*), unless a contrary intention can be gathered from the will (*x*).

JOHN H. MOSS.

(*u*) Lawes v. Bennett, 1 Cox, 167.

(*v*) *Re* Isaacs, Isaacs v. Reginall, L. R. (1894) 3 Chy. 506.

(*w*) Weeding v. Weeding, 1 J. & H. 424.

(*x*) *Re* Pyle, Pyle v. Pyle, L. R. (1895) 1 Ch. 724; Ennis v. Smith, 2 DeG. & Sm. 725.

EDITORIAL REVIEW.

A Dominion Law Association.

A circular, largely signed by members of the Bars of the different Provinces, has been passed around, giving notice of a meeting to be held in Montreal on 15th September, to organize a Dominion Law Association. Now that the matter has taken tangible form, it is to be hoped that the meeting will be representative. It comes at rather an awkward time for the Bar of this Province, as the Court of Appeal sittings and the Assizes will fully occupy the time of all the leading members of the Bar. It must be borne in mind that no invitation to, nor authorization of, any Barrister is necessary in order to entitle him to be present at the meeting, as it is a voluntary meeting for the association of individual members. At the same time, as we have an organized society in this Province, it would give stability to our representation if the Law Society sent some of the Benchers to the meeting.

The Governor-General in Politics.

It is an old story that a certain Judge was never reversed until he began to give reasons for his judgments. Whether a concrete case, or an abstract maxim in concrete form, it contains a great deal of truth. A man may instinctively go right, but when asked for his reasons he may be unable to give them. Lord Aberdeen had the approval of the whole country in declining to make all the appointments recommended by the retiring Ministers. They stood in an unique position. There was no Parliament. It had gone out of existence by lapse of time. They were not members of the House, and had not any authority from the people. The elections went against them. Under these peculiar circumstances, and for these considerations, His Excellency might well hesitate to act

on their advice in any matter not involving urgent or routine business. But when he came to give additional reasons the whole wisdom of his action is dissipated. Not to err, we give the words of His Excellency's message:— "These [Senators and Judges] are life appointments, and with them, under such circumstances as the present, it would seem proper to leave all other life appointments and the creation of all new offices and appointments for the consideration of the incoming Ministers, unless always such a course is shewn to be contrary to the public interest." This is unexceptionable; it is the ideal expression of a constitutional sovereign authority. But what follows immediately is too much like pleading ever to stand as a precedent. "In the case of the Senate, which consists of 78 members, it is to be noted also that there are said to be now no more than five Senators who are Liberals. And it may well be urged that to aggravate this inequality at the present time would not only tend to embarrass the probable successor of this government, but to increase the risk of friction between the two chambers of the Legislature." In other words, His Excellency feels it his bounden duty not to appoint the nominees of the Ministers who represent Conservative thought, because it may embarrass a Liberal Ministry, who naturally will make Liberal appointments. Conservative Senators may be an "aggravation" or may not. Perhaps they are in a body which in all similar constitutions is essentially Conservative. But it does not come well from a representative of the Sovereign. We cannot help applying this mode of reasoning to the reverse case of a Liberal Ministry retiring with a Senate in the same condition. If the Ministry had been Liberal, would His Excellency have felt bound to withhold his sanction to their recommendations, or would he have sanctioned Liberal appointments in order to restore the equilibrium of parties in the Senate before a Conservative Ministry came in?

Continuing, His Excellency said: "In the case of Judges I will only add that, bearing in mind the ordinary

length of their tenure of office, and also the long predominance of one political party in the Dominion Parliament, the current deduction as to the complexion of the political opinions represented upon the bench, whether baseless or well founded, is not unnatural." His Excellency is wofully wrong in supposing that there are any "political opinions represented upon the Bench." If one position in life is absolutely free from the suspicion of political feeling in Canada, it is that of a Judge. Not only is that an indisputable fact, but it was long laid to the credit of the late Sir John Macdonald, even by his political opponents, that his appointments to the Bench never depended upon the political views of those whom he recommended. The extreme weakness of the memorandum lies in the pregnant suggestion, that now that one party has had a chance for its partisans, the other ought to be free to place a few Liberal lawyers on the Bench, either for the purpose of leavening its conservatism, or in order to give them their share of the "spoils of office," as the party newspapers put it. One can hardly avoid the conclusion that His Excellency's anxiety would be allayed by the appointment of a Liberal to the Bench, because he is a Liberal, and because so many Conservatives, according to his notion, have hitherto enjoyed the distinction.

It is to be hoped that the pernicious practice of Conservative Governments, which His Excellency asserts and condemns, of appointing their partisans to the Bench will not be imitated by the Liberal Ministry's appointment of their partisans. If so, we may expect an interminable political warfare over appointments to the Bench, which, so far, we are thankful to say, has been kept free from it.

THE
CANADIAN LAW TIMES.

OCTOBER, 1896.

ESTOPPEL, AND PRINCIPAL AND AGENT.

GENERAL agency, then, as employed in this article, will mean agency with general instructions (Sell my horse); special agency will mean agency with special instructions (Sell my horse, for not less than £100, and give no warranty; and special general agency (as we may term mixed cases) will mean cases in which the instructions are not altogether general, nor altogether special (Sell my horse and give no warranty; price at your own discretion). And the principal use to which these terms will hereafter be employed will be in illustration of the fact that (in direct opposition to the rules already quoted from Brown's Common Law, and Smith's Mercantile Law), it is principally in the cases of "an agent constituted for a particular purpose, and under a limited and circumscribed power," that, by estoppel, the agent *does* bind the principal by "acts in which he exceeds his authority"—cases in which, although "a particular agent exceeds his authority, his principal" *is* "bound by what he does." For example (to indicate a numerous class of cases), a factor is sent into the market (in "a single instance," on "a particular occasion"), to sell some goods; his instructions as to price, terms, etc., are all specially prescribed; he is now a *special* agent; he exceeds his instructions; and the principal is bound; for the reason that the factor usually is, and therefore in the transaction appears to be, a *general* agent. The point which we meet at every turn is this: Here apparently is a *general* agent (one with discretion

—with general authority); his instructions, if proved, would show him to be a *special* agent (one having no discretion); these instructions by the law of estoppel are excluded. The words are useful.

Presumption of General Agency.—The true method, then, of treating this subject seems to be to point out in what cases, and under what circumstances, it may be said that there is an appearance of general agency; for it is in such cases that we may say, that although the agency be special, yet the principal will be estopped from so asserting.

And at the outset this general proposition is worth noting: that in cases in which *the law* assumes (from the nature of the duty to be performed, from the relation of the parties, or from aught else) the existence of general powers (general agency), *the public* will be justified in making a similar assumption.

General agency will be implied by the law, and may be assumed by the public in the following cases:—

(*A*) When an agent is employed to perform a *certain duty*, he has the power to do those things usually incidental to the discharge of such duty.

(*B*) When an agent is employed to act in a *certain capacity*, he has the power which persons acting in that capacity usually have.

(*C*) When an agent is employed to act in a *certain place*, he has the power which persons doing such things, at such place, usually have.

(*D*) When an agent whose business is that of a *general agent* is employed to act in the line of his business, he has, with reference to the particular act, the power which he usually exercises.

(*E*) When an agent is employed to act under *certain circumstances*, he has the power which persons under such circumstances usually have.

(*F*) When agency arises as *incidental to some other legal relationship*, the agent has the power which persons in such relation usually have.

Observe, however, that where it is said that, under such and such circumstances, the agent "has" such and such powers, what is meant is, (1) that under such and such circumstances the law will imply the grant of such powers; but (2) that if, by the contract of agency, such powers are withheld, the law will, of course, not imply that they were granted. In such latter case, however, although the legal assumption ceases, the public is none the less entitled (in the absence of contrary indication) to make the assumption, which the apparent character of the agency warrants.

Medium Powers.—It is not pretended that the rules just suggested are framed according to scientific ideal. Indeed by such standard they are open to the criticism that (*E*) includes all the others, or might easily be made to do so. For practical purposes, however, and, at all events, in exposition of the subject, they will prove useful; for it will be found that the vast majority of the cases range themselves into classes represented by these rules. A few of the authorities to support them are as follows:—

Rule A.—1796, Howard v. Baillie (*x*):—

"An authority of this nature (to pay debts, etc.), necessarily includes medium powers, which are not expressed. By medium powers, I mean all *the means necessary to be used*, in order to attain the accomplishment of the object of the principal power" (*y*).

Rule B.—1811, Alexander v. Gibson (*z*):—

"This is the common and usual manner in which the business is done, and the agent must be taken to be vested with power to transact the business with which he is intrusted *in the common and usual manner*" (*a*).

Rule C.—1812, Pickering v. Busk (*b*):—

"If the principal sends his commodity to *a place* where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale."

(*x*) 2 Hy. Bl. 618.

(*y*) And see Dingle v. Hare, (1859) 7 C. B., N. S. 154.

(*z*) 2 Camp. 555.

(*a*) And see also McMullen v. Williams, (1880) 5 App. R. 518.

(*b*) 15 East, 38.

1847, Bayliffe v. Butternorth (*c*):—

"A person who deals in *a particular market* must be taken to deal according to the custom of that market; and he who directs another to make a contract at *a particular place*, must be taken as intending that the contract may be made according to the usage of that place" (*d*).

Rule D.—1839, Sutton v. Tatham (*e*):—

"A person who employs *a broker* must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed" (*f*).

Rule F.—1841, Hawken v. Bronne (*g*):—

"*One partner by virtue of that relation*, is constituted a general agent for another as to all matters within the scope of the partnership dealings; and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership business, and all such as are usually exercised by partners in that business in which they are engaged."

Medium Powers Withheld—Estoppel.—As has already been pointed out, the law assumes the grant of medium, or usual, powers, in the various cases just treated of. But this assumption is, of course, only made in the absence of agreement between the principal and agent to the contrary. Whatever the agreement is, by that *they* must be bound. The public, too, is entitled to assume the grant of similar powers; the agent is acting as though he has such powers; and the public assumes that he has them. If he has not? In such case the law of agency declares that the principal cannot be bound, for, as Mr. Dicey told us:—

"The principal is always bound by the acts of the agent, up to the extent of the agent's authority; and *is never bound beyond the extent of that authority.*"

It is precisely at this point that the law of estoppel intervenes—the law which prohibits the principal proving the fact that the power of the agent is other than that which he has allowed it to appear to be.

(*c*) 1 Ex. 429.

(*d*) And see Ireland v. Livingstone, (1866) L. R. 2 Q. B. 107.

(*e*) 10 Ad. & E. 30.

(*f*) And see Taylor v. Stray, (1857) 2 C. B., N. S. 193; and Mollett v. Robinson, (1870) L. R. 5 C. P. 646, L. R. C. P. 84.

(*g*) 8 M. & W. 710.

The following are some of the statements of the rules which apply to such cases. It will be observed that they are not couched in the language of the law of estoppel, but it is now (it is hoped) a simple matter to make the necessary translation. Cole v. N. W. Bank (*h*):—

"When a person is deceived by another, into believing he may safely deal with property, he bears the loss *unless he can show that he was misled* by the act of the true owner."

He may show that he was misled by the public appearance of the character of the authority. The rule as to this is expressed in various ways. Pickering v. Busk (*i*) is the leading case. In it Lord Ellenborough said:—

"Strangers can only look at the acts of the parties, and to the external *indicia* of property, and not to the first communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. If the principal send his commodity to a place where it is the ordinary business of the place of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? *Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe.*"

Smith v. McGuire (*j*):—

"If a man by his conduct holds out another as his agent, by permitting him to act in that character, and deal as a general agent, he must be taken to be the general agent of the person for whom he acts, and the latter is bound, though in a particular instance the agent may have exceeded his authority. It is even so in the case of a special agent; as, for instance, if a man sends his servant to market to sell goods, or a horse, for a certain price, and the servant sells for less, the master is bound by it."

Cole v. N. W. Bank (*k*):—

"Where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority."

National v. Wilson (*l*):—

"Where an agent is clothed with ostensible authority, no private instructions prevent his acts, within the scope of that authority, from binding his principal."

(*h*) [1875] L. R. 10 C. P. 372.
(*i*) [1812] 15 East, 38.
(*j*) [1858] 3 H. & N. 554.
(*k*) [1875] L. R. 10 C. P. 364.
(*l*) (1880) 5 App. Ca. 209.

Problems for Solution.—Furnished now with definitions and rules, let us set them at work, and see of what service they are.

Let us apply them to cases such as the following:—

(*a*) An agent is instructed to sell a horse at a fair; the agent gives a warranty, although forbidden to do so; is the principal liable? (*b*) A horse-dealer instructs his servant to sell a horse; the servant gives a warranty although forbidden to do so; is the horse-dealer liable? (*c*) A horse-dealer is employed to sell a horse, and gives a warranty, although forbidden to do so; is the principal liable? (*d*) Would the principal be liable, under such circumstances, if the agent had not been a horse-dealer? (*e*) An insurance broker was instructed to underwrite policies, "not exceeding £100 on any vessel"; he underwrote a policy for £150; is the principal liable? (*f*) The master of a ship (contrary to instructions) signs a bill of lading for goods that were not put on board; are the owners liable?

These and similar questions we are now to endeavour to answer with the aid of the principles of the law of estoppel. It will be observed that every one of the supposed cases is a case of special agency, in the sense in which that term has heretofore been employed, namely, that it is the case of a single instance. If to these cases, then, we apply the rule laid down by the authorities already criticized, we shall say that the principal is not bound in any of them. For that rule is according to Broom's Common Law (8th ed., 575):—

"If a particular agent exceed his authority, his principal is not bound by what he does."

And according to Smith's Mercantile Law (10th ed., 140):—

"The rule is directly the reverse concerning a particular agent, i.e., an agent employed in one single transaction; for it is the duty of the party dealing with such a one to ascertain the extent of his authority; and if he do not he must abide the consequences."

If these statements of the law were correct, they would be ample justification for the usual definition of

general and special agency, for they would then easily answer all the above questions: wherever the transaction was single the principal would win, and when it had predecessors the principal would lose. But they are very far from correct, and in seeking for solutions we shall find them to be of no service whatever. We shall see that the questions cannot be so easily answered; nor can they even all be answered in the one way. We shall have to accept the language of the note to sec. 127 of Story on Agency (9th ed.):—

"The same general principal pervades all cases of agency, whether the party be a general or special agent:"

and we shall have to apply the same principles of the law of estoppel to every sort of agency.

Problem No. 1.—An agent is instructed to sell a horse *at a fair*; the agent gives a warranty; is the principal liable upon the warranty?

Answer.—This is a case of general agency (*m*); the medium powers usual to a person selling a horse at a fair are impliedly given; the question, then, is one of fact; and if (as has been held) it is usual in selling a horse at a fair to give a warranty, the agent had that power, and the principal is bound. The case is an example of agency at "a certain place".

(*m*) It may be objected that the agency is not altogether general, for complete discretion is not given to the agent, inasmuch as the place of sale is specially indicated. The criticism is fair, and rigidly pursued might possibly lead to this, that there is no unadulterated case of general agency short of an authority to do anything the agent likes on behalf of the principal. If so the importance of the classification which provides for mixed cases becomes all the more important, and may even be found upon very careful examination to embrace, not only a very large proportion of cases at first sight classed under general agency, but also on the other hand to include very many cases which might appear to be examples of special agency. For just as it infrequently happens that complete discretion in every respect is entrusted to the agent; so it is most usually the case that in the most special agencies, some discretion is necessarily included. The writer does not stay to discuss this point. It is perhaps altogether academic, for in practical application that which we shall always have to meet is not, whether in every detail of the agency there was, or was not, discretionary power given to the agent; but whether *with reference to the particular point in question* the agent was specially instructed or not—in other words, *was a special or a general agent.*

Problem No. 2.—Add to the last problem, that the principal expressly forbade the agent to give any warranty; is the principal liable?

Answer.—This is a case of special agency (so far as the question of warranty is concerned); the agent has exceeded his authority, and an agent cannot bind his principal except when acting within the scope of his authority; nevertheless (if it be usual to sell with a warranty at a fair) the principal has held out the agent to the public as being a general agent, and he is, therefore, estopped from alleging the special character of the agency, that is, from controverting the evidence furnished by the appearance of the agency.

Problem No. 3.—The agent of a horse-dealer is instructed to sell a horse; the agent gives a warranty; is the horse-dealer bound?

Answer.—This is a case of general agency; medium powers usual to the agent of a horse-dealer are impliedly given; the question is one of fact; and if (as has been held) an agent of a horse-dealer usually has power to warrant, then the horse-dealer is bound.

Problem No. 4.—Add to the last problem that the agent was expressly forbidden to warrant; is the horse-dealer liable?

Answer.—Yes, if (as has been held) it is usual for an agent of a horse-dealer to give a warranty; for the reason given in reply to problem No. 2, namely, estoppel.

Problem No. 5.—A horse is entrusted to a horse-dealer for sale, and he gives a warranty, (*a*) when not forbidden to warrant, (*b*) although forbidden to warrant; is the principal liable?

Answer.—Yes, for the reasons already given, if it is usual (as has been held) for a horse-dealer to give a warranty. The case (*b*) is that of "an agent whose business is that of a general agent" being employed as a special agent.

Problem No. 6.—A horse is entrusted for sale to a person whose business is not connected with horses, and he gives a warranty, (*a*) when not forbidden to warrant,

(*b*) although forbidden to warrant; is the principal liable?

Answer.—No. This is a case of a special agency. There is no implied grant of power to warrant, arising from place, person, or other circumstance. There is, therefore, no appearance of general agency. The agent has exceeded his authority; the principal is not bound; and there is nothing in his conduct to estop him.

Simple as all this appears, it remains to this day in need of clear statement. The legal history of the points, shortly stated, will be not only interesting, but instructive; and will help in the understanding of some more difficult cases which we shall have to encounter.

1790—In Fenn v. Harrison (*n*), one of the most frequently quoted cases, it is said:—

"I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and the servant; but if the owner of the horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the order, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment."

The idea of apparent authority derived from the person is grasped, but not the idea of apparent authority derived from the place. This is supplied by the following case. The doctrine of estoppel is unnoticed.

1803—Helyear v. Hawke (*o*). This is a Nisi Prius case. The language of Lord Ellenborough is probably in the line of the decisions, if taken in connection with the peculiar facts of the case.

1811—Alexander v. Gibson (*p*). This is a case of sending a horse to a fair to be sold. The principal was held liable:—

"This is the common and usual manner in which the business is done, and the agent must be taken to be vested with

(*n*) 3 T. R. 760.

(*o*) 5 Esp. 72.

(*p*) 2 Camp. 555.

power to transact the business with which he is intrusted in the common and usual manner."

1855—Coleman v. Riches (*q*). In this case the language of Fenn v. Harrison (*ante*) is quoted as exhibiting the law; and the idea supplied by Alexander v. Gibson (*ante*) is overlooked.

1861—Brady v. Todd (*r*). The owner of a horse authorized one, *who was not a horse-dealer*, to sell it, and gave no authority to warrant. The sale was not made at a fair. Held, that the agent could not bind the principal by a warranty. This is a case of special agency, and there are no circumstances to indicate anything else.

1866—Howard v. Sheward (*s*). In this case the agent of a horse-dealer (himself a horse-dealer) warranted the horse to be sound. He had no express authority to warrant. Held, nevertheless, that the principal was liable. Willes, J., said:—

"It was not an isolated instance, *though if it had been, I do not conceive that it would have made any difference.*"

The case goes upon the fact that "it is part of the business of a horse-dealer to warrant horses which he sells," and "any person dealing with the agent of a horse-dealer has a right to assume" that the agent had authority to warrant. The rule enunciated by Byles, J., with its reference to "one occasion," cannot be taken as the law. To the same effect are McMullen v. Williams, 1880, 5 App. R. 518; and Baldry v. Bates, 1885, 52 L. T. N. S. 620.

1883—Brooks v. Hassal (*t*). The owner of a horse sent him to *a fair* in charge of his servant, who sold the horse, giving a warranty. No authority was expressly given to warrant, nor was the servant forbidden to warrant. It was held "that under the circumstances the servant had an implied authority to warrant the horse,"

(*q*) 24 L. J. C. P. 130.

(*r*) 9 C. B. N. S. 591.

(*s*) L. R. 2 C. P. 148.

(*t*) 49 L. T. N. S. 569.

and that Brady v. Todd had expressly excluded such a case from the scope of its decision.

1892—Taylor v. Gardiner (*tt*). The owner of a horse authorized a horse-dealer to sell it. The dealer gave a warranty, although not authorized to do so. Held, that the owner was bound by the warranty.

The law then, thus far, may be summed up as follows:—

1. An agent cannot bind a principal by a warranty, upon the sale of a horse, unless the agent have authority to give a warranty.

2. Authority to warrant will be implied if the principal be a horse-dealer.

3. Or if the agent be a horse-dealer.

4. Or if the agent be sent to sell at a place where it is usual to give a warranty.

5. If in such cases the agent be expressly prohibited from giving a warranty, the principal will, as between himself and a purchaser without notice of the unusual limitation of the agent's authority, be estopped from asserting it.

6. The implications 2 and 3 will not be made if (as it is said is the case in the United States) it is not usual for a horse-dealer to give a warranty. And the implication 4 will, of course, not be made if it be not usual at the place of sale to sell with a warranty.

The writer is quite aware that he is not, in thus stating the law, in line with most of the text writers. Their views are as follows:—

Evans on Principal and Agent (p. 467), referring to Alexander v. Gibson (*ante*), in which it was held, that when a horse was sent to a fair, and the usual mode of selling there was by giving a warranty, the principal was bound by a warranty, says that that case

"was afterwards overruled by the Court of Common Pleas: Brady v. Todd, 9 C. B. N. S. 592."

And the learned author might cite the language of Martin, B., in Udell v. Atherton (*u*), in support of the state-

(*tt*) 8 Man. L. R. 310. (*u*) [1861] 7 H. & N. 198.

ment. Both, however, overlooked the fact that Alexander v. Campbell was the case of an agent sent to *a fair*, and that Brady v. Todd, so far from dissenting from that case, has these words:—

"When the facts raise the question, it will be time enough to decide the liability created by such servant as . . . a person entrusted with the sale of a horse in *a fair*, or other public mart."

Story on Agency (9th ed. § 132) has the following:—

"But if the owner of a horse should send the horse to *a fair* by a stranger, with express directions not to warrant him; and the latter should on the sale, contrary to his orders, warrant him, the owner would not be bound by the warranty."

Everything depends, surely, upon what is usual at that particular fair.

Paley on Principal and Agent (p. 197) declares:—

"So a servant entrusted to sell a horse may warrant, unless forbidden. And it is not necessary for the party insisting on the warranty to show that he had special authority for that purpose."

This, with deference, is very clearly wrong.

Smith's Mercantile Law (10th ed. p. 142) says:—

"And, it is said, a warranty given by an agent entrusted to sell, *prima facie* binds the principal."

Under certain circumstances, no doubt, yes; but under others, no.

Addison on Contracts (9th ed. p. 314) says:—

"It has been held that a buyer who takes a warranty from a known agent, professedly selling on behalf of his principal, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty; and that the law clothes a known servant intrusted to sell with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the business of buying and selling."

Later on the author adds:—

"The servant of a horse-dealer, with express directions not to warrant, does warrant, the master is bound, because the servant having a general authority to sell is in a condition to warrant, and the master had not notified to the world that the general authority is circumscribed."

The reason is not that the servant had "a general authority to sell;" for it was of "circumscribed" character, as the language of the author indicates. The reason is that although the servant had only special authority, the

horse-dealer, for reasons already given, was estopped from so saying.

Still later, at p. 560, the law is better, but still inadequately, stated:—

"The general presumption is that where a principal intrusts property to an agent to sell, he authorizes him to make all such warranties as are usual in the ordinary course of that particular business of selling, and that if it is usual to sell with a warranty, he has an implied authority to warrant."

But the implication will only be made where there is no evidence of specific limitation. *As a fact*, the authority can never be greater than the evidence proves it to have been. That such evidence will not be permitted to avail the principal in certain cases is not to alter the facts, but properly to estop him from getting the benefit of them.

Problem No. 7.—Goods are sent to a factor, whose business it is to sell such goods. He sells with a warranty, (*a*) when not forbidden to warrant, (*b*) although forbidden to warrant. Is the principal liable upon the warranty?

Answer.—This is really the same case as that stated in problem No. 5; and the answer must be the same (*v*). The factor is assumed to have power to do those things which factors usually do; and if, usually, they have power to warrant, the agency will appear to be a general one, and no evidence of any special limitation can be given.

If a factor employed to sell, had pledged the goods, the principal would not have been bound, so long as pledging goods was thought not to be within a broker's usual line of business; for there could have been no appearance of authority to pledge (*w*). The Factor's Acts have altered the law in this respect, recognizing that it has

"become a usual and accustomed course for factors intrusted with goods for sale, to make advances to their principals, either in money or by the acceptance of bills against

(*v*) And see the Factor's Acts, 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39; and 40 & 41 Vict. c. 39.

(*w*) McCombie v. Davies, (1805) 6 East, 538.

their consignments, and to keep themselves in funds by repledging the documents of title with brokers or other money dealers" (*x*).

If goods are sent to a *wharfinger*, whose business it is to store, and not to sell, and he, without authority, sell the goods, the principal is not bound. There is, in this case, no appearance of power to sell (*y*).

Problem No. 8.—If the owner of goods sends them to a man who carries on two businesses, one of them that of a factor who deals in such sort of goods, and the other, that of a warehouseman—sends the goods to be warehoused; and if the consignee sells, or pledges, the goods; is the owner bound?

Answer.—The case of Cole v. N. W. Bank (*z*) answers this question in the negative. Blackburn, J., said in that case (*a*):—

"For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer; but it never was the common law, and could not be intended to be enacted, that, if he carried the furniture to his auction room, and there sold it, he could confer any better title on the purchaser than if he, as auctioneer, acted for some other tenant who committed a similar larceny, as a fraudulent bailee; nor, to come nearer to the present case, that a warehouseman or wharfinger, who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by sale of the goods, than he could if they had been intrusted to some other warehouseman who employed him to sell."

As to the relative negligence of the parties, the learned Judge added:—

"But, if the plaintiffs knew that the warehouseman, whom they trusted was also a wool broker, the defendants were aware that the wool broker, whom they trusted, was a warehouseman; and there seems no reason why, without inquiring, they should think he was intrusted in one capacity rather than the other."

(*x*) [1868] Fuentes v. Montis, L. R. 3 C. P. 277.

(*y*) [1809] Wilkinson v. King, 2 Camp. 335; as explained in Pickering v. Busk, (1812) 15 East, p. 42; and Cole v. N. W. Bk., (1875) L. R. 10 C. P. 354; Fuentes v. Montis, (1868) L. R. 3 C. P. p. 277.

(*z*) [1874] L. R. 9 C. P. 470; L. R. 10 C. P. 354.

(*a*) L. R. 10 C. P. 369.

This case was approved in the House of Lords in City Bank v. Barlow (*b*).

Problem No. 9.—A principal gave power to insurance brokers to underwrite policies, "not exceeding £100 for any one vessel." The brokers underwrote for their principal a policy of £150. Is the principal liable?

Answer.—This is a case of special agency; the agent has exceeded his authority; and the principal is not bound; whether or not the principal ought to be estopped from setting up the special character of the agency, must depend upon whether the agency has been held out to be one of general character; this depends upon whether such agents usually act as general agents; if they do, the principal is estopped; if they do not, he cannot be. In Baines v. Ewing (*c*), the evidence shewed that in Liverpool (where the policy was underwritten), it was well known "that in almost all cases, if not in all, a limit is put on the amount for which a broker can sign his principal's name." In Liverpool, therefore, there could be nothing to indicate that the agency was other than what it really was, and the principal could not be estopped.

Problem No. 10.—The owner of a valuable table-top sent it to a dealer in such things, accompanied by the following letter:—

"I will intrust you with the sale of my opal table, upon the following conditions: That the table shall not be sold to any person, nor at any price, without my authorization is first obtained that such sale shall be effected. That the cheque handed to you in payment for the table shall be handed over to me intact," etc.

The dealer, disregarding the limitations imposed, sold the table-top. Is the owner bound by the sale?

Answer.—In Biggs v. Evans (*d*) it was held that the owner was not bound. Wills, J., said as follows:—

"It is said that the plaintiff enabled G. to sell the table-top as his own, and that his doing so was within the scope of his authority, as it would be understood by persons who dealt with

(*b*) [1880] 5 App. Ca. 677.
(*c*) [1866] L. R. 1 Ex. 320.
(*d*) [1894] 1 Q. B. 88.

him ; and that, as he had put it in the power of G. to commit the fraud, he must bear the loss. I think, however, that a fallacy underlies the expression that he enabled G. to commit the fraud. In one sense, and one only, did he do so. He gave him the corporal possession of the table-top, and it was that power which enabled G. to sell it as his own, or by way of a transaction within the scope of his apparent authority, as a person carrying on a business in which such sales are habitually effected. But it is quite clear that it requires more to found the argument in question. In one sense every person who entrusts an article to any person who deals in second-hand articles of that description, enables him, if so disposed, to commit a fraud by selling it as his own. A man who lends a book to a second-hand bookseller, puts it into his power, in the same sense, to sell it as his own. A man who intrusts goods for safe custody to a wharfinger, who also deals in his own goods, or in other people's goods intrusted to him for sale, in such a sense enables him to commit a fraud by selling them to a customer. But such a transaction clearly could not give a title to a purchaser as against the owner. *The true test is, I take it, whether the authority given in fact is of such a nature as to cover a right to deal with the article at all.* If it does, and the dealing effected is of the same nature as the dealing contemplated by the authority, and the agent carries on a business, in which he ordinarily effects, for other people, such dispositions as he does effect, what he has done is within the general authority conferred ; and any limitations imposed as to the terms on which, or manner in which, he is to sell are matters which may give a right of action by the principal, but cannot affect the person who contracts with the agent. *The foundation, however, of the whole thing is that the agent should be authorized to enter into some transaction.* Now, in the present case, the letter taken as a whole shews that the table-top never was entrusted to G. to sell. He was forbidden in express terms to sell without further authority."

This judgment gives little scope to the principles of the law of estoppel. It would confine them to cases in which there has been some minor departure from an authorized course. There must be (1) authority to do something; (2) something done "of the same nature as the dealing contemplated by the author"; and (3) a departure merely as to terms or manner. The writer much prefers Lord Ellenborough's statement in Pickering v. Busk (*e*):—

"If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is consigned to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale ? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody ? When the commodity is sent in such

(*e*) [1812] 15 East, p. 43.

a way and to such a place as *to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.*"

This is strongly confirmed by the language of Brett, J.A., in *Ex p.* Dixon (*f*):—

"Now, the rule of law is, that the extent of an agent's authority, as between himself and third parties, is to be measured by the extent of his usual employment. That being so, the very fact of intrusting your goods to a man as a factor, with right to sell them, is *prima facie* authority from you to him to sell in his own name. Therefore, it not being shewn here that any limitation of that authority was made known to the person who was dealing with the agent, there is sufficient evidence as between the principal and such third party that the goods were to be sold by the agent in his own name as principal with the authority of the person who so intrusted him with the goods."

Distinguish carefully this statement of the law, from that of Blackburn, J., in Cole v. N. W. Bk. (*g*), quoted *ante* p. 242. If a furnished house be rented to an auctioneer, and he surreptitiously remove the furniture to his auction rooms, and sell it there, the owner could not be estopped. But the case would be very different if the owner himself sent his furniture to the auction rooms (if only for the purpose of enabling the auctioneer to present the appearance of doing large business), and with the strictest of instructions not to sell.

The case (Biggs v. Evans) might possibly be supported upon a different ground from that taken in the quotation, namely, that the sale was not made in the usual course of business because of the extraordinary method of payment (*h*). But that is immaterial here.

JOHN S. EWART.

(*f*) [1876] 4 Ch. D. 137; see also Stevens v. Biller, [1883] 25 Ch. D. 31.

(*g*) [1875] L. R. 10 C. P. p. 369.

(*h*) See Kaye v. Brett, [1850] 5 Ex. 269; Williams v. Evans, [1866] L. R. 1 Q. B. 352; Catterall v. Hindle, [1867] L. R. 2 C. P. 368.

(To be continued).

EDITORIAL REVIEW.

The Supreme Court.

The Supreme Court of Canada has narrowly escaped what would have distinctly lowered its dignity and jeopardised its usefulness. We refer to the bill introduced by the Minister of Justice for the appointment of *ad hoc* Judges to sit in place of Judges who might be absent on leave. The proposition was startling enough in the abstract, but when it was gravely proposed to make the appointments from the Bar, or rather not to exclude the Bar, the opposition was so marked that the Minister had to offer to accept an amendment which would confine appointments to the Bench of the Provincial Courts. Even when so modified the bill would not be accepted and had to be dropped.

Amongst the profession, in this Province at least, the feeling was unanimously opposed to the measure. A haphazard way of calling in Judges, who are already so occupied that from vacation to vacation they have no leisure, to decide the most momentous questions that arise in litigation is not one that will ever meet with the favour of either the profession or the public. The number of cases which arrive at the Supreme Court is an infinitesimal proportion of all the cases that arise; and they are the result of a sifting process in which all but the most important in point of law or pecuniary interest disappear. To ensure confidence in the disposition of these cases, stability is the first essential of the Court. A shifting body, the members picked up where they could be got, would possess all the elements of instability, and nothing else. We do not mean to say that the Judges of the Provincial Courts are not capable men. On the contrary, the best selections would necessarily be made from amongst them. It is the shifting character of the Court that it would

acquire, combined with the fact that the public would not attribute sufficient importance to, nor have confidence in, a Court so constituted, that would impair confidence in it.

A more popular movement would be one in which the present Minister of Justice has always shown very much sympathy, and has aided practically, so far as he could, as Attorney-General of this Province, that is, the increase of the salaries of the Judges. With that increase the retiring allowance would increase, and the Honourable Minister would not have to ask irreverently in the House, as he is reported to have done, What would you do with a Judge who ought to retire and would not? or words to that effect. The sincerity of Sir Oliver Mowat's efforts in that direction in past times can now be tested. No one is better aware than he that the Judges are underpaid. Hitherto he has been powerless to do more than represent the fact to the Dominion authorities, but now that he occupies a commanding position in Dominion councils, he is in a way to give practical effect to his views.

The Appellate Work.

The block of cases in the Court of Appeal has necessitated the calling in of the High Court Judges to sit as Appellate Judges. If Earl Li-Hung-Chang, or any other distinguished visitor, had been inquisitive enough to ask about the administration of justice, he would probably have been surprised to hear of the way in which appeals are managed. He would have been told that there were two Courts, the High Court, which, being liable to err, was subject to be overruled by the other Court, the Court of Appeal; and the latter in turn by a Supreme Court. Then he would have been told that although the High Court was so subject to correction, you must take your choice between three Judges there and the four Judges of the Court of Appeal. If you choose three Judges of the High Court, then, although they theoretically require a higher Court to hold them in check, practically they form the final

tribunal. In other words, the country provides a higher Court to correct their errors, but will not allow an appeal to it. But if you choose the Court of Appeal, then, though it is a higher Court than the High Court, you need not accept their decision, but may still appeal. This would strike him as anomalous, and no doubt he would say that, if the High Court were considered so safe a tribunal, why go to the expense of a Court of Appeal? But further to elucidate the matter, it would be necessary to explain that, though the Judges of the High Court would finally determine the case if they were called a High Court, yet if the Court of Appeal asked them to sit as a Court of Appeal, their decision would not be final, but would be subject to a further appeal; and he would then probably give up in despair his attempts to understand the principle of the thing. That such a state of affairs should exist is of course anomalous, and it is only another failure in the attempt to restrict litigants who are determined to use every effort for a thorough investigation of their claims.

The present state of affairs is anything but satisfactory. Cases are shifted about from one Court to another, and come on in spurts, so to speak; and there is a lamentable want of the repose and dignity that has heretofore characterized the final hearing of appeals in the Province. A system, if system it can be called, which requires the assistance of casual Courts to dispose of the work is vicious in its principle. The measure itself produces a bad result. The remedy for this is not to try and preserve the system and cure its consequences, but to do away with the system which produces such results. And the sooner there is a return to the old system the better.

The New Examiners.

The following gentlemen have been appointed Examiners to the Law Society in place of the retiring Examiners:—Messrs. R. E. Kingsford, P. H. Drayton, H. L. Dunn and E. Bayly. They hold office for three years, and are ineligible for reappointment.

BOOK REVIEWS.

English Constitutional History from the Teutonic Conquest to the Present Time. By Thomas Pitt Taswell-Langmead, B.C.L., Oxon., etc., etc. Fifth edition. Revised throughout, with notes. By Philip A. Ashworth, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes. 1896.

This popular work has shrunk somewhat in size under the hand of its present editor, though the text remains unchanged. Notes purely historical have been taken out, and the present editor's notes confined more strictly to constitutional matters.

The Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure, and the law of summary convictions. With a table of offences, their punishments and statutes: tables of cases, statutes, etc. By Seymour F. Harris, B.C.L., M.A., Oxon., author of "A concise Digest of the Institutes of Gaius and Justinian." Seventh edition. By Charles L. Attenborough, of the Inner Temple, and of the Midland Circuit, Barrister-at-Law. London: Stevens & Haynes. 1896.

The frequently recurring editions of this book attest its usefulness. All recent English statutes relating to crime, and the latest cases are added to the work.

CORRESPONDENCE.

Legal Education.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—It seems to us that a correspondent of the CANADIAN LAW TIMES is taking too seriously the remarks reported as having been made by Mr. Bulmer at a meeting of the Nova Scotia Barristers' Society, respecting the condition of legal education in the various provinces. Mr. Bulmer took a very active part in the establishment of the Dalhousie Law School, and, naturally, has a very high opinion of its merits; but you may be well assured that in making a comparison between the standard of legal education in Nova Scotia and in the other provinces he spoke for himself alone. There is not a barrister of any standing in the Province of Nova Scotia who is not aware of the existence of excellent faculties of law connected with Laval and McGill Universities, or who is not familiar with the distinguished names connected with the Osgoode Hall School and the law faculty of Toronto University. The Bar of Nova Scotia have a high opinion of their own institution, but they realize that the relative smallness of their province makes it a difficult task to compete with the institutions we have named; and certainly they would never dream of asserting on its behalf any such peculiar and extraordinary eminence as is claimed for it by Mr. Bulmer, whose zeal for the institution with which he has been connected betrayed him into the use of an expression which, on second thoughts, he would be the first to disclaim.

The remark in question was certainly not acquiesced in by the audience to which it was addressed.

R. L. BORDEN,
President Nova Scotia Barristers' Society.

B. RUSSELL,
Secretary Dalhousie Law Faculty.

[The above communication was received too late for publication in our last number.—Ed. C. L. T.]

Osgoode Hall.

To the Editor of THE CANADIAN LAW TIMES.

SIR,—Now that the threatened deluge is past, it seems to me, that it would be a graceful act on the part of the Benchers if, in their alterations about Osgoode Hall, they could plan a suitable robing room for Her Majesty's Counsel. Those who are Benchers are of course well enough accommodated. Those who are not, have the choice of three rooms.

That near the Queen's Bench Court room is well filled with wardrobes, and has in addition one ancient hair brush, one mirror, one chair, and one piece of railway iron; that near the Common Pleas Court room, besides its wardrobes, has one mirror and one table; while the L shaped room, numbered 4, up two flights of stairs in the west wing, once had a chair without any back, but now has six stout kitchen chairs, one revolving office chair, one mirror, one table, and one whisk as old as the hair brush. It is clear that the entire accoutrements of all three rooms may not suffice to give that unruffled surface which generally a learned counsel likes to present before the Bench. It is true that there is a lavatory in keeping with the Hall, but it is a long way off, and not convenient to the Court rooms.

It is not pleasant, I am sure, for a silk gowned brother, whom force of habit has drawn to his old quarters in the

Benchers' room, to be suddenly reminded by a new face and a stuff gown that he is intruding, and to be obliged to retire in confusion to one of the three rooms mentioned. It is true that some of the more hospitable officials at the Hall allow their pegs and hooks, etc., to be used by the wanderers, but it does not solve the difficulty.

In all seriousness, however, the accommodation for both silk and stuff gowns should be made in keeping with the dignity of the Hall. At the same time let me suggest that some wardrobes should be provided for the exclusive use of the profession from outside of Toronto, the keys to be kept by the Secretary, and to be left with him when not in actual use.

R. J. MACLENNAN.

TORONTO, SEPT. 11TH, 1896.

THE
CANADIAN LAW TIMES.

NOVEMBER, 1896.

DOGS.

ALTHOUGH familiarity with the canon law is not indispensable in this province, everyone should know a few things about canine law. But whether these few observations on this practical subject would have been offered, were it not that the writer still bears four well-defined tooth marks received in the dog days recently passed is a matter of grave doubt. Not that the subject is unworthy, for the dog is "the friend of man," and particularly if the man happens to be a lawyer, for the number of reported actions at law, caused by these friends, is quite remarkable. Happily there is little reciprocity, for while numerous dog actions have come to the lawyer, but few lawyers can be said to have gone to the dogs.

In 1886 an eminent Judge in deciding that a bequest to the "Home for Lost Dogs" was valid, as being to a "charity," said, "Of all domesticated animals, those for which men have the highest affection, and by which they are most served, are dogs" (*a*). After this compliment it is somewhat ungrateful of our friends to continue to so misbehave towards the gentle sheep (*assueti ad mordendum oves*) that the Legislature has felt bound to continue in force an insulting enactment, which implies that the latter animal is of more importance than

(*a*) Re Douglas, Obert v. Barrow, 55 L. T. N. S. 388 (1886).

a man. Because, under the Dog and Sheep Act (*b*) the owner of a sheep or lamb killed or injured by any dog shall be entitled to recover, whether the owner or keeper of such dog knew, or did not know, that it was vicious or accustomed to worry sheep, and without proof of the propensity to kill and worry (*c*), and a dog found pursuing sheep can be shot by any one. But if a man is bitten the dog's owner is not liable, unless the plaintiff can shew *scientia*, by proving that the dog had, to the owner's knowledge, previously bitten some other man, or exhibited other viciousness towards mankind. Even where the owner knew that his dog had once nearly killed a goat, in the case, this summer, of Osborne v. Chocqueel (*d*), a Divisional Court, composed of Lord Russell of Killowen, C.J., and Wills, J., held that this knowledge was not sufficient to render him liable, because a dog might be amicably disposed towards men and yet ferocious to other animals. Although it is well known that the eminent presiding Judge, who has been so recently our visitor, takes a keen interest in horses, dogs and sport generally, yet he cannot be found leaning towards dog ownership, for he said that in his opinion the law was unsatisfactory, and that a man should be responsible for his dog; although he was not so much concerned in what the law ought to be as in saying what it was. This being the law, it means that a person who is injured by a dog receives no consideration in law, unless he puts himself in a position to show that some one else has also been injured—a thing that a stranger to the locality which is the home of the dog finds it most difficult to do. Fleeming v. Orr (*e*), in the House of Lords, is an authority for this doctrine. But in that case in the Scottish Court below, Lord Cockburn said, somewhat contemptuously, "The result of the argument would be that every dog is entitled to have at least one worry, and every bull one thrust without

(*b*) R. S. O. cap. 214, sec. 15.

(*c*) Regina v. Perrin, 16 Ont. R. 446 (1888).

(*d*) L. R. (1896) 2 Q. B. 109.

(*e*) 2 Macq. 14 (1855).

rendering his master responsible. It may be that such is the law of England, but it would rather appear that they have in that country an unbounded toleration for first offences."

Should the *scienter* doctrine with reference to dogs be abolished by statute, and dogs relegated from the class *mansuetae naturae* to that of *ferae naturae*, then the statement of the law by Lord Denman in May v. Burdett (*f*)—a pet monkey case—continues to be correct: "The conclusion to be drawn from an examination of the authorities appears to us to be this: that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it at his peril, and that if it does damage, negligence is presumed without express averment. The negligence is in keeping such an animal after notice." This is in line with Fletcher v. Rylands (*g*). In the Toronto bear case, Shaw v. McCleary (*h*), these were followed, and both husband, owner of the marauding animal, and wife, owner of the premises where it was kept, were held liable for injury to the person attacked. So, also, recently in our own Supreme Court in Vaughan v. Wood (*i*), where the father of the vicious dog's owner allowed it to be about his premises and it injured the respondent, it was held, affirming the judgment of the New Brunswick Supreme Court, that the dog had been harboured so as to render the appellant liable.

It is not necessary to show an actual previous bite to enable the plaintiff to recover. It is enough to show that the dog, to the knowledge of the owner, has evinced a savage disposition by attempting to bite persons, and straining at his chain (*j*).

"The watch-dog's honest bark" may seem very euphonious to the owner, but may give a right of action

(*f*) 9 Q. B. 101 (1846).

(*g*) L. R. 3 H. L. 330.

(*h*) 19 Ont. R. 39 (1889).

(*i*) 18 S. C. R. 703 (1893).

(*j*) Worth v. Gilling, L. R. 2 C. P. 1 (1868.)

to neighbours if continued so as to be a nuisance (*k*). Indeed, in the Supreme Court of New York, it has been held that a summary remedy can be resorted to, and that a dog so offending can be killed, if it cannot be otherwise prevented from continuing his barking and howling. "It would be mockery," said Wilson, J., "to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case."

A man can only keep a fierce watch-dog for protection of his grounds and house at his peril, and an innocent person going there and being bitten may recover (*l*). A visitor or licensee bitten by such a dog has an action, and it would seem that even a trespasser is not without rights (*m*), although the fact of the trespass may affect the quantum of damage. There are many other phases of dog law, as to ownership, trespassing, theft, rabies, carriage by railway, cruelty, and other things which might also be considered, but the sketch will be long enough as it is.

The dog has been the subject of legislation much more in England than North America, but on this continent there is a growing fondness for ownership and breeding of dogs, and no doubt our laws could and will be made more uniform and complete.

In Quebec, the Civil Code, Art. 5558, provides that a justice of the peace, on complaint that a dog is vicious, or is in the habit of attacking persons or animals at large or in harness, without the limits of its master's property, may order it to be confined for 40 days or to be killed. If it is proved that the dog has bitten any person outside the limits of its master's property, the justice of the peace shall condemn the owner or possessor to kill it.

In Ontario, the power to legislate is conferred upon municipalities. By-laws may be passed, (*a*) for restraining and regulating the running at large of dogs, (*b*) for

(*k*) Smith v. Tugwell, 2 Selw. 1070.

(*l*) Stiles v. Cardiff, 33 L. J. 310 (1864).

(*m*) 4 Bing. 628.

imposing a tax upon the owners, possessors or harbourers of dogs, (*c*) for killing dogs running at large contrary to the by-laws, (*d*) for seizing and impounding dogs running at large contrary to the by-laws, and for selling dogs so impounded, or any of them, at such time or times, and in such manner as may be directed by any by-law in that behalf (*n*). This last clause was, in all probability, conferred in consequence of the action of Brook v. City of Toronto, where the plaintiff claimed some $4,000 damages actual and prospective, for alleged injuries to an aristocratic brood dog, called "Lady Dora," for injuries sustained in the city dog pound. The corporation at that time had no direct power to impound. The plaintiff recovered a small verdict.

It is understood that many municipalities have by-laws empowering magistrates to order the destruction of vicious dogs, whether they are "at large" or not, and that many executions have taken place under such by-laws where the dogs are chained and confined. It is probable, however, that the power is confined to dogs running in streets and public places only, where their presence would be a menace to the public safety and convenience.

The expression "at large," as applied to dogs, is doubtful in meaning and extent. In England a very narrow meaning would be given, for in Hay v. Bennett (*o*) Lord Coleridge said the words "under control" must be so effective as to prevent the mischief at which the statute aimed, and in the absence of very positive evidence to the contrary, the fact that a dog was neither muzzled nor led, was sufficient to prove that it had not been under proper control. In McAneany v. Joshua Jewett (*p*) a dog on the premises of its owner and playing with the owner's child, is not "at large" under an ordinance requiring the killing of all dogs going at large which were not licensed and collared, and the

(*n*) 55 Vict. cap. 42, sec. 489; 56 Vict. cap. 25, sec. 17.

(*o*) 3 Times L. R. 24 (1887).

(*p*) 10 Allen, Mass. 151 (1865).

plaintiff recovered for the shooting of the dog by the defendant, a policeman. In Commonwealth v. Dow (*q*) the Judge instructed the jury that, if upon the facts of the case they were satisfied that the dog was by the side of his owner or of his servant having the special charge of him, or was so near to him that he might be controlled and prevented from doing mischief, although he was not tied, he was not, in point of law, at large; but if they were satisfied that he was following his master through the streets loose, and at such a distance as that such control could not be exercised as would prevent mischief, he was at large within the meaning of the law. Again, in Wright v. Clark (*r*), the plaintiff's foxhound was shot by the defendant when in full pursuit of the fox. The defendant, besides pleading that the shooting was accidental, said it was justifiable, as the dog was "running at large" contrary to the terms of a statute then in force. The Court of first instance held that, if the master were near enough to be in view, and the dog was neither doing nor threatening injury to others, the shooting was unjustifiable. On appeal, Ross, J., affirming the judgment, said, "The dog is the most tractable of animals, and yields most readily to restraint other than physical. The voice or look of the master are often more potent to restrain him than cord or chain. . . . The trained hound, when pursuing the fox or deer at his master's bidding, is no more 'strolling without constraint,' or 'wandering, roving or rambling at will' than a boy while going on an errand at his master's command. . . . The fact that the dog was out of sight and hearing of his master is not determinative of whether he was 'running at large.' He was in hot pursuit of the fox, with all his instincts urging him thereto, as each bound brought him nearer and nearer the coveted prize." Although one cannot help suspecting that this Judge has expressed himself as a fox-hunter as well as a Judge, yet it is difficult to find an argument against his interpretation. Interest

(*q*) 10 Metc. Mass. 382 (1845).

(*r*) 50 Vermont, 130 (1877).

in perusing this last cited case is enhanced by an incident which took place in the jury room. The "twelve," it seems, wished to say that the shooting was unintentional, but somewhat careless. Discussion becoming warm as to how to express this idea, a copy of Webster's Unabridged Dictionary was brought to them. The word "wanton" was chosen, and they brought in a verdict that "The shooting of the dog was a wanton act."

The points in the foregoing may be said to be:

(1) To recover for injuries to a person, it must be proved that the owner or harbourer of the dog knew that he had previously bitten, or tried to bite, mankind.

(2) For injuries to a sheep this need not be shown.

(3) Once a dog has destroyed his record for being gentle, the owner or harbourer keeps him at his peril, and negligence need not be averred or proved.

(4) It is not necessary to show a previous bite. Showing disposition to bite is sufficient.

(5) The continued barking of dogs may be an actionable nuisance.

(6) Watch-dogs are kept on the premises of the owner at his peril.

(7) There can be no defined rule as to whether a dog is or is not "at large."

H. M. MOWAT.

ESTOPPEL, AND PRINCIPAL AND AGENT.

Problem No. 11.—One partner accepts a bill in the partnership name, but for his own private benefit. Are the other partners liable ?

Answer.—They are not liable to persons aware that the acceptance was for the partner's private benefit; but they are liable to indorsees for value, without notice.

This problem is not stated because of any difficulty in it; but because an understanding of the reasons upon which its answer proceeds, will be of much service in the next succeeding problem. The law itself is free from dispute (*i*).

Upon what ground, then, is it held that the other partners are liable ? Clearly not because the signing partner had authority to use the partnership name for his own purposes; and clearly not because (in the usual case) the signing partner was held out as having authority to use the partnership name, for his own purposes. The other partners are not bound because the signing partner acted within the scope of his real authority, for he did not. Nor are they bound because the signing partner acted within the scope of his *apparent* authority, for the real and the apparent authority are in this case identical. How, then, can the other partners be liable ?

In considering the next succeeding problem, it will be suggested that the familiar rule, that a principal is bound when the agent acts within the scope of his apparent authority, ought to be supplemented by this other, that *a principal is bound when, apparently, the agent acts within the scope of his authority*; or, dropping as meaningless the word " scope," that not only is a principal bound when his agent acts within his apparent au-

(*i*) See Byles on Bills. 15 ed. 52 *et seq.*; The Partnership Act, 1890, 53 & 54 Vict. c. 39, ss. 5, 7, 10; Federal Bank v. Northwood, [1885] 7 Ont. R. 389; Union Bank v. Bulmer, [1885] 2 Man. R. 380.

thority, but he is also bound when his agent apparently acts within his authority. Meantime, the writer contents himself with intimating that if this latter be not the rule, to which to refer the present problem, he knows of none; and no other, so far as he knows, is supported by any accepted authority. The following quotations assist the writer's contention:—

In Baird's Case (*j*), James, L.J., said:—

"As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other, in every matter connected with the partnership business, or *which he represents as partnership business*, and not being in its nature beyond the scope of the partnership."

Ex p. Bonbonus (*k*), Lord Eldon said:—

"This petition is presented upon a principle which it is very difficult to maintain; that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that, I agree *if it is manifest to the persons advancing money, that it is upon the separate account*, and so that it is against good faith, that he should pledge the partnership, then they should show that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold, that a man borrowing money upon a bill of exchange, pledging the partnership, *without any knowledge in the bankers that it is a separate* transaction, merely because that money is all carried into the books of the individual, therefore, the partnership should not be bound."

Daniel on Negotiable Instruments (§ 357) has the following:—

"The borrowing of money, and negotiation of bills and notes, being incidental to, and usual in, the business of the co-partnerships formed for the purpose of trade, *it follows* that when a co-partner borrows money professedly for the firm, and executes therefor a negotiable instrument in the co-partnership name, it will bind all the partners, whether the borrowing were really for the firm or not, and whether he diverts or misapplies the funds or not, provided the lender is not himself cognizant of the intended fraud."

The reason for the answer to the problem, whatever it may be, is not because of any peculiarity of the law relating to negotiable instruments; for one partner may bind his fellows when he purchases goods for himself in the firm's name (*l*); or when he pledges the firm's goods

(*j*) [1870] L. R. 5 Ch. p. 733.

(*k*) [1803] 8 Ves. 542.

(*l*) Bond v. Gibson, (1808) 1 Camp. 185.

for his own purposes (*m*); or though he be guilty of fraud (*n*). And the Partnership Act 1890 (*o*) makes no distinction between negotiable instruments, and contracts of any other description.

Problem No. 12.—The master of a ship, or the freight agent of a railway company, signs and issues a bill of lading, for goods which have not been shipped. It was part of his duty to sign bills of lading for goods shipped, but he had no power to sign if the goods were not shipped. Are the owners liable for the goods to a bona fide transferee of the bill ?

Answer.—The authorities upon this point are now quite clear—the owners are not liable. The reasons for the conclusions arrived at, however, have not obtained universal assent, and appear to the writer to be fallacious. A short review and discussion of them will aid in the understanding of the general application of the principles of estoppel; and may, perhaps, be not without some benefit in clearing the particular subject of some of its difficulties.

Observe, in the first place, that there are two points involved—two points that ought to be (but are not always) kept wide apart:—(1) Would the owners be liable if they had themselves signed the bill of lading ? If not, *cadit questio.* (2) If so, are the owners liable when the agent signs ?

As to the last, observe, (1) that it is admitted that the master of a ship (for brevity, we may combine the cases of a ship's master, and a railway's freight agent) has no authority to sign a bill of lading, unless the goods mentioned in it are shipped; (2) that everybody dealing with bills of lading is aware of that limitation of his authority; and (3) that, therefore, the master is not held out as one having authority to sign for goods not

(*m*) Lindley on Partnership, 6th ed., p. 183.

(*n*) Rapp v. Latham, (1819) 2 B. & Ald. 795; Lowell v. Hicks, (1836) 2 Y. & C. Ex. 46, 472; Blair v. Bromley, (1846) 5 Ha. 541; 2 Ph. 168; Sawyer v. Goodwin, (1867) 36 L. J. Ch. 578; Blyth v. Fladgate, (1891) 1 Ch. 337.

(*o*) 53 & 54 Vict. c. 39, ss. 5, 7 and 10.

shipped. But observe, further, (1) that the master is put in the place of the owners to sign bills of lading—"to do that class of acts"; (2) that the owners are aware that the public rely upon the truthfulness of the representation contained in bills signed by their master; (3) that the public have no means of ascertaining the truthfulness of the representations, except by going to the servant, whose answer they already have; and (4) that the servant has *apparently* acted within the scope of his authority. Let us now look at the decisions:—

1831—Howard v. Tucker (*p*). The master of a ship signed a bill of lading which stated that the freight had been paid, when, in reality, it had not been paid. Held, that the ship-owners were "estopped," as against the assignee of the bill, from claiming freight.

1851—Grant v. Norway (*q*). This is now the leading case on the subject. The master of a ship gave a bill of lading for goods not shipped. The bill was assigned to the plaintiffs. The jury found that, "By the custom of merchants, bills of lading are commonly pledged and deposited by the holders with others as security for the payment of money"; and that by the bill, the holders of it "were enabled to pledge and deposit the said bill . . . as a security for the payment of money." It was held that the ship-owners were not liable:—

"It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped; nor can we discover any grounds upon which a party taking a bill of lading by endorsement would be justified in assuming that he had authority to sign such bills whether the goods were on board or not. If then, from the usage of trade, and the general practice of ship-masters, it is generally known that the master derives no authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and in that case undoubtedly he could not claim to bind the owner by a bill of lading signed when the goods therein mentioned were never shipped."

The master did not act within his apparent authority. That he apparently acted within his authority, was not present to the minds of the Judges.

(*p*) 1 B. & Ad. 712.

(*q*) 10 C. B. 665.

1853—Hubbersty v. Ward (*r*). A master of a ship signed a bill of lading for a larger quantity of goods than that shipped. Held, that the owners were not liable to an assignee of the bills:—

"We think that when a captain has signed bills of lading for a cargo that is actually on board his vessel, his authority is exhausted."

1886—Cox v. Bruce (*s*). A master of a ship signed a bill of lading shewing certain quality-marks. These marks were identical with those on the shipping notes made out by the shippers, but differed from those on the goods themselves. The bill of lading itself shewed the master's duty to be to insert in the bill of lading quality-marks, only when those were correctly set out in the shipping bills, which was not in this case. Nevertheless, he did insert the marks, and a transferee of the bill of lading sought to hold the ship-owners to his representation of the character of the goods. Held, that the owners were not liable. Said Lindley, L.J.:—

"Then what is the master's authority? Has he such a general authority as would include an authority to give bills of lading with quality-marks inserted, or has he a special authority in this respect? In this case the authority appears from the memo. itself. It is to give bills of lading, with quality-marks inserted, only when such quality-marks are correctly inserted in the shipping notes. If that is so, it is impossible to take this case out of the decision in Grant v. Norway."

1881—Erb v. G. W. Ry. (*t*). A freight agent of a railway company issued to a firm (of which he was a member) bills of lading for goods never received by the railway. On receiving transfers of these bills the plaintiffs made advances to the firm. It was held that the railway company was not liable upon the bills of lading. The majority of the judges held that the authority of the agent

"was a limited authority; his power and the authority to sign a bill of lading depended on the actual receipt and shipping of the goods. If the fact on which the power depended did not exist, the authority could not exist" (*u*).

(*r*) 8 Ex. 330.

(*s*) 18 Q. B. D. 147; see also Thorman v. Burt, (1886) 54 L. T. N. S. 349.

(*t*) [1877] 42 U. C. 90; 3 Ont. App. R. 446; 5 Sup. Ct. Can. 179.

(*u*) 5 Sup. Ct. p. 189.

See also the precisely similar case of Oliver v. G.W.R. (*v*).

The documents which in Coventry v. G. E. Ry. (*w*) were held to estop a railway company from denying possession of more goods than it had received, were probably signed by some official only; but that point was not raised in the case.

We are now in a position to attack the first of the two difficulties which at the outset we found to be involved in the problem. It was put in this form:—Would the ship-owners be liable to transferees of a bill of lading (when goods not really shipped) if they had themselves signed the bill?

1. *Liability to Shipper when Owner Signs.*—The case of Coleman v. Riches (*x*) is authority for saying that the owner would not be liable to the shipper for issuing a false bill of lading, even though he knew that the shipper upon the faith of it would pay over the purchase money. This case, however, not only stands quite alone, but is entirely opposed to the most fundamental principles of the law of estoppel. The case goes upon this, that there was no *contract* between the owner (of the wharf, as it was in that case), and the person who acted upon the representation that the goods had been received. The law of estoppel, however, does not at all proceed upon contract, but upon representation. That law says that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time (*y*). The case, too, has never been taken to have obviated all enquiry as to the liability of the owner to a transferee of the bill in case an agent signed such a receipt (the enquiry upon which we are now to enter); and yet such enquiry would be doubly

(*v*) [1877] 28 U. C. C. P. 143.

(*w*) [1883] 11 Q. B. D. 776.

(*x*) [1855] 16 C. B. 104.

(*y*) Pickard v. Sears, (1837) 6 A. & E. 469; Freeman v. Cook, (1848) 2 Ex. 654.

absurd if the owner would not be liable to the shipper had he himself signed the document.

2. *Liability to Transferee when Owner Signs.*— Whether or not the owner is liable to a transferee of the bill ought, it would seem, to depend upon whether any representation was made, or intended to be made, by the owner, to the transferee. And this seems to depend upon the character of a bill of lading, and mercantile usage in connection with it: whether a bill is a mere receipt, or at most, a contract between owner and shipper, or whether it is intended to pass from hand to hand as a representation of the fact that the owner had received certain goods from the shipper.

On the one hand it is quite clear that if one man lend money to another, and receive, in return and by mistake, a receipt for too large an amount; the borrower would not be estopped from proving the true amount as against any transferee of the receipt. The receipt was never intended to operate as a representation to any third party.

Upon the other hand, suppose that, having no authority to do so, a person accepts a bill of exchange for another "per proc," he is liable for the misrepresentation as to his authority, not merely to the drawer of the bill, but to all transferees of it, no matter how remote. In such a case (*z*) Lord Tenterden (after referring to two other cases) said:—

> "It is true that *there* the misrepresentation was made *immediately* to the plaintiff, and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here the representation is made to *all* to whom the bill may be offered in the course of circulation, and in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have *intended* that all such persons should give credit to the acceptance, and thereby act upon that representation, because that, in the ordinary course of business, is its natural and necessary result."

This case related to a negotiable instrument, but the law is not peculiar to such cases. The question always is whether the representation, although made immediately to one person, was intended to be made to others. What is the intention with reference to a bill of lading?

(*z*) Polhill v. Walter, (1832) 3 B. & Ad. 114.

Holbin v. Sanson (*a*). A warehouse-keeper gave C. H. & Co. a receipt stating that he had in store for them certain goods, which, in fact, he had not. Plaintiffs, relying upon the receipt, purchased the goods, and took an assignment of the receipt. Held, that the warehouseman was estopped from denying the truth of the representations contained in the receipt. Richards, J., said:—

"From the evidence, and finding of the jury, I think we must assume that when the defendants signed the receipt, they knew that C. H. & Co. would produce it to intending purchasers, or, in other words, take it into the market, and on the faith of the truth of the representations therein contained . . . sell that quantity so stored, to any person desirous of purchasing it."

The two cases of Pickard v. Sears (*b*) and Freeman v. Cook (*c*), together with Polhill v. Walter (*d*), were, in this case, held to be authority for holding the warehousemen to be estopped (*e*).

It is clear also that if misrepresentations be made to a committee of a stock exchange as to the shares of a certain company,

"all persons buying shares on the Stock Exchange must be considered as persons to whom it was contemplated that the representations would be made."

In the case quoted from (Bedford v. Bagshaw) (*f*), Bramwell, B., said:—

"But it is not a bad rule, that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be."

In which class of cases, then, ought we to place bills of lading? Are they mere contracts of affreightment, intended solely to act as evidence of the terms of that contract, and as such to be retained by the parties to the contract; or are they intended by negotiation to pass from hand to hand as the *indicia* of the existence of corresponding goods in the hands of the carriers?

(*a*) [1862] 11 U. C. C. P. 606.

(*b*) [1837] 6 A. & E. 469.

(*c*) [1848] 2 Ex. 654.

(*d*) [1832] 3 B. & Ad. 114.

(*e*) See also McLean v. Buffalo R. W., [1864] 23 U. C. Q. B. 448; 24 U. C. Q. B. 270.

(*f* [1859] 4 H. & N. 539.

In Erb v. Great Western Railway (*g*), Burton, J., said (*h*):—

"I cannot bring myself to believe that these documents are, as against the company, anything more than what they purport to be; or that they are intended by them to be a representation to the public, that they may safely advance their money upon them, or that they are more than mere contracts between themselves and their shippers."

See also to the same effect the judgment of the Chief Justice of the Supreme Court (*i*). The contrary was, however, thought to be quite clear by other judges in the same case; and the contrary forms one of the postulates in Grant v. Norway (*j*) and Hubbersty v. Ward (*k*). Holbin v. Sanson (*l*), just quoted, is in line with these latter cases, and, no doubt, accurately sets out the law—at all events if mercantile usage be proved.

It may be that so far as a bill of lading is a contract of affreightment, it is intended to be operative only between the original parties to it; but when one remembers its negotiability, not only as a matter of statutory law, but as a matter of universal practice and mercantile law, it is, as the writer thinks, such a document as the parties must have contemplated would, not only be negotiated, but would be relied upon by all those into whose hands it came. If this be true, then we must say that if ship-owners themselves sign bills of lading, they are responsible to transferees of the bill for the representations contained in it.

(To be concluded.)

JOHN S. EWART.

(*g*) [1881] 42 U. C. Q. B. 90; 3 Ont. App. R. 446; 5 Sup. Ct. Can. 179.

(*h*) 3 Ont. App. R. 468; and see 456, 459, 483.

(*i*) 5 Sup. Ct. Can. 193; and compare Gunn v. Bolckow, (1875) L. R. 10 Ch. 491.

(*j*) [1851] 10 C. B. 651.

(*k*) [1853] 8 Ex. 330.

(*l*) [1862] 11 U. C. C. P. 606.

EDITORIAL REVIEW.

Factums in the Supreme Court.

A great deal of labour is necessarily expended in compiling a well-drawn factum, and consequently a great deal of time is consumed, even where it is drawn by counsel previously concerned in the case. The usage of the Court of Appeal in Ontario, of delivering judgments at the end of June, compels all litigants who purpose going to the Supreme Court to be diligent during the vacation months, not only in preparing the "case" for that Court, but in preparing the best possible arguments to be presented in the factums. The work of preparing the case is not severe. Hitherto the printed case in the Court of Appeal has sufficed, with the addition of the printed judgments of that Court and a new title page. Now that no printed books are used, a little more labour is required, but nothing appreciable. But in preparing a factum, a heavy task is laid upon counsel at the only time of the year at which he can take a rest. He has to consider the judgments of the Court of Appeal as to the law involved; he must check over the findings of fact, or test the conclusions by the evidence. He is very often presented with an entirely new aspect of the case, which involves a reconsideration of the whole case from the beginning; and having done all this, he sits down to a final effort to condense the whole case into a page or two of factum, to be stated with absolute correctness, so as to form the basis of his arguments. He must then arrange the arguments into heads, and symmetrically, and with a due regard for economy in language, express the whole in the way best calculated to convey

his meaning in the most striking and persuasive form. All his powers of comprehension, condensation, incisiveness, and all his literary ability are taxed to the utmost. This is always supposing that he conscientiously performs his duty. The greatest labour in the case is thus laid upon him at a time when he least desires it. And if fortunate enough to have more than one case, he will find that he must either devote one of the vacation months to drawing factums, or he must postpone the drawing till September, and then rapidly and perfunctorily run them off.

If they were to be used immediately upon being deposited, no fault could be found with the arrangement; but as the Ontario list comes second at this sittings, there is no reason why the whole of September should not be given to the parties for the preparation of factums; and an amendment of the rules in that respect would be received with great favour by the Bar of this Province. Still greater reasons exist for giving extra time to the Maritime Provinces, as their list comes last.

Some members of the profession go so far as to advocate the abolition of the factums altogether. There is a good deal to be said for them, however. Such a conscientious drawing of a factum as we have supposed in these remarks must be of benefit not only to the Court but to the parties also. From the practitioner's point of view, he feels that he has exhausted the subject; that he has systematized and arranged his material in a way that he perhaps never did before; he can, in a short time, recall everything by reading his factum, and he feels a great deal of satisfaction in having in the hands of the Court a printed statement of the case from his client's point of view. And from that of the Court, there must also be satisfaction in having a continuous and consecutive argument, which, in any case, must be better than mere notes.

It is to be hoped that some modification of the rule will be made by which the deposit of factums may be postponed for those parts of the docket which come latest, at whatever sittings they may be.

The Judicial Quality.

The judicial quality is found naturally in some men, and in others it seems foreign to their nature. An intimate acquaintance with the career of an advocate will sometimes account for peculiarities of his judgments, when raised to the Bench, which are not otherwise explicable. In such cases the judicial quality is absent. But, whether natural to the individual or not, its discovery depends upon the advocate's career. Years of practice at the Bar; his competitive strife with his fellows; the learning acquired by the necessity of keeping abreast of his competitors and cultivating his faculties to the utmost; the acquaintance with human nature and the motives that actuate men in their daily relations, their habits of thought, their demeanour under trying circumstances, which is nowhere acquired to the same extent as in a large and varied practice; finally the instinct of the advocate trained by long service to pick out his strongest and most reliable points, which gradually drives him to weigh and consider what is absolute, and not argumentative, fact, and what is the undoubted, and not an arguable or tentative, proposition of law, all these tend to the discovery or to the cultivation of the judicial quality. The enthusiasm of the young and inexperienced advocate, who bases his success largely on hope, and the judicial calmness of the experienced advocate, who can give a very fair and sometimes certain forecast of the result, are very wide apart. In the former the judicial faculty has hardly awakened; in the latter it is in full play. The absolute necessity of considering and weighing both sides comes with experience. And without experience, there is great danger of advocacy taking the place of the judicial faculty, if the aspirant to the Bench succeeds in getting there.

The proposal to appoint to the Supreme Court Bench, which rumour says is a certainty, a gentleman who has had no practice and consequently no experience, and in whom the judicial faculty has never been awakened, is a sufficiently alarming one to call forth, on behalf of the

profession, the most emphatic protest that the limits of decency will allow. In the debate on the correspondence of the Governor-General with the late Premier on his retirement from office, the present Premier is reported to have argued in favour of political appointments. He cited the instance of the United States Supreme Court dividing on party lines. Leaving out of consideration the impolicy, not to say the impertinence, of this covert suggestion that the Judges of the Canadian Courts might be so influenced, when all experience is to the contrary, how illogical it is to defend the foreshadowed policy of making appointments for political reasons only. A sure way to introduce an evil which now exists in imagination only.

The proposal to appoint the gentleman in question, which, it is said, will certainly be carried out on the happening of the first vacancy, seems to corroborate what has been said about political appointments. For no other reason exists for the proposed appointment. While he has taken an active and prominent, if not distinguished, part in politics, he has had absolutely no practice at the Bar. Late in life he was called to the Bar of Ontario, on the supposition, which he was responsible for, that he did not intend to practice. He has, we believe, held one brief. But we are strongly inclined to think that if an enquiry were put on foot, the bulk of the population of this Province would be found to be absolutely ignorant that the honourable gentleman was a member of the Bar at all. To introduce a man of absolutely no legal attainments and experience to the public as the final arbiter in the Dominion of their rights and liberties, will do more to shake confidence in the Court than anything that could possibly be conceived. Once the public lose confidence in a Court, its usefulness is gone, and it no longer commands an atom of respect.

There is not only the public to be considered. It would be a most discourteous act to the Bench of the Provincial Courts to elevate to the Supreme Court Bench a gentleman, however respectable, however distinguished in politics, who admittedly has never but once been called upon to

perform a single function in the administration of justice. If Bench and Bar could cast a silent vote as to their opinion, not a single ballot would be found to advocate the appointment.

Actio Personalis, etc.

At a law examination held in Canada last year, one of the candidates for the Bar produced the following answer to the question, "Explain the maxim *Actio personalis moritur cum persona.*"

Answer—An action against a person dies with the person. This maxim holds good where an action lay or was commenced against A., a noted singer, for specific performance of his contract to sing at a series of concerts.

CORRESPONDENCE.

Advertising Solicitors.

To the Editor of THE CANADIAN LAW TIMES:

SIR,—I enclose some verses which, while of course not applicable to any state of facts existing in Toronto, may yet be of interest as showing the deplorable lack of professional dignity which may be imagined to obtain in a less enlightened country.

Please do not suppose that these lines can at all refer to the somewhat sensational reports of litigation which at times appear in the evening papers, and in which, quite against the will of their owners, I am sure, the names of solicitors frequently figure.

Indeed, I feel that an apology is due to the profession for even admitting that the seed, from which the following weed has sprung, was sown by reading a half-column report of an incipient action for alimony, which appeared under the caption of "Located him after twenty years" in *The Toronto Evening News* last night, and in which the Governor-General's name and that of an Ontario solicitor are intertwined with the same appearance of disinterested regard which Mrs. Harris adopted in her relations with Sairey Gamp.

Needless to say, these lines contain no reference to such a valuable report of a case in which the public is so much interested. They are a work of imagination only, based upon the alleged well-known ability of our transmarine neighbours to achieve forbidden ends by unostentatious but effective methods:

HOW IT'S DONE IN CHINA.

In England, Merrie England, where they plead in gown and wig,
They frown with hot displeasure on demeanour *infra dig.*
There a fool can ne'er look foolish, but always grand and wise,
And they never, really never, no, they never advertise.

And Toronto, fair Toronto, which English is, you know,
Is equally particular, though, maybe, not so slow;
And a lawyer seldom comments but with sorrowful surprise
On those active legal gentlemen who try to advertise.

His attenuated practice may be dwindling more and more,
His name may ne'er be visible but on his office door,
But to each persistent canvasser he says with hidden sighs,
"I'm really very sorry, but I never advertise."

And in China, solemn China, they are equally precise;
No lawyer ever "touted," and none dare break the ice.
And a Chinaman will tell you, as he opens wide his eyes,
That they never, oh, they never, no, they never advertise.

Perhaps Chee Foo, in arguing a motion at the Hall,
May have seen a stray reporter and have given him a call,
And have told him that his motion is a veritable prize
As "copy" for a paper—but, he doesn't advertise.

If Mr. Foo is pleading with ability and zeal
That in robbing Ah Wing's henroost his client didn't steal,
And a paper tells of Chee Foo, and his work at the Assize,
Why, the paper's very welcome, though he doesn't advertise.

Fair Yum-Yum, for desertion, sued her husband Pitti Sing;
He wouldn't pay her alimony—wouldn't do a thing.
So she told Chee Foo her troubles, and asked him to advise,
But the business being private, he must not advertise.

But he told the *Pekin Screecher* that poor Pitti Sing must hang;
He was "acting on instructions from his Lordship, Li Hung Chang."
And he whispered to the *Trumpet* that Lord Chang, who never lies,
Thought him such a clever fellow, though he didn't advertise.

Country papers spread the story, and the public all exclaim:
"This must be a famous lawyer, though we never heard his name."
And around his busy office there are heard the eager cries
Of those clamouring to consult him, though he wouldn't advertise.

MORAL.

Now, the moral of this history in China's very clear;
They will not stoop to advertise, but were not born last year.
They do not languish idly in a legal wilderness,
They write a newsy paragraph and give it to the press.

Yours, etc.,

SHIRLEY DENISON.

22ND OCTOBER, 1896.

THE

CANADIAN LAW TIMES.

DECEMBER, 1896.

APPEALS FROM DIVISIONAL COURTS.

WE referred shortly, at p. 170 of this volume, to the effect of the Law Courts Act of Ontario upon appeals to the Divisional Courts. A reference to the note of Ste. Cunegonde v. Gougeon was made, in which the Supreme Court of Canada held that an appeal would not lie to that Court in a proceeding to quash a by-law in the Province of Quebec, where the law does not permit an appeal from the Superior Court to which such a motion is made in the first instance. As the subject is of some importance it is worth referring to again. The Reporter of the Supreme Court has been kind enough to refer us to an early decision of that Court, where the matter is fully discussed on the Supreme Court Act as it then stood, viz., Danjou v. Marquis, 3 S. C. R. 251.

In that case an application was made to the Superior Court of Quebec for a writ of mandamus to compel the warden of a municipal council to sign certain minutes of the council. The application was granted. The warden having signed the minutes an order was made that he pay the costs. He appealed to the Queen's Bench, which Court quashed the appeal for want of jurisdiction, Art. 1033, C. C. P., declaring that the judgment of the Superior Court is final in such cases. The appeal to the Supreme Court raised the question whether an appeal would lie to that Court, and it was held that it would not.

The sections of the Supreme Court Act which were discussed are sections 11, 17 and 23 of the original Act, now section 24, sub-sections (*a*) and (*g*), and section 26 of the Consolidated Act.

The sections of the original Act are substantially as follows: Section 11—When an appeal lies it shall always be understood to lie from the Court of last resort in the Province. Section 17—An appeal shall lie to the Supreme Court from all judgments of the highest Court of final resort. Section 23—An appeal lies in habeas corpus proceedings, mandamus proceedings, and proceedings to quash by-laws.

The sections of the Consolidated Act are now substantially as follows: (*a*) An appeal lies from all final judgments of the highest Court of final resort, now or hereafter established in any Province, whether such Court is a Court of Appeal or of original jurisdiction, where the Court of original jurisdiction is a Superior Court.

(*g*) An appeal lies in habeas corpus proceedings (not criminal), proceedings for or on a mandamus, on a motion to quash a by-law.

26. Except as provided, no appeal lies but from the highest Court of last resort having jurisdiction in the Province in which the action was instituted, whether the judgment was or was not a proper subject of appeal to such higher Court of last resort.

It will be observed that the original Act made use of two expressions, "Court of last resort" in section 11, and "highest Court of final resort" in section 17. The Superior Court of Quebec being the Court of last resort in the case in question, the point arose whether the Supreme Court Act referred to such Court, or to the highest Court in the Province, without regard to whether it was the highest Court for such a case or not. The latter was the interpretation given by the Court.

The present Chief Justice said, with regard to this, "The next enquiry is, what is the meaning to be attributed to the words 'Court of last resort' in section 11? I think it clearly means the highest Court of Appeal in

the Province in which the suit, action, or other proceeding has arisen. This conclusion is thus arrived at. The object of the 17th section is, as I have already attempted to establish, to limit appeals in civil suits and actions to final judgments, as these words are interpreted in section 11, and in Quebec cases to actions in which the matter in dispute is above the specified amount. As regards the Court from which the appeal is to lie, there is no reason to infer that the Legislature intended to make any difference between the class of cases particularly dealt with by section 17, and those to which the general provisions of the interpretation clause would apply. It is not to be arbitrarily assumed that the Legislature, by the words 'highest Court of final resort' meant a different Court from that indicated by the words 'Court of last resort in the Province' in section 11. Then, we may regard the definition of the Court from which an appeal is given in section 17 as intended to repeat with more fulness and particularity, and by way of explanation, the provision of section 11 on the same subject. We are, therefore, to consider the two expressions 'Court of last resort' and 'highest Court of final resort' as convertible and equivalent in meaning. . . . It follows that the appeals, in cases of mandamus under section 23, is restricted by the application of section 11 to decisions of 'the highest Court of final resort.' Then, the prefix 'highest' entirely shuts out the possibility of the construction which would assign to the words 'Court of final resort' the flexible and varying meaning of Court of last resort in each particular case, as it might, or might not, happen to be subject to appeal to the ultimate appellate jurisdiction in the Province, and fixes the true meaning as that of last Court of appeal in the Province, without reference to the particular case; for, though there may be Courts of last resort in different degrees for different cases, it is clear there can only be one highest Court of final resort in a Province." His Lordship, while satisfied that this was the true interpretation of the Act, also alluded to the improbability that the Parliament intended to interfere with provincial legislation regu-

lating the finality of suits concerning property and civil rights.

The phraseology of the Act has been slightly altered in the consolidation. Whereas in the original Act, as we have pointed out, there were two expressions, "Court of last resort in the Province" (section 11), and "highest Court of final resort" (section 17), in the Consolidated Act we find in section 24, s.-s. (*a*), the expression "highest Court of final resort" (taken from section 17), and in section 26, "highest Court of last resort," which are practically the same expressions.

The meaning, however, was made quite plain and free from doubt by s. 13 of 42 Vict. c. 39, which declared that the true construction of the original Act was that "an appeal shall lie only from the highest Court of final resort in the Province." This Act was passed on the 15th May, 1879, and the decision in Danjou v. Marquis was given on 16th April in the same year. The decision was, no doubt, the exciting cause of the Act, and it is therefore clear that the intention of the Legislature was to remove any doubt as to the meaning of the original Act, notwithstanding the Supreme Court decision. The fact that Fournier and Henry, JJ., dissented was an element to be considered.

The Consolidated Act, then, does not admit of the argument as to its meaning, which was addressed to the Court on the original Act. Section 26 is the equivalent of section 13 of the Act of 1879, and it declares that "except as otherwise provided in the Act, or in the Act providing for the appeal, no appeal shall lie to the Supreme Court, but from the highest Court of last resort having jurisdiction in the Province in which the action . . . was originally instituted." It will be observed that it is not the highest Court having jurisdiction in the particular action or class of actions in question, but the highest Court absolutely having jurisdiction in the Province. As an appeal will lie to the Supreme Court only from the Court of Appeal, a case must first reach the Court of Appeal before it can go to the Supreme Court.

The case of Ste. Cunegonde v. Gougeon, 25 S. C. R. 78, is also explicit on the meaning of the Consolidated Act. The Chief Justice said, "That the Provincial Legislature may limit appeals to the Court of Appeal of the Province must be admitted, although the effect of so doing may be to take away in such cases a further appeal to the Supreme Court. And if called upon to express any opinion on the point, I should say that it is not to be regretted that a limit should be placed on appeals in municipal matters of the kind in question here."

The provision otherwise made for appeals in the Act appears in the same section. By consent of parties an appeal lies directly to the Supreme Court from the Court of original jurisdiction. That is to say, in an appealable case the parties may go direct from the trial or other Court of first instance. Such a provision is useful, either when it is desired to save expense, and neither party is able to starve or weary out the other with expensive litigation, or where the appealable Court of a Province has already decided the point, and the unsuccessful party desires to challenge it. It is to be observed, however, that if the alternative is taken of appealing to a Divisional Court, no appeal will lie to the Supreme Court under this section. For it applies only to appeals from the Court of original jurisdiction or first instance. Again, an appeal will lie, by leave of the Supreme Court or a Judge thereof, from any judgment made or pronounced by a Superior Court of Equity, and from the final judgment of any Superior Court of any Province other than Quebec in any action originally commenced in such Superior Court, without any intermediate appeal being had to any intermediate Court of Appeal in the Province. The concluding words are important. The section seems to give an appeal direct by leave only in lieu of an intermediate appeal, and if an intermediate appeal will not lie, then, in all probability, the Supreme Court could not grant leave to appeal direct to that Court.

The result seems to be that the Law Courts Act, 1895, whereby, if a party appeal to a Divisional Court, he shall not be entitled to appeal from that Court to the

Court of Appeal, effectually turns the Divisional Court into a final Court of Appeal for the particular case, if the applicant is unsuccessful, and prohibits any further appeal. It appears, therefore, that though we have a final Court of Appeal in Canada, beyond the jurisdiction of the Provincial Legislature, they may yet, by keeping on foot a final Court of Appeal in the Province and refusing the privilege of appealing to it, in the result, remove from the Supreme Court a large portion of the work which it was intended it should do.

Fortunately a choice is given, and the Legislature cannot be charged with deliberately cutting off appeals to the Supreme Court. It lies with the party interested to elect whether he will go to a Court from which there is no appeal, or to a Court from which a further appeal lies. And the advantage offered in the alternative is eagerly grasped.

ESTOPPEL, AND PRINCIPAL AND AGENT.

(Concluded.)

Liability to Transferees, when Signed by the Master:—The *data* here are, that the master had no authority to sign a bill of lading, unless the goods were shipped, and that he did sign, although the goods were not shipped. There can be no doubt, therefore, that the owners cannot be bound, unless they are in some way estopped from showing the facts. If the question then be, whether the master was held out as having authority to sign when no goods were delivered—whether signing bills, when no goods were delivered, was within his *apparent* authority, the answer must be in the negative. A sentence from Erb v. G. W. R. (*n*) is indisputable:—

"Be this as it may, it cannot be doubted that every person in business, who deals with a railway company, knows that, in the ordinary and usual course of business, no such receipts and bills of lading are ever given or issued, unless the goods have been actually received to be shipped; and nobody so dealing but must know that if a freight agent, discharging the ordinary duties of a freight agent, did give or issue such receipt and bills of lading, without the goods having been delivered, he would be acting in direct opposition to his duty, and in fraud of his principals."

But is this the real point of the case? Let us seek for analogy:—A railway company appoints an officer to maintain order at their stations; his duty (among other things) is to arrest guilty, and not innocent, persons; nevertheless, he does arrest an innocent person; and the railway company is liable. It is liable not because the officer had authority to arrest an innocent party, nor because the officer was held out as having authority to arrest innocent people; but because he had been appointed to do that class of acts, and there was necessarily involved a power to exercise a discretion as to the persons whom he would arrest. This case will not, however, help us, because an agent, appointed to give bills of

(*n*) 5 Sup. Ct. Can. p. 192, already referred to.

lading, has no discretion as to whether or not he will sign them; nor is he held out as having any. If the goods are shipped, he is to give a bill; and if not, he must not.

Trying again, let us suppose that a partner accepts a bill of exchange in the name of his firm, but for his own private purposes. The firm is liable; not because the partner (the agent of the firm) had authority to accept bills in the firm name for his own benefit, nor yet because he was held out as having power to do so; but because he had been authorized "to do that class of acts"; and because *he apparently acted within his authority* (*o*). Notice the change from the usual expression (for which the writer is, to some extent, responsible). Usually it is said (and quite properly, for it covers many cases), that if an agent act within his apparent authority, the principal is (by estoppel) bound. The writer believes that it may also be said, that if an agent *apparently acts within his authority* (*p*), the principal is (by estoppel) bound.

Appearance to the public, sanctioned by the principal, is the ground of estoppel. The appearance of acting within the authority must, of course, always be real, and must be closely examined to see that it exists; just as must the apparent authority. But given the real appearance in both cases, in both of them alike should the principal be bound. The writer would suggest, too, the advisability of the omission from the current language of the word "scope," for it is wholly useless. It is sufficient to say that the agent acted within, or beyond, his authority. Inserting the word "scope" adds nothing to the expression, for an act cannot be beyond authority, and yet within the scope of it. At most it may mean that although the particular act was not within the authority, yet that the class of acts to which it belongs was within the authority. But this only means, after all, that the particular act was unauthorized, and therefore not within the scope of the authority.

(*o*) See Problem No. 10, *ante*.

(*p*) Mr. Justice Story sometimes uses similar language, although not contrasting it with the more usual phraseology. See Story on Agency, sec. 73.

The rules would then be that if an agent acted (1) within his authority, or (2) within his apparent authority, or (3) apparently within his authority, the principal would be bound—in the two last cases by estoppel. The cases which follow, and the cases and considerations contained in the answer to problem No. 11 (*ante*, p. 260), will further develop and explain the principle suggested. This or some other principle there must be, to which one may refer such cases, and many others of analogous character. And if this be the governing principle, the shipowners ought to be liable upon bills of lading, signed by their masters, although no goods were shipped. The following authorities assist the writer's contention:—

Jarmain v. Hooper (*q*). Under a *fi. fa.* against J. J., the sheriff, under directions from plaintiff's attorney, seized goods of another person of the same name. Being sued, the former plaintiff pleaded that his attorney acted beyond his authority; but Tindal, C.J., said:—

"And when it is argued that *he* (the attorney) *cannot be his agent in giving false information*, the answer is, that, *if his agent do the particular act*, the client must stand the consequences if he act inadvertently or ignorantly; as in Parsons v. Lloyd, 3 Wils. 341, where trespass was held maintainable against the client, for causing the plaintiff to be arrested under a writ, which was afterwards set aside for irregularity. It was argued, in that case, that suing out the writ was the immediate act of the attorney, that he had not been retained to sue out a void or an irregular writ, and that it was therefore not within the scope of his authority. But it was answered by De Grey, C.J., that 'the act of the attorney is the act of his client,' and by Gould, J., 'the plaintiff should have employed a more skilful and diligent attorney; for the act of the attorney in point of law, is the act of the party his client.'"

Limpus v. London Gen. Omnibus Co. (*r*). The driver of an omnibus drove it across the road in front of a rival omnibus, which was thereby overturned. Held, that the owner of the former was liable. Willes, J., said:—

"*It may be said that it was no part of the duty of the defendant's servant to obstruct the plaintiff's omnibus, and moreover the servant had distinct instructions not to obstruct any omnibus whatever.* In my opinion these instructions are immaterial. If disobeyed, the law casts upon the master a liability for the act of his servant in the course of his employment; and the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability."

Barwick v. English Bk. (*s*). The manager of a bank, by giving for the bank a guarantee which (because of

(*q*) [1843] 6 M. & G. 827.
(*r*) [1862] 1 H. & C. 526.
(*s*) [1867] L. R. 2 Ex. 259.

facts known to him, but not disclosed), was of no value, obtained a benefit for the bank. The bank would be liable in an action of fraud. In that case Willes, J., said:—

"But with respect to the question, whether a principal is answerable for the act of his agent, in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant, or agent, as is committed *in the course of the service, and for the master's benefit*, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-law. It has been acted upon where persons employed by the owners of boats to navigate them and take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it *may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in.*"

Swift v. Winterbotham (*t*). A manager of a bank made a representation (false to his knowledge) as to the credit of R. Upon the faith of the representation the plaintiff advanced money, the bank profited by the advance. It was within the manager's authority to make representations as to credit, but not to make false representations. Held by the Court of Queen's Bench, that the bank was liable. Upon appeal, the decision was reversed upon other grounds (*u*).

McKay v. Commercial Bank (*v*). The manager of a bank, by misrepresentation, induced the plaintiffs to accept bills of exchange, in which the bank was interested. Held, that the bank was liable in deceit.

"It is seldom possible to prove that the fraudulent act complained of, was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed, it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are

(*t*) [1873] L. R. 8 Q. B. 244; L. R. 9 Q. B. 301.

(*u*) See, however, British, etc., v. Charnwood, etc., (1887) 18 Q. B. D. 717, per Bowen, L.J.

(*v*) [1874] L. R. 5 P. C. 394.

beyond the scope of the agent's authority, in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses, or incurring liabilities on account of them, and would be opposed as much to justice as authority. A wider construction has been put upon the words."

The language of Barwick v. English J. S. Bank is then quoted with approval; and there is added:—

"*It would not have been his* (the manager's) *duty to state a falsehood, still the sending of the telegram with the false statement would have been 'within the scope of his authority' as that expression has been explained.*"

The judgment declares that it is not necessary to say what would have been the result had the facts been (1) that the manager had authority, but the bank had not profited; (2) that the manager had no authority, but the bank had profited.

Swire v. Francis (*w*). An agent in charge of his principal's business had power to draw bills upon B. & S. for advances made for purchases on account of that firm. The agent drew upon B. & S. for an amount which had not been, *but which he asserted to them had been*, advanced for purchases on their account, and received the money. The principal was held to be bound to repay the amount to B. & S.

Montaignac v. Shitta (*x*) is very important. In it Lord Herschell said:—

"If the occasion might have arisen, on which his borrowing powers would have been properly interpreted as comprising the recourse to such means as these, then *their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not.*"

There is a class of cases in the United States Reports which forms a useful analogy—cases in which a bank teller certifies or "marks" a cheque as good. In such cases it was argued that the teller had power to mark only when there were funds, and that if he marked when there were none, the bank was not liable. The decisions, however, are otherwise (*y*). A most instructive case of

(*w*) [1877] 3 App. Ca. 106.

(*x*) [1890] 15 App. Ca. 357.

(*y*) See also the decision of the Canadian Sup. Court, Exchange Bank v. The People's Bank, (1887) 23 Can. L. J. 391.

this class is that of The Farmers & M. Bank v. The Butchers & D. Bank (*z*). Selden, J., said:—

"The bank selects its teller, and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, *so far as is known, or can be seen, by the party dealing with him*, he is guilty of misrepresentation, ought not the bank to be held responsible?"

(This passage was quoted with approval in the U. S. Supreme Court—Merchants' Bank v. State Bank, 1870, 10 Wall. 646). The learned Judge added:—

"It is, I think, a sound rule that where the party dealing with an agent has ascertained that *the act of the agent corresponds in every particular, in regard to which such party has, or is presumed to have, any knowledge, with the terms of the power*, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and cannot be ascertained by a comparison of the power with the act done under it."

Referring to Attwood v. Munnings (*a*), and Alexander v. McKenzie (*b*), the learned Judge said:—

"The general principle laid down in such cases is in perfect accordance with the views here expressed. It is, simply, that where an agent accepts a bill in a form which imports that he acts by virtue of a special power, any person taking the bill is bound to enquire into, and is chargeable with knowledge of the terms of the power. This is not denied. *But the question is whether, after enquiring into the terms of the power, and ascertaining, as far as can be done by comparison, that the act of the agent is within the power, he is chargeable without proof, with a knowledge of extrinsic facts, which shew the act to be unauthorized.*"

Applying that rule to the case in hand the learned Judge said:—

"It is conceded that every one taking the cheques in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective. To discover that he must not only have notice of the limitation upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representations of the agent. There is a plain distinction between the terms of a power, and facts entirely extraneous upon which the right to exercise the authority to confide in the representations of the agent as to the extent of his powers. . . . But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. This is a fact which a stranger who takes a cheque certified by the teller cannot be supposed to have any means of knowing (*c*)."

(*z*) [1857] 16 N. Y. 125.

(*a*) 7 B. & C. 278.

(*b*) 6 C. B. 766.

(*c*) See also the North River Bank v. Aymar, (1842) 3 Hill, 262.

The view of the law here presented was carried from the United States to the Province of Quebec, and, upon an appeal from a Court there, adopted by the Judicial Committee of the Privy Council. See Bryant v. La Banque du Peuple (*d*), where it is said:—

"The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York in President, etc., v. Corner (*e*), cited by Andrews, J., in his judgment in another case brought by the Quebec Bank against the Company. The passage referred to is as follows:—'Whenever the very act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent; *such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority.*'"

With these authorities must be read those quoted in the answer to Problem No. 11, from which it appears that one partner (the agent of the firm) can bind the firm, by acts for which he had neither real, nor apparent, authority.

Here, then, we have a large number of cases (most of them of unquestioned authority), in which a principal has been held liable for the act of his agent, although it was not within the real, or the apparent, authority of the agent. Upon what ground is the principal liable? Is there any reason common to all of them, or are they all separate, and merely arbitrary, declarations of the law? Let us see:—

"*For the Master's Benefit.*"—Much can be found to justify the assertion, that the principal is bound when the act (although beyond both real and apparent authority) was done "for the master's benefit"; but that it would be otherwise were the same act done in fraud of the principal. A good example of this may be found in British Mutual, etc., v. Charnwood, etc. (*f*). A secretary of a company represented that certain debenture stock of the company existed. The representation was false, for the stock had been fraudulently issued by the secretary himself, in excess of the powers of the company; and the representation was, therefore, made, not for the

(*d*) [1893] A. C. p. 180.
(*e*) 87 N. Y. R. 822.
(*f*) [1887] 18 Q. B. D. 714.

benefit of the company, but to shield himself. Held, that the company was not liable. Lord Esher decided the case upon this ground:—

"The secretary was held out by the defendants as a person to answer such questions as those put to him . . . . *and if he had answered them falsely on behalf of the defendants, he being then authorized by them to give answers for them, it may well be that they would be liable.* But although what the secretary said related to matters about which he was authorized to give answers, he did not make the statements for the defendants, but for himself."

See also Erb v. G. W. R. (*g*), Molson's Bank v. Brockville (*h*), Newlands v. National (*i*), Gibbons v. Wilson (*j*), Thorne v. Heard (*k*), and the decision of the Privy Council in McKay v. Commercial Bank (*l*), where the question whether the absence of a benefit by the principal would have varied the result, is expressly reserved.

Upon the other hand, the principal has been held liable in many cases in which he received no benefit, but upon the contrary damage (*m*); and further, the principal has been held liable although the act was not done even with the intention of benefiting the principal, but on the contrary in fraud of him (*n*).

The general rule laid down in Barwick v. English Bk. (*o*) is often discussed. It is that

"the master is answerable for every such wrong of the servant or agent, as is committed in the course of the service, and for the master's benefit."

It is a mistake, however, to treat these words as the language of a statute; and to decide later cases upon their true interpretation. If, indeed, we were to do so, it may be that they mean nothing more than that the act must have been one of the class which the servant is employed to do "for his master's benefit." The latter part of the judgment would seem so to indicate. This interpre-

(*g*) [1873] 3 Ont. A. P. R., *per* Moss, C.J., pp. 479, 480.
(*h*) [1880] 31 U. C. C. P. 174.
(*i*) [1885] 54 L. J. Q. B. D. 428.
(*j*) [1889] 17 Ont. 290.
(*k*) [1849] 1 Ch. 599; (1895) A. C. 495.
(*l*) [1874] L. R. 5 P. C. 394.
(*m*) Jarmain v. Hooper, (1843) 6 M. & G. 827, *ante*.
(*n*) See the cases cited in the answer to Problem No. 11.
(*o*) [1867] L. R. 2 Ex. 259, *ante*.

tation, however, was rejected in British v. Charnwood (*p*).

If we are to adopt this rule, as sometimes interpreted, it would mean that when the agent exceeded his apparent authority, the principal could never be liable, unless the act were done with the intention of benefiting the master. But is there any resting place here? If the master has taken the benefit of the act then, intelligibly, he may be bound; but if the agent exceeded his authority, intending to benefit the master, but really overwhelming him with disaster, is the principal, merely because of the agent's good intention, to be bound? The rule, too, would antagonize all the cases in which the agent had no intention other than to benefit himself. Either those cases, or this strange looking rule, must give way.

The rule that the master is liable *if he take the benefit* of an unauthorized act, is supported by much authority (*q*). It is possible that this rule may require to be limited to cases in which either the principal was aware that the agent had exceeded his authority when he (the principal) took the benefit of the agent's act; or, at all events, to those in which he became aware of it while yet there was a possibility of repudiating the whole transaction. An agent with no power to warrant, and no appearance of such power, may, on behalf of his principal, have exchanged some seed wheat (giving a warranty of freedom from weed seeds) for some cattle, and the principal without the knowledge of the warranty have accepted, and sold, the cattle. Here the principal has accepted the benefit of the agent's act, but he ought not, as the writer thinks, to be liable upon the warranty, for all the damage done by the weed seeds. But see to the contrary Udell v. Atherton (*r*).

(*p*) [1887] 18 Q. B. D. 717.

(*q*) McKay v. Commercial Bank, (1874) L. R. 5 P. C. 394; Weir v. Barnett, (1877) 3 Ex. D. 32; Newlands v. The National, etc., (1885) 54 L. J. Q. B. D. 428.

(*r*) [1861] 7 H. & N. p. 181.

But whether the rule just referred to be valid or not, it clearly does not supply the general principle of which we are in search—some general principle which will apply to cases in which a partner binds the firm, although acting for his own benefit; in which an attorney binds his client, although he makes grievous blunders unwarranted by his instructions; in which an omnibus driver runs down a rival, in defiance of his instructions; in which a bank teller marks a cheque, for which there are no funds; in which a manager, having power to borrow money for his firm, borrows for himself; and to many other analogous cases. For such cases may we not say (ourselves quoting, too, Barwick v. English Bank):—

"In all these cases it may be said . . . that the master has not authorized the act. It is true he has not authorized the particular act, but *he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself* in doing the business which it was the act of the master to place him in."

Or using the language of estoppel, as much more accurate, may we not say, that a principal is never bound by the act of an agent, which is not within the authority given to him; but if the principal has put the agent in his place to do that class of acts, and the act in question be *apparently* within the authority of the agent, the principal is estopped from denying authority? Lord Justice Bramwell prefers to put the matter in this way (*s*):—

"I think that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.

If either of these views be correct the decisions, that ship-owners are not liable to transferees of bills of lading for goods not put on board, seem to be unsustainable.

Problem No. 13.—A person holding a legal mortgage leaves the deeds with the mortgagor, with the intention of enabling him to raise a sum of £15,000, which is to take precedence of the legal mortgage. The mortgagor raises £50,000 upon a deposit of the deeds.

(*s*) Weir v. Bell, (1878) 3 Ex. D. 245.

Can the legal mortgagee redeem without paying the larger sum?

Answer.—The case of Perry-Herrick v. Attwood (*t*) decides, and no doubt rightly, the point in the negative. Observe closely, however, the ground of the decision, for we shall have to refer to it in discussing the next problem. Observe that there is here no relationship of principal and agent; and that no question of agency, or the extent of an agent's powers arises. The legal mortgagee allowed the mortgagor to represent himself to be *the owner* of the land, and left with him the title deeds in order that he might, *as owner*, deposit them for a loan. Estoppel in such case says, that having allowed the mortgagor to represent himself as the unencumbered owner, the legal mortgagee is estopped from asserting that such was not the fact; and is bound by that which, as unencumbered owner, the mortgagor did. This is, no doubt, the principle which is referred to in the judgment as "the plainest equity."

Problem No. 14.—A principal employs an agent to raise money on certain securities, and at the same time directs him not to borrow more than a specified sum. The agent goes into the market, and in exchange for the securities obtains a loan in excess of the amount prescribed from a bona fide lender, who has neither notice, nor knowledge, of the limitation. The agent, instead of accounting to his principal, applies the excess to his own purposes, and absconds. Does the loss in these circumstances fall upon the principal, or upon the lender?

Answer.—The problem is stated in the language of Lord Watson in Brocklesby v. Temperance (*u*); and the judgment in that case answers that the loss must fall upon the lender. But why? Pursuing the lines of examination heretofore employed, we note, first, that the agent exceeded his authority, and that the principal is not bound, unless, indeed, the principal is estopped, because of some apparent authority. We note further,

(*t*) [1857] 2 DeG. & J. 21.

(*u*) [1895] A. C. 173; 11 Rep. 1.

that the agent was not operating in any place, or character, or under any circumstances, which would give to him the appearance of having larger authority than that which he, in reality, had. The apparent authority was no greater than the real authority; there can, therefore, be no estoppel. But the judgments do not proceed upon these lines at all. The only reference to estoppel in them is to be found in the words of Mr. Justice Smith:—

"The point as to an estoppel by negligence, combatted so much by the plaintiff's counsel upon this appeal, I need not allude to, for *it was not argued or insisted upon by the defendants.*"

The learned Judge founded his judgment upon an "equity" which he stated as follows:—

"A Court of Equity will grant no relief to a person who hands over his title deeds to another, with the intention that that other should obtain an advance of money thereon, no matter how much the other may exceed his authority in the advance he obtains, until the person who has so handed over his deeds, pays to the lender the actual amount advanced by him upon the deeds; the reason being that the person claiming back the deeds has, by his own act, allowed another to become a *bona fide* purchaser for value without notice of the limited authority; and in these circumstances, a Court of Equity will not assist him, until the person who has thus been induced to part with his money has been fully recouped. The case of Perry-Herrick v. Attwood decides this."

Lord Herschell, referring to the same authority, said:—

"I confess I am quite unable to see any distinction in principle between the two cases which would render it right, proper, or reasonable, that in the former case a lender should not be bound by a limitation of authority of which he was unaware, but that in the latter case he should be bound by a limitation of which he was unaware."

With great respect for so eminent a Judge, the writer cannot but think that the distinction is very apparent. In the Perry-Herrick case the lender properly believed that he was dealing with *a principal*—with the owner of the land; while in the Brocklesby case he knew that he was dealing with *an agent*. As to the Perry-Herrick case, the law of estoppel says that the legal mortgagee, having allowed the mortgagor to appear as unencumbered owner, is bound by that which the mortgagor does. But in the Brocklesby case the person entrusted with the deeds was allowed to appear as an agent merely, and estoppel binds that principal to the extent of the agent's apparent authority only. It cannot be

correct to say in the Brocklesby case that the principal "allowed another to become a *bona fide* purchaser for value without notice of the limited authority;"

for the purchaser knew that the person with whom he was dealing was an agent, and there was nothing to indicate that that agent had any larger powers than those with which he was actually entrusted. Nor can it be said that there is involved any doctrine peculiar to a Court of Equity. The question is one of legal right. The mortgagee wants his deeds, and tenders the amount he authorized to be borrowed. If he is not to have the deeds it must be either (1) because he or his agent, duly authorized, borrowed more—which is not the case; or (2) that, the agent having without authority borrowed more, the principal is estopped because he allowed it to appear that the agent had the larger authority, which is, also, not the case (*v*).

The writer trusts that it has now been made apparent that not only with reference to this case, but throughout all the law in this article discussed, much benefit may be derived from the introduction and close application of the principles of estoppel.

JOHN S. EWART.

(*v*) There is much in the reasoning of Bacon, V.C., in Fox v. Hawks, (1879) 13 Ch. D. 822, which supports the present writer's views upon this subject.

EDITORIAL REVIEW.

Succession Duty on Foreign Assets.

The Succession Duty Act, 1892, enacts that it shall not apply "to any estate the value of which, after payment of all debts and expenses of administration, does not exceed $10,000; nor . . . to property passing under a will, intestacy or otherwise, to or for the use of the father, mother, . . . of the deceased, where the aggregate value of the property of the deceased does not exceed $100,000 in value." Where there are foreign assets, without including which the total cannot be made up, the question arises whether they are to be included in the computation in order to make up the total to the requisite amount to render the estate subject to duty. Thus, if $75,000 of assets are found in Ontario and $50,000 in a foreign country, does "the aggregate value of the property of the deceased" exceed $100,000 within the meaning of the Act, so as to render the estate subject to duty?

The point received some explanation in two cases from Australia in the Privy Council, though, from the reports, it does not appear that the wording of the Australian Act is precisely the same as ours. In Blackwood v. Reg., 8 App. Cas. at p. 94, Sir Arthur Hobhouse said that where there are sweeping general words in a statute which it is difficult to apply in their full literal sense, one of the safest guides to the construction is to examine other words of like import in the same instrument and to see what limitations must be imposed on them. Now, if we look at the clauses of the Act which apply to appraisement, it is difficult to arrive at the conclusion that the sheriff is to travel through a foreign country making a valuation of foreign assets. And where we find that by section 12 the duty is to form a lien on the property until the amount is paid, and that, by the amended section, the Provincial Treasurer is to give a certificate of discharge of the property when the duty is paid, and that by section 15 the personal representative is given a power to sell so much of the property as will enable him to pay the duty, it becomes al-

most conclusive that only that property, the conveyance or disposition of which could be affected by the Legislature, is to be subject to the duty. The probate of the domicile clearly gives no title to the foreign assets. "At most" (it is said in Blackwood's case, at p. 92), "it gives to the executor a generally recognized claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as, for instance, when a creditor gets letters of administration in the Court of the domicile." Then again, the administration in the foreign country gives the foreign creditors priority as regards the foreign assets, while the creditors of the domicile take priority as regards the assets at the domicile. For the purposes of conveyance, taxation, collection, personal assets have themselves a situs; for the purpose of distribution personal assets follow the law of the domicile.

In the case in question these principles were applied, together with the maxim as to internal evidence derived from other expressions in the statute. In that case, where the deceased, domiciled in Victoria, had property in the colony of Victoria and property in another colony, it was held that duty was chargeable only on property to which the probate in Victoria gave title. The section of the Act in question required every executor to file a statement specifying the particulars of the personal estate of or to which the deceased was at his death possessed or entitled, and of the real estate, and the value thereof, and of the debts due by the deceased, and showing the balance remaining after deducting the amount of the debts from the value of the estate of the testator. These words are general enough to include the whole estate wherever situate, and all the debts, whether charged on foreign assets or not. "In their strict and literal meaning the words clearly include all personal estate, wherever it may be" (at p. 93). But it is said (p. 95), "It is hard to suppose that the Legislature has required a statement of any other personal estate than that which it specified as passing to the administrator, especially as an administrator does not

necessarily hold the same position as an executor in a foreign Court of Probate." And we may add that while by statute in Ontario the personal representative takes realty in spite of a devise, realty in a foreign country may go direct to the devisee. And again, "In these three cases, therefore, words requiring persons to make statements of all real or all personal estate have clearly to be modified by confining them to statements of property coming to the person in the character in which he is required to make the statement." And again (p. 97), "What their Lordships find is that the Victorian Legislature have imposed a tax payable by an executor, as a condition precedent to the issue and efficacy of the probate necessary for his action, out of the estate while it is in bulk, and before distribution or administration has commenced. All these things, the person to pay, the occasion for payment, the final payment, and the time for payment, point to the Victorian assets as the sole subject of the tax."

A cognate question arose in Henty v. Reg., L. R. (1896) A. C. 567, where a testator died domiciled in Victoria. He had, besides assets in Victoria, an interest in land in New South Wales, subject to a mortgage of £50,000; and in making up the statement required, the executors claimed that they had the right to deduct the amount of the foreign mortgage from the Victorian assets, and so reduce them as to free them from duty. But the Court held otherwise. Referring to the section quoted, their Lordships said that it did not follow "that the expressions real and personal estate and secured and unsecured debts must in every case mean the whole estate of the deceased, and his whole debts, secured or unsecured." And again (p. 572), "In a case like the present, where the deceased was domiciled in Victoria, but had estate in another country, the purposes of the Act do not require that his executors shall include foreign assets, to which their Victorian probate gives them no title, although, in such a case, there may be debts due by the deceased to foreigners which, for the purpose of assessing duty, form a legitimate charge upon the assets reached by their probate."

The principle of these remarks is directly applicable to our own statute. The words are general, but there are internal indications in the statute that the property to be assessed, and which must be stated by the executor or administrator in his inventory, is property within the control of the Legislature, especially as it is, by the Act, charged with the payment of the duty. The title of the executor or administrator is confined to local assets, and the judgment of the Probate Court gives him but a claim to be clothed in the foreign country with a lien title to the foreign assets.

It is true that the tax is to be levied only on property situate within Ontario, by the 4th section, and it cannot, therefore, be attributed to the Legislature that they have left the amount to be ascertained by general words. But the reasoning of the cases applies, that is, the liability to be taxed depends upon a state of affairs existing in the Province, not upon one existing without its limits. And as the statement required by the Act is only for the purpose of assessing and collecting the duty, it follows that the statement need only contain a statement of that which the Legislature intended to tax.

This interpretation seems to be favoured by the amendment of 1896, section 4, sub-section 7, by which it is provided that if any foreign assets are brought into Ontario by the personal representative to be administered or distributed here, it shall be liable to the duty by the Act imposed, less any foreign succession duty paid thereon. The assets may be of such a nature that it is inconvenient and undesirable to convert them, and bring this money into Ontario for distribution. But if they are to be distributed here, are they to be taken into consideration in fixing the duty in the first place? Apparently not, because the personal representative has no title to them until the foreign representative conveys them to him. Then, and not before, has he any legal claim to them. And when brought in the statute apparently contemplates that the amount brought in shall alone reach the taxable total required by the Act before duty can be exacted. It "shall be liable to the duty hereinbefore imposed." That is, where the aggregate value of the property exceeds $100,000 and passes.

Altogether the point, like all others under this Act, is not of a simple nature; but the cases referred to throw a great deal of light upon it.

Bicycles are Vehicles.

The Scotch notion enunciated lately, that a bicycle is no more a vehicle than a pair of skates, does not obtain in England. In a recent case, Ellis v. Nott Bower, 13 Times L. R. 35, it was held that a bicycle was a vehicle within the meaning of the Liverpool Corporation Act, s. 12, which provides that, "It shall not be lawful in any street in the city to use any vehicle exclusively or principally for the purpose of displaying advertisements without the consent of the corporation." Half-a-dozen wheelsmen, without leave, paraded the streets on bicycles with placards advertising tea, and were convicted of a breach of the Act. On a stated case, the conviction was upheld. The wheelsmen's counsel attempted a definition of vehicle, which we do not find in the dictionaries, and which is so delightfully general that it would include anything that will not move. "A vehicle is a passive something which carries a thing." This will include a chair, even a rocking-chair, which is passive until disturbed; a hobby-horse, a shovel; and, according to Mr. Justice Wright and the dictionaries, beeswax! The latter being the vehicle used in encaustic painting. There is the obligation to call a human being "a thing" if this definition is extended to chairs, etc., and possibly the gist of the definition is that the cyclist is not "a thing," and therefore the wheel is not a vehicle. There is no reason, however, why the definition should not include a bicycle, which is passive until roused into action. Murray's dictionary defines a bicycle as "a machine for rapid riding"; but the Queen's Bench Division has defined it as a carriage for "driving," within the meaning of the Highway Act: Taylor v. Goodwin, 4 Q. B. D. 228; although at the time the Act was passed bicycles were unknown. But it is not a carriage for the purpose of toll within the meaning of an Act imposing toll for every carriage drawn or impelled by steam or other power or agency; the expression "other such carriage" in the Act confining the general terms to those of the kind

thereinbefore mentioned: Williams v. Ellis, 5 Q. B. D. 175.

The Court, in Ellis v. Nott Bower, had no difficulty in coming to the conclusion that the bicycles were vehicles for the purpose of displaying advertisements, and the advertiser, no doubt, was satisfied that he got more publicity than he expected.

The Judicial Quality.

We gladly print in this number a communication on this subject, as containing the best that can be said in opposition to a view that is the universal view of the profession, as far as can be ascertained, with the exception of the letter. To prolong the discussion would be both unpleasant and unprofitable. While we agree with a great deal that our correspondent says, we fail to see that a profound theorist can ever be thereby alone qualified for the Bench. With great respect for our correspondent, he reminds us of a remark attributed to Lord Melbourne, "I make my Judges of gentlemen, and if they know a little law, so much the better!"

The Appointment of Queen's Counsel.

The Queen's counsel case, which stood so long for argument, has at last been decided, without enlightening us further upon any important point of constitutional law. Indeed, since the decision, to which we have so often referred, of the Maritime Bank of New Brunswick's case, there was no real necessity for presenting the case at all. The decision that the Lieutenant-Governor of a province represents the sovereign in all matters within provincial jurisdiction, indicating with great clearness and directness the exact limits of the executive powers. Unless a direct attack is intended to be made upon the individual patents, we can see no benefit to be derived from pursuing the matter.

Power of Provincial Legislature to Imprison.

In a late case, Fielding v. Thomas, L. R. (1896) A. C. 600, the oft-recurring question of the power of a colonial Legislature to punish for contempt again arose. The Nova Scotia Legislature passed an Act whereby it enacted substantially as follows: The Legislative Council

and its committees shall have the like privileges, immunities and powers as shall be held and enjoyed by the Senate of Canada; and the House of Assembly those enjoyed by the House of Commons of Canada; the same to form part of the public law of Nova Scotia. No member shall be liable to any civil action by reason of any thing brought by petition, bill, etc., before the House. The following acts are prohibited, amongst others: Insults to or assaults upon members during the session. Each House to be a Court of Record, with power to adjudicate upon and punish offences under the Act. Offenders to be liable to imprisonment. The plaintiff intentionally disobeyed the order of the House to attend before the House, and was arrested by the Sergeant-at-Arms and imprisoned under order of the House. Being released on a writ of habeas corpus, he brought an action against certain members for assault and imprisonment. Judgment went for the plaintiff. On appeal to the Supreme Court of Nova Scotia the Court was equally divided, and the judgment affirmed. This appeal was then taken to the Privy Council, and the judgment was reversed, on the ground that the Provincial Act was intra vires.

The Board, however, expressed other views which are sufficiently remarkable to attract attention. In the first place, though it was not necessary for the decision of the case, they held that powers existing in the Assembly before the union survived the B. N. A. Act. Thus, at p. 610, it is said that the Dominion Parliament being a new creation required that special authority should be given it to give itself privileges, powers and immunities, whereas, the Nova Scotia Assembly, having existed before, it was not necessary to so empower it. Such powers having previously existed, "It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose." This rather offended against their Lordships' pronouncement in Bank of Toronto v. Lambe, 12 App. Cas., at pp. 587, 588, where it is said that the B. N. A. Act "exhausts the whole range of legislative power." It seems, also, to conflict with the expression of opinion in Attorney-

General of Ontario v. Attorney-General of Canada, 12 Times L. R. at p. 391: "The first of these [grounds] . . . was to the effect that the power given to each province by No. 8 of section 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the union. Their Lordships can find nothing to support that contention in the language of section 92, etc."

The Board, moreover, held that under that clause of section 92 which gives power to the Provincial Legislature to amend the constitution of the province, the Act was clearly valid, as the protection of the members of the House from insult was clearly part of the constitutional law of the province. This is the first decision on this clause, and apparently is the first attempted exercise of the power except the abolition of upper chambers.

Thirdly, the Board decided that, though the act was in reality equivalent in the result to a criminal libel, that was not sufficient to oust the local jurisdiction. "The Legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence, or brings the offender within the reach of the criminal law."

Finally, the prohibition against bringing any civil action against any member was a complete bar to the action. The whole case might apparently have been well decided on this last ground, which, indeed, affords a key to the whole position. It is not necessary in reality to define the powers, privileges or immunities of the Legislature at all. They may act as they please by word or deed, as long as a civil action against them could be brought; and therefore an Act prohibiting the bringing of any action for assault, imprisonment, libel or what not, dealing, as it would do, with civil rights, would be intra vires and afford complete protection to the Legislature.

CORRESPONDENCE.

The Judicial Quality.

To the Editor of THE CANADIAN LAW TIMES.

Sir,—Your November number contains a vigorous protest against the appointment of a well-known legal gentleman to the Bench of the Supreme Court of Canada. I do not admit that your objections would have the important weight which you attach to them, even in the case of Judges generally, but in the case of a Judge of our highest appellate Court, I contend that the objections which you have raised amount to practically nothing. Let it be kept in mind that the Supreme Court of Canada is almost exclusively an appellate tribunal. Its jurisdiction in "special cases referred" is so limited to constitutional matters, and is so far removed from the arena of the ordinary practitioner, that this point can weigh but little against my contention; and, besides, keeping in view the gentleman against whom your opposition is directed, it will be generally, if not universally conceded, that as a constitutional lawyer he has no superior in the Dominion of Canada.

You mention as qualifications for a Judge: "Years of practice at the Bar; his competitive strife with his fellows; the learning acquired by the necessity of keeping abreast of his competitors and cultivating his faculties to the utmost; the acquaintance with human nature and the motives that actuate men in their daily relations, their habits of thought, their demeanour under trying circumstances, which is nowhere acquired to the same extent as in a large and varied practice, etc., etc. All these," you say, "tend to the discovery or to the cultivation of the judicial quality."

In the trial of a cause at Nisi Prius, where the matter is inquired into for the first time; where the

honesty, the character, and the memory of witnesses are to be tested by examination and cross-examination; where points of practice arise unexpectedly, and have to be decided off-hand and without deliberation; where juries have to be impannelled and then addressed by the Bar and "charged" by the Bench; where counsel frequently have to be kept in check regarding their conduct towards witnesses and jury; where the admissibility of evidence has sometimes to be promptly decided upon; where a mistake relative to the pleadings, the evidence or a single point of practice, may lead to a wrong verdict and a miscarriage of justice; the duties of the Judge are vastly different from those in the Court of Appeal, where there are no witnesses, no juries, and no points of practice arising for the first time, and requiring immediate decision. For these reasons some of the qualifications which you have mentioned, while they might be helpful to, or even requisite for, the Judge on the trial, have little or no application to the Judge exercising appellate jurisdiction.

You have dwelt and lingered upon the word "experience." There are two kinds of experience which in this consideration we require to keep distinct in our minds, namely, the experience of the practitioner and the experience of the student. You would have us believe that the former is the *sine qua non*. You would not think of denying, no one would dare deny, that the gentleman referred to is possessed in a most eminent degree of the experience of the student. You say he "has had no practice, and consequently no experience." If, as you say, he "has had no practice," he certainly has had none of the experience of practice; but he has had the experience of study. And because he has not had the experience of practice you contend that "the judicial faculty has never been awakened" in him, and therefore you sound an alarm. "Without experience," you say (meaning, of course, the experience of practice), "there is great danger of advocacy taking the place of the judicial faculty, if the aspirant to the Bench succeeds in getting there." If, instead of the word "without" you had used the word "with," your assertion

would have been quite as reasonable and forcible, and, in my opinion, more correct. The experience that you refer to, and for which you are so ardently contending, must involve the experience of advocacy. In fact, it seems to involve that and nothing else; and yet you would have us believe that because a man has been an advocate while at the Bar, he will cease to be such as soon as he is elevated to the Bench, and *vice versa*. Is it possible that Judges change their characters so soon and so completely when they don the ermine? Have not some of us learned in our experience at the Bar that the most difficult thing the Judge has to do after leaving an active practice, is to forget by degrees the habits of advocacy which he had hitherto and recently indulged in?

You assert most emphatically that "no other reason exists for the proposed appointment" than a political claim, from which you would have us believe that there is but one requisite for the qualification of a Judge, namely, an active practice while at the Bar, for this is the only one that you have questioned. Surely scholarship, character, moral worth, legal study and research, industry, common sense, as well as physical vigour and intellectual strength, are among some of the best qualifications for such a position. As you proceed you seem to forget or lose sight of your main objection, or else you do not express yourself clearly. You say, "To introduce a man of absolutely no legal attainments and experience to the public as the final arbiter in the Dominion of their rights and liberties, will do more to shake confidence in the Court than anything that could possibly be conceived." I quite agree with you, but no one has ever thought of introducing such a man. Let us keep to our text. You have made practice at the Bar the chief, in fact the only qualification for the Bench. You know that a man may have most eminent legal attainments and experience, that is to say, the experience of the student, and never have held a brief. No man can be admitted to the Bar in this country without very considerable legal attainments and experience. The question under consideration is whether or not after

having been admitted to the Bar a man may not be or become qualified for the Bench otherwise than by the experience of practice at the Bar. Sir William Blackstone, in his Commentaries, vol. III. page 53, referring to the "Judges of the land" and their relations to the law, says: "Their knowledge of that law is derived from experience and study from the '*viginti annorum lucubrationes*' which Fortescue mentions, and from being long personally accustomed to the judicial decisions of their predecessors." Not a word about practice at the Bar, or anything involving such practice in its ordinary meaning. The best lawyers have not always made the best Judges, while some of our best Judges never made any mark as practitioners.

Provision has been recently made for the appointment to the Judicial Committee of the Privy Council of representatives from the colonies. The duties of this tribunal are precisely similar to those of our Supreme Court. What do we find among the qualifications? Not that the appointee shall be a legal practitioner, but that he shall be a Judge of one of the Courts. And why a Judge? In order that he may by his judicial experience have become removed from those very influences which you claim to be essential. I mean those involved in the quotation that I have already made commencing with the words "years of practice at the Bar." I am aware that you are not alone in your contention, and there is, I admit, something to be said on both sides of the question; but I ask you and your readers to consider the matter calmly and logically, and without any regard to political considerations, and when you have done so, I think you will agree with me that for a Judge, especially of a Court having solely appellate jurisdiction there is something more essential than practice, namely, study. The material out of which such Judges should be made is the profound legal student rather than the practitioner at law. Years of diligent research in legal lore rather than "of practice at the Bar"; acquaintance with books rather than "with human nature"; competitive strife "with the principles of jurisprudence" rather than "with his fellows"; the "in-

stinct" of the jurist rather than of the "advocate"; these, together with scholarship, habits of industry, and the other qualities that I have mentioned, are, it seems to me, the requisites of a Judge of the present day, particularly a Judge of an appellate Court.

A man, who, to say nothing of his other characteristics, is known as one of the most profound jurists, who has occupied a prominent position as a law lecturer on constitutional questions, who has long been recognized as a profound lawyer and an eminent authority on the highest class of legal subjects, could not fail, as a member of the Supreme Court of Canada, to do credit to himself, the trbunal of which he would form a part, and to the country of which he has long been a distinguished jurist and statesman.

Yours truly,

HARRIS H. BLIGH.

28th November, 1896.

INDEX OF SUBJECTS.

[Ed., *following a title, indicates that it will be found in the* EDITORIAL REVIEW; L. A., *that it is a* LEADING ARTICLE; Cor., *that it is in a letter to the Editor.*]

THE CANADIAN LAW TIMES

NOTES OF CASES

AND

INDEX-DIGEST FOR 1896.

Edited by

E. DOUGLAS ARMOUR, Q.C.,

Of Osgoode Hall, Barrister-at-Law.

AND

E. B. BROWN,

Of Osgoode Hall, Barrister-at-Law.

VOL. XVI.

TORONTO:

THE CARSWELL Co. (LTD.) PUBLISHERS.

1896.

THE CANADIAN LAW TIMES

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.] [26TH JUNE, 1895.

McKENZIE v. NORTH-WEST TRANSPORTATION CO.

Contract—Correspondence—Carriage of goods— Transportation company—Carriage over connecting lines—Bill of lading.

Where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration.

Hussey v. *Horne-Payne*, 4 App. Cas. 311, followed.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods were shipped.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out

of the usual course of business and seeks to vary the terms of a prior mutual assent.

Judgment of the Court of Appeal affirmed.

Osler, Q.C., and *Lister*, Q.C., for the appellants.

Laidlaw, Q.C., and *Kappele*, for the respondent.

NOVA SCOTIA.] [9TH DECEMBER, 1895.

LAW v. HANSEN.

Action—Bar to—Foreign judgment—Estoppel—Res judicata—Foreign judgment obtained after action begun.

A collision occurred at sea between the ship "Rolf," belonging to H., and the barque "Emilie L. Boyd," belonging to L., by which both vessels were damaged. L. took proceedings against the "Rolf" in the District Court for the eastern District of New York, which resulted in a decision that the "Boyd" was solely to blame for the collision, and this decision was affirmed by the final Court of Appeal for such cases. Before this judgment was obtained, H. had brought an action in the Supreme Court of Nova Scotia against L., to which L. pleaded that the negligence of those in charge of the "Rolf" was the sole cause of the accident. After the American Court had given judgment in the former cause, H. replied to this plea setting up the judgment as a conclusive answer, and on the trial it was held that such judgment estopped L. from again contesting the question as to his negligence, though the trial Judge was of opinion that the "Rolf" was to blame. This decision was affirmed by the full bench of the Supreme Court of Nova Scotia.

Held, affirming the judgments below, that the judgment of the American Court, in proceedings between the same parties and involving the same issue, was a bar to the later action in Nova Scotia, and it made no difference that such later action was begun before the judgment was obtained.

Borden, Q.C., for the appellants.

Newcombe, Q.C., and *Drysdale*, for the respondent.

BRITISH COLUMBIA.]

LOWENBERG & CO. v. WOLLEY.

Principal and agent—Negligence of agent—Financial brokers—Lending money for principal—Liability for loss—Measure of damages.

W., having money to invest, consulted a member of the firm of L. & Co., brokers and real estate agents, who informed him that he had a first-class "gilt-edged" investment, and W. gave him $5,500, authorizing him to lend it on the security mentioned. The security was a mortgage on land, and the broker personally knew neither the borrower nor the property, but acted on the certificate of two friends of the borrower, neither of whom had experience in valuing real estate, which represented the land to be worth $7,000. No interest was ever paid on the mortgage, and on attempting to realize on the security it was found that the land was not worth more than half of the amount lent. W. then brought an action against L. & Co. for the amount of the loan, claiming that they were guilty of negligence in the transaction.

Held, affirming the decision of the Supreme Court of British Columbia, that the evidence established that L. & Co. were agents of W. in the matter of the loan, as they professed to act for him and in his interest, and it made no difference that they were remunerated by the borrower, and not by W. their principal; and also that L. & Co. were guilty of gross negligence and liable to make good the loss sustained by W. in consequence thereof.

Held, also, reversing the decision appealed from, TASCHEREAU and GWYNNE, JJ., dissenting, that W. was not entitled to recover back the whole $5,500 with interest at the rate in the mortgage, as held by the Court below, but could only recover the loss occasioned by the over-valuation adopted and acted on by L. & Co.

Held, *per* GWYNNE, J., that W. was entitled to the sum advanced, but with interest at six per cent. only.

Robinson, Q.C., for the appellants.

Moss, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

2ND D.C., N. & D.] [OSLER, J.A., 21ST DECEMBER, 1895.

COONEY v. SHEPPARD.

Husband and wife—R. S. O. c. 132, s. 5—Produce of farm rented by wife—"Proprietary interest" of husband.

An appeal by the execution creditor from the judgment of Ketchum, County Judge, presiding in the 2nd Division Court of Northumberland and Durham, in favour of the claimant, the wife of the judgment debtor, in an interpleader issue.

The property seized consisted of cattle, farming implements, and grain raised on the farm on which the claimant and her husband resided. The husband was formerly the tenant of the farm, but in November, 1894, the landlord distrained for rent, the execution creditor came in, and the whole chattel property was swept away. Thereupon husband and wife consulted as to the best way to meet the future, and it was determined that the experiment should he tried of making the wife the tenant and manager, the husband working upon the farm for her—practically working it as before. The landlord re-let the premises to her, she borrowed $200 from her brother, and stocked the farm in a small way. It was proved that the landlord would not have re-let to the husband, and the Judge in the Division Court found the whole transaction to have been honest; that the wife was the real tenant of the farm and the real owner of the goods; and that the husband had no proprietary interest therein.

Held, that, on the evidence, his findings of fact could not be disturbed.

The only question to be decided was whether the property seized, so far as it consisted of the produce of the farm, was properly gained or acquired by the claimant in any employment trade, or occupation in which she was engaged, or carried on and in which her husband had no proprietary interest, within the meaning of s. 5 of the Act respecting the property of married women, R. S. O. c. 132. The other chattels bought by or

given to her were, of course, her separate property by force of s.-s. 2 of s. 5.

The cases decided under the former Act, R. S. O. 1877, c. 125, on the subject of a separate trading by a married woman, had little or no bearing on the case. The question no longer was whether the proceeds or profits which the husband's creditors were attempting to grasp were derived from an occupation or trade which the wife carried on separately. At present the only limitation is that the husband must have no "proprietary interest" in the property. That expression signifies simply, "interest as an owner," or "legal right or title." If a married woman may be the owner or tenant of a farm, there is nothing in the relation of husband and wife which forbids the latter, as the law now stands, to engage in the occupation of farming or to procure her husband to manage and work the farm for her as her agent, more than any other trade or occupation, although, as said by the learned Judge below, the interference of the husband in the business must always be an element in determining the *bona fides* of the wife's claim."

Baby v. *Ross*, 14 P. R. 440, and *Larocque* v. *Robertson*, 18 O. R. 469, referred to.

Difference in the Manitoba statute pointed out and cases thereunder distinguished.

Appeal dismissed with the usual costs.

W. R. Riddell, for the appellant.

Aylesworth, Q.C., for the respondent.

High Court of Justice.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 14TH DECEMBER, 1895.

HENDRIE v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Railways—Lands injuriously affected—Right to compensation.

An appeal from the judgment of MEREDITH, C.J., at the trial, following his own previous decision upon a motion for an interim injunction, 26 O. R. 667, 15 Occ. N. 272, was dismissed.

McCarthy, Q.C., and *D'Arcy Tate*, for the defendants.

Robinson, Q.C., and *Bruce*, Q.C., for the plaintiff.

[BOYD, C., AND ROBERTSON, J., 17TH DECEMBER, 1895.

GARLAND v. CITY OF TORONTO.

Master and servant—Workmen's Compensation Act, 1892—Order to which workman injured was bound to conform—55 V. c. 20, s. 3, s.-s. 3.

The order within the meaning of 55 V. c. 20, s. 3, s.-s. 3, may be implied from the ordinary course of business in the construction of the work in question, and so may the fact that a fellow workman is in charge of a particular branch of business in such wise that his assistants are required to conform to his way of doing things and ordering things to be done; and the evidence in this action was such that the jury might have found such a case to have been established.

Nonsuit set aside and new trial ordered.

Elgin Myers, Q.C., and *W. J. Clark*, for the plaintiff.

Fullerton, Q.C., for the defendants.

[7TH JANUARY, 1896.

FARMERS' BANK v. SARGENT.

Summary judgment—Promissory note—Unconditional leave to defend.

On a motion for summary judgment under Rule 739, in an action upon a promissory note, one of the defendants gave facts on affidavit, shewing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note, but stated no facts as to such notice.

Held, that the defendant should have unconditional leave to defend.

E. T. English, for the plaintiffs.

M. Wilkins, for the defendant.

[BOYD, C., STREET, J., MEREDITH, J., 9TH JANUARY, 1896.

In re CURRY, CURRY v. CURRY.

Administration order—Executor—Reference—Conduct of—Parties.

An accounting party should not have the carriage of the proceedings in the Master's office, especially where there is a com-

petition between an executor and beneficiaries as to who should be first in obtaining an administration order.

Such an order, obtained on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the Court.

The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor.

W. H. Blake, for the executor.

L. G. McCarthy, for the legatees.

[BOYD, C., 4TH DECEMBER, 1895.

PATTERSON v. KING.

Landlord and tenant—Garnishment of rent—Wrongful distress.

Rent may be attached, and when it is attached the legal result is that the collateral remedy of the landlord, the judgment debtor, by way of distress is suspended; and by virtue of the Act relating to the apportionment of rent, R. S. O. c. 143, ss. 2-6, a part of such rent may be attached as it accrues *de die in diem*, though not actually payable till the next gale day.

J. E. Cook, for the plaintiff.

R. S. Neville, for the defendants King and McIlwain.

The defendant L. J. Williams in person.

[ROSE, J., 31ST DECEMBER, 1895.

ATTORNEY-GENERAL v. HAMILTON STREET RAILWAY CO.

Sunday—Street railways—Lord's Day Act, R. S. O. c. 203, s. 1—Construction—Exception.

The words "or other person whatsoever" in s. 1 of the Lord's Day Act, R. S. O. c. 203, are to be construed as referring to persons *ejusdem generis* as the persons named, merchant,

tradesman, etc.; and an incorporated company or person operating street cars on Sunday is not within the prohibition of the enactment.

Sandiman v. Breach, 7 B. & C. 96; *Regina* v. *Budway*, 8 Occ. N. 269; and *Regina* v. *Somers*, 24 O. R. 244, followed.

Semble, also, that the defendants, if the enactment applied were within the exception as to "conveying travellers."

Regina v. *Daggett*, 1 O. R. 537, followed.

Regina v. *Tinning*, 11 U. C. R. 636, not followed.

Moss, Q.C., and *A. E. O'Meara*, for the plaintiff.

Edward Martin, Q.C., and *Kirwan Martin*, for the defendants.

IN CHAMBERS.

[ROSE, J., 4TH DECEMBER, 1895.

In re McCABE v. MIDDLETON.

Division Court — Garnishee proceedings — "Cause" — "Action" —Jurisdiction.

A garnishee summons in a Division Court may be issued out of the Court of the division in which the garnishee lives or carries on business, notwithstanding that the cause of action did not arise and the primary debtor does not reside or carry on business therein.

A garnishee proceeding under s. 185 of the Division Courts Act is an "action" or a "cause" within the meaning of s. 87.

In re Hobson v. *Shannon*, 26 O. R. 554; *In re McLean* v. *McLeod*, 5 P. R. 467; and *In re Tipling* v. *Cole*, 21 O. R. 276, referred to.

Tytler, for the primary creditor.

E. D. Armour, Q.C., for the primary debtor.

Totten, Q.C., for the garnishees.

[THE MASTER IN CHAMBERS, 21ST DECEMBER, 1895.

KING v. FEDERAL LIFE ASSURANCE CO.

Costs—Third parties—Indemnity.

The defendants, having paid to other persons the moneys claimed by the plaintiff, brought in those persons as third parties for indemnity, whereupon the third parties paid the plaintiff the amount of his claim and costs.

Held, that the defendants were entitled to be paid by the third parties their costs of defence to be taxed between solicitor and client, and their costs of the claim over against the third parties to be taxed between party and party.

Hartas v. *Scarborough*, 33 Sol. J. 661, followed.

Masten, for the defendants.

G. C. Campbell, for the third parties.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 3RD DECEMBER, 1895.

In re ARMSTRONG.

Infant—Custody of—Husband and wife—Paternal right—Marital duty—Interest of infant.

In determining whether the custody of an infant child ought to be given to the mother as against the father, under ss. 182 and 183 of the Supreme Court in Equity Act, 53 V. c. 4, the Court will take into consideration the paternal right, the marital duty of husband and wife so to live that their child shall have the benefit of their joint care and affection, and the interest of the child.

If both the parents have disregarded their marital duty in the above respect, the Court will award the custody of the child to the father, unless it is satisfied that it would not be for the child's welfare.

Jordan, Q.C., for the petitioner.

Van Wart, Q.C., for the father.

[16TH DECEMBER, 1895.

BELYEA v. CONROY.

Costs—Trusts and trustees—Conversion of trust property—Refusal of trustee to join in suit.

C. wrongfully appropriated merchandise in his possession, as one of the trustees of P.'s estate, for the purposes of his own business. Subsequently, it came into the hands of the defendants under a general assignment to them by C. for the benefit of his creditors. A suit having been brought by the plaintiff, as one of P.'s trustees, against C. and the defendants for the recovery of any assets of the P. estate in their hands, the defendants offered to give up the merchandise to the plaintiff if he could identify it. This could not be done, nor could its value be determined by the plaintiff or the defendants until an inquiry was made by a referee of the Court.

Held, that the defendant trustees were not liable for the costs of the suit.

Where a trustee refusing to join with his co-trustees in a suit for the recovery of trust property was made a defendant to the suit, costs thereby incurred were not allowed against him.

Earle, Q.C., for the plaintiff.

Skinner, Q.C., for the defendant Conroy.

G. C. Coster, for the defendant Dever.

Ashe, for the defendant Hally.

Puysley, Q.C., one of the defendants, appeared in person.

IRVING v. McWILLIAMS.

Illegality—Agreement not to bid at auction sale—Pleading.

Though the defendant has not pleaded the illegality of an agreement by his answer, if its illegality is disclosed by the pleadings, the Court will not enforce it.

An agreement between two intending purchasers of Crown land timber licenses to two lots—neither wanting the whole of the lots—not to bid against each other at their public sale, but that one should bid them in for their joint benefit, is not illegal.

Blair, A.-G., and *M. G. Teed*, for the plaintiff.

A. A. Stockton, Q.C., and *Phinney*, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 19TH DECEMBER, 1895.

MORRICE v. McLEAN.

Mortgage—Foreclosure—Final order—Application to set aside.

Appeal from an order of the referee dismissing a motion by the defendant to set aside an order of foreclosure.

The decree was made in January, 1895, settling the amount due, and naming the 25th July then next as the day for payment.

The final order was granted on the 26th July, and the motion to set it aside was made on the 31st October.

The grounds on which it was sought to set aside the order were: (1) that the value of the property greatly exceeded the amount due; (2) and mainly, that taking the order was a breach of faith, an agreement having been come to between the solicitors some time in March to stay all proceedings in this suit and in connection with certain proceedings under the Real Property Act in connection with the property in question. Except the alleged agreement to stay the proceedings, no excuse

whatever was offered for the non-payment of the money at the appointed time.

Held, that, upon the affidavits and depositions, the referee was right when he came to the conclusion that no agreement to stay the proceedings was proved, and that the conduct of the plaintiff's solicitor was not open to the charge of bad faith in taking the final order when he did. There was also no sufficient evidence of value of the property.

While the Court readily opens a foreclosure upon a reasonable case being made for doing so, there must be some reason or excuse given for the failure to redeem at the proper time. Here there was absolutely none.

The defendant's solicitor knew in August that the final order had been obtained, and then negotiations began for a settlement; the terms were fair and reasonable. All at once the settlement which had been agreed to was repudiated and the motion made.

The order of the referee was right, and the appeal should be dismissed with costs.

Wilson, for the plaintiff.

Elliott, for the defendant.

[27TH DECEMBER, 1895.

DIXON v. WINNIPEG ELECTRIC STREET RAILWAY CO.

Discovery—Officer of company—Application to examine.

Action, under the Workmen's Compensation for Injuries Act, by a servant of the defendants. The cause of action alleged by the plaintiff was that, while in the employ of the defendants and working with some wires from which the electric current had been cut off for the purpose of carrying on the work on which he was engaged, the electric current was turned on and he thereby sustained injury. The current was, he alleged, generated at and turned on from a building called the power-house, and he claimed that there was faulty construction of the switchboard and plant in that building, whereby the current became connected with the wires with which he was working, and so he sustained injury.

The action being at issue, the plaintiff obtained an appointment to examine Somerset, said to be the foreman in the power-house of the defendants, and served a subpœna to secure his attendance, but he did not attend, because, as the defendants contended, he was not an officer of the company examinable under the statute.

The plaintiff then moved under Rule 390 to commit Somerset for contempt; he swore that Somerset was the foreman at the power-house of which he had the control and management, and the connection of the current was under his control and management. The secretary of the company filed an affidavit from which it was sought to argue that Somerset was not the foreman of the power-house or an officer of the company; his duties as electrician had never been defined by the directors, nor had any resolution or by-law been passed making him an officer of the company, and he had never been named or called foreman or superintendent. It was not denied that at the time of the accident Somerset had the control and management of the power-house, and that the connection of the current was under his control and management.

Held, that Somerset was an officer of the company within the meaning of Rule 379, similar to Ontario Rule 478, and should attend and submit to be examined.

Howell, Q.C., for the plaintiff.

Munson, Q.C., for the defendants.

[BAIN, J., 10TH DECEMBER, 1895.

BOOTH v. MOFFAT.

Fire—Damages for loss occasioned by—Negligence—What constitutes.

County Court appeal. The plaintiff sued to recover damages for loss of goods destroyed by a fire set out by the defendant, which spread to the plaintiff's premises.

On 12th April, 1895, about ten o'clock in the morning, the defendant set out fire to burn a bed of rushes on his land, in the low ground on the north of a creek that flowed across his quarter section. The fire burnt through the reeds in ten or fifteen minutes, and the defendant, who had been watching it,

went away to his work in a field to the north of the fire. Between the time when the defendant went to his work and 11.30, a fire started in the grass a short distance to the east of the ground that had been burnt over, and being carried by a high north-westerly wind, it spread with great rapidity over the prairie land between the defendant's and the plaintiff's, and reaching the plaintiff's land it burnt the buildings that were on the land and some personal property.

When the defendant first set out the fire, the wind was blowing lightly from the north, and he watched the fire burn through the reeds, and then he went away to his work, leaving the fire still smouldering; later, when he looked back, he saw that some small pieces of manure were still smouldering. Between ten and eleven the wind began to blow harder, and at half-past eleven the defendant saw the second fire at a place about 24 rods distant from where he had started the fire, and it was useless to attempt to stop it running.

It was not open to question, as a matter of fact, that, as the County Court Judge found, the fire that damaged the plaintiff's property started from the fire set out by the defendant; he held that the defendant had the right to use fire to burn the reeds, but that, as he had not been guilty of negligence in setting out or guarding the fire, he was not liable for the damage the fire had caused, and entered a verdict for the defendant. The plaintiff appealed.

Held, that the appeal must be allowed with costs, the verdict for the defendant set aside, and a verdict entered for the plaintiff for $250 damages with costs.

Courts and juries should exact from everyone setting out fire precaution and care proportionate to the risk, and whatever falls short of taking every precaution that is reasonably possible under the circumstance should be held to be negligence. There may have been no negligence on the part of the defendant in setting out the fire when he did, but it could hardly be said that in his subsequent conduct there was no negligence. To hold that there was not such negligence would be to hold, in effect, that he took all precautions to prevent the fire from spreading that could be expected from a reasonable and prudent man, and that he failed to do this was shewn by his own evidence. It was clearly the defendant's duty to have given his close attention to

the fire he had left, and to have foreseen what was likely to happen, and to have taken proper precautions to prevent it: his own statement that he did not see it till it was so far advanced that nothing could have been done to stop it was in itself sufficient to convict him of negligence that made him liable for the damage that the fire afterwards did.

Pitblado, for the plaintiff.

Clark, for the defendant.

[19TH DECEMBER, 1895.

McCUAIG v. PHILLIPS.

Contract—Construction—"To 1st May," meaning of—Computation of time.

The plaintiff sued to recover $547, the balance of the price of 4,585 bushels of wheat that he sold to the defendants. By the agreement the defendants were to give the plaintiff the benefit of any rise in the market price "to 1st May." Wheat was higher on the 30th April than at any other time during the month, and there was a further rise in the price on 1st May, and the question was whether the plaintiff was entitled to be paid at the market price of 30th April or at that of 1st May. The defendants contended that the expression "any rise in market price to 1st May" was to be taken to exclude that day. The plaintiff claimed to be entitled to the benefit of the rise that took place on 1st May. The defendants paid into Court $301, which, with the sum already paid the plaintiff, they claimed was more than would pay him for his wheat on the basis of the market price of 30th April.

Held, that judgment must be entered for the defendants with costs. The word "to" used in reference to a limit of time has the same meaning as "until." The word "until" is ambiguous, and may be considered to be either inclusive or exclusive of the day mentioned, according to the subject-matter and true intent of the document in which it is used: *Bondman* v. *Mellor*, 4 H. & N. 120; *Rex* v. *Stevens*, 5 East, 256; *Isaacs* v. *Royal Ins. Co.*, L. R. 5 Ex. 296.

The parties, no doubt, intended that the plaintiff was to get the highest market price between the time the agreement was

made and the date limited as the end of the period. It would seem more likely that they would end the period with the last day of the month than with the first day of the following month. If it were permissible to look at the conduct of the parties themselves to see in what sense they used the ambiguous words, it was clear that the plaintiff considered that the period did not extend past the 30th April, for on that day he went to the defendants' office in order to have a settlement for his wheat. The defendant Phillips was away, but the plaintiff met him at the station next day, and Phillips remarked that he supposed the time was up to settle for the wheat.

Nichols v. *Ramsel*, 2 Mod. 280; *Kendall* v. *Kingsley*, 2 Mass. 94; and *People* v. *Walker*, 17 N. Y. 502, were in the defendants' favour. The period limited ended with the 30th April, and the money paid into Court was more than enough to pay the balance due for the wheat at the highest market price to and including the 30th April.

Verdict for the defendants.

Martin and *Anderson*, for the plaintiff.

Howell, Q.C., and *D. A. Macdonald*, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUDGES IN BANC, DECEMBER, 1895.

HULL v. DONOHOE.

Costs—Counsel fee—Disbursements—Application to Court—Practice—Fiat.

The Supreme Court of Canada (15 Occ. N. 356) having reversed the judgmentof this Court in favour of the plaintiffs, and ordered them to pay the costs of the defendant of their appeal to this Court, the defendant moved on notice for a direction to the registrar to tax the sum of $328 paid to counsel for defendant, either as a disbursement under item 99 of the tariff, "all necessary disbursements properly vouched for," or as a counsel fee

under item 104, "counsel fee (including brief and all charges in connection therewith), in the discretion of the Court."

An affidavit of the defendant was filed shewing that she had paid her counsel the sum of $328 upon the argument of the appeal to this Court; that her counsel resided in Calgary, and was necessarily absent therefrom, in going to, remaining at, and returning from Regina, ten days, and his necessary travelling and hotel expenses amounted to $78.

Held, that the mode of application was not one to be approved of.

2. That the judgment of this Court having been reversed with costs in this Court and in the Court ove, this Court should, as a simple matter of duty, consider and determine what, if any, counsel fee should be allowed to the now successful party. The question would, in the natural course of things, be brought before the Court by the registrar when issuing the rule, and the Court might then desire to give either or both of the parties an opportunity to speak to it. But, in the event of such a matter being overlooked, it would not be out of place for counsel to draw attention to it, either openly in Court or otherwise, and it might be a matter of courtesy to indicate in advance to the opposite party the intention of reminding the Court and suggesting the exercise of discretion.

3. There is no provision in the tariff to cover the allowance of the counsel fee and travelling expenses as disbursements. Besides, at an early period in its history, the Court refused to grant or consider such an allowance, and there was no reason to depart from that ruling.

The Court dismissed the motion without costs, and gave a fiat for a counsel fee of $100, the same amount which had been previously allowed to the plaintiffs when this Court decided in their favour.

C. C. McCaul, Q.C., and *Ford Jones*, for the defendant.

P. McCarthy, Q.C., and *Hamilton*, Q.C., for the plaintiffs.

CONGER v. KENNEDY.

Husband and wife—Personal property of wife before marriage—Separate estate—Ordinance No. 16, 1889—"Her personal property."

One W. C. Allen, since deceased, was on the 11th December,

1889, domiciled in the North-West Territories, and so continued to be until his death. He was married on the 11th December, 1889, in Ontario, to Janet C. Conger, who then resided in Ontario. On the 9th January, 1890, they both came to Macleod, in the North-West Territories, where his place of residence was. Just prior to the marriage the wife was in possession of certain personal property in New York, which she removed therefrom to Macleod, where it was, on the 19th January, 1890, placed in the house then occupied by the husband and wife. In October, 1890, the wife left the Territories. On the 17th November, 1892, prior to the death of her husband, she gave a bill of sale of the personal property referred to, to the plaintiff, who in this action claimed it from the administrator of the husband's estate.

The action was tried before ROULEAU, J., who gave judgment of nonsuit.

The plaintiff appealed to the full Court, relying upon Ordinance No. 16 of 1889, assented to 22nd November, 1889, respecting the personal property of married women. It is as follows: "A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate and by will or otherwise deal with personal property as if she were unmarried, subject to the following proviso: Provided always that this Ordinance shall not affect any act done, or any right, or right of action, existing, accruing, accrued, or established at the time of or prior to the passing of this Ordinance."

P. McCarthy, Q.C., for the appellant.

C. C. McCaul, Q.C., for the defendant.

MCGUIRE, J.—The defendant contends that under the law of the North-West Territories, by virtue of the marriage, the personal property which up to that time had been the property of Janet C. Conger became the property of W. C. Allen; that the domicile of the husband should prevail and make applicable the law of the Territories. The plaintiff conceding that the law of the husband's domicile applies, I have simply assumed that to be law. But he replies that at the date of the marriage the personal property did not become the property of the husband, by reason of Ordinance No. 16 of 1889, which came into force before the marriage. It was admitted for the plaintiff that, had that Ordinance not been in force, the marriage would

have operated as a gift to the husband of the property in question.

The defendant contends that this Ordinance does not alter the law as to what is to be deemed the personal property of a married woman, but merely affects her rights and liabilities as to "her personal property," that is, whatever was then, under the law as it existed, "her personal property." By R. S. C. c. 50, ss. 36-40, it is provided that in the Territories certain property (wages, personal earnings, etc.), should be, in effect, the wife's personal property; but, in respect to all other personal property, the common law rule, that marriage operates as a gift to the husband of the personal property owned by the woman prior to the marriage, was the law of the Territories: *Brittlebank* v. *Grey-Jones*, 1 N. W. T. Reps., part 1, p. 1; 5 Man. L. R. 33.

The goods in question here are admittedly not affected by R. S. C. c. 50. It comes then to be a question as to what Ordinance 16 means. Did it intend to define what should be deemed "her personal property," or did it merely regulate her rights and liabilities in respect of "whatever then was her personal property?" It seems to me that it merely says that, in respect of whatever is her personal property, she shall have certain rights and liabilities. Had it intended to change the operation of the marriage as a gift by the wife to the husband of what had been her personal property, it seems to me some apt words would have been used to manifest that intention. (Reference to the Imperial Act of 1882 and the Ontario Act of 1872).

I can find only one word in the Ordinance which is descriptive of the personal property in respect to which she is to have the rights and liabilities mentioned, and that is the monosyllable "her." Can that word be expanded into embracing property which up to that time was clearly not "hers"? If this is to be treated as an Ordinance intended to vary the common law by making that which would otherwise be the husband's, the property of the wife, it comes within the rule that statutes in derogation of the common law are to be construed strictly.

It is argued that, unless such was the intention of the Legislature, Ordinance 16 is of no value, for it did not, it is urged, give a married woman any greater rights than had already been given to her by North-West Territories Act. While not admitting this, I do not feel under obligation to show that the Ordinance has any value. It is conceivable that absolutely useless

Ordinances may be passed. It surely does not follow, because the obvious meaning of an Act is of little or no value, that it must be held to have some other meaning, of which its plain language, in its ordinary sense, does not admit. Where the language used is open to more than one construction, a Court may select that meaning which is most consonant with the obvious intention of the Legislature. (Reference to *Brophy* v. *Attorney-General of Manitoba*, 11 R. 85.)

The words "her personal property" do not seem to me to be ambiguous; they are plain words, and do not appear to be open to more than one construction.

There is another rule of construction which may be invoked here, namely, that an affirmative statute shall not be construed to repeal the prior law by reason of repugnance, where the old and new can reasonably be construed to stand together. Here, at the date of the Ordinance, a married woman had, under the North-West Territories Act, certain property which could be properly called "her personal property," and the Ordinance can, without forcing its language, be read as defining her rights and liabilities in respect thereof.

It was urged that even if the Ordinance could be read as desired, it would be inconsistent with the North-West Territories Act, and consequently *ultra vires* of the Assembly. I cannot concur in that contention. The Assembly had power to legislate as to property and civil rights, subject to any legislation thereon by the Parliament of Canada, and not inconsistently therewith. The North-West Territories Act is in its nature a remedial Act for the benefit of married women; it altered the common law in certain particulars; if the Assembly chose to alter it still further, but so as not to affect the changes made by the Dominion statute, I see no objection to its doing so. However, it is not necessary to give any express decision on this question, in view of the conclusion previously arrived at.

I think the appeal should be dismissed with costs.

RICHARDSON and SCOTT, JJ., concurred.

WETMORE, J., dissented.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 2ND NOVEMBER, 1895.

IMPERIAL BANK OF CANADA v. BROMISH.

Promissory notes —"Receipt notes" — Non-negotiability — Action against supposed executrix—Presumption of death.

This action was brought by the bank against Johanna Bromish, as "executrix of John Bromish, deceased," to recover the amount due under several instruments described by the plaintiffs as promissory notes, made by John Bromish, deceased, in favour of D. M. Ratcliffe & Co., or order, and by them indorsed to the plaintiffs.

Judgment having been entered against the defendant by default, she applied for an order setting aside such judgment and the writ of *fi. fa.* issued thereon, and also the writ of summons and statement of claim and the service thereof upon the defendant.

G. S. McCarter and *G. W. Greene*, for the defendant.

P. McCarthy, Q.C., for the plaintiffs.

ROULEAU, J.—It appears by the papers in this cause that Johanna Bromish was sued as executrix of John Bromish, deceased. The only evidence at the time of the suit of John Bromish's death was a letter of one Radel, the joint maker of the lien notes with John Bromish, in which he said "John Bromish is dead." Upon that information the plaintiffs, without taking any steps to have some one appointed to represent John Bromish's estate, issued immediately a writ against his wife, Johanna Bromish, as executrix. It seems to me a very summary way of selling out the estate of a man who may be, for all we know, full of life. As it is shown by the affidavits and proceedings filed, John Bromish left his residence for parts unknown on the 12th July, 1895. On the 17th September, 1895, Albert Radel informed the plaintiffs that "Bromish is dead," and on the 21st September, 1895, suit was entered, and on

the same day a notice of motion for immediate judgment was given. So it is easily seen that no time was lost to secure judgment against Johanna Bromish.

But let us consider when the law presumes a man is dead, in default of positive evidence of his death. As a general rule a man's death is presumed after an unexplained absence of seven years. In all other cases, the Court will, *upon evidence*, assume that the presumed death took place after a certain date. There is no evidence in this case of such a character as to lead a Court of justice to a reasonable presumption that John Bromish is dead: Taylor on Evidence, pp. 218, 219, 220; Coote's Probate Practice, p. 218. The only evidence before me is that John Bromish disappeared from his residence on the 12th July last, and that he has not been heard from since.

Suppose, however, that John Bromish is dead, and that Johanna Bromish was duly and legally served with the writ of summons in this cause as *executrix de son tort*, had the plaintiffs a cause of action against the estate of John Bromish?

The notes sued upon in this case are what our law calls "receipt notes." It is specially provided in said notes that "the title, ownership, and right of possession of said cattle, for which this note is given, and of any increase therefrom, shall be and remain in D. M. Ratcliffe & Co. until this note or any renewal or renewals thereof, together with all interest, is fully paid," etc. This provision no doubt makes the note non-negotiable, for otherwise it would entitle D. M. Ratcliffe & Co. to negotiate the note for the full amount and then resume possession of the chattels sold under the contract. The fallacy becomes apparent when it is considered that, if it were correct D. M. Ratcliffe & Co. might have kept their cattle and recovered from the defendant the full price thereof. This is exactly what has been attempted here in this case. Under the provisions of the contract, D. M. Ratcliffe & Co. have resumed possession of the cattle and their increase, and the plaintiffs have sued as the holders of the promissory notes which were given for the same cattle.

The law is wise to declare these notes not negotiable, otherwise it would be unreasonable and would be the cause of very

great injustice. As there are any number of decisions on these points, I will merely refer to *Sawyer* v. *Pringle*, 18 A. R. 218, and *Dominion Bank* v. *Wiggins*, 21 A. R. 275.

For the above reasons and the authorities cited, I hold that there is not sufficient evidence before me to enable me to a reasonable presumption that John Bromish is dead, and therefore Johanna Bromish has been wrongly sued as executrix of John Bromish, her husband; also that the notes sued upon by the plaintiffs are "receipt notes" and non-negotiable, and that the plaintiffs had no right to sue on the same as indorsees or holders thereof.

The order is that the judgment entered in this cause in favour of the plaintiffs and the writ of *fieri facias de bonis* issued to the sheriff be set aside; and also that the writ of summons and statement of claim in this action and the service thereof be set aside. Costs of these proceedings to be costs to the defendant.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 16TH NOVEMBER, 1895.

REGINA v. ALLEN.

Criminal law—Larceny—Criminal Code, s. 331 — North-West Territories Act, s. 66—Trial by jury.

Section 66 of the North-West Territories Act provides that in the Territories, when the accused is charged with having committed larceny, in any case in which the value of the whole property alleged to have been stolen does not exceed $200, the charge shall be tried in a summary way without the intervention of a jury.

The prisoner was charged, under s. 331 of the Criminal Code, with stealing a yearling heifer of the value of $15.

Upon application being made on behalf of the prisoner for a jury, on the ground that the offence charged was one of the class formerly known as aggravated larceny, containing ingredients which brought it under a special section, under which a severer punishment could be inflicted than for larceny proper, and consequently was not such a case of larceny as was meant by s. 66 :—

Held, that the North-West Territories Act places no limitation on the meaning of the word "larceny." It is a generic term, and covers all kinds of larceny, simple or compound, unless a distinction is made. Although the use of the term "larceny" is discontinued under the Criminal Code, the word "theft" has been substituted therefor. The definition of theft contained in the Code fully covers cases under s. 331, and therefore a case under that section must be taken to be included within those governed by s. 66, s.-s. (*a*), of the Act.

C. F. Harris, for the prisoner.

C. F. P. Conybeare, Q.C., for the Crown.

[10TH DECEMBER, 1895.

In re COCHRANE.

Assessment and taxes—Court of Revision—Appeal—Notice of—Time for hearing—School Ordinance, s. 117, s.-s. 6.

An appeal by T. B. H. Cochrane and the Canada North-West Coal and Lumber Syndicate against the decision of the Court of Revision of the school district of Canmore, No. 168, in respect of the assessment of certain lands in the notice of appeal described.

The notice was given during the month of April, 1895, and it was not till the 4th November, 1895, that the appeal was fixed for hearing before ROULEAU, J.

J. B. Smith, Q.C., for the appellants.

C. C. McCaul, Q.C., for the respondents, objected that the time for hearing and determining the appeal had expired, the School Ordinance having enacted that appeals from the Court of Revision should be heard and determined before the 1st September, and the Judge had therefore no jurisdiction to entertain it.

BOULEAU, J.—The School Ordinance, s. 117, s.-s. 6, enacts that "at the Court so holden the Judge shall hear the appeals, and may adjourn the hearing from time to time, and defer the judgment thereon at his pleasure, but so that all appeals may be determined before the 1st day of September."

Were it not for this sub-section I should certainly have no jurisdiction to hear such an appeal. Deriving my jurisdiction from the statute, such an appeal as the present can only exist by statute, and only to the extent that the statute plainly gives the right: *Attorney-General* v. *Sillem*, 10 H. L. Cas. 704.

When the Legislature is thus giving to a Judge jurisdiction over rights that have always been the subject of such watchful jealousy, it is in a peculiar manner incumbent on the Judge to confine himself strictly within the limits prescribed for him: *Adey* v. *Hill*, 4 C. B. 38, 40.

It was decided in *Re Ronald and Village of Brussels*, 9 P. R. 232, that a County Court Judge, in appointing a day subsequent to the 1st day of August for hearing an appeal, is not exceeding his jurisdiction, notwithstanding the terms of s.-s. 7 of s. 68 of the Municipal Act of Ontario. The terms of s.-s. 7 are the same as those of s.-s. 6 of s. 117 of the School Ordinance, except that in the former the words "1st day of August" are used instead of "1st day of September." This decision seems to be very much *ad rem*; but, on referring to the facts of the case, it is obvious that it would have been a very great hardship on the appellant to deprive him of his appeal, for the clerk of the Court of Revision had neglected to give the proper notice of appeal, as bound by law to do. Taking into consideration this neglect on the part of a municipal officer, the Judge would not deprive the appellant of his appeal.

This case is quite different: there is no neglect on the part of any officer, but, for some reason or other, the Judge neglected to appoint a day, within the limit of time prescribed by the Ordinance, to hear and determine the appeal, and thus did not conform with the enactment of the law. However, I think the appellant should have prosecuted his appeal by reminding the Judge of it. It is not sufficient, it seems to me, for an appellant to have his notice of appeal duly served, and the Judge notified, and then to remain quiet till the time limited to hear his appeal has elapsed.

At all events, I am of the opinion that the time within which I could hear that appeal has elapsed, and that, therefore, I have no jurisdiction to hear it now.

Supeme Court of Canada.

ONTARIO.] [9TH DECEMBER, 1895.

CLARKSON v. McMASTER.

Chattel mortgage—55 V. c. 26, ss. 2, 4—Agreement not to register—Void mortgage—Possession by creditor.

By the Act relating to Chattel Mortgages, R. S. O. c. 125, a mortgage not registered within five days after execution is "void as against creditors;" and by 55 V. c. 26, s. 2, that expression extends to "simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting Assignments and Preferences." By s. 4 of 55 V. c. 26, a mortgage so void shall not, by the subsequent taking of possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors . . . before such taking of possession."

Held, reversing the decision of the Court of Appeal, 22 A. R. 138, that under this legislation a mortgage so void is void as against all creditors, and not merely those having executions in the sheriff's hands when the mortgagee takes possession, and simple contract creditors who have commenced proceedings to set it aside; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; that the mortgage is void as against persons becoming creditors after its execution as well as before; and as against an assignee appointed after the mortgagee has taken possession; and that a void mortgage will not be made valid by such taking of possession.

Held, per STRONG, C.J., that where a mortgage is given in pursuance of an agreement that there shall be neither registra-

tion nor immediate possession, such mortgage is, on grounds of public policy, void *ab initio*.

S. H. Blake, Q.C., for the appellants.

D. E. Thomson, Q.C., for the respondents.

QUEBEC]

BANQUE JACQUES CARTIER v. REGINAM.

Constitutional law—Powers of members of Government—Letter of credit—Contract of member of executive by—Ratification by legislature.

The Provincial Secretary of Quebec, in order to aid one D. to obtain advances by which he could execute a government contract for printing, wrote him a letter stating that the Government would have an amount voted for him in the ensuing session of the legislature, which would be paid to him as soon as the session ended, or to any person to whom the letter should be transferred by D., and indorsed by him. The Provincial Secretary had the assent of his colleagues to the writing of this letter, but was not authorized by order in council to write it. The money was voted by the legislature as stated in the letter.

Held, affirming the decision of the Court of Queen's Bench, that the letter created no contract between D. and the Government of Quebec.

Held, also, that the vote of the money by the legislature could not be said to ratify the contract with D., as no such contract existed, nor did it, any more than the letter itself, create an obligation binding on the Government, which could only be done by order in council.

D. indorsed the letter and transferred it, as a letter of credit, to La Banque Jacques Cartier.

Held, that such indorsement did not vest in the bank a claim that could be enforced at law against the Government.

Held, also, that the "letter of credit" was not a negotiable instrument under the Bills of Exchange Act, 1890, or the Bank Act, R. S. C. c. 120.

Langelier, Q.C., and *McKay*, for the appellants.

Casgrain, Q.C., A.-G., and *Ferguson*, Q.C., for the respondent.

MERCIER v. BARRETTE.

Title to land—Action en bornage—Surveyor's report—Judgment on—Acquiescence in judgment—Res judicata.

In an action *en bornage* between M. and B., a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the Court directed that boundaries should be placed at certain points on the line. M. appealed from that judgment to the Court of Review, claiming that the report gave B. more land than he claimed, and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention, and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced, and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements showed that the line indicated was not in the line of the old fence, and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the Court, was final as to the location of the fence, and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report, and ordered the surveyor to place the boundaries in the true line of the old fence.

Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review, in which both parties acquiesced, was *chose jugée* between them, not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else but start his line at the said point.

Belleau, Q.C., for the appellants.

Lane, for the respondent.

NORTH BRITISH AND MERCANTILE INS. CO. v. TOURVILLE.

Fire insurance—Condition of policy—Fraudulent statement—Forfeiture by—Proof of fraud—Presumption—Assignment of policy—Fraud of assignor—Appeal—Reversal on questions of fact.

In an action on an insurance policy by an assignee the company pleaded that the insured, in his application for insurance on his lumber, had materially exaggerated the quantity and value of the lumber mentioned in such application and thereby obtained excessive insurance thereon, and that after the loss he had falsely and fraudulently exaggerated the amount thereof, whereby the policy was forfeited under a condition therein that it should be forfeited if the claim was in any respect fraudulent. On the trial of the action there was no direct evidence of fraud, but a strong presumption was raised that the insured could not have had nor lost the quantity of lumber claimed for. The trial Judge held that fraud had not been established, and gave judgment for the plaintiffs, which was affirmed by the Court of Queen's Bench.

Held, reversing the judgment of the Court of Queen's Bench, that direct proof of the fraud was not essential; it was sufficient that it had been clearly established by presumption or inference, or by circumstantial evidence.

Held, further, that fraud by the insured having been established, his assignee could not recover.

If a sufficiently clear case is made out, the Court will allow an appeal on mere questions of fact against the concurrent findings of two Courts below. The rule to the contrary may also be departed from where the action is not tried by a jury; the trial Judge did not hear the witnesses, but gave judgment on written depositions; the Judges of the intermediate Court of Appeal were not unanimous, and the majority expressed great doubt in adopting the findings of the trial Judge; it did not appear that the non-production by the plaintiff of material documents was taken into consideration; and the intermediate Court gave weight to a piece of undoubtedly illegal evidence.

Trenholme, Q.C., and *Lafleur*, for the appellant.

Beique, Q.C., and *Geoffrion*, Q.C., for the respondents.

CORPORATION OF STE. CUNÉGONDE v. GOUGEON.

Appeal—Municipal by-law—Judgment of Superior Court on petition to annul—Appeal to Court of Queen's Bench—53 V. c. 70, s. 310—40 V. c. 29, s. 459—Jurisdiction of Queen's Bench—Judgment quashing appeal—Appeal to Supreme Court from.

By s. 310 of the special Act of incorporation of the city of Ste. Cunégonde de Montreal, 53 V. c. 70, any municipal elector is permitted, by petition to the Superior Court, to demand and obtain the annulment of any by-law of the city on the ground of illegality. By 40 V. c. 29, s. 1, the Town Corporations Act, its provisions apply to every town corporation or municipality which may thereafter be established by the legislature, and constitute part of the special Act relative thereto, unless expressly modified or excepted, and by s. 439 of the latter Act "no appeal shall lie under the provisions of this Act from any judgment rendered by any Judge of the Superior Court respecting municipal matters."

A petition was presented to the Superior Court to annul a by-law of the corporation of Ste. Cunégonde, and the prayer was granted. The corporation appealed to the Court of Queen's Bench, which held that said s. 439 of the Town Corporations Act, not having been excluded from the city charter, was to be read as forming part of it, and that the Court had no jurisdiction to entertain the appeal. The corporation then sought to appeal to the Supreme Court of Canada.

Held, affirming the decision of the Court of Queen's Bench, that an appeal would not lie to that Court from the judgment of the Superior Court.

Held, further, that no appeal would lie to the Supreme Court of Canada, which can only entertain appeals from decisions of the Court of Queen's Bench, and of the Court of Review in certain cases.

Appeal quashed with costs.

Charbonneau, for the respondent.

Beique, Q.C., for the appellant.

MANITOBA.]

FRANCIS v. TURNER.

Debtor and creditor—Agreement between—Conditional license to take possession of debtor's goods—Creditor's opinion of debtor's incapacity—Bona fides in forming opinion—Grounds—Replevin—Joint conversion.

F., a trader, having become insolvent, and being indebted, among others, to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors fifty per cent. of their claims, T. M. & Co. indorsing his notes for securing such payment, they to be paid in full, but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co. should at once become due, and they could take possession of the stock-in-trade, book debts, and property of F., and sell the same for their claim, having first served on F. a notice in writing, signed in the firm name, stating that, in their opinion, F. was so incapable.

This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co., then consisting of T. and N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co. until a certain later day, and resumed possession, but when T. M. & Co. returned on such day, he disputed their right, and ejected them from the premises. Two days afterwards he assigned to an official assignee for the benefit of all his creditors and T. M. & Co. issued a writ to replevy the goods from him and the assignee.

Held, affirming the decision of the Court of Queen's Bench, GWYNNE, J., dissenting, that F. and the assignee were guilty of a joint conversion of the property replevied.

Held, also, affirming that decision, GWYNNE, J., dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable, such opinion must govern, though mistaken in point of law

or fact, illogical, or inconclusive; that they were justified in believing, from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands ot T. M. & Co. had been complied with did not necessarily show *mala fides*; and that the change in the firm of T. M. & Co. did not vitiate the notice, as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F.

Ewart, Q.C., for the appellants.

Howell, Q.C., for the respondents.

British Columbia.]

CITY OF VANCOUVER v. BAILEY.

Statutes—General Act—Repeal of special Act—Repeal by implication—By-law—Municipal corporation.

The original charter of the city of Vancouver provided that any by-law for the purpose of raising money for municipal purposes should receive the assent of a majority of the ratepayers. By an amendment to the charter in 1893, the assent of three-fifths of the ratepayers voting on any such by-law was made necessary. In the same session of 1893 the general Municipal Act was amended, and one provision of the amendment was that every money by-law of a municipality should be passed by a majority of the ratepayers voting upon it. In proceedings to quash a by-law of Vancouver to raise money for supplying the city with electric light:—

Held, affirming the decision of the Supreme Court of British Columbia, that the general Act would not repeal the special charter of the city by implication even if passed at a subsequent session, and, *a fortiori*, an Act passed at the same session would not so repeal it.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [14TH JANUARY, 1896.

WILLIAMS v. LEONARD.

Amendment—Pleading—Bills of Sale Act—Chattel mortgage.

Decision of the Queen's Bench Division, 16 P. R. 544, 15 Occ. N. 234, affirmed on appeal.

Moss, Q.C., for the appellant.

Gibbons, Q.C., for the respondents.

ARGLES v. McMATH.

Landlord and tenant—Fixtures—Short Forms of Leases Act—R. S. O. c. 106—Forfeiture.

A tenant may remove from the demised premises such articles, commonly known as trade fixtures, as are brought on the demised premises by him for the purposes of his business, even though they are fastened to the building, provided, however, the removal can be effected without substantial injury; and the covenant in the Short Forms of Leases Act, R. S. O. c. 106, to leave the premises in repair, does not restrict this right.

Where the determination of a lease depends upon an uncertain event, such as an election to forfeit upon the making of an assignment for the benefit of creditors, a reasonable time for the removal of trade fixtures must be allowed.

Judgment of the Queen's Bench Division, 26 O. R. 224, 15 Occ. N. 85, affirmed.

William Macdonald, for the appellant.

Shepley, Q.C., for the respondent.

MOLSONS BANK v. COOPER.

Collateral security — Suspense account — Banks — Estoppel—Execution—Creditors' Relief Act.

A mercantile firm obtained a line of credit from a bank, "to be secured by collections deposited," and made in favour of the bank a number of notes to cover the amount of the advance. They deposited with the bank customers' notes to an amount nearly equal to the advance, and from time to time withdrew notes that fell due, and deposited others. They suspended payment, and the bank obtained several judgments against them on such of their notes as were due, and issued executions. The sheriff realized under these and other executions, and prepared to make a distribution under the Creditors' Relief Act. The defendants then made an application to compel the bank to credit on the judgments moneys collected by it upon the customers' notes, and an issue was directed, in which it was held that the bank was entitled by virtue of the agreement entered into to hold these moneys in suspense as security against any ultimate loss, and was therefore not bound to give credit. Then the bank brought an action on other notes that had matured, having at the time a larger sum in the suspense account than the amount for which action was brought. At this time the sheriff expected to pay a further dividend under the Creditors' Relief Act.

Held, *per* HAGARTY, C.J.O., and BURTON, J.A., that the bank was entitled to judgment for the full amount of the claim, and was not bound to appropriate the moneys collected to that particular portion of the debt.

Held, also, *per* HAGARTY, C.J.O., and OSLER, J.A., that at all events the judgment in the issue was conclusive upon this question.

In the result the judgment of the Queen's Bench Division, 26 O. R. 575, was reversed; MACLENNAN, J.A., dissenting.

Shepley, Q.C., for the appellants.

Foy, Q.C., and *J. S. Denison*, for the respondents.

CH. D.]

MANLEY v. LONDON LOAN COMPANY.

Mortgage—Payment of prior incumbrance—Interest—Assignment of mortgage —Purchaser of equity of redemption.

When a loan is effected for the purpose of paying off incumbrances, one of which, at a lower rate of interest than the new mortgage, is not due, and the prior mortgagee refuses to accept prepayment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, but must, until the prior mortgage is paid, charge as against the mortgagor only the interest actually paid to the prior mortgagee.

An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, therefore, in such a case as this, charge the mortgagor with the increased rate.

The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the mortgagor and himself, does not make him liable to pay that sum to the mortgagees.

Judgment of the Chancery Division affirmed.

Gibbons, Q.C., for the appellants.

W. H. Blake, for the respondent.

BRIDGEWATER CHEESE FACTORY COMPANY v. MURPHY.

Company—Bills of exchange and promissory notes—Discount by president.

Where the president of an incorporated company made a promissory note in the company name without authority, and discounted it with the company's bankers, paying the proceeds by cheques in the company name to creditors of the company, whose claims should have been paid by him out of moneys which he had previously misappropriated, the bankers, who took in

good faith, were held entitled to charge the amount of the note, when it fell due, against the company's account.

Judgment of the Chancery Division, 26 O. R. 327, 15 Occ. N. 88, affirmed; BURTON, J.A., dissenting.

McCarthy, Q.C., *E. G. Porter*, and *W. Cross*, for the appellants.

Moss, Q.C., *S. Masson*, and *D. E. K. Stewart*, for the respondents.

[14TH JANUARY, 1895.

MERIDEN BRITANNIA CO. v. BRADEN.

Costs—Liability to solicitor—Taxation against opposite party.

Where, by express contract, a party does not incur or become liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party.

Jarvis v. *Great Western R. W. Co.*, 8 C. P. 280, and *Stevenson* v. *City of Kingston*, 31 C. P. 333, approved.

Decision of the Chancery Division, 16 P. R. 410, 15 Occ. N. 94, affirmed.

W. H. P. Clement and *A. McLean Macdonell*, for the appellant.

J. W. Nesbitt, Q.C., for the respondents.

C. P. D.]

COBBAN v. CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Release—Reduced rate—51 V. c. 29, s. 246 (D.)—Trial—Findings of jury.

A railway company is liable for damages to goods resulting from negligence, even though the shippers of the goods agree in consideration of the allowance of a reduced rate of freight not to hold the company liable.

Vogel v. *Grand Trunk R. W. Co.*, 11 S. C. R. 612, followed.

Where the jury find negligence, and then define the negligence to consist in doing certain acts, the Court, if there is some

evidence of negligence in other respects, may in their discretion order a new trial, although there is no evidence to support the specific findings.

Judgment of the Common Pleas Division, 26 O. R. 732, 15 Occ. N. 363, affirmed.

D. E. Thomson, Q.C., and *J. B. Holden*, for the plaintiffs.

W. Nesbitt and *Angus MacMurchy*, for the defendants.

Fullerton, Q.C., for third parties.

JONES v. GODSON.

Arbitration and award—Arbitrators' fees—Penalty—R. S. O. c. 53, s. 29.

An arbitrator is not brought within the punitive provisions of s. 29 of R. S. O. c. 53, when the payment of the alleged excessive fees is made by cheque to an agent who has authority to accept money only, and the arbitrator refuses to take the cheque.

Per MACLENNAN, J.A.—The person desiring to take up the award may either have the fees taxed and then tender the amount, or he may pay the amount demanded and bring action for the penalty, which is a sum equal to treble the excess demanded, and not equal to treble the whole amount of the fees demanded.

Judgment of the Common Pleas Division, 25 O. R. 444, 14 Occ. N. 448, affirmed.

W. R. Smyth, for the appellant.

W. Nesbitt and *A. Monro Grier*, for the respondents.

HANES v. BURNHAM.

Slander—Privilege—Malice—Post office inspector—Notice of action.

A statement by a post office inspector, when investigating complaints as to lost letters, to the sureties of the postmaster that the postmaster's wife has stolen the letters in question and has given him a written confession of her guilt, is *prima facie*

privileged, because of the financial interest of the sureties in the investigation, but such a statement to a partner of one of the sureties is not protected.

The facts that the plaintiff at the trial denies having stolen the letters and having made a confession, and that the inspector does not produce the alleged confession or in any way account for it, is some evidence that he made the accusation knowing it to be untrue and therefore malicious so as to displace the *prima facie* case of privilege.

A post office inspector is not entitled to notice of action to recover damages for defamatory statements made by him.

Judgment of the Common Pleas Division, 26 O. R. 528, 15 Occ. N. 237, affirmed.

F. E. Hodgins and *W. Nesbitt*, for the appellant.

Lynch-Staunton and *J. G. Farmer*, for the respondent.

MEHARG v. LUMBERS.

Bankruptcy and insolvency—Assignments and preferences—Assignment of book debts—Account—R. S. O. c. 124, s. 8.

When an assignment of book debts is set aside as a preference in an action by an assignee for the benefit of creditors, the preferred creditor must pay to the assignee moneys collected under the preferential security before the attack upon it.

Judgment of the Common Pleas Division affirmed.

Moss, Q.C., for the appellant.

Shepley, Q.C., for the respondent.

PARKER v. McILWAIN.

Attachment of debts—Rents—Ex parte orders—Rescission of—Mortgagee—"Party affected"—Notice to tenants—Attornment—Assignment of rents.

Held, reversing the decision of the Common Pleas Divisional Court, 16 P. R. 555, 15 Occ. N. 236, that mortgagees who had served notice upon tenants of the mortgagor, in occupation of the mortgaged premises, to pay the rents to them were "parties

affected " by *ex parte* orders obtained by a judgment creditor of the mortgagor attaching such rents as debts, within the meaning of Rule 536.

And *semble, per* OSLER, J.A., that, even without that Rule, the practice would have warranted a substantive motion by a third party interested to discharge the attaching orders.

Held, also, that the attaching orders were properly set aside; for, although the service of the notice upon the tenants was not in itself sufficient to cause the tenants to hold of the mortgagees, there was satisfactory evidence of an attornment by the tenants; and the notice was signed by the mortgagor under the words "I approve of the above," which operated as an assignment of the rents to the mortgagees.

W. Cassels, Q.C., and *W. H. Lockhart Gordon*, for the appellants.

Aylesworth, Q.C., and *J. E. Cook*, for the respondent.

BOYD, C.]

THOMPSON v. SMITH.

Will—Construction—"My lawful heirs."

The general rule that where a testator devises property to his "heirs," the heirs are to be ascertained at the time of his death, is not affected by the fact that in the will specific provision is made for the person answering that description.

Where therefore a testator, after a gift to his wife and only child for their joint lives and to the survivor for life, directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to take the residue.

Re Ford, Patten v. *Sparks*, 72 L. T. N. S. 5, applied.

Judgment of BOYD, C., 25 O. R. 652, 15 Occ. N. 8, reversed.

Moss, Q.C., and *D. B. MacTavish*, Q.C., for the appellant.

W. Wyld, for the respondents.

ARMOUR, C.J.]

PAVEY v. DAVIDSON.

Action—Fraudulent conveyance—Mortgage of foreign land.

Where all parties reside in this Province, an action can be maintained in this Province by a creditor to have a mortgagee of foreign land declared a trustee for the debtor of the moneys secured by the mortgage.

Judgment of ARMOUR, C.J., reversed; OSLER, J.A., dissenting.

Gibbons, Q.C., for the appellants.

T. H. Purdom and *Francis Love*, for the respondents.

MEREDITH, C.J.]

JANES v. O'KEEFE.

Landlord and tenant—Lease—License—Covenant to pay taxes—Assessment and taxes.

A lease, made in pursuance of the Short Forms Act, of specifically described premises, contained a provision that the lessee might at any time erect a building or extension over a lane described as being "north of the premises hereby demised," the building or extension to be at least nine feet above the ground, and the lessee covenanted to pay all taxes "to be charged upon the demised premises or upon the said lessor on account thereof." The lease also contained a provision that if the lessors elected not to renew the lease, they were to pay for the buildings which should at that time be erected "on the lands and premises hereby demised and over the said lane:"—

Held, per HAGARTY, C.J.O., and BURTON, J.A., affirming the judgment of MEREDITH, C.J., 26 O. R. 489, 15 Occ. N. 182, that the covenant to pay taxes did not apply to the portion of the buildings afterwards erected over the lane.

Per OSLER and MACLENNAN, JJ.A., that the right to build was part of the subject-matter passing by the lease, and that the lessee was liable to pay the taxes assessable against the portion of the building over the lane.

Held, also, however, that this was at all events a question of assessment, and that, although the lessor had been assessed in respect of the lane for its full value as vacant land, and the lessee had been assessed in respect of the extension as merely so much bricks and mortar, the lessor could not recover any portion of the taxes paid by him, the apportionment of the assessment being altogether a matter for the assessment department; BURTON, J.A., expressing no opinion on this point.

McCarthy, Q.C., *E. F. B. Johnston*, Q.C., and *N. F. Davidson*, for the appellant.

Moss, Q.C., and *W. H. Lockhart Gordon*, for the respondents.

ROBERTSON, J.]

TRUST AND LOAN COMPANY v. McKENZIE.

Mortgage—Owner of equity of redemption—Extension of time for payment—Increase in rate of interest.

An agreement between the mortgagee and the purchaser of the mortgaged premises for an extension of time for payment of the mortgage, in consideration of payment of interest at an increased rate, with a reservation of remedies against the mortgagor, does not operate as a release of the liability of the mortgagor upon his covenant. He is not a mere surety, and if his right of redemption is not affected or the value of the mortgaged property impaired, he cannot complain.

Judgment of ROBERTSON, J., reversed.

Marsh, Q.C., for the appellants.

J. N. Fish, for the respondent.

LONG v. CARTER.

Bankruptcy and insolvency—Assignments and preferences—Principal and agent—Trust.

When an agent purchases goods for his principal with money supplied by the principal, there is a trust impressed upon the goods in the principal's favour, and this trust is enforceable

against the agent's assignee for the benefit of the creditors, even though the agent has, while purchasing for the principal, also purchased goods of the same kind for himself, and has not set aside specific portions of the goods to answer the principal's claim.

Harris v. *Truman*, 9 Q. B. D. 264, applied.

Judgment of ROBERTSON, J., affirmed.

Gibbons, Q.C., for the appellant.

Crerar, Q.C., for the respondents.

MACMAHON, J.]

SMITH v. WALKERVILLE MALLEABLE IRON CO.

Company—Share certificates—Estoppel—R. S. O. c. 157, s. 52.

A company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. c. 157, issued a certificate stating that a certain shareholder was entitled to twenty-two shares of the capital stock, as he in fact at the time was. The shares were not numbered or identified, but the certificate was numbered and contained the words: "Transferable only on the books of the company in person or by attorney on the surrender of this certificate." The shareholder assigned the shares to the plaintiff for value, and gave the certificate to him with an assignment indorsed thereon. The plaintiff gave no notice to the company, and did not apply to be registered as a shareholder until several months had elapsed, and in the meantime the shareholder executed another transfer of the shares for value to an innocent transferee, who was registered by the company as the holder of the shares without production of the certificate.

Held, that the transfer to the plaintiff, in view of the provisions of s. 52 of the Joint Stock Companies Letters Patent Act, R. S. O. c. 157, conferred upon him a mere equitable title, which was cut out by the subsequent transfer; and that while the company might have insisted upon production of the certificate, they were not bound to do so, and were not estopped from denying the plaintiff's right to the shares.

Judgment of MacMahon, J., reversed; Hagarty, C.J.O., dissenting.

Lash, Q.C., for the appellants.

J. W. Hanna, for the respondent.

Street, J.]

In re HODGINS AND CITY OF TORONTO.

Municipal corporations—Sidewalks—55 V c. 42, s. 623 (b.)

Publication of an advertisement in a public newspaper having a large circulation in the municipality, stating that the corporation intend to construct sidewalks in certain named districts, is not sufficient notice to a property owner affected by the proposed work.

The procedure to be observed in passing by-laws for the construction of sidewalks considered.

Judgment of Street, J., 26 O. R. 480, 15 Occ. N. 177, affirmed.

Fullerton, Q.C., and *T Caswell*, for the appellants.

F. E. Hodgins, for the respondent.

MacTAVISH v. ROGERS.

Bankruptcy and insolvency—Assignments and preferences—Action by creditor in assignee's name—R. S. O. c. 124, s. 7.

If a preferential security is successfully attacked by a creditor suing under order of the Court in the name of the assignee for the benefit of creditors, he can recover no more than his own claim and costs.

A creditor cannot, after obtaining such an order, increase the amount that he can recover by acquiring the claims of other creditors who have not been willing to consent to the proposed proceedings.

Judgment of Street, J., varied.

Shepley, Q.C., for the appellant.

Watson, Q.C., and *S. C. Smoke*, for the respondents.

C. C. WENTWORTH.] [14TH JANUARY, 1896.

MILLS v. HAMILTON STREET RAILWAY CO.

Costs—County Court—Nonsuit—Appeal.

Upon the trial of a County Court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the Court of Appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs.

Held, however, that nothing was shown to induce the Court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the lost trial, and the motion in term.

J. W. Nesbitt, Q.C., for the plaintiff.

E. Martin, Q.C., for the defendants.

C. C. MIDDLESEX.]

CONNOLLY v. COON.

Landlord and tenant—Lease—Breach by tenant—Damages.

When a tenant leaves the demised premises before the expiration of the term, paying rent up to the time of leaving, and notifying the landlord that he does not intend to keep the premises any longer or pay any more rent, the landlord cannot at once recover the whole rent for the unexpired portion of the term. He must either consent to the tenant's departure and

treat the term as surrendered, or must treat the term as subsisting and sue for future gales of rent as they fall due.

Judgment of the County Court of Middlesex reversed.

Magee, Q.C., for the appellant

N. W. Rowell, for the respondent.

1ST D. C. GREY.] [OSLER, J.A., 31ST DECEMBER, 1895.

WRIGHT v. HOLLINGSHEAD.

Execution—Exemptions—Chattel ordinarily used in the debtor's occupation.

Tools and implements ordinarily used in the execution debtor's occupation are no longer exempt from seizure when he changes that occupation to one in which the tools and implements in question are not ordinarily used.

An execution creditor was held entitled, therefore, to garnish the price of a baker's waggon sold by the execution debtor a few days after he had abandoned the occupation of baker and had entered upon the occupation of laundryman.

Judgment of the First Division Court of Grey reversed.

W. A. Bishop, for the appellant.

H. B. Spotton, for the respondent.

High Court of Justice.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 14TH DECEMBER, 1895.

REGINA v. WOODYATT.

Certiorari—Magistrate—Notice to—Contempt—Attachment.

Where a writ of *certiorari* for the removal of a summary conviction, for the purpose of quashing it, was issued and served on the clerk of the peace, but did not come to the notice or knowledge of the magistrate, who enforced the conviction by the issue of a distress warrant:—

Held, that the magistrate could not be held to be guilty of contempt, so as to justify a writ of attachment being issued against him.

J. W. McCullough, for the defendant.

Wilkes, Q.C., for the magistrate.

REGINA v. FLEMING.

Police magistrate—Salary—Ratepayer of city to which fine payable—Disqualification.

Section 419 (*a*) of the Municipal Act, 1892, which provides that magistrates shall not be disqualified from acting as such by reason of the fine or penalty, or part thereof, going to the municipality of which he is a ratepayer, includes a police magistrate.

Where a police magistrate, appointed under R. S. O. c. 172, is paid a salary instead of fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, and so is not thereby disqualified.

Semble, that there was no disqualification here at common law.

J. W. McCullough, for the defendant.

Wilkes, Q.C., for the magistrate.

[21ST DECEMBER, 1895.

REGINA v. OSBORNE.

Gaming—Betting—Place therefor—Telegraph office—Conviction—Criminal Code, ss. 197, 198.

A bank, a telegraph office, and another office were simultaneously opened in a town. Persons deposited money in the bank and took receipts therefor, which receipts were taken to the telegraph office, where information as to certain races being run in the United States was furnished, and instructions were sent by telegraph without charge to one B. to place or bet the money represented by the receipts on the races, and if the horses upon which the bets were made won, the person depositing the money was paid at the third office under instructions by telegraph from B.

Held, that the defendant, who kept the telegraph office and sent the messages, was properly convicted for keeping a common betting-house under ss. 197 and 198 of the Code.

J. R. Cartwright, Q.C., for the Crown.

W. R. Riddell, for the defendant.

[ARMOUR, C.J., AND FALCONBRIDGE, J., 14TH DECEMBER, 1895.

REGINA v. COURSEY.

Prohibition—Public Health Act—Conviction under by-law in schedule—Issue of distress warrant—Right to appeal to Sessions.

Under a summary conviction for an offence against the by-law contained in schedule B. to the Public Health Act, R. S. O. c. 205, the convicting magistrate, notwithstanding an appeal to the Sessions, issued a distress warrant, under which the defendant's goods were seized.

Held, that the issue of the distress warrant was a ministerial and not a judicial act, and therefore a writ of prohibition to the magistrate would not lie.

Judgment of ROSE, J., 26 O. R. 685, 15 Occ. N. 311, reversed.

Aylesworth, Q.C., for the magistrates.

Shepley, Q.C., for the defendants.

In re HOBSON v. SHANNON.

Prohibition — Division Court — Garnishee proceedings — Judgment against garnishee—New trial—R. S. O. c. 51, s. 145.

The provisions of s. 145 of the Division Courts Act as to a new trial do not apply to a garnishee so as to put him on the same footing as a plaintiff or defendant in an action.

Re McLean v. *McLeod*, 5 P. R. 467, followed.

Re Tipling v. *Cole*, 21 O. R. 276, distinguished.

Decision of BOYD, C., 26 O. R. 554, 15 Occ. N. 258, affirmed.

Raney, for the primary creditor.

A. D. Cartwright, for the garnishees.

MOUNTCASTLE v. NORWICH UNION IRE INSURANCE SOCIETY.

Fire insurance—Agent of company—Delegation of authority.

C., the defendants' local agent, and T. were in the habit of assisting each other in business, and had discussed entering into partnership, though none had been formed. On T. bringing a risk on a mill property to C., C. told T. that, as he was better versed in this kind of property, he was to inspect it himself, giving him a blank form of application and interim receipt, and telling him, if he found the risk a good one, to take the insurance and issue the receipt in the names of C. and T. T. thereupon inspected the property, and, being of the opinion that the risk was a good one, signed the receipt as suggested. Subsequently he informed C. of the circumstances, who thereupon wrote to the head office, enclosing the application and advising the acceptance of the risk, and requesting the general agent, if the risk was not accepted, to wire him; but, instead of doing so, the general agent wrote, but in the meantime the property was destroyed by fire.

Held, that C. had no power to delegate his authority, and therefore no liability was imposed on the company.

Summer v. *Commercial Union Ins. Co.*, 6 S. C. R. 19, followed.

The American authorities and *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav. 377, remarked on as being opposed to this decision.

T. J. Blain, for the plaintiff.

R. McKay, for the defendants.

LARKIN v. GARDINER.

Sale of land—Agreement—Option.

A parcel of land having been placed in a land agent's hands for sale, the defendant went to him and offered to purchase it at a less sum than that at which the agent was authorized to sell, whereupon the agent said he would submit the offer to the plaintiff, and procured the defendant to sign a form of agree-

ment for the sale and purchase of the land, which was taken by the agent to the plaintiff, who then signed it, but, before the defendant was notified thereof, he gave notice to the agent, withdrawing his offer.

Held, that the instrument, though in form an agreement, was in substance a mere offer, and as the defendant had withdrawn before he was notified of its acceptance, there was no completed agreement.

O. M. Arnold, for the plaintiff.

J. Bicknell, for the defendant.

[23RD DECEMBER, 1895.

SHAVER v. COTTON.

Company—Action against stockholder—Sci. fa.—Winding-up Act.

The plaintiff, on 30th March, 1892, recovered judgment against a company incorporated by letters patent under the Joint Stock Companies' Letters Patent Act, upon which a *fi. fa.* goods was issued, and returned *nulla bona*, and on 3rd April a winding-up order was made under R. S. C. c. 29 and 52 V. c. 32 (D.). Subsequently the plaintiff brought an action by way of *scire facias* against the defendant, a shareholder in the company, to recover the amount of his judgment. At the trial judgment was ordered to be entered for the plaintiff, upon the liquidator being added as a co-plaintiff within a week; but in case of failure to do so, the action was to be dismissed with costs; and by a supplementary judgment, the liquidator not having been added, the action was dismissed, but without prejudice to any winding-up proceedings. On appeal to a Divisional Court, judgment was directed to be entered for the plaintiff.

Remarks as to the difference between the Imperial Companies' Act, 1862, and our Winding-up Acts, as to stay of proceedings.

F. E. Titus, for the plaintiff.

Raney, for the defendant.

[ARMOUR, C.J., AND STREET, J., 14TH DECEMBER, 1895.

McGUINNESS v. DAFOE.

Justice of the peace — Jurisdiction—Arrest—Felony—Issue of warrant—Absence of written information—Reasonable suspicion that felony committed—Notice of action—Sufficiency of.

A magistrate acts without jurisdiction, and so renders himself liable in trespass, where, without any written information charging another with a felony, he issues a warrant for his arrest therefor; and while a reasonable ground for the belief that such person had committed the felony might justify the magistrate in arresting such person himself, it does not enable him to issue his warrant for his arrest by another.

Ashfield's Case, 6 Co. 320, followed.

The notice of action in this case alleged that the defendant, on the 8th September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested and kept under arrest on a charge of arson, and on the same day maliciously, illegally, and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him, etc., and to be committed for trial, etc., and to be confined in the common gaol, etc., alleging the subsequent indictment of the plaintiff and his trial on the charge, and his acquittal.

Held, a good notice of action in trespass.

Clute, Q.C., for the plaintiff.

W. R. Riddell, for the defendant.

[FALCONBRIDGE AND STREET, JJ., 31ST DECEMBER, 1895.

FARWELL v. JAMIESON.

Landlord and tenant—Distress for rent—R. S. O. c. 143, s. 28, s.-s. 3.

The defendant was the owner of certain premises which he leased to one A., who assigned his lease to the L. & C. Company, which company employed an agent to obtain tenants. The plaintiffs, under an arrangement with the agent, not specifically assented to by the company, obtained the keys,

took possession, and stored certain pianos there, which were distrained upon and sold by the defendant for rent in arrear.

In an action for illegal distress:—

Held, affirming the judgment of ARMOUR, C.J., that the plaintiffs were in "under" the tenants, the L. & C. Company, within the meaning of R. S. O. c. 143, s. 28, s.-s. 3, and that they could not recover.

Laidlaw, Q.C., for the plaintiffs.

Kilmer, for the defendant.

[BOYD, C., STREET, J., MEREDITH, J., 16TH JANUARY, 1896.

CLARKSON v. DWAN.

Summary judgment—Writ of summons—Special indorsement—Goods sold—Promissory notes—Status of plaintiffs—Affidavits—Amendment—Compound judgment.

Since the Bills of Exchange Act, 1890, interest on an overdue promissory note may be specially indorsed for, and may be simply claimed as "interest," meaning interest at the statutory rate from maturity, which is now given as liquidated damages.

McVicar v. *McLaughlin*, 16 P. R. 450, followed.

It appeared by the writ of summons that one of the two plaintiffs sued as liquidator of a company, the other plaintiff being also a company.

Held, that an indorsement "for goods sold and delivered during the year 1894 to the defendant by the O. C. Co., whereof the plaintiff C. is liquidator, $353," was a good specially indorsed claim on the part of C.; and an indorsement on promissory notes made by defendant, giving dates, amounts, and times when payable, and adding, "and assigned to the L. H. C. Co., one of the the plaintiffs herein," was a good claim specially indorsed as to the L. H. C. Co., though the way in which that company became assignees was not detailed, there being no suggestion that they were not the legal holders.

Upon a motion for summary judgment under Rule 739 it appeared by affidavits that the plaintiff company were mortgagees of the claims and the liquidator transferee subject to the co-plaintiffs' claim.

Held, that the affidavits showed that the special indorsement was not in conformity with the facts, and therefore failed to verify it, and no amendment could be permitted upon the motion; nor could judgment be given, in accordance with the special indorsement, as to one part in favour of the liquidator, and as to the other in favour of the company.

MEREDITH, J., dissented.

A. R. Lewis, Q.C., for the plaintiffs.

F. A. Anglin, for the defendant.

[MEREDITH, C.J., AND ROSE, J., 11TH JANUARY, 1896.

REGINA v. COULSON.

Justice of the peace—Summary conviction—Certiorari—Evidence—Motion to quash—Practising medicine—Ontario Medical Act, R. S. O. c. 148, s. 45.

When a summary conviction is removed by *certiorari* and a motion made to quash it, it is the duty of the Court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever showing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the Court to review it as upon an appeal.

Regina v. *Coulson*, 24 O. R. 246, not followed.

The defendant was convicted under the Ontario Medical Act, R. S. O. c. 148, s. 45, for practising medicine for hire. The evidence showed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that upon the advice of the defendant he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon.

Held, that there was evidence to support the conviction.

Regina v. *Coulson*, 24 O. R. 246, distinguished.

Regina v. *Howarth*, *ib.* 561, followed.

Aylesworth, Q.C., for the defendant.

L. G. McCarthy, for the informant.

REGINA v. CRANDALL.

Justice of the peace —Summary conviction—Permitting deer hounds to run at large—56 V. c. 49, s. 1, s.-s. 2—Scienter—Evidence—Amendment—Criminal Code, s. 889— Quashing conviction—Costs—Protection.

By 56 V. c. 49, s. 1, s.-s. 2, it is provided that "no owner of any hound or other dog, known by the owner to be accustomed to pursue deer, shall permit any such hound or other dog to run at large in any locality where deer are usually found."

The defendant was summarily convicted for allowing "his deer hounds to run at large in a locality where deer are usually found, contrary to the statute," etc.

Held, that the conviction was bad on its face, for it was not said that the dogs were "known by the owner to be accustomed to pursue deer."

The evidence taken by the magistrate was that of a witness who said he saw the defendant's "deer dogs at large on the defendant's premises, in the vicinity where deer are known to inhabit."

Held, that the Court could not be satisfied upon such evidence that an offence of the nature described in the conviction had been committed, and therefore the conviction should not be amended under s. 889 of the Criminal Code.

The statute requires it to be established that the particular dogs were accustomed to pursue deer, and that the owner knew it, and not merely that they were of a breed accustomed to pursue deer.

And the evidence was not sufficient to show that the dogs were permitted to run at large.

The conviction was quashed, but without costs, and with the usual order of protection, because the defendant had made an unsuccessful attack upon the *bona fides* of the magistrate and private prosecutor.

Aylesworth, Q.C., for the defendant.

J. R. Cartwright, Q.C., for the magistrate and prosecutor.

TRUSTS CORPORATION OF ONTARIO v. HOOD.

Principal and surety—Assignment of mortgage—Covenant—Construction—Extension of time—New mortgage—Reservation of rights—Agreement—Parol evidence.

In a deed of assignment of mortgage the assignor covenanted with the assignee that the mortgage money and interest should be duly and regularly paid.

Held, that the assignor was a surety for the mortgagor for the payment of the mortgage money and interest.

Darling v. *McLean*, 20 U. C. R. 372, followed.

Gordon v. *Martin*, Fitz-G. 302, and *Guild* v. *Conrad*, [1894] 2 Q. B. 885, distinguished.

The original mortgagor conveyed his equity of redemption to W., who covenanted to pay the mortgage debt and interest. After maturity, and when the whole of the mortgage moneys were in arrear, W. applied to the assignee of the mortgage to reduce the rate of interest, which the latter agreed to do, and thereupon a new mortgage was given by W. to him to secure the principal money, which was made payable in four years, with interest at the reduced rate. No discharge of the original mortgage was given; the assignee refused to release it, saying that "he would reduce the interest because he had no hold on W. on the first mortgage, and that he would hold on to" his assignor for the deficiency.

Held, that parol evidence of a reservation of rights against the surety was admissible, and, upon the evidence, the assignee did so reserve his rights as to prevent the extension of time given by the W. mortgage from operating to discharge the surety.

Currie v. *Hodgins*, 42 U. C. R. 601, followed.

Bristol and West of England Land Co. v. *Taylor*, 24 O. R. 286, distinguished.

It was contended that, as the original mortgagor became after his conveyance to W. a surety for the latter, and there was no reservation of the rights of the assignee against him, he was discharged, and the assignor was consequently discharged, because, upon payment by him of the mortgage debt, he could not get back the security unimpaired.

Held, not so; for the fair meaning of the reservation of rights against the assignor was that the taking of the W. mortgage was not to operate so as to effectuate anything that should prevent the assignee looking to his assignor for payment of the mortgage and interest because of the default of the mortgagor in paying according to the terms of his mortgage.

Aylesworth, Q.C., for the plaintiffs.

W. M. Doujlas, for the defendants.

HARVEY v. AIKINE.

Judgment debtor—Examination—Answers—Gambling transactions.

Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically, to take an account to ascertain what money was made and subsequently lost by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession.

J. W. Nesbitt, Q.C., for the plaintiffs.

E. G. Rykert, for the defendant.

[ROSE, J., AND MACMAHON, J., 11TH JANUARY, 1896.

QUEBEC BANK v. TAGGART.

Chose in action — Absolute assignment — Secret defeasance — Subsequent assignment for value without notice—Equities.

The insured absolutely assigned to a creditor, by indorsement on a life insurance policy, all his interest therein, and the assignee further absolutely assigned such interest to the plaintiffs, by similar indorsement, for valuable consideration. After the death of the insured, a written memorandum was found in his desk, purporting to be signed by the first assignee, setting forth that the policy was assigned as security for a small debt, and that, after the assignee had paid his own claim out of the insurance moneys, he was to pay the balance to the wife and children of the insured, the defendants. The plaintiffs had no

notice of this. Upon the trial of an interpleader issue, the jury found that the signature to the memorandum was that of the first assignee.

It was contended by the defendants that the first assignee could not assign to the plaintiffs any greater interest than the agreement between him and the insured gave him.

Held, that, as the terms of the first assignment indicated that it was intended to be unaffected by any equities existing between the parties to it, and clothed the assignee with authority to dispose of it absolutely, the plaintiffs were not affected by the agreement found by the jury, and were entitled to the whole of the insurance moneys.

In re Agra and Masterman's Bank, L. R. 2 Ch. at p. 397, specially referred to.

H. H. Collier, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

[Boyd, C., 11th December, 1895.

LEE v. LEE.

Alimony—Judgment—Default—Judgment in County Court for instalments—Validity of—Order for sale of husband's lands.

Where, after the recovery of judgment in an alimony action, directing payment to the wife of a yearly sum in quarterly instalments, the wife, on default being made in payment of two of the quarterly instalments, brought an action therefor in the County Court, and recovered judgment:—

Held, that she was, nevertheless, entitled to the usual order for the sale of the husband's lands, etc., for the realization of the alimony.

Semble, that the judgment recovered in the County Court was a nullity.

F. E. Hodgins, for the plaintiff.

Tremeear, for the defendant.

[12TH DECEMBER, 1895.

TAYLOR v. HOPKINS.

Will—Estate in fee—Disposal during coverture—Effect of.

The testatrix, by the residuary clause of her will, gave her executors and trustees the residue of her real and personal estate in trust, firstly, to sell and dispose of such portions thereof as they should deem necessary to carry out the provisions of the will, paying legacies and bequests, debts and funera expenses secondly, to divide the residue equally between her seven children, naming them, share and share alike, and directing that advances made to the children should be taken as part of their shares, and that the surviving issue of deceased children should inherit his or her parent's share. Full power was given to the executors and trustees to select and apportion the children's shares. It then provided that the daughters' shares, when paid over to them, should be held and enjoyed by them free from their husbands' control, and from their debts and engagements, with full power, notwithstanding coverture, and without their husbands' concurrence, to deal with and dispose of their shares, or any part thereof, during their lifetime. The executors and trustees were then directed, as soon after the death of the testatrix as convenient, and without any unusual delay, to pay all legacies and bequests, and make the division to the children as they attained twenty-one years of age, and in the meantime to invest their shares, etc.

Held, that by the first part of the clause the children took a fee simple in the lands, which, as to the daughters, was not interfered with by the subsequent part of the clause dealing with their shares during coverture.

O. R. Macklem, for the plaintiffs.

C. J. Holman, for the defendants.

[FALCONBRIDGE, J., 30TH DECEMBER, 1895.

GARING v. HUNT.

Mechanic's lien—Leased premises—Repairs by lessee—Interest of lessor—"Owner"—"Mechanic, labourer," etc.

C. leased a theatre to H. by lease in writing, providing for certain repairs to be done by H. and paid for out of the rent.

H. employed the plaintiffs, two scenic artists, to paint scenes, etc., for which they claimed a lien on the premises.

Held, that C. was not an "owner" whose interest could be charged, within the meaning of R. S. O. c. 126, s. 2.

Semble, that a scenic artist is not a "mechanic, labourer, or other person who performs labour," etc., under s. 6 (1) of the Act.

Quære, whether movable scenery and flying stages are part of the freehold.

C. F. Maxwell, for the plaintiffs.

J. A. Robinson, for the defendant Claris.

[MEREDITH, J., 26TH NOVEMBER, 1895.

In re CANADA COAL CO.

DALTON'S CLAIM.

Landlord and tenant—Lease—New arrangement of rent—Effect of—Applicable provisions of old lease.

The company were tenants of D., as assignees of a lease in writing, containing a provision for the acceleration of six months' rent in case the tenant became insolvent.

Before the expiry of the lease, an arrangement was made between the company and the landlord for a reduction of the rent, nothing being said as to the other terms of the lease.

On the company being put into liquidation, it was:—

Held, reversing the decision of the Master in Ordinary, that the arrangement made imported the terms of the old lease if applicable, and as this term was applicable and usual, the landlord was entitled to prove for the six months' rent.

Shepley, Q.C., for the landlord.

Biggs, Q.C., for the liquidator.

IN CHAMBERS.

[BOYD, C., 22ND JANUARY, 1896.

REGINA v. ROSE.

Criminal law—Personation—Municipal election—Offence—Penalty—Statutes—55 V. c. 42, ss. 167, 210.

Motion by defendant for his discharge from custody, upon *habeas corpus*.

The defendant was convicted by the police magistrate for the city of Toronto upon a plea of guilty of an offence under s. 167 of the Consolidated Municipal Act, 55 V. c. 42, the offence being charged as applying for a ballot paper in the name of another person, at a municipal election; and was sentenced to one month's imprisonment with hard labour.

The question was raised whether the conviction was legal and valid, in view of the subsequent provision as to the same offence, in s. 210 of the same Act, which provides, by s.-s. 2, that every person who applies for a ballot paper in the name of some other person shall be deemed to have committed the offence of personation, and shall incur a penalty of $200, and in default of payment of the penalty and costs, the offender shall be imprisoned for a period of sixty days, unless the penalty and costs be sooner paid. This provision is of more recent origin than s. 167, and the variation is noticeable, the earlier section, s.-s. 8, rendering the offender liable to imprisonment for a term not exceeding six months with or without hard labour.

Held, that these provisions cannot be read together or reconciled as cumulative punishments for the same offence, nor can they be left to stand as alternative punishments for the one offence at the option of the magistrate; the very essence of criminal law is that it should be certain in its sanctions and so plainly expressed as to be intelligible to the sense of ordinary people; and the law which is later in date, as well as later in position in the statute book, must in case of inconsistency or repugnancy prevail against the earlier in time and place.

Robinson v. *Emerson*, 4 H. & C. 352; *Attorney-General* v. *Lockwood*, 9 M. & W. at p. 391; *Parry* v. *Croydon Co.*, 11

C. B. N. S. 579, 15 C. B. N. S. 568; *Michell* v. *Brown*, 1 E. & E. at p. 275, referred to.

Order made for discharge of defendant from illegal custody with the usual protection.

Murphy, Q.C., for the defendant.

J. R. Cartwright, Q.C., for the Attorney-General.

In the Surrogate Court of the County of Elgin

[ERMATINGER, JUN. J., 14TH JANUARY, 1896.

In re WILLIAMS.

Will—Executors—Promissory notes made by testator—Gifts to relatives—Consideration—Payment by executors—"Claims"—Bona fides—Evidence—R. S. O. c. 110, s. 31—Charitable bequests—Interest—"Of full age."

About two months before the testator's death he made a promissory note in favour of a nephew who had formerly lived with and worked for him, and had been paid wages. It appeared that the testator had expressed his intention to "do something more" for this nephew, but there was no consideration for the note other than natural love and affection, and perhaps a feeling on the testator's part that he had not sufficiently recompensed his nephew for his past labours. The note was made without the knowledge of the nephew, who was far away at the time. At the foot was this memorandum, "If this note is unpaid at my decease, my executors are requested to pay it."

A few days before his death the testator also made a promissory note in favour of his brother. The note was expressed on its face to be given by the maker's special request and desire. The brother himself described it as a gift. He was aware that he had been named as one of the executors in the testator's will, and, after receiving the note, said to the testator that he would not take any compensation for his services after the gift that had been made him. He stated that the testator said to him, "If I get better, I'll pay you the money; if not, my executors must." After this the testator made a codicil to his will, by

which he revoked the appointment of the brother as an executor.

Semble, assuming a want of consideration in both notes, that they did not operate either as gifts *inter vivos* or *mortis causa*.

Upon the passing of the executors' accounts, it appeared that they had paid both of these notes, and it was urged that they were protected in such payment by s. 31 of R. S. O. c. 110, an Act respecting trustees and executors and the administration of estates: "It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient . ."

It appeared that the testator was a careful and exact business man, a retired farmer, of large means. The executors did not inquire into the consideration for the notes, or as to whether there were any. They did not ask specific advice of their solicitor before paying, though they supposed they were acting with his cognizance and approval. They did consult him as to whether to retain a sufficient sum to cover succession duty in case the amount paid upon these notes should be held liable thereto, with the result that a sufficient sum to cover the duty was retained in the case of the nephew, and a bond taken from the brother. The executors did not require any statutory declarations or other evidence before paying the notes; they simply relied upon the notes themselves as genuine, upon the high character of the payees, as well as that of the testator, and his known exactitude in business matters. Probably they acted also in ignorance of the law as to their liability on voluntary notes and of the law as to gifts *inter vivos* and *mortis causa*, and upon their belief in their solicitor's full knowledge of the facts known to them, as well as the law, and upon the knowledge and tacit approval of a majority, if not all, of the adult members of the family and legatees. The creditors' claims were little or nothing. The payees of the notes did not come into competition with creditors, but only with legatees, volunteers like themselves. There was no suggestion that the executors acted otherwise than in good faith; both were men of standing and reputation, and in no way related to the testator or the payees of the notes.

Held, that the notes were "claims" within the meaning of s. 31, and were paid by the executors in good faith, and upon evidence which they thought sufficient.

Lewin on Trusts, 8th Am. ed., p. 592; Williams on Executors, 9th ed., p. 1695; *Vey* v. *Emery*, 5 Ves. 144, referred to.

Certain bequests to charitable institutions were made by the will, which provided that all legacies "shall bear interest from the time of my decease, at the rate of six per cent., to the legatees of full age."

Held, that, although the words "of full age" were, strictly speaking, applicable only to personal legatees, and not to charitable institutions, yet they must be taken as referring to all who had a present capacity to receive or collect their legacies; and therefore the executors had properly paid interest upon the charitable bequests from the death of the testator.

J. B. Davidson, for the executors.

J. M. Glenn, for the adult residuary legatees.

J. A. Kains, for the infant residuary legatees.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[TUCK, J., 7TH JANUARY, 1896.

JONES v. RUSSELL.

Patent of invention—Agreement—Improvement—New invention.

The defendant was the owner and inventor of a patented snow-plough, and by an agreement with K. sold him a one-half interest in the invention and all improvements that subsequently might be made. The invention proving unsatisfactory, the defendant improved it in many respects, considerably altered its character, and had it patented as a new invention.

In a suit by K.'s administrators to secure to them a one-half interest in the new patent, the defendant contended that it was a new invention, and not an improvement of the old one.

Held, that, although the new invention was sufficiently dissimilar from the old one as not to constitute an infringement of it, it did not amount to more than an improvement within the meaning of the agreement.

Weldon, Q.C., and *C. A. Stockton*, for the plaintiffs.

J. A. Belyea, for the defendant.

[BARKER, J., 24TH JANUARY, 1896.

WELSH v. NUGENT.

Service of papers—Time—Equity Act, 1890, s. 94.

The Equity Act of 1890, s. 94, requires that affidavits shall be served six days at least before the day the motion upon which they are to be used is heard.

An affidavit used on issuing a summons to set a cause down for hearing, returnable on the 24th day of the month, was served on the 18th.

Held, that the service was insufficient and the summons should be discharged with costs.

A. W. Haninyton, for the plaintiff.

Mullin, for the defendant.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 23RD JANUARY, 1896.

CORDINGLY v. JOHNSON.

Security for costs—Application to rescind order—Return of plaintiff within jurisdiction.

Appeal by the plaintiff in an interpleader issue, a married woman, from an order of the referee dismissing her application to rescind a clause in the interpleader order requiring her to furnish security for costs, she having come within the jurisdiction since the making of the order.

The plaintiff at one time resided in Winnipeg with her husband, who carried on a business in which she had moneys invested, and she then owned a house and lot in Winnipeg. She and her husband sold their property and went to the United States, where she bought a farm, which her husband worked.

The plaintiff returned to Winnipeg, without her husband, about 30th November, 1895, bringing only her clothing and

travelling outfit and some bed linen, and at the time of the application to the referee she was residing at the house of a friend doing sewing for another woman. Her affidavit stated that she left Winnipeg owing to the ill health of her husband; that she had now returned to Winnipeg with the intention of residing in the city, and expected her husband to rejoin her in the spring.

She was cross-examined on her affidavit, and the depositions showed that she had no definite intention of settling in Manitoba unless she could procure satisfactory employment for herself or her husband, and that this was wholly uncertain. The only positive statement of her intention that she made in her depositions was that she intended to remain in Winnipeg until after the determination of the suit in any event.

Held, that there was nothing to support her allegation of intention, and much to suggest that she could not well have formed a definite intention. The order having been made, it could not be rescinded upon such uncertain evidence as that offered. It was not certain that her return to Manitoba was anything but a device to evade the obligation to give seccurity.

Monkman, for the plaintiff.

Clark, for the defendant.

LEADLAY v. McGREGOR.

Life insurance—Benevolent society—Appointment by member in favour of beneficiary—Validity of—Subsequent assignment to executors—Rules of society.

Special case. The plaintiffs were the executors of Charles McGregor, deceased, who in his lifetime was a member of an unincorporated benevolent society known as the Order of Scottish Clans. The constitution of the Order provided for the establishment of a "bequeathment fund," from which, on death of a member, a specified sum should be paid to his beneficiary; the member in his application directing to whom he desired his "bequeathment" paid.

At the date of the admission of McGregor as a member of the Order, the bequeathment laws of the Royal Clan provided that the amount of bequeathment should be paid to the beneficiary designated on the bequeathment certificate.

When McGregor was admitted to the Order, he received a certificate, dated 8th December, 1891, which stated that he was entitled to the benefits of the bequeathment fund; that he named as his beneficiary "Duncan McGregor, father," subject to s. 4 of the bequeathment constitution. In 1893 this section was amended so as to provide that the amount of bequeathment should be paid to the "wife, affianced wife, or relatives of or person dependent upon the member, as designated in his bequeathment certificate."

By his will, dated 5th May, 1894, McGregor appointed the plaintiffs as his executors and trustees. About the date of the will he also signed a memorandum, indorsed on the bequeathment certificate, revoking his former directions as to the payment of the insurance due at his death, and directing such payment to be made to the plaintiffs as his executors. He delivered the certificate thus indorsed to the plaintiffs, who handed it to the secretary of the Winnipeg branch of the Order for the purpose of having it forwarded to the proper officials of the Order to have the assignment in favour of the plaintiffs recognized by the Order. It was so forwarded, and the officials refused to recognize it, on the ground that it was in contravention of the laws of the Order, and returned it to the plaintiffs. During the period occupied in the transmission to and from the officers, McGregor died, and the so-called assignment to the plaintiffs was never recognized by the Order. The special case stated that the plaintiffs were not, nor was either of them, the wife, affianced wife, or relative of, or person dependent on, McGregor, or persons designated in the certificate.

Held, that judgment should be entered for the defendant without costs.

The fund was to be raised and paid over to the beneficiary of a deceased Clansman, as provided by and subject to the provisions of the constitution and bequeathment laws of the Order. When the amendment was made in s. 4 of the bequeathment laws, limiting the payment to certain classes, this limited the power of appointment as to its objects to those classes of persons. If an appointment were revocable, this could only be by the making of a new appointment and surrender of the old certificate. Under the amended rules the new appointment was limited, and until there was a valid new appointment, the former one would stand.

Undoubtedly a contractual relation of some kind was created by membership of the Order. In the present case there was no express promise by the Order, as a body, either to McGregor or to the defendant is father. The certificate stated that "said Clansman is entitled to the benefits of the bequeathment fund, conditioned," etc. This, however, was not a distinct promise to pay him or the named beneficiary.

It is a settled doctrine in the Courts of the United States that, in the case of a society having objects and a constitution similar to those of this Order, the member has no interest in the fund raised or to be raised, but merely a power to appoint an object to receive the same: *Maryland Mutual Benefit Society* v. *Clendinen*, 44 Md. 429; *Ashley* v. *Costin*, 21 Q. B. D. 401.

The considerations for the payments made and to be made by the member, the "benefits" mentioned in the certificate, did not include any personal right to the $2,000 to be raised, in either the member when alive, or in his representative after his death, except, perhaps, in the nature of a resulting trust under some circumstances, but that all the member had was a power to to appoint some person or persons to be the object or objects of the bounty of the Order upon his death. Such person or persons would have no right to sue at law for the money; he or they would have no vested right in the lifetime of the member, for the appointment was liable to be revoked. There would seem to be nothing in the nature of things, or in the principles of law or equity, to prevent an equitable right vesting in the appointee or appointees upon the member's death, and the fulfilment of other conditions, though this could be only an equitable right.

Haggart, Q.C., for the plaintiffs.

Tupper, Q.C., and *Phippen*, for the defendant.

[BAIN, J., 21ST JANUARY, 1896.

GRUNDY v. MACDONALD.

County Court—Application to set aside judgment—Expiration of time limited for application—Jurisdiction of Judge.

County Court appeal. In 1887 the plaintiff sued the defendants C. Macdonald and J. R. Macdonald on a promissory note given by them for an organ they had purchased from the

plaintiff. Judgment was entered for the plaintiff on 12th July, 1887, by the late Judge Ardagh. At that time the defendant J. R. Macdonald was under age, but that defence was not raised.

Subsequently, in 1895, the defendent J. R. Macdonald applied to the Judge of the County Court for an order setting aside the judgment and allowing him to amend his dispute note. The Judge made the order, and the plaintiff appealed.

Held, that the appeal should be allowed with costs, and the order set aside with costs.

The County Court Act which was in force when the judgment was entered was C. S. M. c. 34, as amended by 47 V. c. 22, and 48 V. c. 22. By s. 224 of C. S. M. c. 34, an application for a new trial or for a reversal of a judgment had to be made within six months, at the latest, after the judgment had been pronounced, and as the jurisdiction of a Judge of the County Court to grant a new trial could be derived only from the County Court Act, the authority of the Judge to deal with the application had long ago ceased, and he was without jurisdiction to reverse the judgment or grant a new trial as soon as the period limited for making the application expired.

Culver, Q.C., for the plaintiff.

West, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., DECEMBER, 1895.

REGINA v. LALONDE.

Imprisonment—Warrant of commitment—Statement of conviction—Absence of—Return of conviction—Discharge of prisoner.

J. C. F. Bown, for the defendant, moved absolute a summons for the issue of a writ of *habeas corpus* directed to the keeper of the common gaol at Fort Saskatchewan to bring up the body of

the defendant, and for his discharge from custody without the writ actually issuing, and without his personally being brought before the Court.

The warrant of commitment under which the defendant was detained in custody was under the hand and seal of a justice of the peace, and recited that the defendant had been charged on oath before the justice "for that he did kindle a fire and allow it to escape from his control," but did not recite any conviction, and commanded the keeper of the gaol to keep the defendant until he should be delivered by the course of law.

N. D. Beck, Q.C., for the Crown, admitted that the warrant was bad, but contended that if there was a good conviction, or if a good conviction could be made, the warrant could and should be amended; and asked that the application should stand over until the justice should return a proper record of conviction.

SCOTT, J.—Since the argument the justice has returned an amended record of conviction to the clerk of the Court.

In *Re Tinson*, L. R. 5 Ex. 257, it was held that where a prisoner is brought up under a writ of *habeas corpus*, and the commitment is insufficient, and the conviction has not been brought up by *certiorari*, the Court is not justified in looking at the conviction for the purpose of amending the commitment by it, nor in detaining the prisoner in custody until the conviction is so brought up.

This decision is not applicable to the present case, because here the prisoner is not brought up by *habeas corpus*. This is merely an application for such a writ.

In Paley on Convictions, 6th ed., it is laid down that if a warrant in execution, manifestly defective on the face of it, shows that there has been a conviction, the Court will not notice the defect until the conviction is returned into Court, if the defect be one that the conviction may cure, and if the applicant is in a position to remove the conviction by *certiorari*. The language of the judgment in *Re Tinson* clearly shows that the Court merely decided that after the prisoner had been brought up, and application had been made for his discharge, such application must be disposed of without waiting for the conviction to be brought up by *certiorari*.

The amended record of conviction has been returned to the clerk presumably either under s. 102 of the N. W. T. Act, or under s. 888 of the Criminal Code.

In either case, it is properly in Court, and being in Court, it is there for all purposes. A *certiorari* to bring it up is therefore unnecessary.

I am, however, unable to find any authority to support the contention that the conviction may be referred to in order to support the warrant in this case.

Section 886 of the Criminal Code enacts that "No warrant of commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same."

The warrant in question manifestly does not come within this section, because it does not allege that the defendant has been convicted.

The words I have already quoted from Paley on Convictions show that defects in a warrant will not be noticed until the conviction is returned, *provided* the warrant itself shows that there has been a conviction.

In the same work, at p. 344, it is laid down that it is not necessary in the warrant to state the conviction in a precise or technical form, but only so as to show that the party has been convicted of some specific offence.

Had the warrant alleged that there had been a conviction, I think the conviction could be referred to in order to support it, even though the offence were insufficiently stated in the warrant, but as it contains no such allegation, I must hold, in the absence of any authority to the contrary, that the conviction cannot be referred to.

An order will therefore issue for the discharge of the defendant.

[ROULEAU, J., 18TH JANUARY, 1896.

GOLDIE AND McCULLOCH CO. v. TAYLOR.

Pleading—Conversion—Necessary allegations.

Summons issued by the defendant to strike out the plaintiffs'

statement of claim, because it disclosed no reasonable cause of action, and because it was frivolous and vexatious, and tended to embarrass and delay the fair trial of the action.

G. S. McCarter, for the defendant.

C. C. McCaul, Q.C., *(for Beck & Emory)*, for the plaintiffs.

ROULEAU, J.—The plaintiffs have entered action for damages for the conversion of a safe. In order to maintain it they must show: 1st, that they had a general or special property in the goods and an actual or constructive possession or right of possession; 2nd, a wrongful conversion by the defendant; and 3rd, damages, being the value of the goods.

In reading the statement of claim I find that the plaintiffs allege: "That the plaintiffs have suffered damage by the defendant wrongfully depriving the plaintiffs of one safe of the plaintiffs' manufacture, by taking possession of the same on or about the 8th day of August, 1895, and by refusing to give up possession thereof to the plaintiffs on demand, and by subsequently converting the same to his own use by assuming to sell the same." Particulars, etc.

Is there anything omitted in this statement of claim which should be alleged to enable the plaintiffs to succeed in their action? I fail to see it. Property is alleged in these words, "wrongfully depriving the plaintiffs of the safe;" and possession, conversion, and damages are also clearly stated. Besides, the statement of claim is strictly in accordance with the form of such an action given by Cunningham & Mattinson, at p. 562, and also given in the Appendix to the Annual Practice for 1895, at p. 54, No. 1.

Summons discharged with costs.

RYAN v. DONOVAN.

Particulars—Demand—Oral particulars—Application—Costs.

Summons for particulars of the statement of claim.

C. C. McCaul, Q.C. (for *Beck & Emory*), for the defendant.

G. S. McCarter (for *S. S. Taylor*, Q.C.), for the plaintiff.

ROULEAU, J.—It was contended that the particulars were orally given and that the defendant's attorney appeared to be satisfied.

Even if this be correct, I never heard before that when a demand is made in writing for particulars the other party could give them orally. He is bound to give them in writing. The fact that the defendant did not press for the said particulars cannot be a ground of objection against the award of costs of this summons against the plaintiff. On the contrary, I think he should pay for his great neglect in not complying with the demand any sooner.

It is not a good ground of objection to say that any of the parties in the suit is not entitled to particulars after pleadings closed. In some cases expense may be properly saved to the parties by particulars being rendered. It is a matter for the discretion of the Court.

I have no doubt that the defendant is entitled to the particulars asked for in his demand of the 2nd October, 1895. An order, therefore, will be made for full particulars as to whether the alleged misrepresentations were oral or in writing, and when and where the same were made.

Costs to the defendant in the cause in any event.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[ROULEAU, J., 22ND JANUARY, 1896.

REGINA v. WHITE.

Liquor License Ordinance—Summary conviction—Selling liquor during prohibited hours—Offence against s. 64—Evidence under s. 124—Summons under s. 125—Appeal—Notice.

The defendant, a licensed hotel-keeper, was convicted before two justices of selling liquor within prohibited hours, under s. 64 of the Liquor License Ordinance, 1891-2. The defendant, on an affidavit of the agent of his advocate, exhibiting *copies* of the information, evidence, and conviction, certified by the magistrates, and a certificate of the deposit of security mentioned

in s. 124, obtained a summons under s. 125, calling upon the prosecutor to show cause why the conviction should not be quashed. It was clear from the copies that there was no evidence to warrant a conviction.

On the return of the summons, on the 4th January, 1896, *C. C. McCaul*, Q.C., for the prosecutor, objected *inter alia* :—

(1) That if the proceedings were intended to be by way of *certiorari*, they were clearly irregular.

(2) That ss. 124 and 125 applied only to convictions under s. 91.

(3) That even if s. 125 did apply, no notice of appeal had been proved; and the original depositions and the deposit had not been transmitted to the clerk, all conditions precedent to granting a summons under s. 125.

P. McCarthy, Q.C., for the defendant, contended that the provisions of s. 125 applied to any conviction under the Ordinance; and that certified copies answered the requirements of s. 125, s.-s. 1; and the conviction being plainly erroneous, the summons was properly issued.

ROULEAU, J.—This is an appeal under ss. 124 and 125 of he Liquor License Ordinance, 1891-92.

It is provided by s.-s. 1 of s. 124 that "an appeal shall lie from a conviction for any offence for which a penalty or punishment is prescribed by the ninety-first section of this Ordinance, to a Judge of the Supreme Court, in Chambers, without a jury, provided a notice in writing of such appeal is given to the prosecutor or complainant within five days after the date of said conviction."

Section 91 of said Ordinance, to which s-s. 1 of s. 124 refers, reads thus: "Any person who sells or barters liquor of any kind, without license therefor by law required, shall, for the first offence, be liable to a penalty of not less than fifty dollars, nor more than two hundred and fifty dollars, and, in default of payment, not less than two months' nor more than six months' imprisonment. For a second offence," etc.

The procedure therefore provided by ss. 124 and 125 applies only to offences punishable under s. 91, as expressly mentioned in s.-s. 1 of s. 124.

In reading the conviction I find that the defendant was fined for unlawfully selling liquor during the time prohibited by the Liquor License Ordinance of 1891-92, without any requisition for medical purposes, as required by the Ordinance, being produced by the vendor or agent. This is clearly an offence under s. 64, and must be dealt with according to the provisions of s. 120 of the Ordinance. So it is clear that I cannot entertain this appeal under s.-s. 1 of s. 124.

I must add also that no such appeal can be entertained by me unless a notice in writing of such appeal be given to the prosecutor or complainant within five days after the date of the conviction, as provided by s.-s. 1 of s. 124. And whether the defendant remains in custody, or enters into recognizance, or deposits the money as required by the said Ordinance, the justice or justices shall forthwith deliver or transmit, by registered letter, post-paid, the depositions and papers in the case, with the recognizance or deposit (as the case may be) to the clerk of the Court before which the appeal is to be heard. It enables the Judge then to see the evidence, and if he thinks that the conviction may be erroneous, he may grant a summons calling upon the prosecutor to show cause why the conviction should not be quashed.

I am of opinion that all these things are conditions precedent to the granting of the summons, and any of them omitted would be necessarily fatal.

As I consider in this case that the complainant or prosecutor has failed to prove the accusation under the evidence before me, I shall not grant him his costs. I therefore discharge this summons without costs.

Supeme Court of Canada.

ONTARIO.] [9TH DECEMBER, 1895.

HURDMAN v. CANADA ATLANTIC R. W. CO.

Railway company—Loan of cars—Reasonable care—Breach of duty—Negligence—Risk voluntarily incurred—"Volenti non fit injuria—"Kicking" cars on switch.

A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard, and bringing away the cars to be despatched from their depot as directed by the bills of lading.

Held, affirming the decision of the Court of Appeal, 22 A. R. 292, 15 Occ. N. 146, and of the Queen's Bench Divisional Court, 25 O. R. 209, 14 Occ. N. 278, that in the absence of any special agreement to such effect, the railway company's servants, while so engaged, were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars.

That where the lumber company's employees remained in a car, lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using the utmost skill and care in moving the car with them in it, so as to avoid all risk of injury to them.

Heaven v. *Pender*, L. R. 11 Q. B. 503, followed.

On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased

voluntarily accepted the risks of shunting," and that the death of the deceased was caused by the defendants' negligence in the shunting, in giving the car too strong a push.

Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "*volenti non fit injuria*" had no application.

Smith v. *Baker*, [1891] A. C. 325, applied.

Chrysler, Q.C., and *Wallace Nesbitt*, for the appellants.

McCarthy, Q.C., and *Blanchet*, for the respondent.

BARNES v. DOMINION GRANGE MUTUAL FIRE INSURANCE ASSOCIATION.

Fire insurance—Mutual insurance company—Interim contract—Termination—Notice—Statutory conditions—R. S. O. c. 167—Waiver—Estoppel.

B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time, and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract, at any time within fifty days, by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued within the said time, which expired on 4th March, 1891. On 17th April B. received a letter from the manager asking him to remit funds to pay his note maturing on 1st March. He did so, and his letter or remittance crossed another from the manager, mailed at Owen Sound, 20th April, stating the rejection of his application and returning the undertaking and note. On 24th April the insured property was destroyed by fire. B. notified the manager by telegraph, and on 29th April the latter wrote returning the money remitted by B., who afterwards sent it again to the manager, and it was again returned. B. then brought an action

to recover the amount of the loss, which was dismissed at the hearing. A new trial was ordered by the Queen's Bench Divisional Court, whose decision was affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, 22 A. R. 68, 15 Occ. N. 24, and of the Divisional Court, 25 O. R. 100, 14 Occ. N. 210, GWYNNE, J., dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act, R. S. O. c. 167, governed such contract, though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115 requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed, the condition was unreasonable; and that such provision, though the non-receipt might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt.

Held, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract, and were estopped from denying that B. was insured.

Aylesworth, Q.C., for the appellants.

E. R. Cameron, for the respondent.

QUEBEC.]

KERR v. ATLANTIC AND NORTH-WEST R. W. CO.

Prescription—Action for damages—Injury to property—Continuance of damage—Art 2261, C. C.—Railway company—Construction of road—Wrongful act of contractor—Liability for.

K. brought an action against a railway company for damages by reason of a right of way having been, as he alleged, closed up by the building of a portion of the road through the city of Montreal; and claimed that he suffered an annual loss of $450 by being deprived of the right of way. The company pleaded, *inter alia*, that the action, not having been brought within two years from the time the alleged wrong was committed, was prescribed

by Art. 2261, C. C., and also that the injury was done by the contractor for building the road, and they were not liable therefor.

Held, affirming the decision of the Court of Queen's Bench, that the injury complained of having been committed by one act, the consequences of which might have been foreseen and claimed for at the time, the fact that the damage continued did not prevent the prescription running against K.; and his action was barred by Art. 2261, C. C.

Held, also, that the company were not liable for the wrongful act of the contractor in borrowing earth for embankments from a place and in a manner not authorized by his contract, and so committing the injury complained of.

Taylor, for the appellant.

Abbott, Q.C., for the respondents.

LA COMPAGNIE POUR L'ECLAIRAGE AU GAZ DE ST. HYACINTHE v. LA COMPAGNIE DES POUVOIRS HYDRAULIQUES DE ST. HYACINTHE.

Statutes—Construction of—By-law—Exclusive right granted by—Statute confirming—Extension of privilege—45 V. c. 79, s. 5 (P. Q.)—C. S. C. c. 65.

In 1881 a municipal by-law of the city of St. Hyacinthe granted to a company, incorporated under a general Act, C. S. C. c. 65, the exclusive privilege for twenty-five years of manufacturing and selling gas in that city, and in 1882 the company obtained a special Act of incorporation, 45 V. c. 79, s. 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law, or agreement of the said city of St. Hyacinthe, are hereby re-affirmed and confirmed to the company as incorporated under the present Act, including their right to break up, etc., the streets . . . and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use, and sell electric, galvanic, or other artificial light . . . with the same privilege, and subject to the same liabilities, as are applicable to the manufacture, use, and disposal of illuminating gas under the provisions of this Act."

Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that it was a private Act, notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party and in no way assented to it; that in construing it the Court would treat it as a contract between the promoters and the legislature, and apply the maxim *verba fortius accipiuntur contra proferentem*, especially where exorbitant powers are conferred; that the right to make and sell electric light "with the same privilege" as was applicable to gas, did not confer such monopoly, but gave a new privilege as to electricity, entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets, and did not necessarily mean the exclusive privilege claimed.

Geoffrion, Q.C., for the appellants.

Lafleur and *Blanchet*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DEAN, Co. J.] [OSLER, J.A., 12TH FEBRUARY, 1896.

In re LITTLE BOB RIVER DAM AND SLIDE.

Rivers and streams—Improvements—Mill-dam—Tolls—R. S. O. c. 120, s. 20.

Appeal by Messrs. Boyd & Co. from the order and judgment of the Judge of the County Court of the county of Peterborough dismissing an application made by them under s. 13 of R. S. O. c. 120, an Act for protecting the public interest in rivers, streams, and creeks, to fix the amount which they may be at liberty to charge for tolls under the Act, for the use of con-

structions and improvements made by them for the purpose of floating saw-logs and other timber down the river.

The question raised by the appellants was whether they came within the provisions of R. S. O. c. 120, which are taken from 47 V. c. 17, an Act passed in consequence of the litigation in *McLaren* v. *Caldwell*, 6 A. R. 456, 9 App. Cas. 392, which established the right of the public to float timber and logs down streams during the season of freshets, even if such streams were rendered floatable only by means of improvements made by the owner of the bed of the stream, and to use such improvements without compensation.

The appellants contended that their mill-dam was an improvement within the meaning of the Act, for the use of which by others they were entitled to payment of reasonable tolls.

The application and appeal were opposed in the interest of other lumbermen, on two grounds, viz., (1) that the Little Bob, not being a navigable stream, and the channel being the property of the Dominion Government and part of the property and public works of Canada, was not within the legislative authority of the Province, or subject to the provisions of the Rivers and Streams Act; and (2) that, even if it was, the improvement in question was one which, by s. 20 of the Act, was excluded from its operation as coming within the third and fourth sections of the Act respecting mills and mill-dams, R. S. O. c. 118.

Held, that the dam in question being a mill-dam built by the appellants for the purpose of their mill, and not intended, except as incident to that, to facilitate the floating or transmission of logs and timber, the effect of s. 20 of the Rivers and Streams Act was to exclude them from its operation, and to leave them simply in the position and subject to the burdens of the mill-dam owner under R. S. O. c. 118.

No opinion expressed as to whether the stream or channel is or is not one subject to the Provincial legislation.

Appeal dismissed without costs.

Wickham, for the appellants.

W. Cassels, Q.C., and *Thomas Stewart*, for the respondents.

Irving, Q.C., for the Attorney-General for Ontario.

High Court of Justice.

[MEREDITH, C.J., AND ROSE, J., 11TH JANUARY, 1896.

WESTERN BANK v. COURTEMANCHE.

Mortgage—Insurance pursuant to covenant—Assignment of mortgage—Equitable assignee of insurance money.

Courtemanche sold certain goods to Dyson and Gillespie, part of the purchase money being secured by promissory notes made by Dyson to the order of Gillespie, and indorsed by Gillespie, and also by a chattel mortgage on the goods executed by Dyson, to whom by arrangement between the parties they had been transferred by bill of sale by Courtemanche. This chattel mortgage contained a covenant to insure for the benefit of Courtemanche and his assigns, and a policy of insurance was accordingly taken out, which was duly assigned to the mortgagee. Courtemanche discounted the notes with the plaintiffs, and assigned the chattel mortgage to the plaintiffs, but he did not transfer the policy. The insurance expired, and the firm of Dyson & Gillespie, who kept an account with the plaintiffs, renewed it, but it did not appear that the renewal policy was assigned to Conrtemanche or the loss made payable to him. Afterwards a fire occurred, the loss by which was adjusted at $1,600, and Dyson and Gillespie assigned to the plaintiffs the insurance moneys as security for their indebtedness, and the money was duly paid to the plaintiffs. Dyson told the plaintiffs to apply the moneys on the notes above mentioned, and the plaintiffs did so, but Gillespie afterwards objecting on the ground that the money should have been applied on the firm account, and that the plaintiffs had no right to apply it on the notes without the authority of the firm, the plaintiffs transferred the moneys to the firm account, which then left a balance to the credit of that account, which was subsequently withdrawn, and now sued Courtemanche on the notes, or rather on renewals of them.

Held, that the plaintiffs could not recover, for they were not only entitled but bound to apply the insurance money received by them in payment of the notes, to which, as between Dyson, Gillespie, and Courtemanche, it was primarily applicable, Dyson having acted for the firm when he covenanted to insure the

goods in the chattel mortgage for the benefit of Courtemanche as mortgagee, and Courtemanche being equitable assignee of the policy under which the money was paid, and which was a renewal of that which had been effected in accordance with the covenant, and entitled to have the money applied in payment of the notes, and the plaintiffs having taken the insurance moneys as assignees thereof of Dyson & Gillespie subject to the equitable rights of Courtemanche, of which they had notice.

C. E. Hewson, for the plaintiff.

O'Connell, for the defendant.

D. O. Cameron, for the third party.

[Boyd, C., Street, J., and Meredith, J., 16th January, 1896.

In re McCABE v. MIDDLETON.

Division Court—Garnishee proceedings—"Cause"—"Action"—Jurisdiction.

On appeal, the judgment of Rose, J., *ante* p. 8, was unanimously affirmed.

Per Street, J.—The jurisdiction in garnishee cases, where the primary debtor and the garnishee live in different divisions, is founded upon the existence of a debt from the garnishee to the primary debtor, not upon the mere assertion of its existence.

E. D. Armour, Q.C., for the primary debtor, the appellant.

Totten, Q.C., for the garnishees.

Tytler, for the primary creditor.

[Armour, C.J., Falconbridge, J., and Street, J., 22nd January, 1896.

SMITH v. LOGAN.

Judgment—Appearance—Default—Tender—Notice.

On the day after the last day for appearance to a specially indorsed writ, the plaintiffs' solicitor attended before the officer of the Court to enter judgment for default. The officer proceeded to enter it and was engaged in entering it, but the stamps had not been affixed, when the defendant's solicitor came in

with an appearance, which he tendered to the officer, informing him what it was. The officer, however, disregarded the appearance, and completed the entry of the judgment.

Held, per ARMOUR, C.J., that the judgment was regular; for the officer, being seised of the business of entering the judgment, was not obliged to give it up to attend to the appearance.

Per FALCONBRIDGE, J., that the appearance, if received after the time limited, and without the notice required by Rule 281, would be something which the plaintiffs' solicitor would not be bound to regard, if he had made search in due time and found no appearance.

Per STREET, J., that by the tender of the appearance in the presence of the plaintiffs' solicitor, the officer was stayed in his right to enter judgment, and the judgment which he proceeded to enter was irregular; and he could not proceed again to enter judgment, even if no notice of appearance were served, until the time for service, that is the whole of the day of appearance, had expired.

Aylesworth, Q.C., for the plaintiffs.

W. H. Blake, for the defendant Wilson.

[Leave to appeal granted 31st January, 1896.]

[23RD JANUARY, 1896.

WILMOTT v. MACFARLANE.

Jurisdiction—Appearance—Defence—Subject-matter of action.

An appeal by the plaintiff from an order of the Master in Chambers dismissing a motion by the plaintiff to strike out the defence of the defendant Caldwell, upon the ground that it was a plea to the jurisdiction, and that the defendant, having been served with the process out of the jurisdiction, should have moved to set aside the service, and not having done so, but having entered an appearance, could not now object to the jurisdiction.

The defendant's objection to the jurisdiction was not, however, based upon the ground that the case did not come within Rule 271, but upon the ground that the relief sought by the

plaintiff, viz., priority as to certain assets in the hands of the defendant Caldwell, in the Province of Quebec, could not be granted by an Ontario Court.

A. C. McMaster, for the plaintiff, cited *Boyle* v. *Sacker*, 39 Ch. D. 249; *Preston* v. *Lamont*, 1 Ex. D. 361; *Bell* v. *Villeneuve*, 16 P. R. 413.

W. M. Douglas, for the defendant Caldwell, contended that the appearance only admitted the jurisdiction of the Court over the defendant and not over the subject-matter of the action, and pointed out that in such cases as *Henderson* v. *Bank of Hamilton*, 23 O. R. 327, 20 A. R. 646, the question of jurisdiction was raised by plea after appearance, and, although here the defendant resided and was served out of the jurisdiction, that did not affect the question.

THE COURT held that, under the circumstances mentioned, the question of jurisdiction could be raised by the defence, and that the appearance did not necessarily give the Court jurisdiction over the subject matter of the action.

Appeal dismissed with costs.

[31ST JANUARY, 1896.

KOHLES v. COSTELLO.

Local Judge—Jurisdiction—Injunction—Rule 42 A. (1419.)

An appeal by the defendant from an order of the local Judge of the county of Wellington continuing till the trial an interlocutory injunction granted by him, restraining the defendant from trespassing upon certain lands.

The appeal was based upon the ground, among others, that the local Judge had no jurisdiction, without the consent of all parties, to grant an injunction for more than eight days.

The defendant did not consent to the local Judge entertaining the motion; but the solicitors for all parties resided in the county of Wellington, in which the action was brought.

Rule 42 A. (1419) provides that a local Judge may, in cases of emergency, grant an interlocutory injunction for a period not exceeding eight days; and sub-Rule (*a*) that in any action in which a local Judge has granted an interlocutory injunction

under the next preceding clause, *and in which all parties interested consent thereto*, the local Judge may hear, determine, and dispose of any motion to continue, vary, dissolve, or otherwise deal with the injunction; (*b*) that any person affected may appeal to a Divisional Court; and (*c*) that every local Judge shall, in actions brought in his own county, possess the like powers as a Judge of the High Court sitting in Court, with regard to hearing, determining, and disposing of the following proceedings and matters, viz: (1) Motions for judgment and all other motions, matters, and applications (not including trials of actions) where all parties agree that the same shall be heard before such local Judge, *or where the solicitors for all parties reside in such county.*

THE COURT held that the above special provision with regard to injunctions (*a*) excluded the application of the general provision (*c*) (1); and therefore, although the solicitors for both parties resided in the local Judge's county, he had no jurisdiction to continue an injunction till the trial, unless with the consent of all parties.

The appeal was allowed with costs in this Court and below.

Douglas Armour, for the defendant.

William Kingston, Q.C., for the plaintiff.

[26TH FEBRUARY, 1896.

MARPLES v. ROSEBRUGH.

Vacation—Reference—Official referee.

Every legal proceeding which may properly be taken out of vacation may with equal propriety be taken during vacation, unless something to the contrary can be found in some statute or Rule of Court.

An official referee may proceed with a reference during vacation.

Shepley, Q.C., for the plaintiff.

W. J. Elliott, for the defendant.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 12TH FEBRUARY, 1896.

PEARSON v. TORONTO RUBBER SHOE MFG. CO.

Pleading—Specific performance—Defence—Inconsistent pleading in another action—Estoppel—Conduct disentitling party to relief.

An appeal by the plaintiff from an order of the Master in Chambers dismissing a motion made by the plaintiff under Rule 387, in an action for specific performance of a contract, to strike out portions of the statement of defence setting up that the plaintiff had made certain allegations in another action relating to the same subject-matter, inconsistent with the allegations in his present action, which former allegations were not true, but, if true, showed that the plaintiff had no right to maintain the present action.

Held, that if the allegations attacked were pleaded by way of estoppel or as an answer to the action, they should be struck out as disclosing no answer; but it was not clear, and should not be determined upon this application, whether the defendants should not be allowed to plead the allegations in the other action as conduct disentitling the plaintiff to relief in this action.

Order made allowing the defendants to amend accordingly within ten days, with leave to the plaintiff to raise a point of law under Rule 385. If the amendment is not made, the appeal is to be allowed and the paragraphs complained of struck out. Costs to the plaintiff in the cause.

W. M. Douglas, for the plaintiff.

W. H. Blake, for the defendants.

[17TH FEBRUARY, 1896.

BELANGER v. MENARD.

Bills of sale and chattel mortgages—Fraud—Possession.

The registration of a bill of sale, and the consequent publicity given to the transaction which it evidences, prevents the inference of fraud being drawn from the retention of the possession by the bargainor.

Cookson v. *Swire*, 9 App. Cas. at pp.664-5, specially referred to.

Judgment of the County Court of the united counties of Prescott and Russell reversed.

Shepley, Q.C., for the plaintiff.

J. B. O'Brian, for the defendant.

[ARMOUR, C.J., and STREET, J., 20TH FEBRUARY, 1896.

MADIGAN v. FERLAND.

Venue—Change of—Convenience—Preponderance.

Upon appeal by the defendant from an order of a Judge affirming an order of a Master refusing to change the venue from Toronto to Sault Ste. Marie, the Court was divided in opinion.

Per ARMOUR, C.J.—The venue should be changed, because the action could be more fitly and conveniently tried at Sault Ste. Marie.

Per STREET, J.—The defendant had not shown so great a preponderance of convenience in favour of the change as was necessary under the authorities, especially in view of the previous refusals by the Master and Judge.

Peer v. North-West Transportation Co., 14 P.R. 381, referred to.

D. Armour, for the defendant.

Osler, Q.C., for the plaintiff.

[BOYD, C., 22ND JANUARY, 1896.

LONGBOTTOM v. CITY OF TORONTO.

Municipal corporations—Negligence—Accident—Ice on sidewalk—Notice of accident and cause—57 V. c. 50, s. 13—Bar to action—Pleading—Evidence.

In an action for damages for injuries sustained by the plaintiff from a fall owing to snow and ice upon the sidewalk, the jury found in favour of the plaintiff. The notice required by s. 13 of 57 V. c. 50 "of the accident and the cause thereof" to be given within thirty days, was not given till two months after the

accident. The statement of claim was silent as to the notice, and no objection to the absence of it was raised by the defendants in their pleading, nor at the trial until the close of the evidence.

Held, that the purpose of the notice is to inform the corporation before action of the nature and cause of the accident, and thus to give the municipal authorities an opportunity of investigating the matter in all its bearings, with a view to settling or contesting the claim.

The enactment provides that the want or insufficiency of the notice is not to be a bar to the action if the Judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency, and that the defendants have not thereby been prejudiced in their defence.

Held, having regard to Rule 402, that it is the proper practice for a defendant to set up the want of notice where the statement of claim is silent on the point, and the Judge at the trial can then go into the circumstances, if any, excusing the want or insufficiency; and as this was not done in this case, and the Judge was unable to say that the defendants were prejudiced, he refused to give effect to the objection taken at the very close of the contest, the jury having affirmed the claim of the plaintiff to be meritorious.

A. M. Denovan, for the plaintiff.

H. L. Drayton, for the defendants.

[Boyd, C., 1st February, 1896.

ARMOUR v. MERCHANTS BANK OF CANADA.

Judgment—Petition to open up—New evidence—Forum—Rule 782.

An application to open up a judgment on the ground of newly discovered material evidence is provided for by Rule 782, and is properly made in Court to the Judge who tried the action, and is a proceeding in the cause.

F. A. Anglin, for the plaintiff.

Shepley, Q.C., for the defendants.

[ROBERTSON, J., 31ST DECEMBER, 1895.

BELL v. GOLDING.

Sale of land—Registered plan—Lane—Sale according to plan—Right to use of lane.

One Marshall, owner of a plot of land in Brampton, divided it by a plan into five lots and a lane, which lane ran round the west and south sides of lot 4, terminating at the east limit of lot 5, which lay to the west of lot 4. He registered this plan in 1868, and in 1869 he sold to Clarke lots 1, 4, and 5, "together with the lane bordering on said lot 4, as shewn by said plan," and in the same year Clarke similarly conveyed the three lots, together with the lane, to the defendant. In 1871 the defendant conveyed lot 5 to Dawson, under whom, by various mesne conveyances, the plaintiff claimed title to the same, the plaintiff's deed being in 1871. All the conveyances described the lots as being according to the plan. Neither Marshall nor Clarke, up to the time that he conveyed to the defendant, ever used the lane as a way, and in 1887 the defendant erected a building across the northerly end of the lane and also a stable on the south-west corner of lot 4, and extending across the westerly end of the lane.

Held, that the defendant having by the conveyance from Clarke become the owner of lots 1, 4, and 5, together with the lane, as laid out on the plan, and having afterwards conveyed lot 5 as laid out on the plan, this amounted to an adoption by him of the plan; and having granted to Dawson all ways, rights, etc., appertaining to the lot, amongst which was the lane, Dawson's title was now in the plaintiff, who therefore had a private right to use the lane; and there should, therefore, be judgment for the plaintiff requiring the defendant to remove all buildings, obstructions, etc., placed by him on the lane.

W. H. McFadden and *E. G. Graham*, for the plaintiff.

T. J. Blain and *J. J. Mahaffy*, for the defendant.

IN CHAMBERS.

[STREET, J., 17TH FEBRUARY, 1896.

In re BAGWELL: ANDERSON v. HENDERSON.

Administration—Summary order—Executors and administrators—Account.

More than a year after the grant of probate to the sole executrix named in the will of the testator, three legatees applied summarily for an administration order, upon the ground that the executrix, who for several years before the death of the testator had managed his business affairs, had refused to account for her dealings with his moneys, and now claimed an allowance from the estate for her services before the death and as executrix, denying that any sum was due by her to the estate.

Held, that the legatees were entitled to the usual administration order, under which the Master could make all the necessary inquiries; and were not driven to an action for administration.

J. Bicknell, for the plaintiffs.

Bruce, Q.C., for the defendant.

[20TH FEBRUARY, 1896.

MONES v. McCALLUM.

Receiver—Administration action—Status.

The right of a judgment creditor of a legatee or devisee under a will to bring an action for the administration of the estate of the testator is doubtful.

A receiver, appointed at the instance of a judgment creditor to receive the interest of the judgment debtor in the estate of his father for satisfaction of the judgment debt, was given leave to bring an action for administration, no opinion being expressed as to his status.

Douglas Armour, for the application.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 24TH JANUARY, 1896.

HANFORD v. HOWARD.

Mortgage—Interest post diem—Foreclosure—Practice—Motion for judgment

The assignee of the equity of redemption in a mortgage on 31st May, 1884, executed his bond to the mortgagee conditioned to pay him $2,200, the balance due on the mortgage, in one year, and "in the meantime and until the said sum is fully paid and satisfied, pay interest thereon as upon such part thereof as shall remain unpaid, such interest to be calculated from the 1st day of June, 1884, at the rate of seven per cent. per annum."

In a suit for foreclosure of the mortgage :—

Held, that, assuming that as against the assignee the land was chargeable with the debt and interest according to the terms of the bond, the mortgagee was entitled after the 1st June, 1885, to interest at the statutory rate only.

Where the defendant appears in a foreclosure suit, the plaintiff cannot have the damages assessed on motion to have the bill taken *pro confesso*. The proper practice in such a case is to have the bill taken *pro confesso*, and the damages assessed upon a subsequent motion upon notice.

J. Roy Campbell, for the plaintiff.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 10TH FEBRUARY, 1896.

GREY v. MANITOBA AND NORTH-WESTERN R. W. CO.

Railways—Mortgagees—Sale—Receiver—Part of line out of jurisdiction—Remedy.

Appeal from decision of KILLAM, J., 15 Occ. N. 166.

Held, that the Court cannot make a decree for the sale of land over which it has not territorial jurisdiction. While the 180 miles forming the first division of the railway may be a section capable of being sold under the Railway Act, there is nothing to warrant a sale, as a section, of that part which lies within the Province. As, then, the Court cannot sell the whole, because part lies outside the jurisdiction, it follows that no decree for sale can be made at all.

Companhia de Mocamibique v. *British South Africa Co.*, [1893] A. C. 602; *Strange* v. *Radford*, 15 O. R. 145; *Ross* v. *Ross*, 23 O. R. 48; *Henderson* v. *Bank of Hamilton*, 23 O. R. 327; 20 A. R. 646; 28 S. C. R. 716, referred to.

The plaintiffs were entitled to have a receiver; an account of the amount due upon the bonds and an order for the payment of that amount into Court; an inquiry what personal property was embraced or included in their security and to have that sold. The decree might contain a declaration that the working expenses of the entire railway were a charge in priority to the bonds. The decree made at the hearing must be varied accordingly.

There should be no costs up to and including the original hearing, and the defendants should have the costs of the rehearing, as they succeeded on all their main contentions.

Ewart, Q.C., and *Wilson*, for the plaintiffs.

Culver, Q.C., and *Phippen*, for the defendants.

[15TH FEBRUARY, 1896.

LINES v. WINNIPEG ELECTRIC STREET R. W. CO.

Street railways—Action for injuries—Negligence—Rate of speed—Proximate cause—Damages.

Appeal from decision of BAIN, J., 15 Occ. N. 338.

Appeal dismissed with costs.

While the speed of a car may not be evidence of negligence *per se*, yet the circumstances may show it to be unreasonable and negligent in a particular case. In this case there was very clear and definite evidence of a rate of speed of from eight to ten miles or more per hour, and that the place of the accident was

a particularly dangerous one. It was for the jury to decide whether the rate of speed was greater than should be used at the place and under the circumstances.

The damage to the plaintiff was the natural consequence of the alarm of the horses, and the defendants were as much liable for that as if the injury had been caused to the driver of the frightened horses.

Machray, for the plaintiff.

Munson, Q.C., for the defendants.

BOOTH v. MOFFAT.

Fire—Damages for loss occasioned by—Negligence—What constitutes.

Appeal from decision of BAIN, J., *ante*, p. 18.

Held, that the appeal should be dismissed with costs.

There was ample evidence of negligence to warrant a verdict in favour of the plaintiff. It might be that the fire was originally set out for the necessary purposes of husbandry, and that in setting it out as and when he did the defendant was not guilty of negligence, but in his subsequent conduct he was negligent.

Pitblado, for the plaintiff.

Clarke, for the defendant.

CANADA PERMANENT LOAN AND SAVINGS CO. v. SCHOOL DISTRICT OF DONORE.

School districts—Alteration of boundaries—Liability on debentures.

The defendants were sued by the name of the School District of Donore, number 118, to recover the amount of certain debentures issued on 30th March, 1881, by the Protestant School District of Donore. The pleas denied the making and presentment of the debentures and coupons. The issues were tried before TAYLOR, C.J., when a verdict was entered for the plaintiffs. A motion was then made to have this verdict set aside and a nonsuit or a verdict for the defendants entered.

The main question argued was whether the defendants were the same corporation who issued the debentures.

Held, that the appeal should be dismissed with costs; the defendants were liable for the payment of the debentures sued on; for, whatever changes there might have been in the territory embraced in the School District of Donore, it was clear from the School Acts and the evidence at the trial that the corporation sued was identical with the one that issued the debentures, and that it had succeeded to its rights and obligations. Since the district that issued the debentures was first established in February, 1881, there had always been a school district of Donore, and a portion of the territoryt sometimes more and sometimes less, that was in the district when the debentures were issued, had always been and still was in the defendants' school district. It was manifest that in the various changes of boundaries that had been made it was not intended to do away with the School District of Donore that had been established in 1881, but only to readjust its boundaries in view of the necessity of establishing new school districts.

The corporation that was sued, being the same as the one that contracted the liability, the presumption would be that the liability continued, notwithstanding the change of name, but both in the School Amendments Act, 1888, and in the Public Schools Act, 1890, there is express provision that no change in the name of a school district is to affect obligations incurred prior to such change.

Ewart, Q.C., for the plaintiffs.

Munson, Q.C., for the defendants.

[TAYLOR, C.J., 3RD FEBRUARY, 1896.

LAFERRIERE v. CADIEUX.

Duress—Arbitration—Submission procured by threat—Illegal contract not to prosecute criminally.

In an action of replevin, the plaintiff appealed from a judgment of a County Court in favour of the defendant.

The plaintiff and his brother bought from the defendant a bay mare and a gray mare, and gave a chattel mortgage,

which was to be paid by delivering hay. In December, 1893, the plaintiff exchanged the gray mare with the defendant for a brown mare. The plaintiff claimed that at this time the chattel mortgage had been paid by delivery of the hay, and that the hay had been sold to his brother by the defendant. In February, 1894, the defendant, after trying unsuccessfully to get a bailiff to seize the two mares under the chattel mortgage, went to the plaintiff's stable at night and took them away. In consequence of this, proceedings were taken against the defendant for stealing, and the defendant in his turn threatened proceedings for perjury.

On the day the case against the defendant was to come up in the magistrate's court, an agreement was come to, to submit the matters in dispute to the award of three arbitrators, the plaintiff and his brother to appoint one, the defendant to appoint another, and these two to appoint the third.

On 22nd February the third arbitrator decided that the bay mare and the brown mare should "be reverted" to the defendant, who was to pay the feed bill due against them and $15 for previous expenses. The defendant paid the feed bill and the $15 and took away the two mares.

On 2nd July the plaintiff brought the present action.

The plaintiff set up that he signed the submission to arbitration under duress, under threat of a prosecution for perjury; that it was entered into to stifle a criminal prosecution, and was therefore wholly void *ab initio;* and that the proceedings upon the arbitration were so wholly irregular that he was not in any way bound by the findings of the arbitrators.

The County Court Judge found that the chattel mortgage was satisfied, and that the plaintiff had adopted the award and could not be heard against it.

Held, that the appeal should be allowed with costs, the verdict for the defendant set aside, and a verdict entered for the plaintiff with costs. The evidence showed that the submission was entered into under threat of criminal proceedings against the plaintiff. Any compromise of a misdemeanour, or indeed of any public offence, cannot be otherwise than illegal. The Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecu-

tion, when it is for an act which is an injury to the public: *Keir* v. *Leeman*, 9 Q. B. 392; *Windhill Local Board* v. *Vint*, 45 Ch. D. 351.

Munson, Q.C., and *Forrester*, for the plaintiff.

Hagel, Q.C., for the defendant.

[KILLAM, J., 29TH JANUARY, 1896.

DOLL v. HOWARD.

Practice—County Court action—Transfer to Queen's Bench—Appeal against order of transfer—Queen's Bench Act, 1895, s. 86.

County Court appeal. A writ had been issued, in this suit in a County Court, and the defendant had filed a dispute note, when the plaintiff's solicitor applied, under s. 86 of the Queen's Bench Act, 1895, to have the action transferred to the Queen's Bench. The Judge made the order, and the papers and proceedings were transmitted by the clerk of the County Court to the proper officer of the Court of Queen's Bench. The defendant now appealed against the order of the County Court Judge.

Held, that the appeal could not be entertained. Under s. 86 of the statute, the action became a cause in the Court of Queen's Bench upon the papers reaching the prothonotary, even if it did not upon their leaving the hands of the clerk of the County Court. On this taking place, there was no longer a cause in the County Court in which proceedings for the appeal could be taken: *Harris* v. *Judge*, [1892] 2 Q. B. 565; *Duke* v. *Davis*, [1893] 2 Q. B. 260.

The order appealed from should not have been made, but it was for the Judge of the County Court to decide, in the first instance, whether it was shown that the defence involved matters beyond the jurisdiction of his Court. He had jurisdiction to decide that question, and having determined it judicially, his decision could not be treated as given without jurisdiction.

The appeal must be quashed without costs.

Martin, for the plaintiff.

Hough, Q.C., for the defendant.

Supreme Court of Canada.

AWARD OF ARBITRATORS.] [9TH DECEMBER, 1895.

PROVINCE OF ONTARIO v. DOMINION OF CANADA AND PROVINCE OF QUEBEC.

In re INDIAN CLAIMS.

Constitutional law—Province of Canada—Treaties with Indians—Surrender of Indian lands—Annuity to Indians—Revenue from lands—Increase of annuity—Charge upon lands—B. N. A. Act, s. 109.

In 1850 the late Province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indians' lands were surrendered to the Government of the Province, in consideration of a certain sum paid down, and an annuity to the tribes, with a provision that "should all the territory thereby ceded" by the Indians "at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time."

By the B. N. A. Act the Dominion of Canada assumed the debts and liabilities of the Province of Canada, and s. 109 of that Act provided that all lands, etc., belonging to the several provinces should belong to the provinces in which the same were situate, "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."

The lands so surrendered were situate in the Province of Ontario, and had for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government had paid the annuities since 1867, and claimed to be reimbursed therefor by Ontario.

Held, affirming the award of the arbitrators, that the payment of the annuities was a debt or liability of the Province of Canada assumed by the Dominion under the B. N. A. Act.

Held, also, reversing the award, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or "an interest other than that of the province in the same," within the meaning of s. 109; and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the annuities, but only liable jointly with Quebec as representing the Province of Canada.

Æmilius Irving, Q.C., *S. H. Blake*, Q.C., and *J. M. Clark*, for the Province of Ontario.

Christopher Robinson, Q.C., and *Hogg*, Q.C., for the Dominion of Canada.

Girouard, Q.C., and *Hall*, Q.C., for the Province of Quebec.

EXCHEQUER COURT.] [22ND FEBRUARY, 1896.

COOMBS v. REGINAM.

Railway company—Purchase of ticket—Rights of purchaser—Continuous journey—Right to stop over—Conditions on ticket.

C. saw an advertisement of the Intercolonial Railway that on 30th and 31st March and 1st April excursion tickets would be issued at one fare, not good if used after 1st April. He purchased a ticket on 31st March, his attention not being drawn to conditions on the face of it "good on date of issue only," and "no stop-over allowed," and he did not read them. He started on his journey on 31st March, and stopped over night at a place short of his destination, and took a train for the rest of the trip the next morning, when the conductor refused to accept the ticket he had, and ejected him from the car, as he refused to pay the fare again. He filed a petition of right to recover damages from the Crown for being so ejected.

Held, affirming the decision of the Exchequer Court, 4 Ex. C. R. 321, that if the ticket had contained no conditions, it would only have entitled C. to a continuous journey, and not have given him the right to stop over at any intermediate station, and he had still less right to do so when he had express notice that

he could only use the ticket on the day it was issued, and would not be allowed to stop over.

Orde, for the appellant.

Newcombe, Q.C., for the respondent.

ONTARIO.] [9TH DECEMBER, 1895.

In re CHRISTIE AND TOWN OF TORONTO JUNCTION.

Appeal—Judgment awarding damages to respondent—Increase of damages—Cross-appeal.

C. claimed damages from the town of Toronto Junction for injury to his house property by the raising of the grade of the street on which it stood, and the claim was submitted to arbitration under the Ontario Municipal Act, 1892. The arbitrators considered that C.'s property was benefited by the alteration in the grade of the street, which was raised to the level of the houses, and so made a more convenient entrance, and they awarded him nominal damages. On appeal to ROSE, J., he increased the award to substantial damages, and the Court of Appeal sustained his judgment, being equally divided as to his jurisdiction so to deal with the case: 22 A. R. 21, 15 Occ. N. 26. The corporation then appealed to the Supreme Court of Canada.

Held, that the Ontario Judicature Act, R. S. O. c. 44, ss. 47, 48, and Rule 16 thereunder, gave the Court of Appeal power to increase the amount of the award to the extent to which it had been increased by Rose, J., and the judgment appealed from was right; that the Supreme Court, under its Rule No. 61, had the like power to increase damages awarded to a respondent, though there was no cross-appeal.

Robertson v. *The Queen*, 3 S. C. R. 52, followed.

Held, also, that the amount awarded by Rose, J., did not compensate the respondent for the injury to his property, and it should be still further increased.

Held, per STRONG, C.J., that as the statute under which the arbitration took place required the Court to pronounce just such

judgment as the arbitrators should have given, it was sufficient notice to the appellant of what the Court might do without a cross-appeal.

Appeal dismissed with costs, subject to variation by increasing the damages.

Aylesworth, Q.C., and *Going*, for the appellants.

W. R. Riddell and *A. Cecil Gibson*, for the respondent.

[4TH MARCH, 1896.

EASTMURE v. CANADA ACCIDENT ASSURANCE CO.

Master and servant—Dismissal—Agent of insurance company—Acceptance of agency for rival company.

By agreement in writing the plaintiffs became chief agents for Ontario of the defendants, doing ordinary accident plate-glass and employers' liability insurance. By one clause in the agreement the plaintiffs engaged to fulfil conscientiously all the duties assigned to them, and to act constantly for the best interests of the defendants, and by another the agreement was to continue from year to year, subject to termination by either party on giving three months' notice to the other. Shortly after they became agents of the defendants, the plaintiffs accepted the agency for Ontario of the Lloyds' Plate Glass Insurance Company, and on refusing to give it up on demand of the defendants, the plaintiffs were dismissed.

Held, affirming the decision of the Court of Appeal, 22 A. R. 408, 15 Occ. N. 230, that the acceptance by the plaintiffs of the agency of the rival company, by which they would be prevented from conscientiously fulfilling the duties assigned to them by the defendants, was sufficient justification for the dismissal.

Gormully, Q.C., and *Orde*, for the appellants.

W. Cassels, Q.C., and *Bruce*, Q.C., for the respondents.

QUEBEC.] [18TH FEBRUARY, 1896.

DRYSDALE v. DUGAS.

Nuisance—Livery stable—Offensive odours from—Noise of horses—Damages.

An action for damages was brought by a householder against

the proprietor of a livery stable adjoining his premises, which, it was claimed, constituted a nuisance from the offensive odours proceeding from it, and from the noise made by the horses at night. The pleas to the action were that the stable was a necessity to the residents of the place, and that it was built according to the most improved modern methods of drainage and ventilation. The trial Judge found that the odours and noise were a source of injury, and gave judgment for the householder with damages for past damage and a separate amount for damages in the future unless the cause of offence were removed at a certain time. The Court of Queen's Bench affirmed the first holding, but reversed that as to future damages.

Held, GWYNNE, J., dissenting, that if the stable was offensive to the plaintiff he could recover damages for the inconvenience caused thereby, and, the two Courts having found that the cause of offence existed, their judgment should be affirmed.

Greenshields, Q.C., for the appellant.

Robidoux, Q.C., for the respondent.

[25TH FEBRUARY, 1896.

HAMEL v. HAMEL.

Appeal—Final judgment—Interlocutory proceeding—Petition for leave to intervene.

In an action brought by one executor of an estate to have the other removed, E. H., mis-en-cause in the action, wishing to take proceedings for the removal of both executors, presented a petition to the Superior Court asking to be allowed to intervene. His petition was dismissed, the Court holding that, as he was already in the cause as mis-en-cause, if he wanted relief that he could not obtain in that capacity, he must bring a separate action. The judgment dismissing the petition was affirmed by the Court of Queen's Bench, and the petitioner sought to appeal to the Supreme Court.

Held, that the proceedings were only interlocutory, and there was no final judgment from which an appeal would lie; and the appeal was, on motion, quashed with costs.

Drouin, Q.C., for the motion.

Belcourt, contra.

NEW BRUNSWICK.] [18TH FEBRUARY, 1896.

CAMPBELL v. CITY OF ST. JOHN.

Municipal corporation—Repair of streets—Non-feasance—Elevation of sidewalk.

In the city of St. John, N. B., a sidewalk on one of the streets adjoining private property had been covered with asphalt, whereby it was raised considerably above the level of the private way. After a time water dropping from a house on the adjoining property wore away a portion of the sidewalk, and C., in stepping on it from the private property, fell and was injured, and brought an action against the city for damages. At the trial of the action she was nonsuited, but the nonsuit was set aside by the full Court and a new trial ordered.

Held, reversing the judgment of the Supreme Court of New Brunswick, 33 N. B. Reps. 131, that if the accident occurred from the level of the sidewalk being raised above that of the private way, it was not misfeasance; and if from the street being out of repair, it was mere negligence or non-feasance; and in neither case was the city liable.

Municipality of Pictou v. *Geldert*, [1893] A. C. 524, and *Municipality of Sydney* v. *Rourke*, *ib.* 433, followed.

Pugsley, Q.C., and *Baxter*, for the appellants.

Currey, Q.C., for the respondent.

TROOP v. ST. PAUL FIRE AND MARINE INS. CO.

Marine insurance—Voyage policy—"At and from" a port—Construction of policy—Usage.

A ship was insured for a voyage "at and from Sydney to St. John, N. B., there and thence," etc. She went to Sydney for orders, and, without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour, and having received her orders by signal, attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy, evidence was given establishing that Sydney was well known as a port of call; that

ships going there for orders never entered the harbour; and that the insured vessel was within the port according to a Royal Surveyor's Chart furnished to navigators.

Held, affirming that the decision of the Supreme Court of New Brunswick, 33 N. B. Reps. 105, that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John.

Currey, Q.C., for the appellants.

Pugsley, Q.C., for the respondent.

MOWAT v. BOSTON MARINE INS. CO.

Marine insurance—Goods shipped and insured in bulk—Loss of portion—Total or partial loss—Contract of insurance—Construction.

M. shipped on a schooner a cargo of railway ties for a voyage from Gaspé to Boston, and a policy of insurance on the cargo provided that "the insurers shall not be liable for any claim for damage on . . . lumber . . . but liable for a total loss of a part if amounting to five per cent. on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memorandum in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy.

Held, reversing the decision of the Supreme Court of New Brunswick, 33 N. B. Reps. 109, TASCHEREAU, J., dissenting, that M. was entitled to recover; that, though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat it as a total loss; and that the memorandum on the certificate did not alter the terms of the policy, the words "free from partial loss" referring not to a partial loss in the abstract, applicable to a policy in the ordinary form, but to such a loss according to the contract embodied in the policy.

Held, further, that the policy, certificates, and memorandum together constituted the contract, and, so as to avoid any repugnancy between their provisions and any ambiguity, must be construed against the insurers, from whom all these instruments emanated.

Palmer, Q.C., for the appellant.

Weldon, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

IN CHAMBERS.

[MACLENNAN, J.A., 2ND MARCH, 1896.

DONNELLY v. AMES.

Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, s. 77.

Under s. 77 of the Judicature Act, 1895, security was specially ordered to be given by the plaintiffs in the sum of $200 on their appeal to the Court of Appeal from the judgment of the trial Judge dismissing their action for the recovery of land of which the defendants and those under whom they claimed had been in undisturbed possession for nearly thirty years, where two of the plaintiffs resided abroad, and the other two, who resided in the Province, had no property exigible under execution, and the taxed costs in the Court below were unpaid, and execution therefor had been returned *nulla bona*.

E. D. Armour, Q.C., for the plaintiffs.

Shepley, Q.C., for the defendants.

High Court of Justice.

[Armour, C.J., Street, J., 31st December, 1895.

McKAY v. NORWICH UNION INSURANCE SOCIETY.

Fire insurance—Statutory conditions—Variation—Unreasonableness—Notice—Vacancy—Materiality—Part affected—Title—Agreement between mortgagee and insurers—Subrogation.

The defendants insured seven houses, described in the policy as "a two-storey frame, rough-cast, felt-roofed block, 128 by 78 feet, containing seven dwellings, six of which are occupied by tenants and one by assured." In the application the question as to how many tenants was answered "six tenants and applicant," but the defendants' agent was informed and he advised them that "the largest house of the lot the applicant *will* occupy himself." A variation of the statutory conditions was printed on the policy in these words: "This policy will not cover vacant or unoccupied buildings (unless insured as such), and if the premises shall become vacant or unoccupied . . . this policy shall cease and be void unless the company shall by indorsement . . . allow the insurance to be continued."

Held, that the defendants could not escape liability upon the ground that the actual facts were not before them at the time of the application, nor by their variation of the statutory conditions as to vacant or unoccupied houses.

Held, also, that the variation as to the premises becoming vacant or unoccupied in a case like this, where the houses were of a class likely to be occupied by monthly tenants or by tenants for short periods, where the moving out of one tenant and leaving the tenement vacant one day, whether the insured was aware of it or not, might avoid the policy, was unreasonable, and the reasonableness of the variation was to be tested with relation to the circumstances at the time the policy was issued, and not in the light of those existing at the time at which the condition was sought to be applied.

Smith v. City of London Insurance Co., 14 A. R. 328; and *Ballagh* v. *Royal Mutual Fire Insurance Co.*, 5 A. R. 87, specially referred to.

Semble, following *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, 121, that when an attempted variation of a statutory condition has been held for any reason not binding, the other conditions must then be read as if the attempted variation was not in the policy.

Held, also, that the fact that three or four of the houses having been vacant to the knowledge of the plaintiff for some months before the fire was, under the third statutory condition, a change material to the risk, and the risk was increased by it, and the failure to notify the defendants avoided the policy "as to the part affected," which in this case was the whole block.

Held, also, following *Reddick* v. *Saugeen Mutual Fire Ins. Co.*, 14 O. R. 506, that the provisions of the third statutory condition could not be distinguished from those of the first as to the meaning of the word "risk;" and matters relating to title were not covered.

Held, also, following *Imperial Fire Ins. Co.* v. *Bull*, 18 S. C. R. 697, that the defendants, having under an agreement paid the mortgagees, and taken an assignment of the mortgage, could not hold it against the mortgagor, the plaintiff, even though they could show that the mortgagor never had any claim against them, and that that case is no authority for holding that the effect of the agreement between the mortgagees and the defendants, limited to the extent of the mortgagees' interest, was to do away, as between the mortgagor and the defendants, with the conditions upon which the policy was issued.

Judgment of FALCONBRIDGE, J., affirmed.

Elgin Myers, Q.C., and *W. J. Clark*, for the plaintiff.

Wallace Nesbitt and *R. McKay*, for the defendants.

[25TH JANUARY, 1896.

SMITH v. TOWNSHIP OF ANCASTER.

Way—Toll roads—Municipal corporations—By-laws.

A macadamized road, portions of which were in the townships of A. and B. and under the control and management of

the Minister of Public Works, was, under the powers contained in s. 52 of 31 V. c. 12 (D.), declared to be no longer under his control; and by s. 53 it was declared that the road should be under the control of and managed and kept in repair by the municipal or other authorities of the locality. Subsequently the township of B. passed a by-law authorizing the township of A., for the purpose of keeping the road in repair, to take possession thereof, and, so long as they kept it in repair as a toll road, to retain possession; and the township of A. also passed a by-law assuming the said portion of the road.

Held, that both these by-laws were invalid; and consequently the township of A. had no authority to levy tolls on the part of the road so assumed.

Corporation of Ancaster v. *Durand*, 32 C. P. 563, distinguished.

Lynch-Staunton, for the plaintiff.

W. Cassels, Q.C., for the defendants.

[27TH FEBRUARY, 1896.

BEATTIE v. DINNICK.

Statute of Frauds—Promise to answer for the debt of another—Guarantee —Indemnity.

The plaintiff was a holder of a promissory note of a company of which the defendant was president, and was pressing for payment, when the defendant verbally promised to see him paid.

Held, reversing the judgment of FALCONBRIDGE, J., that a promise, whether unconditional or not, to pay a debt for which another remains liable, is within the fourth section of the Statute of Frauds; while a promise to indemnify is not; and that, as the defendant's promise was really a guarantee, and not an indemnity, the plaintiff could not recover.

Guild v. *Conrad*, [1894] 2 Q. B. 885, followed.

Aylesworth, Q.C., for the appeal.

J. W. Elliott, contra.

[ARMOUR, C.J., FALCONBRIDGE, J., 3RD JANUARY, 1896.

MILLIGAN v. SUTHERLAND.

Chattel mortgage—After-acquired goods—Description—Sufficiency of.

Persons carrying on business as manufacturers of hoops and staves at their factory at B., and also as general storekeepers at L., in the same county, made a chattel mortgage conveying to the defendant their goods and chattels, as set forth in two schedules annexed thereto. Schedule A. covered the machinery and other goods and chattels in the factory, and, after describing them, extended the operation of the mortgage to all other goods and chattels thereafter purchased or manufactured or brought on the premises, whether for the business of stave manufacturing or not, or into or upon any other premises thereafter to be occupied by the mortgagors, or either of them, it being understood that all logs, staves, and bolts manufactured and timber brought on the mortgagors' premises, after the execution of the mortgage, should be covered thereby. The other schedule covered the goods and chattels in the general store, and extended to goods and chattels thereafter brought into the said store premises, etc.

Held, that the provision in schedule B. as to after-acquired goods referred only to goods brought into the store in which the business was then being carried on, and not to goods brought into a store at B. to which that business had been subsequently removed; neither would the provision as to after-acquired goods in schedule A. apply to the after-acquired goods brought into the store at B., for the reference thereto was only to goods of the character referred to in that schedule.

T. W. Crothers, for the plaintiff.

Aylesworth, Q.C., for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 27TH JAN'Y, 1896.

ABRAHAM v. HACKING.

Married woman—Contract—Separate estate.

Where, at the time of a contract being entered into by a married woman, the only property possessed by her consisted of

her engagement and wedding rings, a silver watch and chain, and her clothing :—

Held, that this was not separate estate such as she could be deemed to have contracted with reference to.

C. Elliott, for the plaintiff.

J. P. Mabee, for the defendant Annie Hacking.

[4TH MARCH, 1896.

LANGTRY v. CLARK.

Landlord and tenant—Distress—Possession of goods—Impounding—Sale—Reasonable time — Seizure under chattel mortgage — Pound-breach—2 W. & M., sess. 1, c. 5, s. 4.

The plaintiff, as landlord, distrained the goods of his tenant on 16th July, and left them in the custody of the tenant, who agreed to hold possession and deliver them up when required. On 10th August a chattel mortgagee seized and removed the goods.

In an action for pound-breach under 2 W. & M., sess. 1, c. 5 s. 4, by the landlord against the chattel mortgagee and his bailiff :—

Held, affirming the decision of the County Court of Grey, that the landlord had the right to impound and secure the goods on the premises, and at the expiration of five days to sell them, and had a reasonable time after the five days to sell, which had elapsed in this case ; that there was a good distress and a good impounding, and the agreement bound the tenant, but not the mortgagee, who was entitled to have the provisions of the law carried out ; and who could, after the expiry of a reasonable time for sale, say the goods are not in the custody of the law, but of the landlord under an agreement with the tenant, and in taking them under his chattel mortgage he did not commit a pound-breach.

G. W. Patterson, for the plaintiff.

George Kerr, for the defendant.

[BOYD, C., ROSE, J., ROBERTSON, J., 17TH JANUARY, 1896.

In re THOMPSON.

Attachment of debts—Assignment for benefit of creditors—Executions—Priorities—Sheriff—Creditors' Relief Act, s. 37.

An assignment by an insolvent for the general benefit of his creditors does not oust a prior attachment by a creditor of the insolvent of a debt due to him.

Wood v. *Joselin*, 18 A. R. 59, followed.

Section 37 of the Creditors' Relief Act must be construed to refer only to a case where the facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain one at his own instance, under s.-s. (1) of s. 37; and, to entitle him to such order, there must be in his hands several executions and claims, and not sufficient lands or goods to pay all and his own fees, and a debt owing to the execution debtor by a person resident in the bailiwick.

And where a debtor, who was entitled to certain insurance moneys, assigned them to his wife, who subsequently assigned them to her husband's assignee for the benefit of creditors, and such moneys were also attached by a creditor of the husband between the dates of the assignment to his wife and his assignment for creditors; and some months after these transactions, when the moneys were in Court awaiting the result of litigation between the assignee and the attaching creditor, two executions against the debtor came into the hands of the sheriff of the county in which the insurance company in whose hands the moneys were when attached had its head office :—

Held, that the moneys had ceased to be the property of the debtor, and even if there had been no attaching order, the sheriff could not have obtained the moneys for the purpose of satisfying the executions.

Semble, also, that the provisions of s.-s. (3) of s. 37 should be read as confined to creditors having executions and claims in the sheriff's hands at the time of the attaching of the debt.

W. R. Riddell and *F. J. Travers*, for the attaching creditor.

Rowell, for the sheriff of Elgin.

W. H. Blake, for the assignee.

[Boyd, C., Robertson, J., MacMahon, J., 18th February, 1896.

GUROFSKI v. HARRIS.

Fraudulent conveyance—13 Eliz. c. 5—Intent to defeat action for tort—Creditor—Preference.

Where a conveyance of land was made by a father to a daughter, with intent on the part of both to defeat an action for slander then pending against the father, but made and accepted in satisfaction of a *bona fide* pre-existing debt to the extent of the full value of the land :—

Held, that the conveyance being attacked under 13 Eliz. c. 5, by one who became a creditor by reason of the judgment obtained in the action of slander three months after the conveyance, and there being no other creditors, the preferring of one creditor was no ground for setting aside the conveyance as fraudulent and void.

Cameron v. *Cusack*, 17 A. R. 489, followed.

A plaintiff suing for a tort is not a creditor within the meaning of the Ontario statute as to preferences.

Ashley v. *Brown*, 17 A. R. 500, followed.

F. E. Titus, for the plaintiff.

Watson, Q.C., for the defendants.

[Boyd, C., Ferguson, J., Meredith, J., 20th February, 1896.

BROWN v. CARPENTER.

Appeal—Divisional Court—County Court — Discovery of new evidence—Motion for new trial—Law Courts Act, 1895, s. 44, s.-s. 3.

Under s. 44, s.-s. 3, of the Law Courts Act, 1895, 58 V. c. 13, a motion for a new trial on the ground of discovery of new evidence in a County Court action must be made before the County Court, and, there being no provision giving any right of appeal, the judgment of the County Court Judge is final and absolute ; and this applies to a judgment given before the coming into effect of the said Act.

Quære, per FERGUSON, J., whether, where judgment had been delivered and proceedings in appeal commenced before the coming into force of the Law Courts Act, it could be proceeded with.

Shepley, Q.C., and *J. E. Farewell*, Q.C., for the plaintiff.

T. A. McGillivray, for the defendant.

[26TH FEBRUARY, 1896.

DENNIS v. HOOVER.

Life tenancy—Lease—Rent payable half-yearly in advance—Death of life tenant during half year—Apportionment.

Under a lease made by a tenant for life, the rent was payable half-yearly in advance. The life tenant died a few days after the rent became due. Part of the rent was remitted to her on the day she died, but was never received by her, but by her executor, and the balance was paid to the executor on his representation that he was entitled to it.

Held, that the rent must be deemed to have been received by the executor for the use of those entitled to it, and was, therefore apportionable between the executor and the remaindermen.

Where the rent had been paid over by the executor to those entitled under the life tenant's will :—

Held, that the executor was entitled to an order for repayment.

J. W. St. John, for the plaintiff.

J. W. McCullough, for the defendant.

D. C. Ross and *Nason*, for the third parties.

THIBAUDEAU v. GARLAND.

Insolvency—Purchase of debt after knowledge of insolvency—Right of set-off.

After a trader had become insolvent and had absconded before he had made an assignment for the benefit of creditors, a person indebted to the insolvent, and aware of his insolvency, purchased from a creditor of the insolvent a debt due to the

creditor by the insolvent, which he claimed to be entitled to set off against his debt to the insolvent.

Held, under R. S. O. c. 224, s. 23, in connection with the general law of set-off, he might properly do so.

McCarthy, Q.C., for the plaintiffs.

Ritchie, Q.C., and *Masten*, for the defendants.

[BOYD, C., ROBERTSON, J., 26TH FEBRUARY, 1896.

ROSE v. McLEAN.

Trade-name—Geographical designation—Injunction—Literary publication.

The plaintiffs, being publishers of a journal devoted to the interest of booksellers in Canada, and called *The Canadian Bookseller*, sought to enjoin the defendants from altering the name of the journal which they had been publishing for eleven years under the title of *Books and Notions*, to *The Canadian Bookseller and Stationer*, and from selling it under the latter name.

Held, reversing the decision of MACMAHON, J., that the plaintiffs were not entitled to the injunction sought for.

Per BOYD, C.—Two elements must co-exist in a case of this kind where the inhibition is with regard to the use of a common geographical name; the first of which was present in this case, but the second absent. The first is that the publication must have been such as to connect the proprietor with the publication in the mind of the trade or community interested; but further, there must also have arisen in connection with such prior user of the geographical name, some secondary meaning attributable to the epithet which is sought to be appropriated,—some secondary meaning connoting character or quality of the product. Here, however, the title "Canadian" in connection with "Bookseller" did not mean, so far as appeared from the evidence, any special kind of periodical or publication, but merely asserted the fact that the particular print *The Bookseller* was a Canadian publication. A man cannot have a monopoly of property in a geographical name as such.

Kappelle and *J. Bicknell*, for the plaintiffs.

Robinson, Q.C., and *Levesconte*, for the defendants.

PRIDE v. ROGERS.

Crown lands—Locatee—Partition—Jurisdiction—Improvements—Statute of Limitations.

Certain land was located by the Crown to one R., who left the Province in 1868, and was last heard of in 1877. The defendant, a son of R., had resided continuously on the property since 1881, cultivating and improving it. The plaintiff, a sister of the defendant, resided on the property off and on till 1887, when she went away. R. had two other children, who had not been in possession of the land. This action was brought in 1895.

Held, that R. must be presumed to have been dead by 1884, and the defendant had acquired by the operation of the Statute of Limitations a good title as against the children who had not been in possession, but the plaintiff's claim as to one-quarter was as good as the defendant's, and in making partition the Crown should recognize the right of the defendant to the improvements.

The Statute of Limitations applied because the rights involved upon the record were merely private rights, not affecting the pleasure or the sovereignty of the Crown.

As both parties to these proceedings had put themselves upon the Court, and the whole case had been investigated without any objection to the jurisdiction to decree partition, the fee being in the Crown, no effect should be given to any such objection to the jurisdiction. Moreover, under R. S. O. c. 44, s. 21, s.-s. 7, there is jurisdiction to "decree the issue of letters patent from the Crown to rightful claimants," and declaratory relief may in a suitable case be given which will work practically the result of a partition of the property, if the Crown is willing to act upon the judgment of the Court.

William Kingston, Q.C., for the plaintiff.

W. H. Blake, for the defendant Andrew Rogers.

[BOYD, C., STREET, J., MEREDITH, J., 26TH FEBRUARY, 1896.

HENRY v. DICKIE.

Mortgage—Consideration — Value of stolen goods — Stifling prosecution—Duress.

The defendant, a prisoner charged with larceny, sent for the

agent of the owner and offered to give security by a mortgage on his property for the value of the goods stolen. The agent told him he would have to stand his trial, whether he gave a mortgage or not, and he could not release him from his position even if he secured him, but he let him know that on making a settlement he would endeavour to get a mitigation of the sentence, which he afterwards did.

Held, affirming the decision of a local Master, STREET, J., dissenting, that there was no promise and no agreement that there should be any interference with the course of justice, and no promise to stifle or suspend the prosecution, and no steps taken which interfered with the due prosecution of the offender, and that the mortgage which was given was a valid security.

Per STREET, J.—The mortgage was obtained by promising that if it was given endeavours would be made to have the punishment made as light as possible, and such a bargain is founded on an illegal consideration, and a security given in consequence of it cannot be enforced.

Hamilton Cassels, for the defendants T. F. and A. Dickie.

J. F. Grierson, for the defendant McMillan.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 10TH FEBRUARY, 1896.

PATRICK v. WALBOURNE.

Mechanic's lien—Increased value—Destruction of—Rights of lienholder and mortgagee—When increased value to be ascertained.

In a mechanic's lien proceeding, where it was found by an official referee that the lienholders had increased the selling value of the land to an amount equal to their claims, and to that extent were declared prior to mortgages on the premises, although pending the proceedings the buildings were burned down and the increased value gone :—

Held, affirming the decision of FALCONBRIDGE, J., who had reversed that of the referee, that the policy of the Act is to take from the mortgagee the benefit which at common law he was entitled to of the work and materials which after the making of his mortgage had been employed in the improvement of the property and which had not been paid for by the mortgagor, and

to leave his security otherwise unimpaired. The lienholder gets priority to the mortgage on the increased value, and the mortgagee retains his priority over the lienholder as to all that his security embraces, except that increased value, and any loss or depreciation in value of that which gives the increased value to the land must fall on the lienholder; the increased value, and that only, is his security as against the mortgagee.

Semble, that the question of what is the increased value to which the lienholder is entitled as against the mortgagee to resort for the satisfaction of his lien, cannot be finally determined until the lands have been sold, and it is with reference to the result of the sale, and the condition of the property at the time of the sale, that the respective rights of the mortgagee and the lienholder are to be finally ascertained.

James Bicknell, for the appellants.

Aylesworth, Q.C., for the mortgagees.

[MEREDITH, C.J., 7TH JANUARY, 1896.

SILLS v. WARNER.

Will—Devise to religious body—Minister's residence—Necessity for user as — Gift for school teacher's residence—Validity.

A testator by his will, made six months prior to his death, gave to his wife a life estate in a house and lot of land, and by a subsequent clause directed that after her death the property should go to the trustees for the time being of a named Presbyterian Church for a manse, if required, or to be kept in good repair and rented for the benefit of the congregation thereof; and in case the said Presbyterian Church should cease to exist, etc., and a Congregational Church be organized in lieu thereof, then to the trustees of such Congregational Church, for rental and benefit thereof, or for a parsonage. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse.

Held, that the devise was valid.

By another clause certain other land was given to the trustees of a named Common School Section, on which a teacher's

residence might be erected, or it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot, etc.

Held, a devise for charitable purposes within 9 Geo. II. c. 86, and, not being excepted by the legislation from the operation thereof, was therefore void.

Clute, Q.C., for the plaintiff.

Warner, for the defendant Warner.

S. C. Smoke and *W. G. Wilson*, for the defendants Wilkison, Caesar, and Amey.

G. F. Ruttan, for the official guardian.

Deroche, Q.C., for the defendants the school trustees and the defendants the trustees of the Presbyterian Church.

Preston, Q.C., for certain legatees.

S. Gibson, for the Attorney-General for Ontario.

DONNELLY v. AMES.

Limitation of actions—Recovery of land—State of nature—Statutory period—Registry laws—Will.

In an action for the recovery of land, proof of possession is *prima facie* evidence of title; and, in the absence of proof of title in another, is evidence of seisin in fee; but the plaintiff must recover on the strength of his own title; and if it be proved that the title is in another, even though the defendant does not claim under or in privity with such other, the plaintiff's action will fail.

Where, in such an action, the plaintiffs claimed to have acquired a title thereto by possession, but such possession was merely that of a squatter, commencing in 1851, on land then patented and in a state of nature, such possession being without the knowledge of the patentee or those claiming under him:—

Held, under 27 & 28 V. c. 29, s. 1, that in order to create a good title by possession, forty years' possession at least was necessary; and the action therefore failed as against the defendant in possession, though not claiming through or in privity with the patentee.

The plaintiffs claimed under the will of their father, which had never been registered; while the defendants claimed under a chain of title derived through conveyances by the successive occupants, which were duly registered.

Quære, as to the effect of the Registry Act in such cases.

Walkem, Q.C., and *J. B. Walkem*, for the plaintiffs.

Shepley, Q.C., and *Mudie*, for the defendants.

ONTARIO AND WESTERN LUMBER CO. v. CITIZENS' TELEPHONE AND ELECTRIC CO.

Trading company—Contract not under seal—Part performance—Liability.

Contracts not under the corporate seal made with trading corporations relating to purposes for which they are incorporated, or, if partly performed, and of such a nature as would induce the Court to decree specific performance thereof if made between ordinary individuals, will be enforced against them.

Where, therefore, an electric light company, while they were making changes in their factory, entered into a contract, by correspondence merely, for the use, at a specified amount, of one of the wheels in the plaintiffs' mill, which was used and a part payment made, the contract was held to be binding, and the plaintiffs entitled to recover the balance due, notwithstanding the absence of the corporate seal.

Ewart, Q.C., and *Allan McLennan*, for the plaintiffs.

Henry Langford, for the defendants.

HARPELLE v. CARROLL.

Landlord and tenant—Distress—Withdrawal—Arrangement with tenant—Second distress—Fraud—58 V. c. 26, s. 4—Construction of.

After a landlord had distrained for rent, he withdrew the distress under an arrangement made with the tenant, whereby the tenant gave him a chattel mortgage on the goods and chattels, the mortgage containing a provision that in case the mortgagee should feel unsafe or insecure, or deem the goods in

danger of being sold or removed, the mortgage money should immediately become due and payable. The mortgagee, before the time for payment had elapsed, deeming himself unsafe, and the goods liable to be sold, and, having ascertained that the mortgagor had fraudulently concealed from him the existence of a prior mortgage to the defendant, issued a second distress warrant to distrain, as well for the said rent as for another year's rent which had become due in the meantime.

Held, that the withdrawal of the first distress, not being a voluntary one, but under the special arrangement, did not prevent the landlord from making the second distress.

Semble, the second distress could be supported by reason of the first distress having been withdrawn through the tenant's fraud.

Section 4 of 58 V. c. 26 does not preclude a right of distress, unless there is an express contract therefor contained in the lease; and, in any event, the section is not retrospective.

Machar, for the plaintiff.

E. H. Smythe, Q.C., and *Deroche*, Q.C., for the defendant.

BROOKE v. GIBSON.

Limitation of actions—Trespasser—Possession—Tax title—R. S. O. c. 111, s. 5, s.-s. 4—Construction of.

A person claiming title by possession to land derived through prior trespassers, and by his own possession, can only acquire a title to the land of which there has been actual possession for the statutory period.

Sub-section 4 of s. 5 of the Real Property Limitation Act, R. S. O. c. 111, requiring twenty years' possession as to non-cultivated lands, only operates in favour of the patentee and those claiming under him, and not to a title acquired under a sale for taxes.

Hamilton Cassels, for the plaintiffs.

E. G. Porter, for the defendant.

[ROBERTSON, J., 6TH JANUARY, 1896.

In re ONTARIO FORGE AND BOLT CO.

Company—Winding-up—Claim for salary—Auditor—"Clerk."

An auditor employed in auditing books of a company does not come within the designation of "clerks and other persons having been in the employment of the company in or about its business or trade" so as to entitle him to the special privilege given by s. 56 of the Winding-up Act, R. S. C. c. 129, to be collocated in the dividend sheet for arrears of salary or wages, etc.

Akers, for the appellant.

John Greer, for the liquidator.

[STREET, J., 18TH FEBRUARY, 1896.

JARVIS v. CITY OF TORONTO.

Municipal corporations—Expenditure of public money—Contribution to costs of private action—Injunction.

A ratepayer of a city having brought an action against a gas company, on behalf of all the gas consumers of the city, for an account of moneys alleged to have been improperly obtained in the past by the company from the consumers of gas, and with the intent of reducing the price of gas to consumers, the defendants' executive committee reported in favour of authorizing the council to grant money to carry on the action and any other actions which might be brought by ratepayers where the corporation was interested or could have brought such action.

Held, that the plaintiff was entitled to an injunction to restrain any such payments by the defendants.

If the plaintiff had instituted the action upon the promise on the part of the defendants to indemnify him, it might well be that such a promise would, under the circumstances, have been within their powers; but voluntarily to pay him after litigation the costs which he had incurred, without any obligation to do so, would be *ultra vires* of the municipal council.

Shepley, Q.C., and *Lobb*, for the plaintiff.

Robinson, Q.C., and *J. MacGregor*, for the defendants.

IN CHAMBERS.

[STREET, J., 20TH FEBRUARY, 1896.

REGINA *ex rel.* HARDING v. BENNETT.

Municipal elections—Quo warranto—Disqualification—Interest in contract—Property qualification.

Motion in the nature of a *quo warranto* to void the election of R. W. Bennett, who has been declared elected alderman for the city of London.

In 1892 the city council passed a by-law exempting the property of the respondent's partnership from taxation except as to school rates.

Held, the exemption not being founded upon any contract, but being an exemption without a contract as provided by 56 V. c. 35, s. 4, that there was no disqualification.

Regina ex rel. Lee v. *Gilmour*, 8 P. R. 514, distinguished.

Held, also, as to property qualification, that the respondent was entitled to qualify upon his rating upon the assessment roll of 1895, as the joint holder of a freehold estate in the partnership property aforesaid, the three partners being rated for this property as freeholders to the amount of $10,000: 55 V. c. 42, ss. 73, 86.

Notwithstanding the exemption by-law above mentioned, the partnership property remained liable to pay school rates, which by 54 V. c. 55, s. 110, had to be levied by the municipality upon the taxable property within it; nor did the amendment in 56 V. c. 35, s. 4, debar the respondent from so qualifying, for the words "exempt from taxation" in that section must be held to mean exempt from payment of all taxes, whereas the property of the respondent was not exempt from school taxes.

Hellmuth, for the relator.

Moss, Q.C., for the respondent.

[25TH FEBRUARY, 1896.

In re HENDRY.

Arrest—Division Courts—Warrant—"Backing"—Where arrest can be made —R. S. O. c. 51, ss. 242, 243.

There is no authority for the "backing" of a Division Court warrant by a magistrate; and a defendant in a Division Court action cannot be arrested, under a warrant issued under s. 242 of the Division Courts Act, outside of the county in which the Division Court is situate from which the warrant issued.

History of sections 242 and 243 of R. S. O. c. 51 considered.

F. C. Cooke, for Hendry.

R. McKay, for the plaintiff.

Douglas Armour, for the gaoler.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 25TH FEBRUARY, 1896.

In re HOPPER INFANTS.

Infant—Sale of land—Payment of debts.

The Court has not power under s. 175 of the Supreme Court in Equity Act, 1890, 53 V. c. 4, to order the sale of an infant's interest in land inherited from his father, if part of the proceeds therefrom is to be used in payment of debts of the deceased owner.

A. P. Barnhill, for the petitioner.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 7TH MARCH, 1896.

GILES v. McEWAN.

Master and servant — Verbal contract— Non-performance within a year— Recovering on quantum meruit—Joint action by husband and wife for services rendered.

Appeal from decision of TAYLOR, C.J., 15 Occ. N. 384.

Appeal allowed. The rule allowing the appeal from the County Court and directing the entry of a nonsuit should be discharged, and the judgment of the County Court restored; defendant to pay the costs of the original appeal and of this application.

It was clear that the agreement was one not to be performed within a year, and, as such, was void under the fourth section of the Statute of Frauds, but, taking into consideration all the circumstances of the case, and particularly the fact that the defendant dismissed the plaintiffs without any justifiable or reasonable ground, just two days before their year's services would have been completed, there seemed no reason why, in the absence of any stipulation to the contrary, the plaintiffs should not be considered to have constructively and effectually commenced their year's services under the contract on the day that they started for the defendant's farm. The moment they left as directed to do by the defendant's message, they placed themselves and were acting under the actual orders and instructions of the defendant.

The plaintiffs were entitled to recover for work and labour upon a *quantum meruit*.

The contract of hiring was a joint one, and the plaintiffs performed joint services, for which there was a lump sum to be paid for wages. During the whole time the plaintiffs worked for the defendant, and in his letters to them, he treated both plaintiffs as jointly employed and performing joint services. They had a joint interest in the amount due to them for wages and were entitled to bring a joint action.

West, for the plaintiffs.

Bradshaw, for the defendant.

[TAYLOR, C.J., 2ND MARCH, 1896.

McLEAN v. REEKIE.

Fire—Damages for loss occasioned by—Negligence—What constitutes.

County Court appeal. The plaintiff sued to recover damages for the loss of several stacks of grain destroyed by a fire alleged to have been set out by the defendant. The plaintiff had a verdict, and the defendant appealed.

The evidence showed that the season was dry and windy; that the defendant's farm was in a thickly settled neighbourhood; that there were a very large number of grain stacks on adjoining farms. On 24th September there was a high wind; about five o'clock in the afternoon of that day the defendant sent his son to set on fire a quantity of straw left from threshing; the straw was lying on stubble, and there was no fire guard around it; after he had started the fire, the boy remained about an hour and then went away. After tea the defendant saw a little flame, but looking out at eleven at night he saw no fire. Early in the forenoon of the next day the wind got up, and, between 10 and 11, the defendant's wife saw smoke in the direction of where the straw piles had been; she sent her son, and he took a wet sack to beat out the fire; she also sent the hired man to plough a guard; but they could do nothing effectual, the fire having got such headway; after running some distance, it burned the plaintiff's stacks.

Held, that setting fire to such a quantity of straw as the produce of thirty acres would be, in a dry and windy season, without ploughing any fire break, leaving no one to watch it, not going to examine the place next morning when the wind was rising, doing nothing until the fire broke away, and then making only a feeble and ineffectual effort to stay its progress, was such negligence as fully to justify the finding of the County Court Judge that the defendant was negligent in the setting out and keeping of the fire.

On the ground then that the defendant was guilty of negligence, the appeal should be dismissed with costs.

Ewart, Q.C., and *McLaren*, for the plaintiff.

Munson, Q.C., for the defendant.

[12TH MARCH, 1896.

DOLL v. HOWARD.

County Court—Transfer of action—Queen's Bench—Procedure.

Appeal from the referee. This action was originally brought in the County Court. After the dispute note had been filed, the plaintiff obtained an order transferring the case to the Court of Queen's Bench. The first step then taken by the plaintiff was the serving of a notice of trial. The defendant moved to set it aside, contending that the plaintiff could not give notice of trial until he had brought the case down to issue in the Queen's Bench. Section 86 of the Queen's Bench Act, 1895, as to the transfer of cases from the County Court to the Queen's Bench, provides that "the same shall thenceforth be continued and prosecuted in the Queen's Bench as if it had been originally commenced therein."

In Manitoba an action is commenced, not by a writ as in England and Ontario, but by filing a statement of claim; and the plaintiff contended that under the statute the action was to be continued and not commenced *de novo* by filing a statement of claim.

The referee set aside the notice of trial, holding that the case, since the order of the Judge and the transference of the papers thereunder, was a case in the Queen's Bench, and must be continued and prosecuted as if originally commenced in that Court. The plaintiff must prosecute his suit as if originally commenced in the Queen's Bench. If so commenced, the plaintiff would have filed a statement of claim.

Held, that the appeal should be dismissed without costs. When an action is transferred from the County Court to the Queen's Bench, there must be a statement of claim filed, and that must be followed by a statement of defence.

Davies v. *Williams*, 13 Ch. D. 530; *The Carisbrook*, 38 W. R. 543, referred to.

Mathers, for the plaintiff.

Hough, Q.C., for the defendant.

[DUBUC, J., 5TH MARCH, 1896.

WHITLA v. AGNEW.

Judgment debtor—Examination—Production of documents—Notice sufficient, without subpœna duces tecum—Rule 732.

The defendant was served with a subpœna and paid conduct money to attend and be examined as a judgment debtor under Rule 732 of the Queen's Bench Act, 1895.

Service was also made upon him at the same time of a copy of the appointment for his examination, and of a notice to produce his day books, ledgers, and other books of account.

He attended and was examined, but on certain questions being put to him which he could not satisfactorily answer without his books of account, he was asked to produce them, and, on the advice of counsel, refused to do so.

The examination was then adjourned, and, on an application made to him, the referee made an order requiring the defendant

to attend, at his own expense, and produce for examination all his books of account containing any entries in any way touching his estate and effects, book debts and credits, and his means of satisfying the plaintiff's judgment.

The defendant appealed against this order, contending that under Rule 736 he could not be compelled, by a mere notice to produce, to bring in and produce his books; for that purpose a subpœna *duces tecum* should have been served upon him.

Held, that the examination of a judgment debtor under Rule 732 is more in the nature of, and should be more properly assimilated to, an examination for discovery, as provided for by Rule 379 *et seq.* Rule 384 provides that the person to be examined shall, if so required by notice, produce on the examination all books, etc., which he would be bound to produce at the trial under a subpœna *duces tecum*. The proper practice had been followed, and the order of the referee should be affirmed: *Russell* v. *Macdonald*, 12 P. R. 458; *Lavery* v. *Wolfe*, 10 P. R. 488.

Appeal dismissed with costs.

Elliott, for the plaintiff.

Vivian, for the defendant.

[KILLAM, J., 15TH FEBRUARY, 1896.

SYLVESTER v. PORTER.

Promissory notes—Agreement to guarantee—Mistake—Reformation—Changing form of claim.

County Court appeal. The plaintiffs, a firm of dealers in agricultural implements, employed the defendants as their agents for the sale of their goods at Portage la Prairie. The relations between them for the year 1890 were governed by a formal contract in a printed form, with some few alterations and additions in writing. Among other provisions of the printed form was an agreement by the defendants to indorse all notes

taken in settlement. In 1890 the parties signed another document by which the plaintiffs purported to appoint the defendants as their agents for 1891. This instrument, also, was on a printed form, with a few alterations and additions in writing. By a printed clause, not found in the agreement for 1890, the defendants agreed to guarantee payment of all notes taken in settlement for machinery; but the agreement to indorse in the printed form was struck out, and there was inserted, in writing, a provision that any notes found to be unsatisfactory or uncollectable before 1st January, 1892, were to be taken by the defendants for commission, whether they should then be due or not.

The plaintiffs sued the defendants as guarantors of the payment of a promissory note taken for goods sold in 1891. By their dispute note the defendants traversed the alleged guarantee, but at the trial, by leave, they were allowed to set up the defence that their signatures to the agreement for 1891 were obtained by fraud, and were not binding on them. Evidence was given on the part of the defendants to show that, in the course of negotiations for the contract for 1891, the defendants expressly stipulated that they were not to be responsible for notes to be taken, except that the plaintiffs were to be allowed a period ending on 1st January, 1892, to investigate the quality of notes taken by the defendants, who were to accept on account of commission any which were objected to within that period, after which their responsibility was to cease, and that this was agreed to by the plaintiffs. The defendants also gave evidence that the contract was prepared and produced to them by one of the plaintiffs; that it was signed by them without their reading it, and without knowing that it contained the clause relating to a guaranty of the notes; they did not notice its insertion until the plaintiffs made the claim on which this action was founded.

The County Court Judge found in favour of the defendants; he did not decide whether the plaintiffs knew that the printed provision was contained in the instrument when they procured the signatures of the defendants, holding that, whether the mistake as to the contents was mutual or unilateral only, the instrument did not contain the agreement made by the defendants to which they understood themselves to be assenting when

they affixed their signatures to the document, and was not binding upon them. The plaintiffs appealed.

Held, that the appeal must be dismissed with costs. In order to reform an instrument purporting to contain the agreement between the parties, the evidence to vary the language of it must be of the clearest and most satisfactory character. The party seeking rectification of an instrument must establish that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution : *Fowler* v. *Fowler*, 4 DeG. & J. 264.

Seeing that the course of business contemplated in the framing of the printed form of contract was one under which a further instrument or agreement of guaranty was to be given, the agreement in the printed form signed should be construed as being one for the execution of some such further instrument or agreement, and not one of present guaranty of the notes to be given *in futuro*.

This was not an action for neglect or refusal to enter into a guaranty, but directly upon an alleged guaranty, and the judgment should not be set aside to enable the plaintiffs to change the form of the claim.

Howell, Q.C., for the plaintiffs.

Martin, for the defendants.

[5TH MARCH, 1896.

MAXWELL v. MANITOBA AND NORTH-WESTERN R. W. CO.

Discovery—Production of documents—Receiver—Actual possession in general manager.

Appeal from an order of the referee directing production by the defendant company of certain books, etc.

In a suit of *Allan* v. *Manitoba and North-Western R. W. Co.* an order had been made appointing a receiver of the defendant

company, and the defendants objected that the receiver held the books for the parties to the suit in which he was appointed. As a matter of fact, the books were, as they always had been, in the actual possession of the general manager of the defendant company; the receiver had never had possession of them.

Order made directing that the books and documents be produced to the plaintiffs or their solicitors at the company's general offices, and that the plaintiffs be allowed to take copies of or extracts from same. No costs of appeal allowed.

Wilson, for the plaintiffs.

Phippen, for the defendants.

REGINA v. EGAN.

Criminal law—Criminal Code, Part LV.—Appeal from summary conviction.

Application for a mandamus to a police magistrate to take a recognizance on an appeal. The question was whether a person convicted under Part LV. of the Criminal Code, 1892, by a police magistrate, had a right of appeal.

Section 808 provides that "the provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections 804 and 805 and of Part LVIII., shall not apply to any proceedings under this part."

Held, that this section prevents the application of any of the provisions of Part LVIII., in which are found the sections as to appeals from summary convictions, to convictions under Part LV. Except under the clauses of Part LVIII. no Court in Manitoba is given authority to entertain an appeal from a conviction by a magistrate. Application for mandamus dismissed.

Maclean, for the Crown.

Ashbaugh, for the prisoner.

[11TH MARCH, 1896.

HOLMWOOD v. GILLESPIE.

Sale of land—Statute of Frauds—Insufficient memorandum—Recovery of purchase money where land conveyed.

County Court appeal. The action was brought for the balance of purchase moneys of certain lands claimed by the plaintiff to have been sold by him to the defendant and to have been conveyed to the latter at the plaintiff's request by a third party who had originally purchased them of the plaintiff and had verbally agreed to sell to him. A memorandum in writing of the agreement between the plaintiff and the defendant was drawn up and signed by the plaintiff, but had not any signature of the defendant at the end thereof.

The County Court Judge held that this did not constitute a sufficient memorandum to satisfy the Statute of Frauds, but that the land had been conveyed to the defendant, and the defendant had promised to pay the balance due, which enabled the plaintiff to recover upon an account stated, and he gave judgment for the plaintiff for the balance claimed. The defendant appealed.

It appeared that the description in the memorandum was merely that of a certain portion of section 34 in range 2, east, the number of the township not being given.

Held, that the memorandum was insufficient for want of a proper description of the land intended to be sold.

The defendant relied on *McMillan* v. *Williams*, 9 Man. L. R. 627, and the plaintiff on *Brown* v. *Harrower*, 3 Man. L. R. 441.

While total or partial performance on one side does not take the case out of the statute, so as to enable either party to recover on the contract itself, yet where one party has furnished the consideration, or some portion thereof, on his side, and the other party refuses to perform, or has disabled himself from performing, his part of the agreement, the former party can recover the value of what he has furnished as having been supplied on a consideration that has failed.

The Court recognizes that it cannot enforce the original contract, but says that the party repudiating the contract cannot retain the benefit which he has secured under it, without making compensation therefor.

The third party, having conveyed to the defendant, at the plaintiff's request, and the defendant having accepted the conveyance as made in performance of the plaintiff's agreement, the land transferred to the defendant must be deemed to have come to him from the plaintiff, to whom alone he must make compensation.

Prima facie, the land was worth the amount the defendant agreed to pay, and *prima facie*, also, the defendant should pay the balance which he admitted to be payable for it.

Appeal dismissed with costs.

Aikins, Q.C., for the plaintiff.

Clarke, for the defendant.

Supreme Court of Canada.

ONTARIO.] [18TH FEBRUARY, 1896.

AGRICULTURAL INS. CO. v. SARGENT.

Principal and surety—Continuing security—Appropriation of payments—Imputation of payment—Reference to take accounts.

J. H. S. was a local agent for an insurance company, and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until, on 15th October, 1890, one W. S. joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that the payment of the note or renewals, or any part thereof, was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears, which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, etc., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account as cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and, after he had been credited with general payments, there remained due

at the time of trial $1,009. The note W. S. signed on 15th October, 1890, was payable four months after date with interest at seven per cent., and the mortgage was expressed to be payable in four equal annual instalments of $312.50 each, with interest at six per cent. on unpaid principal.

Held, that the giving of the accommodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *prima facie* an admission that at the respective dates of renewal at least the amounts mentioned therein were still due upon the security of the mortgage; that, in the absence of evidence of such intention, it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account, which included the debt secured by the mortgage; and that, there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in *Clayton's Case* as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account, would not apply.

Held, also, reversing the judgments dismissing the plaintiffs' action in the Courts below, that under the circumstances disclosed the proper course would have been to have ordered accounts to be taken upon a reference to the Master.

C. J. Holman, for the appellants.

Watson, Q.C., for the respondent.

HOOFSTETTER v. ROOKER.

Mortgage—Agreement to charge lands—Statute of Frauds—Registry Act—Witness.

The owner of an equity of redemption in mortgaged land, called the Christopher farm, signed a memorandum as follows: "I agree to charge the east half of lot No. 19, in the seventh

concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively upon the Christopher farm . . . amounting to $750 . . . and I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages."

Held, affirming the decision of the Court of Appeal, 22 A. R. 175, 15 Occ. N. 79, that this instrument created a charge upon the east half of lot 19 in favour of the mortgagees named therein.

This agreement was registered, and the east half of lot 19 was afterwards mortgaged to another person. In a suit by one of the mortgagees of the Christopher farm for a declaration that she was entitled to a lien or charge on the other lot, it was contended that the solicitor who proved the execution of the document for registry as subscribing witness was not such, but that the agreement was in the form of a letter addressed to him.

Held, affirming the judgment of the Court of Appeal, that, as the agreement was actually registered, the subsequent mortgagee could not take advantage of an irregularity in the proof, the registration not being an absolute nullity.

Held, per TASCHEREAU, J., that if there was no proof of attestation, the Registry Act required a certificate of execution from a County Court Judge, and it must be presumed that such certificate was given before registry.

E. H. Smythe, Q.C., for the appellants.

Langton, Q.C., for the respondent.

NOVA SCOTIA.]

NOVA SCOTIA MARINE INS. CO. v. CHURCHILL.

Marine insurance — Repair of ship — Constructive total loss — Notice of abandonment—Sale by master—Necessity for sale.

The schooner "Knight Templar," insured by a time policy, sailed from Turk's Island, W. I., bound for Nova Scotia. Having sprung a leak, she put back to Turk's Island, and was beached. A survey was held, and the surveyors recommended that the cargo be taken out to get at the leak. Two days later

another survey resulted in finding her leaking three inches per hour, and two days after again she was making six inches, and the master was advised, if she could not be hove out, to put in ballast and take her to a port for repairs. She was then taken round to an anchorage, where she remained some weeks, and, after being surveyed again, was stripped, beached, and sold at auction. The owners first heard of her having been disabled after the sale, and they sent to the underwriters a full account of the whole proceedings.

In an action for the insurance tried with a special jury, all the findings were in favour of the assured, one of them being that the schooner could have been repaired if cost were not considered, but that it would cost much more than she was worth. A verdict was given against the underwriters.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that if the vessel could have been repaired, even at a cost far exceeding her value, there was not even a constructive total loss, unless notice of abandonment was given; but

Held, further, that, as it appeared that instructions could not be received from the owners inside of four weeks, the expense of keeping the schooner safely, the danger of her being driven ashore, and the probability that she would greatly deteriorate in value during the delay, justified the master in selling on his own responsibility, and the sale excused the giving of notice.

Macdonald, for the appellant.

Ritchie, for the respondent.

PRINCE EDWARD ISLAND.]

MAYHEW v. STONE.

Administrator—Payment of doubtful claim by—Death of administrator—Administration de bonis non—Recovery back of amount paid—Unadministered asset.

M. married a widow with a daughter, S., thirteen years old, who afterwards lived with him as one of his own family. M. died intestate, but had previously provided well for his own children. His widow took out letters of administration, and

advertised for presentation of claims against the estate. S. presented a claim of $1,000 for services performed for deceased, and the administratrix consulted her solictor and others, who advised her to pay it, which she did, and a month afterwards she died. An administrator *de bonis non* was appointed, who filed a bill in equity to have S. declared a trustee for the estate of the $1,000, and ordered to transfer it to the estate. On the hearing S. gave evidence of a claim for payment for services made by her on deceased in his lifetime, and a promise by him to provide for her at his death. The Master of the Rolls granted the decree as prayed for in the bill, but his judgment was reversed by the Court of Appeal in Equity, on the ground that S. was entitled to recover on a *quantum meruit* the value of her services to deceased according to the terms of the agreement to which she testified, and following *McGugan* v. *Smith*, 21 S. C. R. 263, and *Murdoch* v. *West*, 24 S. C. R. 305. On appeal from that decision:—

Held, that the claim of S. having been made *bona fide* and paid by the administratrix under competent advice, the money, even if paid under a mistake in law, could not be recovered back by the estate as an unadministered asset.

Stewart, Q.C., for the appellant.

Davies, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [10TH MARCH, 1896.

In re SOLICITOR.

Solicitor—Taxation of bill—Appeal—Rules 848-851, 1226 (d), 1230, 1231.

Upon an appeal by the solicitor from the decision of the Queen's Bench Division, 16 P. R. 423, 15 Occ. N. 84, upon an

appeal from the taxation of his bill of costs against his client, under the common order for taxation, the Court was divided in opinion as to one of the grounds of appeal, viz., that the appeal was not properly before the Court below.

Held, per HAGARTY, C.J.O., that whether the appeal was or was not regularly before the Court below, it had jurisdiction to interfere to prevent a gross abuse. *In re Johnston*, 15 App. Cas. 205, followed.

Per OSLER, J.A., that where what is sought by the appeal is the review of certain items of a solicitor's bill of costs against his client, the appeal is as from a Master's report under Rules 848-850; and this is the effect of Rule 1226 (*d*).

Per BURTON and MACLENNAN, JJ.A., that such an appeal is regulated by the same Rules and practice as apply to an appeal from a taxation of costs between party and party; and the provisions of Rules 1230 and 1231 not having been complied with, an appeal could not be taken under Rule 851.

Tremeear, for the appellant.

W. E. Middleton, for the respondent.

IN CHAMBERS.

[OSLER, J.A., 17TH MARCH, 1896.

MOLSONS BANK v. COOPER.

Appeal bond—Condition—Affidavit of execution—Affidavit of justification.

The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then this obligation shall be void; otherwise to remain in full force and effect."

Held, that the bond was not irregular.

2. The affidavit of execution of such a bond need not be entitled in the cause.

8. A surety in such a bond, when justifying in the sum sworn to "over and above what will pay all my just debts," need not add "and every other sum for which I am now bail."

J. S. Denison, for the defendants.

W. E. Middleton, for the plaintiffs.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 18TH FEBRUARY, 1896.

TOWNSHIP OF MORRIS v. COUNTY OF HURON.

Statutes—Repeal of Act—Exception—Interpretation Act—Effect of—55 V. c. 42, s. 533a—57 V. c. 50, s. 14.

Section 14 of the Municipal Amendment Act, 1894, 57 V. c. 50, must be read with s. 8, s.-ss. 43 and 48, of the Interpretation Act, R. S. O. c. 1, so that rights of action acquired at the passing of the Act of 1894 are not affected thereby.

On the 29th April, 1893, a township corporation obtained an award against a county corporation under s. 533*a* of the Consolidated Municipal Act, 1892, for part of the cost and maintenance of certain bridges. An appeal against the award was made to a Judge, and then to the Court of Appeal, the appeals being dismissed, but, while the appeal was before the Court of Appeal, the Act of 1894 was passed.

Held, that the award was not a pending award at the date of the passage of that Act.

The plaintiffs were held entitled, notwithstanding the repeal of s. 533*a*, to recover the amount expended on the bridges; and not merely the amount expended up to the date of the passing of the Act of 1894, but their (the plaintiffs') proportion of the whole amount actually expended.

Judgment of MEREDITH, C.J., 26 O. R. 689, varied.

Aylesworth, Q.C., and *E. L. Dickenson*, for the plaintiffs.

Garrow, Q.C., for the defendants.

[3RD MARCH, 1896.

MULLER v. GERTH.

Particulars— Slander.

In an action of slander the defendant has a right to the fullest particulars the plaintiff can furnish as to the place where, the time when, and the person to whom the words alleged were uttered; and also to full particulars of the names of the persons who have ceased business dealings with the plaintiff on account of the slander.

Shifty and uncertain particulars, such as are rendered meaningless and evasive by saying "among others" and "some of the persons," are to be discouraged.

The plaintiff is bound to give definite information, so far as he can, and to stop there; if further information comes to his knowledge, he can obtain leave to amend.

The defendant is entitled to particulars of slanderous statements alleged merely as matters shewing express malice or in aggravation of damages.

W. N. Ferguson, for the plaintiff.

F. A. Anglin, for the defendant.

[16TH MARCH, 1896.

SPENCE v. GRAND TRUNK R. W. CO.

Railways—Mail car—Posting letters on—Moving train—Invitation —Licensee.

A person who posts a letter on a mail car attached to a train about to start, although the car is furnished with a slit for posting letters under instructions from the Post Office Department, is a mere licensee.

The invitation to post, if any, is the invitation of the Post Office Department, and not of the railway company.

Held, that the plaintiff, who, in attempting to post a letter on a moving train, tripped and fell over a peg placed in the ground by the company and was injured, could not recover.

Judgment of MEREDITH, C.J., affirmed.

J. J. Maclaren, Q.C., for the plaintiff.

Osler, Q.C., for the defendants the Grand Trunk Railway Company.

Wallace Nesbitt and *Angus MacMurchy*, for the defendants the Canadian Pacific Railway Company.

[BOYD, C., FERGUSON, J., MEREDITH, J., 26TH FEBRUARY, 1896.

KINNARD v. TEWSLEY.

Promissory note—Liability of guarantor—Signature to note—Surety.

Where a promissory note, commencing "I promise to pay," etc., and signed by two persons as makers, was afterwards discounted by the plaintiff for the defendant, the holder thereof, the money being paid to the defendant on his agreeing to become surety for the payment of the note, the defendant signing his name under that of the makers:—

Held, that the defendant's liability being that of a surety, he was liable to the plaintiff on the note, his liability not being affected by the manner in which the note was signed.

Judgment of Third Division Court, Haldimand, affirmed.

W. D. Swayze, for the plaintiff.

F. F. Hodgins, for the defendant Dodge.

J. F. Macdonald, for the defendants the Tewsleys.

[BOYD, C., ROSE, J., ROBERTSON, J., 18TH FEBRUARY, 1896.

CARROLL v. BEARD.

Landlord and tenant—Distress—Conditional sale of goods—Lien—Property—"Interest"—Statutes—Repeal—Substitution.

An agreement upon the sale of certain machinery and other goods contained a provision that until the balance of the purchase money should be fully paid, the vendor should have a lien on the goods for such balance, as and for and by way of a vendor's lien, and that no actual delivery of such property should be made, nor should possession be parted with, until such

balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, on the 1st April, 1890, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question.

Held, that the stipulation in the agreement for a vendor's lien was inappropriate and inconsistent and must be read out as mere surplusage; and so reading the agreement, the transaction was one of conditional sale, and, under 57 V. c. 43, only the interest of the tenant in the goods could be distrained on.

Held, also, that the Act 57 V. c. 43, which repeals s. 28, s.-s. 1, of R. S. O. c. 143, and substitutes a new section therefor, applies to leases made on or after 1st October, 1887, to which the repealed section, by s. 42, applied.

Moss, Q.C., for the plaintiffs.

Arnoldi, Q.C., for the defendants.

[MEREDITH, C.J., ROSE, J., STREET, J., 16TH MARCH, 1896.

TODD v. RUSNELL.

Divisional Court—Appeal to—Stay of proceedings—Rule 799 A. (1484).

A Divisional Court has jurisdiction to allow an appeal from the judgment of a trial Judge to be set down upon short notice of motion, and such setting down will operate as a stay of proceedings in the action.

J. W. McCullough, for the plaintiff.

A. H. Marsh, Q.C., for the defendant.

[BOYD, C., 20TH MARCH, 1896.

KERR v. SMITH.

Will—Devise—Legacy—"Legal personal representatives"—Vesting.

A testator devised land to executors and trustees, upon trust to allow his wife to use and occupy it during her life, and after her death to sell and pay the proceeds of part to his son, but, if

the legatee died before his share or portion was paid over to him, to his legal personal representatives.

The son conveyed his share to the plaintiff, and died before his share was paid over.

Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executors and administrators as "legal personal representatives," and that the plaintiff was entitled.

James Bicknell, for the plaintiff.

H. W. Mickle, for the next of kin.

W. L. Payne, for the executors.

[MEREDITH, C.J., 29TH DECEMBER, 1895.

BAIN v. ANDERSON.

Master and servant—Action for wrongful dismissal—Indefinite hiring—Common law rule—Contract not under seal.

Action for damages for wrongful dismissal of the plaintiff, who had been in the employment of a certain company as superintendent of its factory.

Notwithstanding the statement of the law, found in certain text books and the earlier cases, that where no time is limited, either expressly or by implication, for the duration of a contract of hiring or service, the hiring is considered in point of law a hiring for a year, the more modern cases have modified the law as so stated, and now it is pretty well settled that, at all events as to many kinds of service, there is no inflexible rule that an indefinite hiring is a hiring for a year, but the question is one of fact to be determined according to the circumstances of each particular case, and that, in the absence of anything to qualify it, a jury may properly find as an inference of fact that the hiring is a yearly one.

Semble, it is also a question of fact whether such a contract of hiring is not subject to be put an end to by reasonable notice to be given by either of the parties to it, and as to what in the particular case is reasonable notice.

The fact that the employer in this case was an incorporated company did not render it less liable under a contract inferred

from the conduct of the parties. At one time the exception to the common law rule as to the liability of corporations upon contracts was very limited, being based upon the principle of convenience almost amounting to necessity, and applied to small matters of daily occurrence. A more liberal rule is applied in the modern cases, traceable to the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times.

Gibbons, Q.C., for the plaintiff.

Osler, Q.C., and *W. T. McMullen*, for the defendants.

IN CHAMBERS.

[BOYD, C., 16TH MARCH, 1896.

TAYLOR v. NEIL.

Discovery—Examination of party—Criminal conversation—Alienation of affections—R. S. O. c. 61, s. 7.

It is not in the power of the plaintiff to enforce the attendance or examination of the defendant as a witness or for discovery where the proceeding is one instituted in consequence of adultery.

Mulholland v. *Misener*, infra, followed.

But where the action is of a compound character, and raises a distinct claim for damages on account of the alienation of the affections and loss of the society of the plaintiff's wife, the defendant must submit to examination upon that branch of the case.

Construction of s. 7 of R. S. O. c. 61, and difference between it and s. 3 of the Imperial Act 32 & 33 V. c. 68, pointed out.

P. McPhillips, for the plaintiff.

T. G. Meredith, for the defendant.

[21ST MARCH, 1896.

In re ROSE.

Dower—Sum in gross—Devolution of Estates Act—Creditors.

Under the Devolution of Estates Act, land of an intestate was sold by the administrator, with the approval of the

official guardian, and, by consent of the widow, freed from her dower. The consent was upon the footing that the widow was to get out of the proceeds of the sale a sum in gross in lieu of dower. The estate was practically insolvent, and but little was left for the sustenance of the widow and children. The creditors, after the sale, opposed the payment of a sum in gross.

Held, that, whatever might be the proper course in the case of a large estate where the family were left amply provided for, the better practice in a case like this was to prefer the claim of the widow to a gross sum to that of creditors to have only annual payments on a funded capital, the residue of which should be distributed on the widow's death.

J. H. Moss, for the widow.

J. Hoskin, Q.C., for the infants.

T. W. Howard, for creditors.

[MacMahon, J., 24th September, 1895.

MULHOLLAND v. MISENER.

Discovery — Examination of party — Criminal conversation— R. S. O. c. 61, s. 7.

In an action for criminal conversation with the plaintiff's wife the defendant cannot be compelled to submit to examination for discovery.

Construction of s. 7 of R. S. O. c. 61, and difference between it and s. 8 of the Imperial Act 32 & 33 V. c. 68, pointed out.

McBrayne, for the plaintiff.

D'Arcy Tate, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 27TH FEBRUARY, 1896.

HEGAN v. MONTGOMERY.

Discovery—Production of documents.

Section 59 of the Supreme Court in Equity Act, 1890, 53 V. c. 4, does not empower the Court to order the production of documents discovered to be in the possession or power of one of the parties. The section is limited to discovering whether documents are in his possession or power. If admitted to be, their production may be ordered under s. 61.

The Court will not compel a plaintiff to produce documents in his possession or power, although the defendant swears that he cannot fully answer without their production. If the plaintiff, on request, refuses to produce them, he cannot complain of the insufficiency of the defendant's answer.

C. J. Coster, for the plaintiff.

Currey, Q.C., for the defendant.

[17TH MARCH, 1896.

THOMAS v. GIRVAN.

Mortgage—Interest on interest—Referee—Finding of fact—Appeal.

At the request of the mortgagor, the plaintiff took a transfer of a mortgage, paying off the principal and interest.

Held, that, in the absence of an agreement, interest could not be charged on the sum paid for interest.

The finding of a referee on a question of fact will not be disturbed, where it depends upon the credibility of witnesses,

though the evidence is contradictory and might warrant a different finding.

A. A. Stockton, Q.C., for the plaintiff.

C. A. Palmer, Q.C., for the defendant.

JONES v. HUNTER.

Landlord and tenant—Appurtenance—Alley-way—Easement.

A shop, two rooms, and a cellar connected with the shop by a hatchway and stairs, were leased by the defendant to the plaintiffs "with the privileges and appurtenances thereunto belonging." The rooms communicated with the shop, and a door in one of the rooms opened off an alley-way leading from the street to the rear of the premises. A coal shute to the cellar also opened off the alley-way, which was sufficiently wide to allow coal to be carted to the shute. The alley-way was part of the lot upon which the demised premises were, and was in the ownership and possession of the defendant at the date of the lease. For many years previous to the lease the door of the alley-way had been used by occupiers of the premises, including the defendant, who was in occupation at the date of the lease, and coal had always been carted by them to the shute. The defendant now sought to build upon the alley-way in such a manner as to block up the door opening into the alley-way and to prevent access to the shute by carts. In a suit for an injunction to restrain the defendant from erecting the building, he contended that the door was not necessary for the convenient use of the premises; that coal could be put in the cellar by way of the front door and hatch; and that a right to the use of the alley-way did not pass to the plaintiffs, in the absence of an express grant.

Held, that the plaintiffs were entitled to the unimpaired use of the alley-way, since it was in use at the date of the lease as an easement belonging to the premises.

C. J. Coster, for the plaintiffs.

G. G. Gilbert, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 20TH MARCH, 1896.

CLEMONS v. MUNICIPALITY OF ST. ANDREW'S.

Assessment and taxes—Sale for taxes, when none due—Remedy of owner—Municipal corporations—Indemnity—Ascertainment of.

Demurrer to the declaration.

This was an action to recover the value of land claimed to have been sold for taxes when none were in arrear, and to which the purchaser obtained an indefeasible title by certificate under the Real Property Act.

By the Assessment Act, R. S. M. c. 101, s. 192, it is provided that: "In case any lands should be sold for arrears of taxes, when no taxes are due thereon . . . the owner . . . in case the land cannot be recovered back by reason of its having been brought under the operation of the Real Property Act . . . . shall be indemnified by the municipality for any loss or damage sustained by him on account of such sale of said lands, and the amount of such indemnity may be settled by agreement between the municipality and the person entitled thereto, or, if an agreement cannot be effected, by arbitration," etc.

The declaration showed the sale by the municipal officers; that no taxes were in arrear; and that the purchaser had obtained a certificate under the Real Property Act, showing a clear title in him in fee simple. It did not show, however, that the amount of the imdemnity had been settled by agreement, or by arbitration; and the question to be determined was whether an action would lie before this had been done.

Held, that judgment must go for the defendants upon the demurrer; no action would lie at common law until the amount had been ascertained.

Elliott, for the plaintiff.

Perdue, for the defendants.

Supreme Court of Canada.

ONTARIO.] [18TH FEBRUARY, 1896.

NEELON v. CITY OF TORONTO.

Building contract—Construction of—Inconsistent conditions—Dismissal of contractor—Architect's powers—Arbitrator—Disqualification—Probable bias—Evidence, rejection of—Judge's discretion as to order of evidence.

A contract for the construction of a municipal building contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same, it shall then be lawful for the said architect to dismiss the said contractors, and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractors' failure to do so, the architect shall have the power at his discretion (with the consent in writing of the court house committee or commission, as the case may be), without process or suit at law, to take the work, or any part thereof mentioned in such notice, out of the hands of the contractor."

Held, SEDGEWICK and GIROUARD, JJ., dissenting, that this last clause was inconsistent with the above clause of the contract, and that the latter must govern. The architect, therefore, had power to dismiss the contractor without the consent in writing of the committee.

At the trial the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial Judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether there was malice on the part of the architect. Upon this ruling the plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.

Held, that this ruling did not constitute a rejection of evidence, but was merely a direction as to the marshalling of evidence, and within the discretion of the trial Judge.

Judgment of the Court of Appeal affirmed.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellant.

McCarthy, Q.C., and *Fullerton*, Q.C., for the respondents the City of Toronto.

Wallace Nesbitt and *Monro Grier*, for the respondent Lennox.

RAY v. ISBISTER.

Partnership—Promissory note made by firm—Indorser—Res judicata—Representation as to members—Judgment against firm—Action on, against reputed partner—Holding out—Estoppel—Liability.

An action was brought against the firm of M. I. & Co., as makers, and against J. I., as indorser, of a promissory note. Judgment went by default against the firm, but the action failed as to J. I., it being held that an agreement, established on the trial, by which the holders of the note admitted that it was indorsed for their accommodation, and agreed that the indorsee was not to be liable, was a conclusive answer. An action was afterwards brought on the judgment against the firm to recover from J. I. as a member thereof, and also on several promissory notes made by M. I. & Co.

Held, affirming the decision of the Court of Appeal, 22 A. R. 12, 15 Occ. N. 28, which reversed the judgment of STREET, J., 24 O. R. 497, 14 Occ. N. 122, as to the action on the judgment, but affirmed it on the other claim, that J. I. having

succeeded in the former action on the ground that it had been agreed that he was not to be liable in any way on the note there in suit, the judgment in such former action was a conclusive answer to the present.

Held, further, that as to the other notes sued on, J. I. having, when the notes were made, held himself out to the payees as a member of the firm of M. I. & Co., the makers, he was liable as a maker, though he might not, as a matter of fact, have been a partner at the time.

McCarthy, Q.C., and *R. G. Code*, for the appellant.

Aylesworth, Q.C., and *W. K. Cameron*, for the respondents.

CANADIAN PACIFIC R. W. CO. v. TOWNSHIP OF CHATHAM.

Municipal corporations—Drainage—Special assessments — By-law—Additional necessary works—Resolutions—Ultra vires—Executed contract—R. S. O. c. 184, s. 573.

After the construction of certain drainage works under the provisions of the Municipal Act, R. S. O. c. 184, ss. 569 and 576, which benefited lands in an adjoining township, it was found necessary to construct a culvert under the line of the Canadian Pacific Railway, in order to carry off the water brought down by the drain and prevent damages by the flooding of adjacent lands. By contract under seal entered into between the plaintiffs and defendants, the plaintiffs agreed to construct and did construct the needful culvert at a cost of over $200. On its completion the works were accepted and used by the municipal corporation, certain officials of the corporation having assured the plaintiffs that, should the funds provided under the original by-law for the construction of the drainage works prove insufficient, the necessary amendments would be made under s. 573 of the Municipal Act, and the additional sum so required obtained. The municipal council passed resolutions approving of the work and paid sums on account, but did not pass a new by-law, or make any report or fresh assessment respecting the contract with the plaintiffs or the works executed thereunder.

Held, reversing the decision of the Court of Appeal, 22 A. R. 330, 15 Occ. N. 171, and of the Common Pleas Divisional Court, 25 O. R. 465, 14 Occ. N. 470, TASCHEREAU, J., dissenting, that as the works done by the plaintiffs under the agreement were absolutely necessary to the efficient completion of the drainage works contemplated by the original by-law, the case came within the provisions of s. 573 of the Municipal Act, R. S. O. c. 184, and the contract under which it had been executed was binding upon the defendants.

Held, by TASCHEREAU, J., dissenting, that the plaintiffs were guilty of laches in neglecting to ascertain whether the corporation were acting *intra vires* before entering upon their contract, and that it would be contrary to the policy of the statute to grant them a recovery which would be so largely in excess of the expenditure contemplated by the original by-law.

Moss, Q.C., and *Angus MacMurchy*, for the appellants.

Pegley, Q.C., and *M. Wilson*, Q.C., for the respondents.

NOVA SCOTIA.]

CLARK v. PHINNEY.

Executors—License to sell real estate—Petition to revoke—Judgment on—Res judicata—Estoppel.

Judgment creditors of devisees under a will present a petition to the Probate Court to revoke a license granted to the executor to sell the real estate of the testator for payment of his debts. The petition was refused by the Probate Court, and the judgment refusing it affirmed by the Supreme Court of Nova Scotia. The executor sold the land under the license, and a part of the purchase money was paid to the judgment creditors, who, still claiming the license to be null, issued execution against the lands so sold, and the purchaser from the executor brought this action to establish the title thereto.

Held, affirming the decision of the Supreme Court of Nova Scotia, 27 N. S. Reps. 884, that in this action the judgment creditors could not attack the license on grounds which were or might have been taken on the petition to revoke, and the judgment on said petition was *res judicata* against them.

Held, further, that the creditors, by accepting a portion of the purchase money on the sale, knowing the source from which it came, had elected to treat the license as valid and were estopped from attacking it in this proceeding.

Roscoe, for the appellants.

J. J. Ritchie, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [10TH MARCH, 1896.

JOURNAL PRINTING CO. v. MACLEAN.

Libel—Incorporated company—Damages—Evidence—Miscarriage—New trial—Estoppel.

An action will lie at the suit of an incorporated trading company to recover damages for a libel calculated to injure their reputation in the way of their business.

South Hetton Coal Co. v. *North Eastern News Association*, [1894] 1 Q. B. 133, followed.

Journal Printing Co. v. *MacLean*, 25 O. R. 509, approved.

If the judgment of a Divisional Court directing a new trial is not appealed against, the questions determined by it cannot be re-opened upon an appeal from the judgment at the second trial.

Witnesses in a libel action may be properly asked the question, who, in their opinion, is aimed at by the libel in question.

It is not proper in such an action to ask a witness whether, in his opinion, the alleged libel is likely to cause injury to the plaintiffs' business, but the Court refused to interfere because of

the admission of that opinion, where in the charge to the jury special stress was laid on the fact that they were to form their own opinion as to the damages, and the damages allowed were small.

Judgment of the Queen's Bench Division affirmed.

McCarthy, Q.C., and *Stuart Henderson*, for the appellant.

Aylesworth, Q.C., and *G. F. Henderson*, for the respondents.

SCARLETT v. NATTRESS.

Chose in action—Covenant—Assignment of, by one joint covenantee to his co-covenantees—Mercantile Amendment Act, R. S. O. c. 122—Mortgage—Conveyance of equity to one of several joint mortgagees.

One joint covenantee can by virtue of the Mercantile Amendment Act, R. S. O. c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff; BURTON, J.A., dissenting on this point.

A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt.

Judgment of the Queen's Bench Division, 15 Occ. N. 271, affirmed.

J. M. Clark and *R. U. Macpherson*, for the appellant.

E. P. McNeill, for the respondents.

CH. D.]

GARLAND v. CITY OF TORONTO.

Master and servant—Workmen's Compensation for Injuries Act, 1892—"Superintendence."

No implied right of superintendence within the meaning of s. 2 (1) of the Workmen's Compensation for Injuries Act, 1892,

55 V. c. 30, arises from length of service or skill, and the employer is not liable where one workman, presuming on greater length of service or skill, directs his fellow-workman to do certain work with insufficient appliances, and injury results.

Judgment of the Chancery Divison reversed.

Fullerton, Q.C., for the appellants.

W. J. Clark, for the respondent.

BOYD, C.]

COMMISSIONERS FOR THE QUEEN VICTORIA NIAGARA FALLS PARK v. HOWARD.

Crown lands—Ordnance lands—Chain reserve along Niagara river.

The "chain reserve" along the bank of the Niagara river and the slope between the top of the bank and the water's edge were not set apart for military or ordnance purposes, and did not pass to the Dominion Government as "ordnance lands."

Judgment of BOYD, C., 28 O. R. 1, affirmed.

Robinson, Q.C., and *W. P. Torrance*, for the appellants.

Irving, Q.C., and *Moss*, Q.C., for the respondents.

ARMOUR, C.J.]

WANLESS v. LANCASHIRE INSURANCE CO.

Fire insurance—Variation from statutory conditions—Co-insurance.

A provision in a fire insurance policy that "the assured shall maintain insurance on the property covered by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do the assured shall be a co-insurer to the extent of such deficit, and in that capacity shall bear his, her, or their proportion of any loss," is a condition, and not a mere direction as to the mode of ascertaining the amount of the loss, and it is void if not printed in accordance with the provisions of the Act.

Judgment of ARMOUR, C.J., affirmed.

Lash, Q.C., for the appellants the British America Assurance Co.

McCarthy, Q.C., and *F. Ford*, for the respondents the Lancashire Insurance Co.

Watson, Q.C., for the respondents the plaintiffs.

ROSE, J.]

ONTARIO FORGE AND BOLT CO. v. COMET CYCLE CO.

Costs—Company—Liquidator—Claim and counterclaim.

Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.

Where the plaintiff succeeds upon his claim, and the defendant upon his counterclaim, the former should receive the costs of the action, and the latter those of the counterclaim.

Judgment below varied.

Robinson, Q.C., and *John Greer*, for the appellants.

E. B. Ryckman and *A. T. Kirkpatrick*, for the respondents.

HAMILTON PROVIDENT AND LOAN SOCIETY v. STEINHOFF.

Partnership—Covenant in firm name—Liability.

Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to mortgages in favour of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgages, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in

the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgages.

Held, affirming the judgment of ROSE, J., that this covenant bound only the partner who signed it.

Osler, Q.C., and *Crerar*, Q.C., for the appellants.

Watson, Q.C., for the respondent.

TIERNAN v. PEOPLE'S LIFE INSURANCE CO.

Life insurance—Payment of premium—Agent's authority.

An agent of an insurance company has no power to bind the company by giving a policy holder a receipt for the amount of a premium as payment for services alleged to have been rendered by the policy holder to the company, the policy on its face providing that payment of the premium in cash to the company was necessary.

Judgment of ROSE, J., 26 O. R. 596, 15 Occ. N. 277, affirmed.

Osler, Q.C., and *J. B. Jackson*, for the appellant.

W. H. Hunter, for the respondents.

ROBERTSON, J.]

THOMSON v. HUGGINS.

Chose in action—Equitable assignment—Building contract—Default—Bills of exchange and promissory notes.

The contractor for a building gave to the plaintiff, a lumber merchant, the following order: "On completion of contract on building now in course of erection, pay to the order of (plaintiff) $400, value received, and charge to account of (contractor):" and the defendant accepted thus: "Accepted, payable at Niagara Falls, Ont., as payment for lumber used in my building." After this the defendant paid to the contractor more than $400. The contractor made default before the completion of the building, when more than $400 of the contract price had yet to be

earned, and the defendant completed the building, the cost being more than the contract price.

Held, reversing the judgment of ROBERTSON, J., that this was not a bill of exchange, because the time for payment was not fixed, nor an equitable assignment, because the fund out of which payment was to be made was not specified, but was merely a promise to pay upon the completion of the contract by the contractor or some one on his behalf, and that by reason of his default no liability arose.

DuVernet and *J. E. Jones*, for the appellant.

Watson, Q.C., and *S. F. Washington*, for the respondent.

MACMAHON, J.]

BECHERER v. ASHER.

Principal and agent—Sale of goods—Undisclosed principal.

Where undisclosed principals, carrying on a wholesale business, employ an agent to carry on a retail business in his own name but for their benefit, and sell their goods, they are not liable for the price of goods of the same kind purchased by the agent from other persons without their knowledge.

Watteau v. *Fenwick*, [1893] 1 Q. B. 346, considered.

Judgment of MACMAHON, J., reversed.

Moss, Q.C., and *B. N. Davis*, for the appellants.

DuVernet and *J. E. Jones*, for the respondents.

STREET, J.]

ITTER v. HOWE.

Church—Trust—Alteration in constitution—Change in doctrine.

The civil Courts will deal with questions of church doctrine and beliefs only in so far as it becomes necessary so to do to determine civil rights. Where a dispute arises as to which of two bodies represents a particular church, in trust for which

property has been granted, a question of ecclesiastical identity arises, and those who claim that the trust has been violated must show that their opponents have so far departed from the fundamental principles of the church in question as to be in effect no longer members thereof.

A provision that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands," is not violated by mere alterations in expression or fuller and clearer statements of doctrine.

Where the constitution of a church provides that there shall be no alteration therein "unless by request of two-thirds of the whole society," alterations initiated by the governing body and assented to by two-thirds of those of the members who have voted thereon, all members having been asked to vote, are valid. No previous request is necessary, nor is it necessary to have the assent of two-thirds of all the members.

Judgment of STREET, J., reversed.

Robinson, Q.C., and *W. H. P. Clement*, for the appellants.

S. H. Blake, Q.C., for the respondents.

WATERFORD SCHOOL TRUSTEES v. CLARKSON.

Bond—Public schools—Secretary-treasurer.

The secretary-treasurer of a public school board holds office for a year only, and not during pleasure, and the sureties to a bond given as security for the performance of his duties, though on its face unlimited as to time, are not liable for defaults occurring after the year, notwithstanding his re-appointment to office.

Judgment of STREET, J., affirmed.

Wilkes, Q.C., for the appellants.

W. Cassels, Q.C., for the respondent.

MEREDITH, J.]

STEPHENS v. BOISSEAU.

Bankruptcy and insolvency—Assignments and preferences—Surplus proceeds of sale of mortgaged goods.

The application by a chattel mortgagee of the surplus proceeds of sale of the goods in question in satisfaction of an unsecured debt due by the mortgagor to him is not a preference within the meaning of the Assignments Act.

Judgment of MEREDITH, J., reversed.

Kappele and *J. Bicknell*, for the appellant.

Gibbons, Q.C., for the respondent.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 26TH MARCH, 1896.

In re WILLIAMS.

Executors—Payments by—Promissory notes—Consideration—Gifts—53 V. c. 33, s. 30 (D)—R. S. O. c. 110, s. 31.

Upon appeal from the order of a Surrogate Court upon the passing of executors' accounts:—

Held, that payments made by them to the payees of promissory notes signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts to the payees, were not protected either by the *prima facie* presumption of a valuable consideration raised by s. 30 of the Bills of Exchange Act, 53 V. c. 33 (D), nor by the provisions of s. 31 of R. S. O. c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient."

Decision of the Surrogate Court of the county of Elgin, *ante* p. 61, reversed upon this point.

J. M. Glenn, for the residuary legatees.

J. B. Davidson, for the executors.

J. A. Harvey, for the payees of the notes.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 29TH FEBRUARY, 1896.

In re COCKBURN.

Way—Easement—Implication—Prescription—Interruption—Unity of possession—Unity of seisin—"Lost grant"—Tenancy—Estoppel.

A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood.

Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4.

The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1884, the owner of No. 13 was also the tenant of No. 9.

Held, per MEREDITH, C.J., that unity of possession during that period would interrupt the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R. S. O. c. 111, s. 35.

Dictum of Hatherley, L.C., in *Ladyman* v. *Graves*, L. R. 6 Ch. 768, not followed.

But, *per Curiam*, that at all events the *locus* in question could not be treated as a way to lot 4; it was rather a way to that portion of lot 5 on which house No. 9 stood; and there being unity of seisin of the alleged dominant and servient tenements in the devise of lot 5, no easement could exist while that unity continued; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation.

Semble, per MEREDITH, C.J., that, but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant."

And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant.

Shepley, Q.C., for the appellant.

W. M. Clark, Q.C., for the respondent.

[27TH MARCH, 1896.

FOX v. FOX.

Jury notice—Striking out—Discretion—Local Judge—Powers of—Equitable issues.

Although, by Rule 1287 (16), the Master in Chambers has no power to strike out a jury notice except for irregularity, a local Judge has jurisdiction, in an action brought in his own county, where the solicitors for all parties reside in such county, by virtue of s. 185 (5) of the Judicature Act, 1895, to make an order under s. 114 striking out such a notice as a matter of discretion; and he may do so sitting in chambers.

And where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury:—

Held, that the local Judge should have exercised his discretion and struck out the jury notice.

Semble, that where there are both legal and equitable issues on the record, in the absence of an order under s. 114, a party has the right to have the legal issues tried by a jury.

Baldwin v. *McGuire*, 15 P. R. 305, commented on.

F. A. Anglin, for the plaintiff.

L. G. McCarthy, for the defendant.

[MEREDITH, C.J., 28TH MARCH, 1896.

In re KERR AND COUNTY OF LAMBTON.

Municipal corporations—County by-law—Guaranteeing debentures of town—Assent of electors—By-law of town—Time of passing—Form of by-law—Guaranty—Liability.

The assent of the electors is not required to make valid a by-law of the council of a county corporation, passed under s. 511, s.-s. 2, of the Consolidated Municipal Act, 1892, guaranteeing the debentures of a municipality within the county.

At the time such a county by-law was passed, the by-law of the minor municipality authorizing the issue of the debentures had not been finally passed, but had been provisionally adopted and had received the assent of the electors, in accordance with s. 293, and the form that the guaranty of the county was to take was such that it could not actually be given until after the final passing of the by-law of the minor municipality.

Held, that, under these circumstances, the county by-law was not prematurely passed.

The by-law in question enacted: (1) that the corporation "do hereby guarantee the due payment of the debentures," etc.; (2) that upon each debenture should be written "payment hereof guaranteed by the corporation of the county," etc.; (3) that the warden and clerk should sign and seal such guaranty on each debenture; (4) that when so signed the corporation should be liable to the holders of the debentures and responsible for the due payment thereof.

Held, that the by-law did not impose upon the county corporatian any greater liability than was authorized, viz., that of guarantors.

Aylesworth, Q.C., for the applicant.

Shepley, Q.C., for the corporation.

[MEREDITH, J., 23RD MARCH, 1896.

CREDIT FONCIER FRANCO-CANADIEN v. LAWRIE.

Action on covenant—Deed not executed by defendant—Implied covenant.

The defendant Lawrie purchased certain lands subject to

mortgages made to the assignor of the plaintiffs. The conveyance to Lawrie contained a covenant on her part by which she agreed to pay these mortgages, but she did not execute it. The plaintiffs obtained from the mortgagor, the grantor to Lawrie, an assignment of the above covenant, and brought this action upon it against the defendant Lawrie and the mortgagor.

Held, that no action could lie upon a covenant in a deed not executed by the alleged covenantor.

R. McKay, for the plaintiffs.

No one for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 17TH MARCH, 1896.

In re STEEN'S ESTATE.

Infant—Sale of land—Past maintenance.

The Court has not power under s. 213 of the Supreme Court in Equity Act, 1890, to order the sale or disposal of land held in trust for an infant, to pay for the infant's past support.

H. H. Hansard, for the petitioners.

A. I. Trueman, for the guardian.

MANITOBA.

In the Queen's Bench.

[KILLAM, J., 20TH MARCH, 1896.

OWENS v. BURGESS.

Fire—Damage by—Custom of agriculture—Negligence.

County Court appeal. The action was brought to recover damages for the loss of a quantity of wheat burnt in a fire, which it was alleged spread to the plaintiff's farm through the negligence of the defendant, a thresher, who had been threshing on a neighbouring farm, in not taking effectual means to extinguish the fire from the engine, but allowing it to escape.

The action was tried with a jury, who found that the fire originated from fire left by the employees of the defendant while threshing on the neighbouring farm, but found that the defendant was not guilty of any negligence in the care of the fire left while threshing; and returned a verdict for the defendant. The plaintiff appealed.

Held, following *Booth* v. *Moffatt*, *ante* p. 13, that where a person uses fire in his field in a customary way, for the purpose of agriculture, he is not liable for damage arising from the escape of the fire to other lands unless the escape is due to his negligence. The use of fire to furnish motive power for threshing machines was a customary use of it in Manitoba.

It would appear to make no difference that the person sued was not the farmer, but one who threshed the grain of many farmers for profit to himself. It must be assumed that he used the fire with the knowledge and consent of the farmer, and towards others he must be regarded as the servant of the farmer

for the purpose of the threshing. The jury negatived the existence of negligence, and there was no ground for reversing their decision upon that point.

Pitblado, for the plaintiff.

Mathers, for the defendant.

[Bain, J., 25th March, 1896.

WATEROUS ENGINE WORKS CO. v. WILSON.

Statutes—Company—License—58 & 59 V. c. 4, s. 9—Retroactivity.

Bill filed to enforce a lien on land of the defendant for the balance due under a contract for the sale and purchase of an engine.

The plaintiffs were incorporated under the Dominion Companies' Act; they had not obtained a license to carry on business in Manitoba; and the defendants urged that, as they had not a license, they could not maintain this suit.

The statute 46 & 47 V. c. 88 was the Foreign Corporations Act that was in force when the agreement in this suit was made. But the provisions of this Act did not apply to a company carrying on a business like the plaintiffs'; nor did the company come within the Foreign Corporations Act of the Revised Statutes. The Act of 1895, 58 & 59 V. c. 4, was the first Act under which the plaintiffs could have obtained a Provincial license, and it was assented to on 29th March, 1895, just a day before this suit was commenced. Section 9 declared that no company not incorporated under a Provincial Act, or that had not obtained a license under the Act, "shall be capable of taking, holding, or acquiring any real estate within this Province."

Held, that every statute which takes away or impairs vested rights, or which attaches disabilities in respect of transactions or matters that are past, must be presumed not to have a retrospective operation: *Moon* v. *Durden*, 2 Ex. 22. There was nothing in the statute that would lead one to think that the Legislature ever intended that s. 9 should apply to lands, or interests therein,

that companies had already legally acquired, or that it should prevent companies from maintaining actions to enforce rights that had become vested in them. That the section was not intended to be retrospective was made clearer from the fact that the intention that the next section was to have a retrospective effect was expressly stated in that section.

Decree for the plaintiffs.

Ewart, Q.C., and *Sutherland*, for the plaintiffs.

Clark, for the defendants.

[28TH MARCH, 1896.

GAUDRY v. CANADIAN PACIFIC RAILWAY CO.

Fire—Damage by—Nonsuit—Want of title to goods in plaintiff.

County Court appeal. The action was brought to recover the value of 62 tons of hay destroyed by fire, which the plaintiff alleged was caused by burning waste from the hot box of an engine on the defendants' line of railway. The action was tried with a jury, who found in favour of the plaintiff. The defendants appealed.

The hay was alleged to have been burnt on section 11, township 9, range 2, east; it had been cut by the plaintiff on that section and left there by him some time previous to the fire: the section was a "school section" set apart under the Dominion Lands Act as an endowment for educational purposes. The plaintiff did not allege or show that he had any title to the land at the time he cut the hay, or any permit to cut the same. He lived four miles from where the hay was, and was at his own place when it was burnt: he was not in any way in actual possession of it at the time it was burnt.

The defendants contended that the hay was not the plaintiff's and that he had no right to bring the action.

Held, that the Judge of the County Court should have granted the motion of the defendants' counsel for a nonsuit, on the ground that the plaintiff had failed to show that he had any

property in the hay in question that would entitle him to maintain an action for its loss.

The plaintiff, having cut the hay without having had any right to do so, acquired no property in it from the mere fact of his having cut it, that, apart from possession, would give him a right of action, even against a wrong-doer: *Rackham* v. *Jessup*, 3 Wils. 332; *Graham* v. *Heenan*, 20 C. P. 340.

Appeal allowed with costs; verdict entered in the County Court set aside; and a nonsuit entered with costs.

Aikins, Q.C., and *Culver*, Q.C., for the defendants.

Munson, Q.C., for the plaintiff.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[SCOTT, J., OCTOBER, 1895.

In re TAYLOR.

Assessment and taxes—Income—Advocates—Ascertainment.

Appeal from the Court of Revision of the Town of Edmonton.

The appellants were assessed for $1,500 on income as practising advocates.

It is provided by s. 1 of part 1 of the Municipal Ordinance that "all municipal, local, or direct taxes or rates shall, where no other express provision has been made in this respect," be levied "equally upon the whole ratable property, real, personal,

and income, of the municipality, according to the assessed value of such property and income." No other provision was made as to the assessment and taxation of income, except that the income of a farmer derived from his farm, and the income of merchants, mechanics, and other persons derived from property liable to taxation, is exempt. There was no enactment shewing how the amount of the income should be ascertained, or upon what it was to be based.

S. S. Taylor, Q.C., for the appellants.

N. D. Beck, Q.C., for the municipality.

SCOTT, J.—It is admitted that the appellants are practising advocates, and doubtless the assessment is based on what would be considered their income from their profession during the present year; but I can find no authority, such as there is in Ontario, to base it upon the income derived by them during the preceding year. The income of a professional man fluctuates, and because he may have obtained certain profits for a portion of the time, up to the time of the assessment, it cannot reasonably be inferred that he will continue to make the same profits, at the same rate, during the remainder of the year, or even that the profit made by him up to the time of the assessment may not be swallowed up by losses made in his practice during the remainder of the year.

In *Lawless* v. *Sullivan*, 6 App. Cas. 373, it was held that the word "income" in the New Brunswick Assessment Act, when applied to a commercial business, meant the balance of gain over loss, and that when no such gain has been made during the year there is no income or fund capable of being assessed. But it was contended by Mr. Beck, on behalf of the town, that there is a distinction between the income of advocates derived from their profession and that derived from trade and commerce. Truly, there may be such a distinction in some respects, but I do not see any reason why the income of an advocate should not be held to be the balance of gain in his practice over the losses therein.

In view of the fact that it is impossible to ascertain the amount of the appellants' income for the year, I must hold that the assessment cannot stand.

[10TH JANUARY, 1896.

In re MARRIAGGI.

Registry laws—Land Titles Act, 1894, s. 92—Executions—Expiration—Certificate.

A reference by a Registrar of Titles under s. 111 of the Land Titles Act, 1894.

Marriaggi was the transferee of land at Fort Saskatchewan by transfer through one Peter Coutts.

The lands were subject to two executions against Peter Coutts for $78.51 and $259.75, and the Registrar doubted whether the following document was a certificate shewing the expiration, satisfaction, or withdrawal of such executions, within the meaning of s. 92 of the Act:—"I, the undersigned, deputy-sheriff of Edmonton, do hereby certify that there are no writs of execution in my hands for execution against the lands of Peter Coutts unless or except as follows. There are in my hands: (1) A writ of execution for the sum of $73.51 against the lands of Peter Coutts, at the suit of the Hudson Bay Co., dated 18th September, 1893, marked as follows, 'renewed for one year from 18th September, 1894; Alex. Taylor, D.C.S.C.;' and not otherwise renewed. (2) A similar writ of execution, but for the sum of $259.75, dated 24th June, 1893, and marked renewed for one year from 23rd June, 1894."

Held, without deciding whether the executions had been effectively renewed and their expiration thereby prevented, that the certificate was not a certificate within the meaning of s. 92, because it did not shew the expiration, satisfaction, or withdrawal of the writs of execution; for, under certain circumstances, such, for instance, as a seizure of the lands under the execution during their currency, renewal might be unnecessary to prevent their expiry, and the existence of any such circumstances was not disproved by the certificate or otherwise.

N. D. Beck, Q.C., for Marriaggi.

S. S. Taylor, Q.C., for the execution creditors.

IN CHAMBERS.

[ROULEAU, J., 29TH FEBRUARY, 1896.

In re HADDON.

Exemptions—Chattel mortgage—Assignment for creditors—Marshalling of assets.

H. and H. had given a chattel mortgage in July, 1895, to one T. W. L., covering practically all their chattel property, expressly including all property exempt from seizure under execution. On 11th November, 1895, H. and H. assigned to one T. A. S., for the benefit of creditors, all their property *that was liable to seizure and sale under execution.* Shortly after the assignment was executed the assignee, who had taken possession of all the goods and chattels, including property which might be claimed as exempt from seizure and sale under execution, with the advice and consent of the assignors, sold sufficient assets, including a number of cattle, horses, and some oats that were within the Exemptions Ordinance, to pay off the chattel mortgagee and the claim of the landlord for rent.

Subsequently the assignors served a notice on the assignee claiming (1) to be reimbursed the value of the "exempt" property so sold, and specifically describing the same and claiming the benefit of the Ordinance respecting exemptions; (2) claiming certain other specifically described property remaining unsold in the assignee's hands as "exempt," and therefore not covered by the assignment.

Certain execution creditors thereupon notified the assignee that they objected to the claims of the assignors: (1) because the right to claim exemptions had been waived, at any rate, as respects the goods already sold; and (2) because as against both the landlord and the chattel mortgagee they were entitled to have the assets marshalled, and to be paid out of the fund realized or to be realized from the sale of "exempt" property, to the extent that they had been deprived of the benefit of the fund arising from the sale of the other property by payments to the landlord and chattel mortgagee.

The assignee issued an originating summons for determination of the questions of law thus arising under the Judicature Ordinance, s. 492.

G. S. McCarter, for the assignee.

P. McCarthy, Q.C., for the assignors.

C. C. McCaul, Q.C., (for *Beck & Emery*), for the execution creditors.

ROULEAU, J.—The law seems to be well established, that when the right depends upon selection or demand it may be impliedly waived by the debtor by failure to make a selection or demand at the proper time or in a reasonable manner: Thomson on Homesteads and Exemptions, s. 646. In this case, far from making his selection or demand before the sale, the debtor advised the assignee to sell cattle and horses in order to pay off that mortgage, and therefore impliedly waived his right as to his exemptions of the same. The debtor is not entitled to more protection than if the mortgagee had sold the cattle and horses to satisfy his mortgage. It would have been different if the mortgagor had paid off his own mortgage; then his exemptions might have been claimed by himself.

Exemptions are a privilege of which only the debtor can avail himself, and if he allows his property to be sold without claiming his exemptions, as in this case, and without selecting or making a demand for them, he has only himself to blame, and I consider that he is now too late to claim them.

Does the equitable doctrine of marshalling assets and securities arise in this case? I do not think so. In *Aldrich* v. *Cooper*, 8 Ves. 382, Lord Eldon states the principle thus: "It is the ordinary course in equity that a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the extent that the only fund to which the other has access may remain clear to him." I refer more especially to the case of *Topping* v. *Joseph*, 1 A. R. 292, where the principles laid down will in part apply to this case.

The decree or order will be:—1. That the goods unsold and exempt from seizure or sale under c. 45 of the Revised Ordi-

nances are the property of Haddon, and that they may be delivered over by the assignee to the said Haddon. 2. That the said Haddon has waived his right of exemption to the goods sold to pay the mortgage and distress for rent, and is not entitled to claim such exemptions. 3. That the cost of these proceedings be paid out of the estate by the said assignee.

[SCOTT, J., 28TH NOVEMBER, 1895.

McLEOD v. WILSON.

Pleading—Rejoinder—Agreement—"Understanding"—Particulars—Building contract—Architect—Extension of time—Condition precedent—Fraud—Joinder of issue—Special traverse—Waiver—Embarrassment.

Upon a motion by the plaintiff to strike out certain portions of the defendant's rejoinder in an action on a building contract:—

Held, that a paragraph setting up that if the defendant did certain acts, he did them under express agreements and understandings with the plaintiff, etc., need not be stricken out as embarrassing because it was not stated whether the "agreements and understandings" were in writing, but the defendant should furnish particulars of the agreements and understandings relied upon, and state whether they were in writing; and, in view of the particulars ordered, the use of the word "understandings" was not embarrassing because of uncertainty as to its meaning.

2. The reply stated that the written contract contained a provision that the architect should have power to extend the time for the completion of the work, for the causes mentioned, and the architect did extend the time.. In rejoinder to this the defendant alleged that if the architect did extend the time, he did so without the instructions of the defendant and without having power to do so, and that the extensions were unnecessary and were not just and reasonable.

Held, that this pleading was bad, because it was not alleged that the receipt of instructions from the defendant was a condition precedent to the architect's acting in the premises, and

because the exercise of the powers of the architect could not be called in question except upon the ground of fraud or undue influence.

3. In a plea subsequent to defence a party may specially traverse any allegation in the previous pleading in addition to joining issue upon the whole pleading.

4. In a pleading an objection to a previous pleading in point of law must be taken explicitly, and an allegation which suggests inefficiency, but does not take the point clearly, is embarrassing; and a paragraph of the rejoinder stating that certain paragraphs of the reply, if true, did not constitute a waiver a waiver of defences specified, or constitute in any manner proper matter of reply, was struck out.

5. It is no answer to a pleading to say that it is embarrassing or that it prejudices or delays the fair trial of the action. If the pleading is open to any such objection, the proper course is to move to strike it out.

James Muir, Q.C., (for *Beck & Emery*), for the plaintiff.

G. S. McCarter (for *S. S. & H. C. Taylor*), for the defendant.

[27TH JANUARY, 1896.

KELLY v. HOWEY.

Pleading—Payment into Court—Damages—Costs.

An application by the plaintiff to strike out the 3rd paragraph of the statement of defence in an action for assault, on the ground of embarrassment.

The paragraph stated that the defendant, while denying the assault, brought into Court $15, and said that sum was sufficient to satisfy the plaintiff's claim and costs.

C. C. McCaul, Q.C., (for *Beck & Emery*), for the plaintiff.

S. S. Taylor, Q.C., (for *Muir & Jephson*), for the defendant.

SCOTT, J.—I think the paragraph complained of is embarrassing and must be struck out. The money is paid in under the authority of the latter part of Order XXII., Rule 1, and is therefore subject to the provisions of Rule 6 of the same Order, a reference to which will show that the money must be paid into Court in respect of the cause of action alone and not in respect of the costs of the action, because, under clause (*A*) of Rule 6, the plaintiff may accept the amount paid in in satisfaction of his claim, and in that event will be entitled to his costs of the action. In the event of his not accepting the amount in satisfaction, and of his proceeding with the action under clause (*C*) of Rule 6, further difficulties will arise, because upon the trial of the action the Court cannot determine how much of the $15 was paid in in respect of the cause of action.

[8TH FEBRUARY, 1896.

PRUDEN v. SQUAREBRIGGS.

Sale of land—Judicial sale—Purchase by party having conduct.

By the judgment in a partnership action it was directed that certain lands should be sold and the proceeds applied: first, in payment of a mortgage thereon for $1,154.72; second, in payment of the plaintiff's one-fourth interest in the partnership; third, in payment of the plaintiff's claim of $1,200 against the defendant; fourth, in payment of the plaintiff's costs; and the balance to be paid to the defendant.

The lands were duly advertized for sale pursuant to the judgment, and were put up at auction, whereat the plaintiff became the purchaser.

The plaintiff now moved for an order confirming the sale.

C. C. McCaul, Q.C., (for *Beck & Emery*), for Mone and Macdowell, execution creditors of the defendant, objected that the plaintiff had the conduct of the sale, and had not obtained leave to bid thereat.

S. S. Taylor, Q.C., and *G. S. McCarter*, for the plaintiff, contended that it was the clerk of the Court, not the plaintiff, who had the conduct of the sale: that even if the plaintiff had the conduct, his purchase was merely voidable; and that the execution creditors, before they could be heard, must show that the lands were of such value as to leave a surplus for the defendant after payment of the prior charges given by the judgment.

SCOTT, J.—In the absence of any order or direction respecting the conduct of the sale, I must hold that the plaintiff had the conduct of it.

Where the person having the conduct of the sale desires to bid at it, he must obtain leave to do so, and when such leave is granted, the conduct of the sale is usually given to another party to the suit.

The general rule is clearly stated by Gifford, L.J., in *Guest* v. *Smythe*, L. R. 5 Ch. 561.

In the present case the plaintiff's duty and interest clearly conflicted; his duty being to endeavour to secure the best possible price for the defendants, and his interest being to secure it for himself at the lowest possible price.

It is not necessary for the person opposing the confirmation of such a sale to show that the purchaser has perpetrated a fraud, or that he has so conducted the sale as to enable him to acquire the property for less than its value, or that by reason of his having the conduct of the sale he has obtained an undue advantage to the detriment of any person interested in the proceeds. To hold that it is necessary to show this would be, in effect, to hold that the rule referred to was of no effect, for it is reasonable to assume that, even in the absence of any such rule, the sale would be avoided upon any such misconduct being shown. The apparent object of the rule is to prevent the possibility of any such misconduct. For the same reason I think it is not incumbent upon the person opposing the confirmation to show that the lands should have realized a sum sufficient to give him an interest in the proceeds after payment of all the prior charges.

Counsel for the plaintiff in support of his contention that the sale was not void, but merely voidable, referred to *Crawford* v. *Bays*, 6 P. R. 278. The Referee in Chambers there expresses

the opinion that such a sale should not be confirmed if any of the parties to the suit object. I think a more reasonable rule to lay down would be that such a sale should not be confirmed if it is objected to by any person having an interest in the proceeds.

For these reasons I think I ought not to make an order confirming the sale.

The application is therefore dismissed with costs.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 5TH FEBRUARY, 1896.

In re ALLEN—ALLEN v. KENNEDY.

Administration order—Originating summons—Account—Vouching out of Court.

Upon the return of an originating summons calling upon the administrator to show cause why an order for administration of the estate of an intestate should not be granted, an order was made on the 30th April, 1895, under the provisions of Order LV., Rule 10 (*a*), directing that the summons should stand over for six weeks; and that the defendant should within one month furnish the plaintiff with a proper statement under oath of his accounts and dealings with the estate as administrator. The defendant, in pursuance of this order, delivered to the plaintiff a statement under oath as required, within the time limited.

The plaintiff did not appear upon the summons at the expiration of the six weeks, and no further steps or proceedings were taken by him until 21st December, 1895, when he gave notice of an application for an order to cross-examine the defendant upon his affidavits filed.

Held, that the object and intention of Order LV., Rule 10 (*a*), is to afford a means of avoiding the expense of an administration suit. If the accounts directed by the order of the 30th April were satisfactory to the plaintiff, it would be unnecessary to proceed further. By that order a period of two weeks was allowed for the plaintiff to consider the account and formulate his objections to it. The practice is to direct accounts to be furnished and vouched out of Court, and only to allow the disputed items to be adjudicated on in Chambers: *In re Lockwood*, 8 Times L. R. 293. The disputed items, if any, should be settled and adjusted before the plaintiff should be permitted to otherwise proceed under his originating summons.

Application dismissed with costs to the defendant in any event.

P. McCarthy, Q.C., and *C. F. Harris*, for the plaintiff.

C. C. McCaul, Q.C., (for *Haultain & McKenzie*), for the defendant.

Supreme Court of Canada.

QUEBEC.] [24TH MARCH, 1896.

O'NEILL v. ATTORNEY-GENERAL FOR CANADA.

Constable—Criminal Code, s. 575—Persona designata—Officers de facto and de jure—"Chief constable"—Appointment of deputy—Common gaming house—Confiscation of gaming instruments, moneys, etc.—Evidence—Canada Evidence Act, 1893, ss. 2, 3, 20, 21—Judgment in rem—Res judicata.

The high constable for the district of Montreal (which includes the city of Montreal as well as a large territory adjacent thereto) was appointed under a commission from the Crown in the year 1866, and had ever since then continued to hold that office. In 1885 he appointed a deputy, who thereupon took the oath of office, the attesting magistrate adding in the record of the oath the words "jusqu' au 1er. Mai, 1886." The deputy was never re-sworn, but had continued to act as such ever since then, and on the 14th October, 1893, in execution of a warrant issued by a police magistrate under s. 575 of the Criminal Code, and addressed to him by name as "deputy high constable for the city of Montreal," he seized certain moneys and instruments in a common gaming house within the limits of the city of Montreal. The section referred to empowers "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence," to make the reports and seizures provided for therein.

Held, affirming the judgment of the Court below, GIROUARD, J., dissenting, that an officer whose functions and duties are of a character sufficient to bring him within the designation of the officer named in the section is competent to execute warrants and make seizures under it, although his office may not bear the exact title given in the Code.

That the high constable for the district of Montreal has power to appoint a deputy to perform acts of a ministerial nature under the provisions of s. 575 of the Criminal Code.

That a seizure under s. 575 of the Criminal Code by a person performing *de facto* the duties of deputy high constable is sufficient upon which to ground a confiscation under that section.

That, notwithstanding the omission to be re-sworn, the executing officer in this case was not only *de facto*, but strictly *de jure*, the deputy chief constable for the district of Montreal, and an officer in all respects competent to act under s. 575 of the Criminal Code, and even if he had merely filled the office *de facto*, the proceedings taken by him could not be vitiated by reason of his failure to be re-sworn.

In an action to revendicate the moneys so seized, the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke the Canada Evidence Act, 1893, so as to be a competent witness in his own behalf in the Province of Quebec.

Held, *per* STRONG, C.J., that a judgment declaring the forfeiture of moneys seized under the provisions of s. 575 of the Criminal Code could not be collaterally impeached in an action of revendication brought against the high constable and the clerk of the peace for the specific recovery of the moneys confiscated.

Guerin, for the appellant.

Hall, Q.C., for the respondent.

NOVA SCOTIA.] [18TH FEBRUARY, 1896.

SLEETH v. HURLBERT.

Canada Temperance Act—Search warrant—Seizure of goods under—Replevin—Judgment quashing warrant—Justification under warrant after—Estoppel.

A search warrant was issued under the Canada Temperance Act to search for liquors on the premises of H., a hotel keeper in Yarmouth. The goods having been found were seized, and, on subsequent proceedings before a magistrate, they were

ordered to be destroyed, which was done, though H. had caused a writ of replevin to be issued. The proceedings before the magistrate were then removed into the Supreme Court of Nova Scotia by *certiorari*: *Regina* v. *Hurlbert*, 27 N. S. Reps. 62: and the search warrant was quashed for not having stated that the premises of H. were within the jurisdiction of the magistrate. In the replevin suit the Nova Scotia Court held that the warrant having been quashed, H. was entitled to recover the value of the goods destroyed.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 27 N. S. Reps. 375, TASCHEREAU, J., dissenting, that the warrant having followed the form prescribed in the Act, and having been issued by competent authority, the officer executing the order of the magistrate could justify under it notwithstanding it had been quashed.

Held, also, that the officer having been no party to the proceedings in which the warrant was quashed, and the judgment therein not being a judgment *in rem*, but *inter partes* only, he was not estopped thereby from setting up the warrant as a justification.

Orde, for the appellant.

Roscoe, for the respondent.

[24TH MARCH, 1896.

KIRK v. CHISHOLM.

Assignment for benefit of creditors—Preferences—R. S. N. S., 5th ser., c. 92, ss. 4, 5, 10—Chattel mortgage—13 Eliz. c. 5.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors, it is "an assignment for the general benefit of creditors," under s. 10 of the Nova Scotia Bills of Sale Act, R. S. N. S., 5th ser., c. 92, and does not require an affidavit of *bona fides*.

Durkee v. *Flint*, 19 N. S. Reps. 487, approved and followed.

Archibald v. *Hubley*, 18 S. C. R. 116, distinguished.

A provision in an assignment for the security and indemnity of makers and indorsers of paper for accommodation of the debtor not due does not make it a chattel mortgage under s. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.

An assignment is void under the Statute of Eliz., as tending to hinder or delay creditors, if it gives a first preference to a firm of which the assignee is a member, and provides for allowance of interest on the claim of said firm until paid, and the assignor is permitted to continue in the same possession and control of the business as he had previously had.

A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part," will also avoid the assignment under the Statute of Eliz.

Authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges, and expenses to arise in consequence" of such paper, is a badge of fraud.

Judgment of the Court below affirmed.

Mellish, for the appellant.

Gregory, for the respondent.

PRINCE EDWARD ISLAND.] [27TH FEBRUARY, 1896.

GORMAN v. DIXON.

Principal and surety—Giving time to principal—Reservation of rights against surety.

G., as surety for his brother, indorsed a promissory note which was dishonoured. The bank holding the note accepted a part payment and a new note for the balance, indorsed by D., and retained the old note. D. had to retire the paper he indorsed, and brought an action against G. on the old note. On the trial the manager of the bank testified that it was arranged when the new security was given that he was to retain the old note until it was paid. A verdict was given in favour of D.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, GWYNNE, J., dissenting, that taking the new note was giving time to the principal by which the surety would have been discharged, but that the evidence of the manager showed that when time was given to the principal debtor to pay, the remedy against G. as his surety was reserved, and D. was entitled to hold his verdict.

Stewart, Q.C., for the appellant.

Peters, Q.C., A.-G., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [7TH APRIL, 1896.

REGINA v. GRANT.

Jury notice—Crown—Rule 364—Trial Judge.

The Crown, coming into the High Court of Justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendant.

Rule 364 applied.

Per OSLER, J.A.—If before the trial the Court or a Judge has ordered that the action may be tried without a jury, the Judge presiding at the trial has no power to say that it shall be tried by a jury.

F. E. Hodgins, for the Crown.

A. E. H. Creswicke, for the defendants.

IN CHAMBERS.

[OSLER, J.A., 22ND APRIL, 1896.

McCORMICK v. TEMPERANCE AND GENERAL LIFE ASSURANCE CO. OF N. A.

Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, s. 77.

Standing alone, the appellant's poverty is not a circumstance, within the meaning of s. 77 of the Judicature Act, 1895, entitling the respondent to a special order for security for costs.

L. G. McCarthy, for the plaintiff.

W. H. Blake, for the defendants.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 13TH FEB'Y, 1896.

UNION SCHOOL SECTION FIVE, TOWNSHIP OF HULLETT v. LOCKHART.

Public schools—Union school section—Alteration of—Petition of ratepayers—Award—54 V. c. 55, s. 87.

The joint petition of five ratepayers from each of the municipalities concerned, required under 54 V. c. 55, s. 87, s.-s. 1, for the formation, alteration, or dissolution of a union school section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality of which they are ratepayers, and not that there should be a joint petition of five ratepayers from each municipality.

Judgment of MEREDITH, C.J., 26 O. R. 662, 15 Occ. N. 274, reversed.

Where the award in such case is that no action should be taken on the petition, the restriction in s.-s. 11 of s. 87 against any new proceedings for a further period of five years does not apply.

Judgment of MEREDITH, C.J., on this point affirmed.

J. R. Cartwright, Q.C., for the plaintiffs.

E. L. Dickinson, for the defendants.

[4TH APRIL, 1896.

ANDERSON v. GRAND TRUNK R. W. CO.

Railways—Passenger—Ticket—"Station"—Access to—Expropriation of land—Use of railway lines—Necessity—Invitation—Passenger lawfully upon the railway—Negligence—Passing train—Neglect to give warning—Liability.

A man who had bought a ticket by the defendants' railway from London to Ailsa Craig found that the train which he wished to take had been cancelled; he thereupon took the train to Lucan Crossing, from which point he commenced to walk along the railway westward towards Ailsa Craig, and about thirty rods from the crossing was struck by a following freight train, the persons in charge of which were not obeying the requirements of s. 256 of the Railway Act, and killed. The nearest public highway crossed by the railway was twenty-five rods east of the Crossing, and the nearest to the west was at a distance of over one mile from the Crossing. There was no way for passengers to get from or to either of these roads except by going along the railway or by trespassing upon private grounds, which had been forbidden, and the defendants owned no lands at the Crossing except such as were taken for their lines. Passengers had been in the habit of coming to and going from the Crossing along the lines, without interference by the defendants.

Held, that the deceased was entitled to travel on his ticket from London to Lucan Crossing, and when he arrived there was at a place where he had a right to be.

2. That the defendants had made the Crossing a "station" by selling tickets to it and receiving passengers at it, although there was no ticket nor telegraph office there.

3. That the defendants had power under the Railway Act to expropriate the land necessary to give ingress and egress to and from this station.

4. That the deceased, being lawfully at the station, had a right to egress from it, and, there being no other way, had a right, from necessity, to gain egress by the railway; and the defendants had impliedly invited the public to walk along the railway for such purpose; and the deceased was therefore lawfully upon the railway when he was killed.

5. That all persons are entitled to the benefit of s. 256 of the Railway Act, whether travelling on a highway or not; and the omission by the defendants of the duty imposed by that section to ring the bell or sound the whistle at the highway crossing to the east of the station was evidence of the neglect of a duty which they owed to the deceased which entitled the plaintiffs to have the case submitted to the jury.

6. That a person walking on the railway by necessity or by the implied invitation or license of the defendants would not be liable to conviction under s. 278.

Aylesworth, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

[Boyd, C., Street, J., Meredith, J., 26th February, 1896.

YOUNG v. WARD.

Married woman—Status of judgment creditor—Right of husband—Married Woman's Property Act—Fraudulent conveyance.

In an action to set aside a lease and conveyance of a farm as a fraud on creditors, brought by a creditor under a judgment in a Division Court for $58 and costs, recovered after such action brought, by a married woman who was living apart from her husband, for board, lodging, washing, and medicine supplied to the defendant's wife:—

Held, reversing the decision of Robertson, J., who had found on the facts that the arrangement as made was a reasonable one and for value, Boyd, C., dissenting, that the plaintiff's claim under the Division Court judgment was, under the Married Woman's Property Act, her separate property so as to entitle her to bring this action, and that, on the evidence, there was an

actual intent to delay, hinder, and defeat creditors, and that the transaction could not stand.

Per BOYD, C.—The bulk of the plaintiff's claim was for board and lodging supplied; the plaintiff having no order for the protection of her earnings, and her husband being legally liable for the provisions supplied to her and for the rent of the house, the rent coming from a lodger would be his property to be collected at his suit, and not at that of his wife, and the separation of his claim from that of his wife for personal services would leave a residue too small whereon to found a writ of execution against lands under 57 V. c. 23, s. 80.

J. MacGregor and *B. E. Swayzie*, for the plaintiff.

DuVernet and *J. E. Jones*, for the defendants.

[FALCONBRIDGE, J., STREET, J., 2ND APRIL, 1896.

SPENCE v. GRAND TRUNK RAILWAY CO.

Statutes—Law Courts Act, 1896—Amendment—Procedure—Pending actions—Judgment not entered—Leave to appeal—Grounds.

By paragraph 7 of the schedule to the Law Courts Act, 1896, s. 73 of the Judicature Act, 1895, was amended so as to enable a Divisional Court and the Court of Appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained.

Held, that, being a matter of procedure, it applied to pending actions.

Watton v. *Watton*, L. R. 1 P. & M. 227, followed.

2. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending.

Holland v. *Fox*, 3 E. & B. 977, and *In re Clagett's Estate*, 20 Ch. D. 637, followed.

3. Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse

of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued was a serious one, and there was no authority upon the question of law decided by the Divisional Court.

J. J. Maclaren, Q.C., for the plaintiff.

W. M. Douglas, for the defendants the Grand Trunk R. W. Co.

W. Nesbitt, for the defendants the Canadian Pacific R. W. Co.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 8TH APRIL, 1896.

McALLISTER v. O'MEARA.

Security for costs—Class suit—Insolvent plaintiffs.

Security for costs was refused in an action brought by four ratepayers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve, for an account of moneys received by the latter from the former, in spite of the financial incompetency of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, where the action was virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there was no contention that it was frivolous.

Clark v. *St. Catharines*, 10 P. R. 205, distinguished.

Watson, Q.C., for the plaintiffs.

W. H. P. Clement, for the defendants.

[MEREDITH, C.J., 11TH MARCH, 1896.

FLEMING v. LONDON AND LANCASHIRE LIFE ASSURANCE CO.

Life insurance—Premium—Promissory note of third person—Acceptance by insurers in satisfaction—Promissory note of insured—Discount by agent—Payment.

The defendants' agent accepted promissory notes in his favour, made by the insured and his brother, for the first

premium on policies of life insurance, discounted the notes with his bankers, and retained the proceeds. He sent to the defendants his own promissory note for the amount of the premium, less his commission, in a letter in which he described it as "settlement of new premiums." The defendants' manager, by letter, acknowledged the receipt of this note, and added, "which we will hold as requested." The notes given by the insured were renewed and were unpaid in the hands of the bankers, and one of the renewals overdue at the time of the death of the insured, after which they were retired by the defendants. The agent did not communicate to the defendants the fact that he had taken these notes or inform them how he had arranged for payment of the premium, and they supposed it had been paid in cash. The policies were issued, and were included in the defendants' return to the Government. In the bond given by the agent and his sureties to the defendants it was agreed that it should cover payment of all notes made by the agent that the defendants might accept from him for premiums under policies effected by him. The agent's note was not paid.

Held, that it was received by the defendants in satisfaction and discharge of the premium; that there was nothing to prevent them so accepting the note of a third person; and that a condition of the policy to the effect that if a note should be taken for the first premium, and should not be paid when due, the policy or assurance should become null and void at and from default, was not applicable to a note so taken, but to one taken for and on account of the premium.

Semble, also, that the transaction between the agent and the insured amounted, when the proceeds of the discount were received, to a payment in cash of the premium.

Osler, Q.C., and *J. R. Roaf*, for the plaintiff.

Wallace Nesbitt and *R. A. Dickson*, for the defendants.

ELLIOTT v. MORRIS.

Will—Widow—Legacy—Dower—Election—Estoppel.

A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except

as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity. The will also provided for the early conversion into money and distribution of the estate.

Held, that the widow was not put to her election, but was entitled both to her legacy and to dower.

The will further provided that the widow for the $25,000 legacy might have the first selection of such securities or real estate as she might think desirable. After the death of the testator the widow joined with her co-executors in sales and conveyances of parts of the real estate and selected the remainder of it in part satisfaction of her legacy, without making any claim to dower, and subsequently dealt with such remainder as her own. It appeared that the question of dower was not considered by any of the parties, but all proceeded, without inquiry, upon the assumption that the widow had no claim except that which the will gave her, and it was not until after the sales and selection referred to that she became aware that she was entitled to dower as well as the legacy, upon which she immediately asserted her right to it.

Held, that, under these circumstances, and having regard to the fact that the transfer to the widow of the lands selected by her had not been completed by conveyance, and the fact that the residuary legatees had not been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower; but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the sum at which the lands selected by her were valued at as was equal to the value of her dower in those lands, ascertained in the same way.

Bingham v. *Bingham*, 1 Ves. Sen. 126, applied.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the plaintiff.

A. H. Macdonald, Q.C., for the defendants the executors.

Moss, Q.C., and *W. A. McLean*, for the defendants the Guelph General Hospital.

[1st April, 1896.

TORONTO GENERAL TRUSTS CO. v. IRWIN.

Will—Construction—Devise—Incumbrances—Exoneration—Widow—Dower—Election—Remainder—Acceleration.

By paragraph 3 of his will the testator, who died in 1895, devised house No. 35, east of Broadview avenue, in the city of Toronto, with some land in the rear of it, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns forever, free from all incumbrances." This property, together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for $1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for $1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4, the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime, and nothing passed to his wife under this paragraph. By paragraph 5, the testator directed his wife to pay off the mortgage for $1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose.

Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother, from the payment of the mortgage, and to cast the burden of the payment of it upon the residuary estate.

2. That the devisee of house No. 35 was not entitled to have it discharged of the dower of the widow, she having elected to take her dower instead of the provision made for her by the will.

3. Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all my said property," and directed that the proceeds of the sale should be invested and the interest of the investments paid in certain proportions to M. S. and M. J. G. for their lives and the life of the survivor, and for the division of the corpus after the death of the survivor among certain persons named.

Held, that the provisions of paragraph 7 applied only to the devise contained in paragraph 6, and not to that in paragraph 8.

4. That the effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder and make it an estate in possession.

T. W. Howard, for the plaintiffs.

W. Davidson, for the infant defendants.

George Lindsey, for the defendant Richard Irwin.

T. H. Bull, for the defendants Stewart and Glassie.

Skeans, for the defendant Martha Irwin.

[FERGUSON, J., 7TH FEBRUARY, 1896.

LOCKE v. LOCKE.

Mortgage—Building loan— Prior mortgage—Mechanic's lien—Selling value—Priority—R. S. O. c. 126, s. 5, s.-s. (3)—56 V. c. 24, s. 6.

A mortgage dated 27th August, 1894, for $2,700, to be advanced for building purposes, was made repayable in monthly instalments of $35.95 each during ten years, but did not on its face disclose, nor by reference to any other document declare, that it was a mortgage under 56 V. c. 24, s. 6. By a letter from the mortgagor to the mortgagees, delivered to them prior to the mortgage, it appeared that the mortgage money was to be advanced as follows: $1,600 when the whole job was ready for plaster, $500 when plastered, $300 when trimmed, and $300 when completed. At the time of the loan the property was incumbered by a mortgage amounting to $1,134.55, which the mortgagees paid out of the first advance of $1,600, and gave the balance to the mortgagor upon his making the declaration required by s. 6, and without notice of any unpaid claims. Upon a reference in a mechanic's lien action the Master in Ordinary found that the "land and property" was incumbered by a prior mortgage for $1,134.55, within R. S. O. c. 126, s. 5, s.-s. 3, before the 27th August, 1894; that this mortgage was paid as above stated; that the selling value of property had been increased by work done to the extent of $2,000, and that the plaintiff's lien was entitled to priority upon the selling value over the mortgage for $2,700, to the extent of $1,134.55.

Held, on appeal, affirming the Master's decision, that as to the sum of $1,184.55 the mortgage for $2,700 was not a mortgage within s. 6 of the first mentioned Act.

E. F. B. Johnston, Q.C., for the appellants.

H. E. Caston, for the plaintiff.

[ROSE, J., 18TH MARCH, 1896.

ATTORNEY-GENERAL v. CAMERON.

Succession Duty Act—Present and future interests—Duty, when payable.

Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 V. c. 6, is to be assessed on the whole estate at the time of the testator's death, including both the present and future estates or interests, but the duty is only to be paid at the death or within eighteen months thereafter on the present estates or interests, that is, those of which there is present possession or enjoyment, the duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but the duty assessed upon the value of such estates or interests at the time the right of possession or enjoyment accrues.

In computing the duty on annuities payable on a testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on their then value. Duty also must be payable on the capital producing such annuities, when it becomes distributable as legacies, or upon the final distribution of the estate.

J. R. Cartwright, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendants.

[ROBERTSON, J., 9TH JANUARY, 1896.

WRIGHT v. BELL.

Costs—Administration—Taxed costs in lieu of commission—Rule 1187—Labour and difficulty of reference.

This was an action for construction of the will and administration of the estate of Thomas Bell, deceased.

A reference for administration was directed to J. S. Cartwright, official referee, and was begun on the 9th May, 1892.

Interim reports, making distributions of the estate to the extent of $31,560.27, were made on the 13th June, 1892, and 10th June, 1893.

By the final report, dated 2nd November, 1895, seventeen persons were found entitled to share in the distribution of the estate *per capita*. These persons were represented by six different solicitors. No infants were in any way interested in the estate.

The whole value of the estate was $41,500.

There were twenty-nine regular sittings in the referee's office, besides over two hundred ordinary attendances in the course of the reference, and two hundred and seventy-five letters written by the solicitors having the carriage of the proceedings.

In the course of the reference an unusual number of special matters of more or less difficulty came up for adjustment and determination, among which were the following:—

1. The expropriation by a municipality of land belonging to the estate.

2. The opening up of certain streets through land belonging to the estate.

3. A claim made by a stranger to the action to the ownership of buildings upon the estate, which was contested and defeated.

4. A claim successfully prosecuted by the estate against such stranger for rents collected by him and for occupation rent.

5. A question whether the estate had acquired title by possession to certain land, which was carefully looked into, but ultimately dropped.

6. A claim made by two strangers of the right to remove two houses standing upon land belonging to the estate, which was litigated and resulted in favour of the estate.

7. The sale of land in Markham and Queen Streets, in the city of Toronto, in seven parcels, for $10,367, and the collection of rentals pending the sale.

8. The sale of fruit-growing land in the township of Mersea, in twenty-one parcels, to eleven different purchasers, for over $16,000.

9. Questions arising upon the title to the lands in Mersea.

10. An adverse claim to a portion of these lands, which was compromised.

11. A claim by the defendant J. J. Bell for compensation for improvements under mistake of title.

12. A claim by the defendant J. J. Bell to $4,000 of the moneys of the estate.

13. A claim by the solicitor for the defendant J. J. Bell to a lien upon his share of the estate in priority to costs awarded against him.

14. Various assignments of different shares made during the course of the proceedings, which complicated the settling of the final report.

The referee certified to the difficulty and labour of the reference, and that, in his opinion, taxed costs should be allowed in lieu of the usual commission. An affidavit of the plaintiff's solicitor set out in detail all the circumstances above referred to.

"In all actions or proceedings instituted for administration, . . . unless otherwise ordered by the Court or a Judge, instead of the costs being allowed according to the tariff, each person properly represented by a solicitor, and entitled to costs out of the estate . . . shall be entitled to his actual disbursements . . . and . . . a commission on the amount realized:" Rule 1187.

Upon the case coming on for hearing on further directions before ROBERTSON, J., in Court, on the 8th January, 1896, all parties consenting, the plaintiff asked that taxed costs of all parties of the proceedings on the reference and of the interim distributions and further directions should be paid out of the estate.

Lash, Q.C., and *A. H. F. Lefroy*, for the plaintiff and certain of the defendants, referred to two unreported cases before FERGUSON, J., in which taxed costs were allowed in lieu of commission: *Re Goodfallow, Traders' Bank* v. *Goodfallow*, 10th June, 1889, an administration matter; and *McCabe* v. *McCabe*, 14th September, 1892, a proceeding for partition or sale.

W. N. Miller, Q.C., *H. T. Beck*, *McBrayne*, *J. H. Moss*, and *Day*, for the other defendants.

Judgment was delivered on the following day.

ROBERTSON, J.—After reading the numerous papers handed in on the motion for further directions, the affidavit of Mr. Lefroy, and the certificate of the referee, I am of opinion that this is a case in which taxed costs should be allowed in lieu of commission. I think, however, that there was no necessity for the appearance before me of so many counsel on this motion; the whole matter could have been brought to the attention of the Court by one counsel; there was no dispute, no differences to be reconciled; the only question was as to the costs, and the affidavit of Mr. Lefroy and the certificate of the referee make it clear that it is one for taxed costs. The taxing officer will allow, however, the attendance of each of these gentlemen as solicitors, except in the case of counsel for the plaintiff, who should be allowed an ordinary fee as upon a non-contentious application.

[MEREDITH, J., 26TH MARCH, 1896.

MAY v. LOGIE.

Will—Construction—Absence of material words—Devise.

A testator provided as follows:—"It is my will that as to all my estate both real and personal whether in possession expectancy or otherwise which I may die possessed of my wife Elizabeth and I hereby appoint my said wife Elizabeth to be executrix of this my will."

Held, that the above must be construed as a devise to the testator's wife.

The words "it is my will that as to all my estate" meant no more nor less than "I will all my estate," and the omission of the word "to" before the words "my wife Elizabeth" made no more difference than the almost universal omission of it before the like words in the transposed use of them, as "I will my wife all my estate." Neither technical nor grammatical accuracy is required in wills or other legal documents. No matter how ungrammatical, how inaccurate, how complicated, how clumsy, or how great the evidence of ignorance in its writing, effect must be given to the will of the testator in every

particular in which his meaning can be gathered from anything contained anywhere within the four corners of the writing.

J. A. Donovan, for the plaintiff.

W. M. Clark, Q.C., and *Shepley*, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 15TH APRIL, 1896.

SCOTT v. IMPERIAL LOAN CO.

Assessment and taxes—Tax sale—Not conducted in fair and open manner—Assessment Act, R. S. M. c. 101, ss. 154, 191.

Issue under the Real Property Act to determine the right to land purchased by the plaintiff at a tax sale. Numerous objections were taken by the defendants as to the irregularity of the proceedings, but these had been validated by special Act of the Legislature.

Section 154 of the Assessment Act, R. S. M. c. 101, provides that "the sale shall take place at such place as the council shall by resolution or by-law appoint, or, in the absence of such appointment, at such public place in the assize town or city of the judicial district wherein the municipality is situated, as may be chosen by the treasurer."

No place for holding the sale was appointed by the council, but the treasurer chose, of his own motion, to have the sale held at a small upstairs hall in the municipality, used for meetings of the council and other purposes.

Besides holding the sale at this unauthorized place, it appeared that it began at eleven o'clock, and after it had gone on for some time all present went away to a tavern for dinner,

and were absent for an hour. During that time no one was left in charge of the hall, nor was any notice put up stating when the sale would be resumed. The land in question was put up after the intermission.

Section 191 of the Assessment Act, as amended by 55 V. c. 26, s. 7, provides that "no tax sale deed shall be annulled or set aside, except upon the following grounds and no other, that the sale was not conducted in a fair and open manner," etc., etc.

Held, that the sale in question, which was held, not at a public place in the assize town, but at a small hall in the country where, according to the Act, it was, under the circumstances, improper to hold it, and conducted as this sale was, could not be considered to have been conducted in a fair and open manner.

Judgment for the defendants.

Henderson, for the plaintiff.

A. D. Cameron, for the defendants.

[DUBUC, J., 18TH APRIL, 1896.

MALCOLM v. BROWN.

Nuisance—Offensive odours—Injury to health and business.

Action for damages. The plaintiff kept a shop on the ground floor of a block, and had her dwelling apartments and a work-room on the second floor.

The defendants rented the cellar under the plaintiff's shop for the purpose of storing potatoes, onions, cabbages, etc.

During the winter months a strong and offensive odour came from the cellar into the shop and work-room, by which the plaintiff and some of her employees were made ill. She further alleged that her business was thereby seriously injured, and she sued to recover damages for the injury to her health and business through the nuisance caused by the decaying vegetables stored in the cellar by the defendants. The defendants contended that no noxious odour came from the vegetables, the smell that came from the cellar being only the ordinary vegetable smell, which was inoffensive; and therefore the plaintiff had no right of action.

The question of law was whether the defendants, being in the lawful exercise of their right in using the cellar for storing vegetables, could be held responsible for the discomfort and injury sustained by the plaintiff by the smell emanating from the vegetables.

Held, that the exercise of a person's particular right is limited by the general right of the public, and he cannot in the use of it infringe upon or interfere with the legitimate right of his neighbour: *Robinson* v. *Kilvert*, 41 Ch. D. 94; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; *Crump* v. *Lambert*, L. R. 3 Eq. 409; *Humphries* v. *Cousins*, 2 C. P. D. 239.

The evidence showed that the plaintiff's health and her business had been injuriously affected by the nuisance.

Verdict entered for the plaintiff for $336, being for damage to her business $250, and $86 for medical attendance, medicines, and nursing.

Anderson, for the plaintiff.

Cooper, Q.C., for the defendants.

[KILLAM, J., 10TH APRIL, 1896.

LINSTEAD v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Attornment clause—Goods of third party sold under distress warrant.

County Court appeal.

One Mitchell gave the defendants a mortgage on his farm. The mortgage deed contained an attornment clause, under which Mitchell became a tenant of the defendants at a yearly rental. Default having been made by Mitchell, the defendants issued a landlord's warrant to a bailiff to distrain on his goods. The bailiff seized and advertised the goods for sale by virtue of the landlord's warrant. At the sale the plaintiff purchased two horses for $86. One Black forbade the sale, as he claimed the horses, and some two weeks afterwards he took them out of the plaintiff's possession. The plaintiff then sued the defendants for a return of the purchase money, and Cumberland, Co.J.,

entered a verdict for the plaintiff for $86, the price of the horses, with interest and costs.

The defendants appealed.

The plaintiff contended that s. 2 of the Distress Act, R. S. M. c. 46, which provides that "the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only, and as to such goods and chattels to such only as are not exempt from seizure under execution," was applicable and prevented the mortgagees from distraining the goods of a third person.

Held, that the attornment clause in the mortgage effectively created the relation of landlord and tenant between the defendants and the mortgagor, so as, apart from the question raised under s. 2 of the Distress Act, to warrant a distress for the rent thereby reserved.

Trust and Loan Co. v. *Lawrason*, 10 S. C. R. 679, distinguished, because in that case there was no fixed rent reserved.

Held, also, following *Hobbs* v. *Ontario Loan Co.*, 18 S. C. R. 483, that a clause purporting to be a demise by the mortgagee to the mortgagor, in an instrument not executed by the mortgagee, was sufficient, as a matter of conveyancing, to create that relation. In that case the disproportion of the rent purported to be reserved with the fair annual value of the land showed the attempted creation of a tenancy to be a sham and not really intended by the parties. In the present case a specific rent was reserved, and it was not an unreasonable rental for the land.

The distress in this case was for rent and not for interest, and did not come within the Act; it was valid, and the plaintiff acquired a good title to the property.

Appeal allowed with costs.

Howell, Q.C., for the plaintiff.

Clark, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 5TH MARCH, 1896.

McCARTHY v. BRENER.

Writ of summons—Service out of jurisdiction—Powers of Colonial Legislatures—Small debt procedure—Necessity for order authorizing service—Evidence.

The plaintiff sued, in his own right and as assignee of certain other persons, to recover $62.79 for work and services done and performed by him and such other persons, and for money paid by him and such other persons, as advocates, in the prosecution of a certain action in this Court wherein the defendants were plaintiffs and one Donohoe was defendant, particulars of which were rendered to these defendants.

The action was begun by a summons purporting to have been issued under the provisions relating to small debt procedure in Ordinance No. 5 of 1894, which was served upon the defendants in the Province of Ontario, where they were domiciled.

No order was made directing the issue of a summons for service out of the jurisdiction, nor for the allowance of service thereof thereout.

Upon an application by the defendants to set aside the summons and the service:—

1. It was contended that the Colonies have not, under their constitutions, any legislative power or authority over persons

resident or domiciled outside of the Colonies, and therefore the Colonial Legislatures cannot provide for service without the limits of the Colony of the writs of Colonial Courts.

Held, that, in the absence of any direct authority, this contention could not be upheld. There seemed to be no reason why a Colony, having authority to establish Courts of civil jurisdiction and to provide for procedure therein, should not be held to have authority to include in such procedure a practice which forms part of the code of procedure of every civilized nation.

Piggott on Service out of the Jurisdiction, pp. 48, 201; *Jeffreys* v. *Boosey*, 4 H. L. C. 815; and *Macleod* v. *Attorney-General for New South Wales*, [1891] A. C. 455, referred to.

2. It was contended that, even if the Dominion Parliament possessed the power, it had not clothed the Legislative Assembly with authority to provide for such a procedure.

Held, that service out of the jurisdiction is merely a matter of procedure, and the power to make provision for it must be taken to be included in the powers given by s. 15 of the North-West Territories Act, and s.-s. 10 of s. 13, as amended by 54 & 55 V. c. 22.

3. By s. 32, s.-ss. (*c*) and (*d*), of Ordinance No. 5 of 1894, it is provided that a summons issued under that Ordinance shall be returnable at the expiration of thirty days from the service thereof where the defendant resides in any place in Canada outside the Territories, or in the United States of America, or in the United Kingdom; and by s.-s. (*e*), that it shall not be necessary to obtain an order for service out of the jurisdiction. English Order II., Rule 4, which is in force in the Territories by s. 556 of the Judicature Ordinance, provides that no writ of summons for service out of the jurisdiction shall be issued without leave of the Court or of a Judge; and s. 32 of the Judicature Ordinance provides that service out of the jurisdiction may be allowed by a Judge in certain cases therein specified. The practice both in England and the Territories is to combine both applications, and to obtain an order giving leave both to issue the writ and serve it out of the jurisdiction. It is not necessary then to obtain another order allowing the service.

Held, that such being the practice at the time of the passing of Ordinance No. 5 of 1894, and in view of the fact that s.-ss.

(*c*) and (*d*) of s. 82 provide for fixing a return day for a summons issued out of the jurisdiction, and of the fact that s.-s. (*e*) provides that it shall not be necessary to obtain an order for service out of the jurisdiction, the intention of the Ordinance is that an order to issue a writ for service out of the jurisdiction shall not be necessary. If a defendant, however, can show affirmatively that the action is not one in which service out of the jurisdiction would be allowed under s. 82 of the Judicature Ordinance, he will be entitled to an order setting aside the service.

4. *Held*, that it is not necessary that the pleadings or proceedings should show that the case is a proper one for the allowance of service out of the jurisdiction.

James Muir, Q.C., (for *C. C. McCaul*), for the defendants.

P. McCarthy, Q.C., the plaintiff, in person.

RANDALL v. ROBERTSON.

Parties—Application to add defendant—Indemnity—Counterclaim.

An application by the defendant to add one Osborne as a defendant to an action for the conversion of certain household furniture of the plaintiff, and for leave to Osborne to defend and counterclaim.

The defendant alleged that he seized and sold the furniture as bailiff to Osborne under colour of a distress for rent, and that Osborne, before the seizure by the defendant, had undertaken and agreed to indemnify the defendant against any claim by the plaintiff in respect of the seizure, and that Osborne had a good defence to the action on the merits.

Held, not a reason for adding or substituting Osborne as a defendant, but merely a ground for the defendant claiming relief over or indemnity against Osborne and for bringing him in as a third party under s. 57 *et seq.* of the Judicature Ordinance.

The defendant also contended that, under s. 45 of the Judicature Ordinance, Osborne should be added as a defendant for the purpose of enabling him to counterclaim against the plaintiff in respect of certain matters alleged.

Held, that the only questions involved in the action were the conversion by the defendant of the plaintiff's goods and the amount of damages the plaintiff was entitled to recover, and it was not necessary for the determination of these questions that Osborne should be added as a defendant, or that he should be permitted, if so added, to set up by way of counterclaim matters foreign to these questions. Even if the defendant were liable to the plaintiff, it would not necessarily follow that Osborne was also liable because he authorized the distress. The liability of the defendant might have arisen by reason of some act done by him in excess or outside of the authority conferred upon him by Osborne. In such case Osborne might not be liable to the plaintiff. It would be unreasonable to compel the plaintiff to proceed against a person who was not liable to him, and thus render him liable to the costs of a successful defence on the ground of non-liability. It was not shown that the plaintiff had the same right of action against Osborne as against the defendant, and even if he had, it was doubtful whether he could be compelled to proceed against both. Section 45 did not authorize the addition of Osborne as a defendant merely for the purpose of settling by way of counterclaim any of the alleged claims against the plaintiff.

Montgomery v. *Foy*, 14 R., and *Moser* v. *Marsden*, [1892] 1 Ch. 487, discussed.

G. S. McCarter (for *S. S. Taylor*), for the defendant.

Horace Harvey (for *Beck & Emery*), for the plaintiff.

Supreme Court of Canada.

ONTARIO.] [24TH MARCH, 1896.

HAUBNER v. MARTIN.

Contract—Sale of goods—Statute of Frauds—Memorandum in writing—Repudiation of contract—Denial of agent's authority.

In an action for the price of goods sold through an agent, the alleged purchaser denied the agency, and claimed that the goods had never been delivered. In answer to this last contention the following letter was relied on as constituting a memorandum in writing sufficient to satisfy the Statute of Frauds:

"Toronto, 13th September, 1894.

"L. D. Haubner, Esq.,

"Dear Sir,—In reply to yours of the 5th inst., I have to say that Mr. Silberstein had only limited instructions to buy certain goods and to a certain amount only. Your draft has not been presented and cannot be accepted, as I do not want the goods purchased by Silberstein, and they are of no use to me. I am advised that the goods are here, but have not interfered with them, and they are subject to your order so far as I am concerned. The goods shown by your invoice are not what I wanted, and the amount is far in excess of the value of the goods I did want.

"Yours truly,

"JOHN M. MARTIN."

Held, affirming the decision of the Court of Appeal, 22 A. R. 468, 15 Occ. N. 886, that the invoice referred to in the letter could be identified by evidence, and, as the writing contained a statement of all the terms requisite to constitute a memorandum of the contract under the statute, it could be used for that purpose, notwithstanding that it repudiated the sale.

Robinson, Q.C., and *D. Macdonald*, for the appellant.

W. Cassels, Q.C., and *W. H. Blake*, for the respondents.

LAND SECURITY CO. v. WILSON.

Vendor and purchaser—Agreement for sale of land—Assignment by vendee—Principal and surety—Deviation from terms of agreement—Giving time—Creditor depriving surety of rights—Secret dealings with principal—Release of lands—Arrears of interest—Novation—Discharge of surety.

An agreement for the purchase and sale of certain specified lots of land, in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified, was subject to payments being made in advance of these dates under a proviso that "the company (the vendors) will discharge any of said lots on payment of the proportion of the purchase price applicable on each."

The vendee assigned all his interest in the agreement to a third party, by a written assignment registered in the vendors' office, and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and on account of the principal remaining due from time to time, as lots and parts of lots were sold by him, and, without the knowledge of the vendee, arranged a schedule apportioning the amounts of payments to be made for releases of lots sold, based on their supposed values, and in fact released lots and parts of lots sold, and conveyed them to sub-purchasers upon payments according to this schedule, and not in the ratio of the full number of lots to the unpaid balance of the price, and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest, and also allowed the assignee an extension of time for the payment of certain interest overdue, and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement.

That notice to the vendors of the assignment, and their knowledge that the vendee held the land as security for the per-

formance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.

In a suit taken by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the vendors as having got from the third party, on every release of a part of a lot, the full amount that they ought to have got from him on a release of an entire lot, and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement, the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

Decision of the Court of Appeal, 22 A. R. 151, 15 Occ. N. 26, affirmed.

George Kerr and *Rowell*, for the appellant.

J. K. Kerr, Q.C., for the respondents.

QUEBEC.] [6TH MAY, 1896.

LACHANCE v. LA SOCIÉTÉ DE PRÊTS ET DE PLACEMENTS DE QUEBEC.

Appeal—Amount in controversy—Creditor's claim.

L., a creditor of an insolvent firm in the sum of $525, contested the claim of another creditor on the ground that a hypothec held by the latter on the insolvent's property was null, and that the amount thereof, $2,044, should belong to the estate for collocation among all the creditors. The contestation was unsuccessful, and L. sought to appeal to the Supreme Court from the judgment of the Court of Queen's Bench, by which it was dismissed. The respondents moved to quash the appeal.

Held, that, to determine the amount in controversy necessary to entitle L. to an appeal, only his own pecuniary interest could be looked at, and that being less than $2,000, the appeal would not lie; the fact that the contestation, if successful,

would give the estate the benefit of more than $2,000 did not give the Court jurisdiction.

The appeal was quashed with costs.

Turcotte, for the motion.

Geoffrion, Q.C., contra.

MANITOBA.] [24TH MARCH, 1896.

MARTIN v. NORTHERN PACIFIC EXPRESS CO.

Bailee—Express company — Receipt for parcel — Condition — Compliance with—Pleading—"Never indebted"—Plea of non-performance.

M., sending a money parcel by express, received a receipt in a "money receipt book," which contained a provision that the money would be forwarded "subject to the printed conditions on inside front cover of this book," and one of such conditions was that the company would not be liable for any claim "unless such claim is presented in writing within sixty days from the date of loss or damage in a statement, to which a copy of this contract shall be annexed." The parcel was not delivered, and M. presented his claim in writing, but no copy of the contract was annexed.

Held, reversing the decision of the Court of Queen's Bench, 10 Man. L. R. 595, 15 Occ. N. 227, that M. must be held to a strict compliance with the conditions of his contract with the company, and his claim was barred for want of notice.

M. brought an action for money had and received to recover the value of the parcel.

Held, that the company was not obliged to plead non-performance of the condition in answer to this action, as all necessary proof could be made under the plea of "never indebted."

D. McCarthy, Q.C., for the appellants.

Ewart, Q.C., for the respondent.

BRITISH COLUMBIA.]

WILLIAM HAMILTON MFG. CO. v. VICTORIA LUMBER AND MFG. CO.

Negligence—Construction of boiler—Defect in—Expert evidence—Questions of fact—Concurrent findings of Courts below.

A lumber company gave a verbal order for the construction of a boiler for a steam tug to the W. H. Mfg. Co., accompanying such order with a sketch or plan, but without any specifications or details other than those on the plan itself, which was prepared by the engineer of the tug. The boiler was made and delivered to the lumber company, who placed it in the tug. It was not built according to the plan submitted, but was certified under the Steam Boat Inspection Act as properly built and showing a capacity to stand a working pressure of 128 lbs. to the square inch. After being used for six months it sprang a leak, and the manufacturing company having sued for the price, the lumber company counterclaimed for damages in consequence of defective construction.

On the trial it was proved that no boilers were built according to the plan of the engineer; that if so built it would only stand a pressure of some 18 lbs.; and that all the great ocean steamships had boilers of the design of the one in question. The engineer who had prepared the plan agreed with the other evidence as to the ocean steamers, but gave as his opinion that in one particular the boiler in question was defective, and that such defect caused the leak. The Government boiler inspector at Victoria, B.C., concurred in this opinion, and the Court below awarded damages to the lumber company on their counterclaim, affirming the judgment of the trial Judge, but increasing the amount.

Held, reversing the decision of the Supreme Court of British Columbia, 4 B. C. Reps. 101, that the evidence did not justify the judgment for the lumber company; that the experts on whose testimony the judgment was founded were not present at the time of the accident, and the evidence they gave was not founded on knowledge, but was mere matter of opinion, and no reasons were given, nor facts stated, to show on what their opinion was based; that it was mere conjecture which should not be allowed

to dispose of the case in hand, and still less to condemn, as defective in design and faulty in construction, boilers in general use all over the world; and that such judgment should not be allowed to stand, notwithstanding the concurrent findings of the two Courts on a matter to be decided by evidence.

Aylesworth, Q.C., and *Dumble*, for the appellants.

C. Robinson, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [12TH MAY, 1896.

PRITTIE v. CONNECTICUT FIRE INS. CO.

Chose in action—Collateral security—Action by assignor—Parties—Fire insurance—Mortgagor and mortgagee.

Where an assignment of a chose in action is made by way of security, the assignor retaining a beneficial interest, he may, notwithstanding the assignment, maintain an action in his own name to recover the debt, the assignee being a proper but not a necessary party.

Where there is separate insurance in favour of mortgagee and mortgagor, the latter is not bound by a settlement of the amount of the loss between the former and the insurance company.

Judgment of the Queen's Bench Division affirmed.

Watson, Q.C., and *J. G. Smith*, for the appellants.

E. B. Ryckman and *A. T. Kirkpatrick*, for the respondent.

FARWELL v. JAMIESON.

Landlord and tenant—Distress—Goods of stranger—Person in possession "under or with the assent of" the tenant—R. S. O. c. 143, s. 28, s.-s. 3.

The plaintiffs were let into possession of certain demised premises by the agent of the tenants, who afterwards repudiated the agent's authority and refused to recognize the plaintiffs as sub-tenants. The defendant, who was head landlord, in the meantime distrained the plaintiffs' goods for arrears of rent, and the plaintiffs brought this action to recover damages.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that, notwithstanding the tenants' repudiation of the agent's authority, the plaintiffs were in possession "under" the tenants, within the meaning of s.-s. 3 of R. S. O. c. 143, s. 28; and the distress was lawful.

Per BURTON and MACLENNAN, JJ.A., that the right of distress is limited to cases where some privity exists; and the distress was unlawful.

In the result, the judgment of the Queen's Bench Division, 27 O.R. 141, *ante* p. 51, was affirmed.

Kappele and *J. Bicknell*, for the appellants.

Kilmer and *W. H. Irving*, for the respondent.

SHAVER v. COTTON.

Company—Winding-up—Action against shareholder by creditor of company—R. S. C. c. 129—R. S. O. c. 157, s. 61.

After a winding-up order has been made under R. S. C. c. 129, a judgment creditor of the company cannot bring an action under s. 61 of R. S. O. c. 157, against a contributory for payment of the amount unpaid on his shares.

Judgment of the Queen's Bench Division, 27 O. R. 131, *ante* p. 50, reversed.

Raney, for the appellant.

F. E. Titus, for the respondent.

CH. D.]

PIERCE v. CANADA PERMANENT L. & S. CO.

Mortgage — Building loan — Further advances — Subsequent mortgage — Priorities—Registry Act—Notice.

An appeal by the plaintiff from the judgment of the Chancery Division, 25 O. R. 671, 14 Occ. N. 464, reversing the judgment of FERGUSON, J., 24 O. R. 426, 14 Occ. N. 98, was dismissed with costs, MACLENNAN, J.A., dissenting, the reasons for judgment of the majority of the Court being substantially the same as those reported below.

See now 57 V. c. 84.

George Bell, for the appellant.

S. H. Blake, Q.C., and *Beverley Jones*, for the defendant company.

Caston, for the defendant Parsons.

C. P. D.]

DRENNAN v. CITY OF KINGSTON.

Municipal corporations—Highways—Ice on sidewalk—57 V. c. 50, s. 13.

A street-crossing, in the line of and adjoining parts of a sidewalk on opposite sides of the street, is not a sidewalk within the meaning of 57 V. c. 50, s. 13.

On the street-crossing in question snow had accumulated, partly from being shovelled there from the sidewalk and partly from the action of passing sleighs, so that there was a descent of some inches from the crossing to the sidewalk, and the plaintiff slipped on this descent and was injured.

Held, per HAGARTY, C.J.O., and MACLENNAN, J.A., that the municipality was not liable.

Per BURTON and OSLER, JJ.A., that there was evidence of negligence to go to the jury.

In the result the judgment of the Common Pleas Division was affirmed.

Walkem, Q.C., and *Shepley*, Q.C., for the appellants.

J. A. Hutcheson, for the respondent.

DAVIDSON v. FRASER.

Bankruptcy and insolvency — Assignments and preferences — Payment of money to creditor—R. S. O. c. 124, s. 3.

Indorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor by the debtor within the meaning of s. 3 of R. S. O. c. 124.

Armstrong v. *Hemstreet*, 22 O. R. 386, overruled.

Judgment of the Common Pleas Division upon this point reversed, OSLER, J.A., dissenting.

G. G. Mills, for the appellants.

Watson, Q.C., for the respondents.

MEREDITH, C.J.]

McPHILLIPS v. LONDON MUTUAL FIRE INS. CO.

Fire insurance—Assignment of policy before loss—Action by assignee.

A policy of insurance upon chattels may, before loss, be validly assigned by the insured to the mortgagee of the buildings owned by the insured in which the chattels are, and the assignee may in the event of loss recover in his own name.

Judgment of MEREDITH, C.J., affirmed.

E. R. Cameron, for the appellants.

Aylesworth, Q.C., for the respondent.

ROSE, J.]

CITY OF OTTAWA v. KEEFER.

CITY OF OTTAWA v. CLARK.

Municipal corporations—Public Parks Act—Purchase by park commissioners—R. S. O. c. 190.

The city of Ottawa adopted the Public Parks Act, R. S. O. c. 190, and park commissioners were appointed, who entered into contracts with the defendants to purchase lands for park

purposes, and made a requisition on the city for the purchase money. The city refused to recognize the contracts, and brought these actions for a declaration that they were invalid.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the park commissioners had, in the *bona fide* exercise of their discretion, the right to enter into the contracts, and that the city, so long as the statutory limit was not exceeded, was bound to provide the purchase money.

Per OSLER and MACLENNAN, JJ.A., that the city council had a discretion whether or not to adopt the contracts and provide the purchase money.

In the result, the judgment of ROSE, J., dismissing the actions, was affirmed.

Robinson, Q.C., and *D. B. MacTavish*, Q.C., for the appellants.

Arnoldi, Q.C., and *Chrysler*, Q.C., for the respondents.

F. R. Latchford, for the park commissioners.

ROBERTSON, J.]

BELL v. GOLDING.

Easement—Abandonment—Sale of land—Sale by plan—Lane not in use.

Abandonment of an easement may be shown, not only from acts done by the owner of the dominant tenement, indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement.

Where, therefore, the owner of a property over which a right of way existed built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an ice house upon the portion reserved, and after some years pulled down the ice house, and with the same knowledge built a stable on the same site, it was held that the owner of the dominant tenement could not then have the right of way opened.

Per MACLENNAN, J.A.—A conveyance of a lot according to a registered plan, upon which a lane is laid out, does not pass any interest in the lane when it has not in fact been opened on the land and has not been used or enjoyed with the lot in question.

Judgment of ROBERTSON, J., reversed.

E. D. Armour, Q.C., and *T. J. Blain*, for the appellant.

W. H. McFadden, for the respondent.

FALCONBRIDGE, J.]

CONFEDERATION LIFE ASSOCIATION v. KINNEAR.

Infant—Representation as to age—Mortgage by infant married woman—R. S. O. c. 134, s. 6.

To make an infant liable upon a mortgage of his property, there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation.

Section 6 of R. S. O. c. 134, does not make valid deeds executed by infant married women. It merely does away with the necessity of acknowledgment.

Judgment of FALCONBRIDGE, J., reversed.

S. H. Blake, Q.C., and *W. H. Blake*, for the appellant.

McCarthy, Q.C., and *Snow*, for the respondents.

MACMAHON, J.] [10TH MARCH, 1896.

In re CANADIAN PACIFIC R. W. CO. AND CITY OF TORONTO.

Municipal corporations—Railway company—Joint special agreement—Local improvements.

A city municipality and a railway company and others entered into an agreement for the execution of certain works by the former, authorized by order in council under the Railway Act, the cost being apportioned between them, of which the railway company paid their share.

The agreement provided that no party to it should be entitled to compensation for injury or damage to their lands by reason of the construction or maintenance of the works, a necessary part of which was the construction of a road towards and

under the railway tracks, a portion of the roadway fronting on the lands of the railway company, and the city sought to charge the company with the cost of the roadway as a local improvement under the Consolidated Municipal Act, 1892, and passed a by-law for that purpose.

Held, that the work having been done under the agreement between the parties and the order in council, the local improvement clauses were not applicable, and the by-law was void.

Judgment of MACMAHON, J., affirmed.

Fullerton, Q.C., and *T. Caswell*, for the appellants.

Armour, Q.C., and *Angus MacMurchy*, for the respondents.

MEREDITH, J.] [12TH MAY, 1896.

GRANT v. WEST.

Bankruptcy and insolvency—Assignments and preferences—Assignment for the benefit of creditors—Claim for damages—R. S. O. c. 124.

A person claiming damages against the assignor for breach of contract is not a creditor within the meaning of the Assignments and Preferences Act, R. S. O. c. 124, and cannot, after the assignment, bring an action to ascertain the damages and rank for the amount against the estate in the hands of the assignee.

Judgment of MEREDITH, J., reversed.

Atkinson, Q.C., for the appellants.

Osler, Q.C., and *J. S. Fraser*, for the respondent.

[20TH MAY, 1896.

In re SMALL AND ST. LAWRENCE FOUNDRY CO.

Arbitration and award—Revocation of submission—Rejection of evidence—Rentals of adjacent properties.

It is not sufficient ground for the revocation of a submission to arbitration to fix the renewal rental of a block of land bounded by streets, that the arbitrators decline to receive evidence of the gross and net rentals derived from properties on the other side of one of the streets.

Judgment of MEREDITH, J., affirmed; MACLENNAN, J. A., dissenting.

McCarthy, Q.C., and *R. B. Henderson*, for the appellants.

A. Hoskin, Q.C., and *D. E. Thomson*, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 28TH JANUARY, 1896.

In re COHEN'S BAIL.

Criminal procedure—Bail—Estreating recognizance—Next Court of competent jurisdiction.

A recognizance entered into before a magistrate committing a prisoner for trial was conditioned for the prisoner to appear at the next Court of competent jurisdiction to be holden at Toronto. The next Court was the sittings of the Court of Oyer and Terminer for the County of York, commencing on 30th April, 1895, but no indictment against the prisoner was then preferred. The information, depositions, and recognizance were transmitted to the Sessions of the Peace for the County of York, commencing on 14th May, 1895, where an indictment having been preferred and a true bill found, and neither the prisoner nor his bail appearing, the recognizance was on the last day of the Sessions forfeited and the surety arrested, the writ of *fieri facias* having been returned *nulla bona*.

Held, that the order forfeiting the recognizance, the estreat roll, and the writ of *fieri facias* and *capias*, must be quashed, and all proceedings thereon stayed.

G. G. S. Lindsey, for the surety.

J. R. Cartwright, Q.C., for the Crown.

[27TH MARCH, 1896.

ARMSTRONG v. LYE.

Equitable assignment—Attorney for sale of lands—Authority to attorney to pay an advance out of proceeds of sale—Attorney subsequently becoming purchaser—Lien for advance on land—Personal obligation.

R. being the owner of certain lands, subject to a mortgage to G. and to certain charges to B. and C., which lands had been directed to be sold under proceedings taken by G., the defendant agreed with R. to pay off G.'s mortgage within a year, and in the meantime to secure G. collaterally to the extent of $10,000, R. to pay the defendant $500 as well as G.'s mortgage within three months, failing which, he created the defendant his attorney irrevocable for the sale of the lands, authorizing him to retain one-third of the net proceeds after payment of the claims of G. and B. and C.

R., who also owed H. $6,000 under a bond therefor, signed an instrument whereby he agreed that in case any person should make H. a loan or advance to the extent of $1,200 and interest, the same should be charged by way of mortgage against the lands, and authorized the defendant to pay the same out of R.'s share in the surplus proceeds of the sale after paying the claims of G. and B. and C.; such amount to be applied on the $6,000 bond. H. procured an advance of $459 from the plaintiff, from whom she had previously borrowed $500, on the defendant's agreeing to pay the same out of the surplus proceeds, as soon as he received them. These instruments, attached together, were deposited in the proper registry office upon an affidavit of execution made as to the first of them. Subsequently the defendant became the purchaser of R.'s equity of redemption in the lands.

Held, affirming the judgment of BOYD, C., at the trial, that the plaintiff was entitled to a lien on the lands for the amount of his advance; but, reversing his judgment, STREET, J., dissenting, that he was also, under the circumstances, entitled to a personal order against the defendant therefor.

Watson, Q.C., and *Ruddy*, for the plaintiff.

Wallace Nesbitt and *F. A. Hilton*, for the defendants Lye and Rankin.

Walter Read, for the defendant Hutchins.

[ARMOUR, C.J., FALCONBRIDGE, J., 16th MARCH, 1896.

BUILDING AND LOAN ASSOCIATION v. POAPS.

Statute of Limitations—Sale of land—Trustee and cestui que trust—Possession by cestui que trust—Non-effective right of entry—Mortgage by trustee—Registry Act—Priority.

The relationship arising out of an agreement for the sale of land, on payment of the purchase money and the taking of possession by the purchaser, is that of trustee and *cestui que trust*, and, as the former has no effective right of entry, the Statute of Limitations does not apply in favour of the possession of the *cestui que trust*.

The principle of the decision in *Warren* v. *Murray*, [1894] 2 Q. B. 648, applied.

A mortgagee from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that anyone other than the mortgagor is in occupation of the land, and without notice, actual or constructive, of any equitable right of the *cestui que trust*, is entitled to set up the provisions of the Registry Act, which is retrospective, and to plead it, if it is necessary to do so.

Bell v. *Walker*, 20 Gr. 558, and *Grey* v. *Ball*, 23 Gr. 390, followed.

Allan Cassels, for the plaintiffs.

Leitch, Q.C., for the defendants.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 7th April, 1896.

ARDAGH v. COUNTY OF YORK.

Revivor—Præcipe order—Delay in prosecution of action—Change of interests.

A statute passed in 1889 gave persons making certain claims a right to bring an action within a year. The plaintiffs brought such an action within the year, but did not proceed with it, and no proceeding was taken by either party, after the delivery of the defence in June, 1890, until, one of the plaintiffs

having died in January, 1895, the action was revived in February, 1896, by a præcipe order. In the meantime changes had taken place in the interests of the parties.

Held, that the order should not be interfered with. The old practice had been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived.

James Pearson, for the plaintiffs.

C. C. Robinson, for the defendants.

[8TH APRIL, 1896.

DAVIS v. DAVIS.

Will—Election—Period of accounting—Interest.

Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality was hers. After his death, his widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will.

Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime.

Marsh, Q.C., and *G. G. S. Lindsey*, for the plaintiff.

D. Macdonald, for the defendant.

[10TH APRIL, 1896.

In re SOLICITOR.

Solicitor—Special journey—Authority—Ratification—Bill of costs—Block charge—Taxation—Items—Appeal—Certificate.

The solicitor acted for municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in

the High Court, Court of Appeal, and Supreme Court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the Privy Council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for a part of his expenses, which was honoured.

Held, that the resolution, the payment on account of expenses, and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him; and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a *per diem* charge for waiting, having regard to his being absent from his own business.

The solicitor made a block charge of $1,400 for his services, time, and expenses.

Held, that it should be resolved into details and taxed in items.

An appeal from the certificate of taxation of costs of a bill of costs between solicitor and client is to the Court, as if it were an appeal from a Master's report.

Fullerton, Q.C., and *H. L. Drayton*, for the city of Toronto.

Shepley, Q.C., for the solicitor.

[MEREDITH, C.J., 20TH FEBRUARY, 1896.

HALSTEAD v. BANK OF HAMILTON.

Banks and banking—Bank Act, 53 V. c. 31—Assignments as security—Advances—Debts incurred—"Negotiating."

A bank, in dealing with a customer, discounted certain promissory notes and placed the proceeds thereof to his credit in his general account, at the same time taking assignments of goods to secure the payment of the notes, but, under an arrangement, no actual advances were made, and by a system of bookkeeping the proceeds were transferred to other accounts of the customer in the bank and retained.

Held, that, as no loan or real advance was made or debt incurred when the assignments were taken, they could not be supported under the provisions of the Bank Act.

Held, also, that there was no "negotiating" of the notes within the meaning of s. 75 of that Act.

Gibbons, Q.C., for the plaintiff.

J. J. Scott, for the defendants.

[ROSE, J., 29TH APRIL, 1896.

In re CANADIAN PACIFIC R. W. CO. AND COUNTY AND TOWNSHIP OF YORK.

Constitutional law—Railways—Crossings—Railway Act of Canada, 1888—Powers of Railway Committee of Privy Council—Erection and maintenance of gates—Contribution to cost of—Municipal corporations.

The Railway Committee of the Privy Council of Canada made an order that gates and watchmen be provided and maintained by the Canadian Pacific Railway Company for the protection of the railway crossings at certain streets which traversed the city of Toronto, the township of York, and other townships within the county of York, such crossings being at the north limit of the city of Toronto, and that the corporation of the city of Toronto should contribute to the cost of erection and maintenance. Subsequently, the committee, upon the representation of the city corporation, made an order that the township and county should contribute part of the share of such cost originally allotted to the city.

Held, having regard to ss. 11, 18, 21, 187, and 188 of the Railway Act of Canada, 1888, that the British North America Act conferred upon the Parliament of Canada the exclusive legislative authority to deal with the Canadian Pacific Railway and with the guarding of the crossings; that legislation upon such a subject was necessary legislation; that the Dominion Parliament could and did confer upon the Railway Committee the power to make such orders as those in question; that it was within the power of the committee to determine what persons were interested in the crossings; that the Court had no power to review such decision, it being declared to be final; and that

the fact that the highways in question were vested in municipalities, or in any sense controlled by them, did not in anywise limit the powers of Parliament to legislate respecting the subject, or of the Railway Committee to make the orders in question, but that the municipal corporations were subject to such legislation and to the orders made thereunder as any private individual would be.

Robinson, Q.C., and *Angus MacMurchy*, for the railway company.

Aylesworth, Q.C., for the township corporation.

C. C. Robinson and *T. H. Lennox*, for the county corporation.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[MacMahon, J., 25th April, 1896.

MARTIN v. SAMPSON.

Chattel mortgage—Affidavit of bona fides—Money not actually advanced at the time—Invalidity of mortgage.

A chattel mortgage, perfectly regular in every other respect, was duly executed and filed in the proper office, but the consideration money was not actually paid over until four days after the filing of it, nor was there any binding agreement, at the time of the execution and filing, between the parties that the money should be advanced. Consequently the affidavit of *bona fides* was not true.

Held, that the mortgage was invalid.

J. J. Scott, for the plaintiff.

H. Cassels, for the defendant Sampson.

J. N. Waddell, for the defendant Angus.

[Street, J., 15th April, 1896.

STEPHENSON v. VOKES.

Company—New stock—By-law for allotment by shareholders—Right of directors to allot—Directors—By-law passed at annual general meeting for duration of office—Right of shareholders at special general meeting to vary.

Where a by-law is passed at the annual general meeting of

a company providing for the allotment of certain new stock by the shareholders, the directors have no power to pass a by-law directing its repeal and providing for the allotment by themselves.

At a meeting of the directors of a company a by-law was passed providing that they should hold office for one year and until their successors were appointed, which was subsequently confirmed by the shareholders at the annual general meeting of the company, and certain persons were appointed directors.

Held, that the by-law so passed could only be repealed at the next annual general meeting of the company; and therefore a by-law passed during the directors' year of office by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid.

T. Mulvey and *L. V. McBrady*, for the plaintiffs.

S. H. Blake, Q.C., and *F. Denton*, for the defendant Vokes.

J. Bicknell, for the defendant Oxenham.

[STREET, J., 6TH MAY, 1896.

In re WILLIAM RODDICK.

Life insurance—Voluntary settlement—R. S. O. c. 136—Beneficiaries.

William Roddick insured his life in a mutual insurance society, by way of benefit certificate, expressed to be payable to his mother, and by contract between himself and the society it was agreed that the benefit certificate should not be payable to any one else than the wife, children, dependents, father, mother, sister, or brother of the insured; and that the certificate could not be transferred or assigned by him to any one else than the above named, and that if he died without having made any further direction as to payment, the money should be paid to the above beneficiaries, in the above order, if living.

William Roddick died intestate, his mother predeceasing him, and his two sisters claimed to be entitled, by reason of the above contract, to the policy moneys. His estate was insolvent, and his administrator claimed that the money was available for the creditors.

Held, that the insurance amounted in effect to a voluntary settlement on the sisters of the insured, who, though not within the protection of R. S. O. c. 186, were beneficiaries named in the policy, and it was not shown that the insured was not in a position to make a voluntary settlement at the time he effected the insurance or at any time.

J. A. Paterson, for the claimants.

E. J. B. Duncan, for the administrator.

[7TH MAY, 1896.

In re STONEHOUSE AND TOWNSHIP OF PLYMPTON.

Municipal corporations —Drainage by-law — Engineer's report—Erroneous basis of fact.

Motion to quash a by-law of the township of Plympton providing for the repairing and deepening throughout of what was therein spoken of as the Stonehouse drain in the townships of Plympton and Enniskillen and the village of Wyoming.

The by-law set out the report of the engineer of the corporation of Plympton, wherein he recommended the work to be done, and assessed the cost in different proportions against the three corporations respectively. In his report he spoke throughout of the drain as one drain, whereas it consisted of at least two drains, built at different times and for different purposes.

Held, that the by-law must be quashed.

The persons affected were entitled to have the engineer's judgment, when assessing them, upon the true state of facts, because he might have assessed the lands of one of the three townships lower, had he made his estimate on the basis that the drain in it was not a part of the original system, but was itself a separate original drain designed to carry off only the natural soakage, and not the volume brought upon it at times by the drain in another of the three townships, and the same applied to the council who had to act upon his report.

Aylesworth, Q.C., and *Shaunessy*, for the applicant.

Shepley, Q.C., and *J. Cowan*, for the township.

In re DAVIS' TRUST.

Trustee—Removal—Summary application.

The Court has no power upon a summary petition, or otherwise than in an action, to remove a trustee *in invitum*.

D. Macdonald, for the petitioner.

G. G. S. Lindsey, for the trustee.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 4TH MAY, 1896.

BERTRAND v. HEAMAN.

Attachment of debts—Assignment by judgment debtor for benefit of creditors—Issue between assignee and garnishing creditor—Evidence—Admission by judgment debtor—Interest—Validity of judgment.

Appeal from decision of BAIN, J., 15 Occ. N. 387.

Held, DUBUC, J., dissenting, that the appeal should be allowed, the verdict in favour of the plaintiff set aside, and a verdict entered for the defendant with costs.

There was no community of interest between the defendant, the judgment creditor, and James Heaman, the judgment debtor, to render the evidence admissible, and there was no proof that James Heaman, whose declarations against interest were sought to be got in, was dead. There was some effort to show that he was out of the Province, but even had it been proved that he was absent from the country, that would not make the evidence admissible: *Taylor on Evidence*, s. 669. The onus was on the plaintiff to prove his title to the money. The sole evidence in support of his claim was the evidence of Fenwick as to statements made by James Heaman, and that evidence being inadmissible, his claim was unsupported.

At the trial the plaintiff seemed desirous of proving that the udgment of the defendant against James Heaman was a fraudu-

lent and collusive one, but the trial Judge held that the validity of the judgment was not in issue.

Donohoe v. *Hull*, 24 S. C. R. 683, was an authority against such a question being raised on the trial of an issue like the present.

Machray, for the plaintiff.

Bradshaw, for the defendant.

[20TH MAY, 1896.

GRAY v. MANITOBA AND NORTH-WESTERN R. W. CO.

Appeal to Privy Council—Application for leave to "admit" appeal—Jurisdiction—Lapse of time.

The defendant company applied to the Court to "admit" a cross-appeal to Her Majesty in Council from that portion of the decree in the cause not affected by the order of the full Court, the plaintiffs having already obtained leave to appeal from the order of the full Court varying the decree. The company did not apply for leave to so appeal within fourteen days after the pronouncing of the order of the full Court, but the plaintiffs consented to the making of the order, notwithstanding the delay, and it was argued that the Court could still give leave to appeal to Her Majesty, or that, at any rate, it could admit such an appeal under the last paragraph of the first section of the Order in Council of the 26th November, 1892. (See Dominion Statutes, 1894, part 1, p. xxxiii.)

Held, that as the jurisdiction to grant leave to appeal was given by implication only, from the authority to apply within a certain time, it could not be exercised upon application made after the expiration of that period.

Under the Order in Council this Court had no jurisdiction to grant or refuse the leave except upon application within the specified period, and the jurisdiction to "admit" the appeal arises only when the Court has given the leave and the requisite steps have been subsequently taken: *Flint* v. *Walker*, 5 Moo. P. C. 179; *Rekmeyer* v. *Obermuller*, 2 Moo. P. C. 98.

The application should be refused, without any reference to the question whether the company should or should not be allowed to appeal.

Phippen, for the defendants.

Ewart, Q.C., for the plaintiffs.

[TAYLOR, C.J., 29TH APRIL, 1896.

FOULDS v. CHAMBERS.

Parties—Suit by owner of reversion for rent—Nonjoinder of trustees—Amendment—Costs occasioned by raising erroneous defence.

On 12th January, 1893, Henry Foulds, the then owner, leased a parcel of land to the defendant for a term of two years from 1st April, 1893. By deed dated 20th April, 1893, made between Henry Foulds of the first part, T. G. Mathers and G. F. Monroe of the second part, and the plaintiff of the third part, Henry Foulds granted the same parcel of land to the parties of the second part in trust for the party of the third part, his heirs and assigns, until any of certain acts or events therein set forth should be done or occur, in the lifetime of the party of the first part, and then, on the occurrence of any of these acts or events during the lifetime of the party of the first part, in trust for the party of the first part, his heirs and assigns. When the term created by the lease expired on 1st April, 1895, there was $90 due from the defendant under his covenant to pay rent.

On 28th June, 1894, one Jessie Foulds obtained a decree for payment of certain moneys by Henry Foulds, and on 13th April, 1895, she obtained an order attaching all debts due from the defendant to Henry Foulds, which order was served upon the same day. On 21st May an order was made for the payment of $90 by the defendant to Jessie Foulds. He paid over $70.

The plaintiff sued, as assignee of the reversion, for payment of the $90, the balance of rent due on 1st April, 1895, when the term expired.

The defendant denied that he had any notice of the reversion having been assigned to the plaintiff until a conversation he had with him after the attaching order had been served. This was contradicted by Henry Foulds. The objection was

taken that the legal estate was in the trustees, Mathers and Monroe, and that they alone could sue.

Held, that the defendant had notice of the deed before the service of the attaching order.

Held, also, that the trustees were the proper persons to sue, and not the plaintiff. The plaintiff should have leave to amend under Rule 235 (*a*) and Rule 338: *Duckett* v. *Gover*, 6 Ch. D. 82; *Ayscough* v. *Bullar*, 41 Ch. D. 431; *Woodward* v. *Shields* 32 C. P. 282; *McGuin* v. *Fretts*, 13 O. R. 699.

Order made that upon the plaintiff filing within one week the written consent of Mathers and Monroe to be added as co-plaintiffs, the statement of claim be amended accordingly, and that thereupon judgment be entered in favour of the plaintiffs for $90 with costs, except any costs of making the amendment.

The action was originally brought in the County Court, but the defendant there raised a defence which ousted the jurisdiction of that Court. The defence was one he had no right to raise, so the additional costs of an action in this Court having been occasioned by him, he should bear them.

Howell, Q.C., and *Machray*, for the plaintiff.

Hagel, Q.C., and *Howden*, for the defendant.

LONDON AND CANADIAN LOAN AND AGENCY CO. v. CONNELL.

Exemptions—Judgment against executor of person exempt—Land cultivated by widow—Liability to sale.

Appeal from a decision of the referee. One William Kines made a mortgage in favour of the plaintiffs, which contained a covenant for repayment of the money advanced. He died leaving a will, by which he appointed the defendant and one Jacobs his executors. In May, 1894, a patent was issued for the land occupied by Kines, in his lifetime, to the executors. The widow of Kines and his two children had ever since his death lived on and cultivated the land. Jacobs, one of the executors, died, and on the 19th November, 1895, the plaintiffs recovered a judgment on the covenant against the defendant as surviving executor, which was duly registered in the

Lands Titles office. The plaintiffs then moved under the Queen's Bench Act, 1895, Rule 804, for an order for sale of the land to realize the amount payable under the judgment. No one appeared to oppose the motion, and an order was made, but before it was drawn up or signed the defendant moved to rescind the order.

The referee refused the motion to rescind, and directed that the order as originally made should issue. The defendant appealed.

The ground taken by the defendant was that, inasmuch as the Judgments Act, R. S. M. c. 80, s. 12, provides that no proceedings shall be taken under any registered judgment against the land upon which the judgment debtor or his family actually resides, or which he cultivates, and the widow and children of Kines were actually residing upon the land, it was not liable to be sold for the satisfaction of the plaintiffs' judgment.

Held, that the appeal should be dismissed with costs. It could not be contended that the exemption continued after the death of the judgment debtor, unless something was read into the Act which was not found there. This would apply had the judgment been one recovered against Kines in his lifetime. It applied more strongly under the existing circumstances. The judgment was recovered against Connell, the executor, by default; he was the "judgment debtor," and neither he nor his family actually resided on or cultivated the land. The land was not exempt from sale under the plaintiffs' registered judgment.

Perdue, for the plaintiffs.

McKerchar, for the defendant.

[14TH MAY, 1896.

ÆTNA LIFE INSURANCE CO. v. SHARP.

Pleading—Statement of defence—Motion to strike out parts as being demurrable—Queen's Bench Act, Rule 318—Practice.

Action upon a bond given by a surety, the principal debtor being also a defendant. The surety filed a statement of defence, and a motion to strike out several paragraphs was made by the plaintiffs under Rule 318.

While in the Queen's Bench Act of 1895 most of the Rules under the Ontario Judicature Act were adopted, those under which a plaintiff can demur to a statement of defence were not. It would appear that only a statement of claim could be demurred to.

Held, that there being, under the Queen's Bench Act, no means of demurring to a statement of defence, the Court should give a wider meaning to Rule 318 than had been given to the corresponding Rule (423) in Ontario, or was formerly given to the analogous section in the Common Law Procedure Act. A defence which was bad in law was certainly one which tended to prejudice the plaintiff, and except by a motion under that Rule there appeared no way in which a plaintiff could get rid of such a defence.

Eight paragraphs in the statement of defence were moved against. The 5th, which was that the principal debtor had satisfied and discharged the plaintiffs' claim against him by payment, and the 6th, that he satisfied and discharged the plaintiffs' claim against him by delivering to the plaintiffs his promissory note in satisfaction of their claim, were not defences to the plaintiffs' cause of action, and would, under the old mode of pleading, have been held bad pleas on demurrer, for they did not allege the payment or delivery of the note in satisfaction to have been before action brought.

The 7th paragraph, which stated that the plaintiffs' claim against the principal debtor did not accrue within six years before action, was also no defence, for the action was on a bond, and the plaintiffs' right could not be barred until ten years from the time when the surety became liable to make good the default.

The 11th, which alleged that the plaintiffs, knowing of the defaults of the principal debtor, omitted and neglected to inform the surety of them, did not appear to raise a defence.

The 18th, which alleged that the plaintiffs were not authorized to carry on business in Manitoba, was no defence. A man cannot set up the incapacity of the party with whom he contracted in bar of an action for breach of the contract. *Manitoba Mortgage Co.* v. *Daly*, 10 Man. L. R. 425.

The 16th, by which the surety claimed the benefit of all defences the principal debtor might have against the plaintiffs'

claim, without showing what those defences were, was certainly embarrassing.

The 17th, which stated that the surety knew nothing of the plaintiffs' alleged claim and of the principal debtor's defaults, and that the plaintiffs had not delivered any statement or particulars of them, did not appear to be a defence to the cause of action. The defendant might call upon the plaintiffs to deliver particulars.

The 18th, which stated that the plaintiffs did not, when requested, investigate the default of the debtor and wind up his business, was not a defence.

If the defendant desired to amend paragraphs 5 and 6 by inserting the words "before action brought," or any similar words, the order might give him leave to do so.

All the other paragraphs must be struck out. Paragraphs 5 and 6 should also be struck out if the defendant did not amend them within 48 hours after the service of the order.

Costs to be costs in the cause to the plaintiffs in any event.

Culver, Q.C., for the plaintiffs.

Dawson, for the defendant.

[19TH MAY, 1896.

GRANT v. McKEE.

Consent order—Application to vary—Grounds.

The defendant was a tenant under a lease containing a proviso for re-entry on non-payment of rent. Rent being in arrear, the plaintiff, the landlord, recovered judgment by default for the amount of the rent and for delivery of possession, and a writ of possession was executed by the sheriff. Afterwards an order was made by consent, that upon the defendant paying on the 29th April the amount of rent and costs, he should be relieved from the forfeiture. On that day the defendant's solicitor tendered to the plaintiff's solicitor the amount due, and offered to pay it over on condition of receiving an assignment of the plaintiff's judgment to a person who had advanced part of the money. The plaintiff's solicitor declined to agree to this assignment being given without first seeing his client, who lived

at some distance, and the money was not paid over. On the 2nd May the money was tendered unconditionally and refused by the plaintiff's solicitor as too late.

The defendant then moved to have the term for making the payment extended, and this motion was opposed on the ground that the order being a consent one, the Court had no jurisdiction to interfere, neither surprise nor mistake being suggested.

Held, that, in the absence of surprise, mistake, or fraud, a consent order will not be varied, unless by consent: *Harvey* v. *Croydon Sanitary Authority*, 26 Ch. D. 249; *Re West Devon Mine*, 38 Ch. D. 51; *Davis* v. *Davis*, 13 Ch. D. 861. Here no such ground was made for varying the order, so the motion must be refused, but without costs.

Hull, for the plaintiff.

Mathers, for the defendant.

[KILLAM, J., 4TH MAY, 1896.

CHARLEBOIS v. GREAT NORTH-WEST CENTRAL R. W. CO.

Railways—Receiver—Expenses of company—Application for payment of—"Working expenditure."

Motion by the defendants for payment by the receiver and manager appointed in the cause, or out of moneys paid into Court by him, of certain expenses alleged to be "working expenditure" of the company's railway, and to be payable out of the revenues, in priority to the plaintiff's claim.

By an order of the Court, made on 19th April, 1893, it was directed that a receiver and manager of the property of the defendants, including the railway and rolling stock, be forthwith appointed, and it was referred to the Master to appoint some person to receive and manage the property and to operate, carry on, and superintend the railway, and to receive the rates, tolls, and dues arising therefrom, until the trial or other disposition of the suit, or until further order; the receiver to pay into Court the balances found due from him "after paying the expenses of operation and management of the railway and the expenses incurred by him under this order."

By another order of 27th May, 1893, it was directed that, "except as to such proceedings as may be necessary in connection with the management of the company's railway by the receiver and manager appointed, and except as otherwise provided, all proceedings be stayed until further order."

Held, that the only expenses which the receiver and manager was entitled to deduct before bringing moneys into Court were those which he was authorized to incur in performing the duties imposed upon him under the orders of the Court and incident to his office. The definition of the term "working expenditure" in the Railway Act, 51 V. c. 29, s. 2, s.-s. (*x*), was not to be taken as applicable to the expression "expenses of operation and management" in the order of the Court.

The receiver and manager had nothing to do, and was not entitled to have anything to do, with the incurring of the expenses now in question, and had no authority to defray them out of the moneys in his hands before bringing them into Court, and so long as the order staying proceedings was in force, their further disposition could not be determined.

Application dismissed with costs.

Culver, Q.C., and *Bradshaw*, for the company.

Howell, Q.C., *Phippen*, and *Nugent*, for the plaintiff and other parties.

[Bain, J., 20th May, 1896.

In re ELLIOTT AND CITY OF WINNIPEG.

Municipal corporations — By-law — Application to quash — Illegality — Delegation of authority to officer of corporation.

Application to quash, on the ground of illegality, a by-law passed by the council of the city of Winnipeg, No. 1004, for the licensing, inspection, and regulating of dairies and vendors of milk.

Section 1 provided that every person who carries on, within or without the city, the trade of vendor of milk, for the purpose of sale or supply of milk for use in the city, should first obtain a license therefor and be registered as such.

Section 8 provided that it should be lawful for the health officer or veterinary inspector to enter in and upon all dairies and other buildings used by the vendor and inspect the same, and, if satisfactory to him in all respects, he should direct a license to issue to such dairyman upon payment, etc.

Held, that ss. 1 and 8 of the by-law should be quashed with costs.

The by-law, so far as it related to vendors of milk who resided and had their dairies outside of the city limits, exceeded in some respects the legislative authority.

The inspection of dairies, etc., is purely ministerial work, and may be performed by the officials employed by the council for that purpose, but s. 8 hands over to the health officer a duty that is more than ministerial. It authorizes him to direct the issue of a license without any report of the result of the inspection, or any further reference to the council; and an official is thus enabled arbitrarily to decide whether an applicant is to receive a license or not. This is a delegation of authority that cannot be justified; for the council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself. Such a delegation of authority might result in injustice and hardship, and this provision of the by-law must be held to be illegal: *Regina* v. *Webster*, 16 O. R. 187; *Hitchcock* v. *Galveston*, 96 U. S. R. 341.

Martin, for the applicant.

I. Campbell, Q.C., for the city of Winnipeg.

NORTH-WEST TERRITORIES.

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[ROULEAU, J., 24TH APRIL, 1896.

In re CALGARY GAS AND WATER-WORKS COMPANY.

Assessment and taxes—Mains and pipes—Streets.

An appeal by the company from the decision of the Court of

Revision of the city of Calgary in respect to the assessment of lots 26 to 32, inclusive, in block 11, section 16, in that city, $100,315.

The following were the grounds of appeal: 1. That the assessment was excessive. 2. That the property was not assessed in accordance with the provisions of the Ordinance incorporating the city of Calgary, No. 33 of 1893. 3. That the assessment was not according to law.

James Muir, Q.C., and *P. McCarthy*, Q.C., for the appellants.

C. C. McCaul, Q.C., and *A. L. Sifton*, for the respondents.

ROULEAU, J.—The appeal is entirely confined to the "value of buildings and other improvements;" the value of the lots is not contested.

Section 31 of the city charter provides that "land," "real property," and "real estate," respectively, shall include all buildings and other things erected upon or affixed to the land, and all machinery and other things so affixed to any building as to form any part of the realty, and all mines, minerals, and quarries in and upon the same.

Section 32 defines "personal property" and "personal estate;" and s. 33 goes on to say that "property" shall include everything set forth in the two preceding sections.

It is evident, therefore, that the legislature did not intend to give a wider meaning to the words "land," "real estate," and "real property" than the meaning given to these expressions by s. 31 under the heading "assessment." Otherwise, the words "unless otherwise declared or indicated by the context," used in the interpretation clause at the end of the Ordinance, would be meaningless. The interpretation clause reads thus: "Unless otherwise declared or indicated by the context, whenever any of the following words occur in the Ordinance, the meaning hereinafter expressed shall attach to the same, namely . . . (2) the words 'land,' 'lands,' 'real estate,' 'real property,' respectively, include lands, tenements, and hereditaments, and all rights thereto and interests therein."

In my opinion, the interpretation clause, as to the words referred to, cannot mean anything else when these words are employed in the Ordinance without any expressed meaning given to them, except in the case of "assessment," when a specific meaning is given.

It is conceded in this appeal that the water mains and pipes of the company, which, it is claimed by the city, are assessable against the appellants as real property, are included in the assessment, and that the value of the buildings and improvements on said real property, without the mains, would be that placed on them by Mr. George Alexander, the only witness examined in the case.

On behalf of the city it is contended that the mains are either fixtures, or appurtenances, or hereditaments, and as such are assessable, because they form part of the buildings and lots, being attached thereto, and being a part of the whole system called the "water works."

This contention is based principally on the case of *Consumers' Gas Company* v. *City of Toronto*, 26 O. R. 722. Boyd, C., who rendered judgment in that case, seems to have followed the principle laid down in the cases cited therein in support of his views. But it never struck him that these cases are decisions given under 43 Eliz. c. 2, s. 1, where occupiers of lands or houses are declared assessable for the poor rate as provided in the statute.

Here it is not a question of persons being assessed; it is the real property, the land itself; so that *ownership* is not taxed, but the land.

The decision in the case of *Toronto Street Railway Co.* v. *Fleming*, 37 U. C. R. 116, is conclusive as to the difference between our assessment law and the law under 43 Eliz. c. 2. . . . The only case that seems to give some reason for the conclusion arrived at by Boyd, C., in *Consumers' Gas Co.* v. *City of Toronto*, is the case of *Metropolitan R. W. Co.* v. *Fowler*, [1898] A. C. 416. This case is quite distinguishable from the one submitted. The assessment law under which the case has been decided is a special Act called the Metropolitan and District Railways (City Lines and Extensions) Act, 1879, 42 & 43 V. c. 201. By the 16th section of that Act it was provided that "with respect to any lands which the two companies are by the provisions of the Act authorized to enter on, take, and use for the purposes of the railways, new street, and works, and which are in or under the roadway or footway of any street, road, or highway, the two companies shall not be required wholly to take those lands or any part of the surface thereof, or any cellar, vault, or other construction therein or thereunder, held or

connected with any house in any such street, road, or highway. but the two companies may appropriate and use the subsoil and undersurface of any such roadway or footway, and if need be they may purchase, take, and use, and the owners of and the other persons interested in any such vault, cellar, or arches shall sell the same for the purposes of the railways, new street, and works, or any of them; and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within s. 92 of the Lands Clauses Consolidation Act, 1845." The Court then, after applying the provisions of the Land Tax Act, 38 Geo. III. c. 5, to s. 16 of the Act above referred to, came to the conclusion that the tunnel was the property of the railway company, and that as such it was taxable. · · ·

It was intimated during the argument that this case virtually reversed the decision of *Chelsea Waterworks Co.* v. *Bowley*, 17 Q. B. 358. I do not find anything of the kind. Lord Herschell only referred to that part of the decision which said that the water company, in respect of their right to lay pipes for the purpose of carrying a stream of water through certain lands, had no interest in the lands, but had only an easement over them. His Lordship does not seem to share that opinion, but goes on to add: "I do not propose to enter upon a further discussion of those cases—*Regina* v. *East London Waterworks Co.*, 18 Q. B. 705, and *Chelsea Waterworks Co.* v. *Bowley*—because the *ratio decidendi* in the case of *Chelsea Waterworks Co.* v. *Bowley* was distinctly this, whether the decision was right or wrong, that the water company had no greater rights than those which are possessed by a person entitled to an easement, and that they had no interest in the land."

This is exactly what Scott, J., decided last year in an appeal before him by the same parties on a similar case, and I have certainly no great reason to differ from his decision.

The question as to how the land is assessable has been fully determined by the case of *Electric Telegraph Co.* v. *Overseers of Salford*, 24 L. J. N. S. (M. C.) 146. Pollock, C.B.: "The estate extends indefinitely upwards and downwards." Alderson, B.: "There is not any distinction in principle between electric fluid conveyed through a parish and water conveyed through a parish; neither can it matter whether it is conveyed through space, or above or under ground, for all up to heaven and all below the earth to its centre are equally land."

Following this decision, it is clear that under the city charter an assessment cannot extend any further under ground or upwards than the limit of said land owned by the company. Besides, according to the authorities, the mains and pipes through the streets form part of said streets as long as they are there, and as the streets are exempt from taxation under s. 38, s.-s. 5, of the city charter, it necessarily follows that they are not taxable. If, on the contrary, they were assessable as realty, there is no doubt they would be subject to sale, and under the law the town is prohibited from selling either the streets or any part thereof.

It was contended also on behalf of the company that their lands or personal property were not assessable at all, because the city had the power to tax their stock. I do not find anything in the city charter referring to companies' stock; s. 32 refers only to "shares in incorporated companies." But, as the shares of the company are not taxed, neither their income, so as to enable them to claim that they are paying taxes on a double assessment, I fail to see where the prohibition comes in. It will be time enough for the appellants, when their income is taxed, to raise the objection that their real estate should be exempt from taxation on the ground of double assessment.

Having reviewed all the authorities cited as carefully as time would allow me, I come to the conclusion that, 1st, the mains and pipes of the company passing through the streets form part of the streets, and as such are not assessable, because it is specially enacted by the city charter that "all property belonging to the city" is exempt from taxation; 2nd, that these mains and pipes are neither fixtures, nor appurtenances, nor hereditaments, forming part of the realty assessable and belonging to the company, outside of the limits of said lots; 3rd, that s. 31 of the city charter defines what is meant by "land," "real property" and "real estate" in all cases of *assessment of real property;* and 4th, that the assessment on said lots is excessive.

Appeal allowed and the assessment to be amended by deducting the sum of $94,580 therefrom.

IN CHAMBERS.

[SCOTT, J., 9TH MAY, 1896.

DOUGLAS v. GOURLEY.

Security for costs—Counterclaim —Administrator—Property in jurisdiction.

An application by the plaintiff for an order directing the defendant to give security for costs in respect of the counterclaim set up by him.

The statement of claim alleged that the defendant, as administrator of the estate of a deceased person, was indebted to the plaintiff in an account amounting to $117.50. The defendant, besides denying the plaintiff's claim, alleged that the plaintiff was indebted to him in $107 for goods sold and delivered by the firm of Gourlay & Rankin, of which it was admitted that the deceased was a member, to the plaintiff, which claim was assigned by that firm to the defendant, and the defendant claimed to set off that amount against the plaintiff's claim.

The counterclaim was in respect of the same account of $107 so assigned by Gourlay & Rankin to the defendant.

The defendant resided out of the jurisdiction, but it was shown that he was possessed of real estate in the Territories of the value of $300. His counsel, however, admitted that these lands were held by the defendant as administrator of the deceased.

James Muir, Q.C., (for *Conybeare & Galliher*), for the plaintiff.

James Short, for the defendant.

SCOTT, J.—It does not clearly appear from the pleadings or otherwise whether the counterclaim is in respect of a debt due to the defendant personally or to him as administrator of the deceased. I think, however, that it should be treated as a claim by the defendant in the same capacity as that in which he is sued, and a perusal of the pleadings leads to the view that it is so intended.

As the defendant is shown to be possessed as administrator of deceased of real estate in the Territories of value sufficient to answer the plaintiff's costs of the counterclaim, I think he should not be called upon to give security for costs.

The summons will be discharged with costs to the defendant in any event on final taxation.

Supreme Court of Canada.

EXCHEQUER COURT.] [18TH MAY, 1896.

MURRAY AND CLEVELAND v. REGINAM.

Contract—Public work—Progress estimates—Action for payment on—Engineer's certificate—Revision by succeeding engineer.

A contract with the Crown for building locks and other work on a Government canal provided for monthly payments to the contractor of 90 per cent. of the work done, at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer that the work certified for had been executed to his satisfaction, approved by the Minister of Railways and Canals; the obtaining of the certificate and approval was to be a condition precedent to the right of the contractor to receive payment of the 90 per cent., and the remaining 10 per cent. of the whole work was to be retained until its final completion; the engineer was to be the sole judge of work and material, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final, and he could make any changes or alterations in the work which he should deem expedient.

The work to be done included the construction of a dam, and after it was begun the engineer decided that the state of the river bed required such dam to be made much deeper than was first intended. The earth for the dam was all to be brought from a certain place, but, owing to the change, that place could not supply enough, and, by direction of the engineer, the material excavated from the lock pits and entrances thereto was used for the purpose and paid for at the same rate as that first used, and the contractor was also paid the price specified in the schedule for carrying away the excavated material and depositing it in a bay in the vicinity. The engineer who certified to

these payments having resigned, his successor caused a new examination and measurement of the work to be made, and decided that the contractors should not have been paid for the excavated material under both classifications as above mentioned, but allowed them a smaller sum than was paid as extra cost of depositing the material, which the contractors refused to accept, and a reference was had to the Exchequer Court to determine whether or not they were entitled to the larger amount.

Held, reversing the judgment of the Exchequer Court, that the engineer in charge when the work was done having decided as to its character and value, his decision was final and could not be re-opened nor reversed by his successor.

Held, also, that the necessary certificate having been given and approved by the Minister, the contractors could proceed by action upon the progress estimate, and were not obliged to wait until the work was completed and the final certificate given before suing.

McCarthy, Q.C., and *A. Ferguson*, Q.C., for the appellant.

Hogg, Q.C., for the respondent.

ONTARIO.] [24TH MARCH, 1896.

ADAMSON v. ROGERS.

Covenant—Lease—Improvements—"Buildings and erections"—Earth-filling.

The lessee of a water lot, who had made crib-work thereon and filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the works so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term.

Held, affirming the judgment of the Court below, 22 A. R. 415, 15 Occ. N. 230, that the crib-work and earth-filling became part of the ground leased, and were not "buildings and erections" within the meaning of the proviso.

Laidlaw, Q.C., for the appellant.

Robinson, Q.C., and *J. H. Macdonald*, Q.C., for the respondent.

[18TH MAY, 1896.

ROBERTSON v. JUNKIN.

Will—Legacy—Bequest of partnership business—Acceptance by legatee—Right of legatee to an account.

J. and his brother carried on business in partnership for over thirty years, and the brother having died, his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible."

Held, affirming the decision of the Court of Appeal, that J. on accepting the legacy could not be called on to contribute to any deficiency in the assets to pay creditors, and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency.

Aylesworth, Q.C., for the appellant.

McCarthy, Q.C., for the respondent.

CARROLL v. PROVINCIAL NATURAL GAS AND FUEL CO. OF ONTARIO.

Contract—Subsequent deed—Inconsistent provision.

C., by agreement of 6th April, 1891, agreed to sell to the Erie County Gas Company all his gas grants, leases, and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On 20th April a deed was executed and delivered to the company, transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by such deed to the defendants, who immediately cut off from the works of C. the supply of gas, and an action was brought by C. to prevent such interference.

Held, affirming the decision of the Court of Appeal, that as the agreement was embodied in the deed subsequently executed, the rights of the parties were to be determined by the latter instrument, and, as it contained no reservation in favour of C., his action could not be maintained.

Aylesworth, Q.C., and *W. M. German*, for the appellants.

McCarthy, Q.C., and *T. D. Cowper*, for the respondents.

QUEBEC.] [6TH MAY, 1896.

MONTREAL GAS CO. v. LAURENT.

Negligence—Obstruction of street—Assessment of damages—Questions of fact—Action of warranty.

Where there is evidence to support it, a judgment assessing actual present damages sustained through injuries will not be interfered with upon an appeal to the Supreme Court.

In cases of *delit* or *quasi-delit*, a warrantee may before condemnation take proceedings *en garantie*, and the warrantor cannot object to being called into the principal action as a defendant *en garantie*.

Archibald v. *Delisle*, 25 S. C. R. 1, followed.

Bissaillon, Q.C., for the appellants the Montreal Gas Company.

Madore, for the appellants and respondents the corporation of the city of St. Henri.

Geoffrion, Q.C., and *D'Amour*, for the respondent St. Laurent.

[21ST MAY, 1896.

DUFRESNE v. GUEVREMONT.

Appeal from Court of Review—Appeal to Privy Council—Appealable amount—Addition of interest—Arts. 1115, 1178, 1178a, C. C. P.—R. S. Q. Art. 2311—54 & 55 V. (D.) c. 25, s. 3, s.-s. 3—54 V. (Q.) c. 48.

Under 54 & 55 V. (D.) c. 25, s. 3, s.-s. 3, there is no appeal to the Supreme Court of Canada from a decision of the Court of Review which would not be appealable to the Privy Council.

In determining the right of either party to an appeal to the Privy Council, in cases decided in the Court of Review where the judgment of the Superior Court has been affirmed and no appeal lies to the Court of Queen's Bench for Lower Canada, the provisions of Art. 2311, R. S. Q., making the amount in dispute depend on the amount demanded and not on that recovered, where they are different, will not permit the addition of interest *pendente lite* to the original demand in order to raise the amount in controversy to the appealable amount.

Stanton v. *Home Insurance Co.*, 2 Legal News 314, followed.

Allan v. *Pratte*, 13 App. Cas. 780, and *Monette* v. *Lefebvre*, 16 S. C. R. 887, referred to.

Appeal quashed without costs.

Ouimet, Q.C., and *Emard*, for the motion.

Fleming, Q.C., and *Germain*, contra.

NOVA SCOTIA.] [18TH MAY, 1896.

FRASER v. FRASER.

Will—Devise to two sons—Devise over of one's share—Condition—Context—Codicil.

A testator devised property equally to his two sons, with a provision that, "in the event of the death of my said son T. G. unmarried or without leaving issue," his interest should go to the other. By a codicil, a third son was given an equal interest with his brothers in the property, on a condition which was not complied with, and the devise to him became of no effect.

Held, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that the two sons named in the will took the property as tenants in common, the one having an absolute, and the other a conditional, estate; and that the condition meant the death of T. G. at any time, and not merely during the lifetime of the testator.

Mellish, for the appellant.

Borden, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Ch. D.] [12TH MAY, 1896.

KNICKERBOCKER TRUST COMPANY OF NEW YORK v. WEBSTER.

Security for costs--Interpleader—Party out of jurisdiction.

Where the sheriff obtains an order directing the trial of an interpleader issue between the execution creditor and the claimant of the goods seized under the execution, the party out of the jurisdiction, whether plaintiff or defendant, must give security for costs to his opponent in the issue; BURTON, J.A., dissenting.

Decision of Chancery Division reversed.

G. G. Mills, for the appellant.

J. B. Clarke, Q.C., for the respondents.

MEREDITH, C.J.]

FLOOD v. VILLAGE OF LONDON WEST.

Negligence—Contributory negligence—Negligence of driver of carriage—Injury to occupant.

The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger, having no control over the management of the carriage.

Where, therefore, the hirer of a carriage allows one of his friends to drive, and an accident results from the latter's negligence, the former cannot recover.

Judgment of MEREDITH, C.J., affirmed.

P. McPhillips, for the appellant.

E. R. Cameron, for the respondents.

HIGH COURT OF JUSTICE.

[FERGUSON, J., ROBERTSON, J., 10TH APRIL, 1896.

In re ROBINSON.

Infant—Custody of—Charitable institution—Right to indenture out.

Where a child under the protection, with her mother's consent, of the Girls' Home, a charitable institution incorporated by 26 V. c. 69 and 50 V. c. 91, was, under the powers conferred by these Acts, indentured as domestic servant, an application by the mother to have such indenture set aside and for the custody of the child was refused.

Decision of STREET, J., affirmed.

J. E. Jones, for the applicant.

R. S. Neville, contra.

ALDRICH v. CANADA PERMANENT L. & S. CO.

Mortgage—Power of sale—Improvident exercise of—Sale en bloc—Damages.

A mortgage contained two separate pacrels of land, namely, a farm and some village lots, the latter not belonging to the mortgagor, but to his mother, who had become surety for the mortgagor, and for such purpose had become a party to and included the land in the mortgage. The mortgagees, under the power of sale, sold the land *en bloc*, whereas the evidence disclosed that had the parcels been sold separately, a very much larger amount would have been obtained.

Held, that the mortgagors were entitled to the damages they had sustained thereby.

Judgment of MACMAHON, J., reversed.

Charles Macdonald, for the plaintiff.

W. Cassels, Q.C., and *G. A. Mackenzie*, for the defendants.

[FALCONBRIDGE, J., STREET, J., 21ST APRIL, 1896.

In re YOUNG v. WARD.

Creditors' Relief Act—Division Court execution—Return of nulla bona—Execution sent to sheriff under 57 V. c. 23—Prohibition.

Where, on the return of *nulla bona* to a Division Court execution, the plaintiff, under 57 V. c. 23, amending the Division Courts Act, issued out of the Division Court an execution to a sheriff, and placed it in his hands, but, before the sheriff had taken any steps to enforce it, the defendant's solicitor paid him the amount of the execution and his fees, with the request to apply it on the plaintiff's execution :—

Held, that the Creditors' Relief Act applied to the moneys so received by the sheriff.

Order of BOYD, C., for prohibition affirmed.

B. E. Swayzie, for the plaintiff.

J. E. Jones, for the defendant.

Charles Macdonald, for the sheriff of Ontario and Marion Ward, another execution creditor.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 30TH APRIL, 1896.

CENTRAL BANK v. ELLIS.

Receiver—Equitable execution—Unliquidated damages.

The appointment of a receiver to receive on behalf of a creditor money due to a debtor is only made where a proper case is made out, shewing the debtor entitled to rights which would be subject to ordinary execution if they had been legal instead of equitable in their nature, and does not apply to the case of a claim for unliquidated damages.

C. Millar, for the plaintiffs.

Raney, for the defendant.

[BOYD, C., 18TH APRIL, 1896.

FROWDE v. PARRISH.

Copyright—Compilation—Proprietor—Residence in England—Agent copyrighting—"Printing"—Infringement.

A person, resident in England, who procures a book, for valuable consideration, to be compiled for him, is the proprietor thereof, and entitled to copyright the same under the Dominion Copyright Act, R. S. C. c. 62; and printing and publishing the same from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation thereof.

American reprints of the plaintiff's copyright book, called "Helps to the Bible," added as an appendix to American reprints of the Bible imported into Canada, were held to be a violation of the plaintiff's rights.

T. W. Howard, for the plaintiff.

J. A. Macdonald, for the defendant.

[ARMOUR, C.J., 29TH APRIL, 1896.

In re BROWER AND COUGHELL.

Arbitration and award—Motion to set aside award—Time.

Where an award under a consent reference was made on the 28th January, 1896, and published on the 30th, a motion to set it aside, made on the 17th April following, is too late.

T. W. Crothers, for the applicant.

Moss, Q.C., and *J. A. McLean*, contra.

[18TH MAY, 1896.

In re TORONTO, HAMILTON, AND BUFFALO R. W. CO. AND BROWN.

Railways—Award—Appeal from—Weight of evidence—Improper reception and rejection of evidence.

On an appeal from an award made under s. 161 of the Railway Act of Canada, 51 V. c. 29, the Judge before whom the

appeal was heard refused to interfere, being unable to say that the decision arrived at was wrong, in view of the fact that the arbitrators resided at the place where the land was situate and were conversant therewith, and had the benefit of seeing and hearing the witnesses.

Quære, whether objections to the reception or rejection of evidence are properly subjects of appeal from an award under the Railway Act, or whether not rather matters for a motion to revoke the submission or for a motion prior to the award to compel or prevent the reception of such evidence, where the course pursued by the arbitrators amounts to misconduct.

Lynch-Staunton, for the appellant.

D'Arcy Tate, for the railway company.

[FERGUSON, J., 9TH JUNE, 1896.

McFADYEN v. McFADYEN.

Will—Construction—Devise of land not owned by plaintiff—Application to land owned by plaintiff.

A testator devised "all my real and personal estate . . . in manner following, that is to say: I give and bequeath to my son Hector Allen the south 50 acres of lot 21. . . . I give and bequeath to my son Laughlin the north 50 acres of lot 21."

The will contained no residuary devise and no other gift of land.

The testator resided for many years, and at the time of his death, upon the east half of lot 21 (100 acres), which he owned by inheritance under his father's will. But he had no inheritance in the west half of lot 21.

Held, that Hector Allen took the south 25 acres of the east half of the lot, and Laughlin the north 25 acres of the east half.

Semble, they took as tenants in common.

Casey Wood, for the plaintiffs.

C. J. R. Bethune, for the adult defendant.

A. J. Boyd, for the infant defendant.

[MEREDITH, J., 11TH JUNE, 1896.

In re BEATTY AND FINLAYSON.

Execution—Exemptions—Free grant lands—Debt, when incurred.

An execution against lands on a judgment for a debt incurred before the issue of a patent for lands under the Free Grants and Homesteads Act, R. S. O. c. 25, is no charge against such lands, even after the expiry of twenty years from the date of the location of the lands.

H. E. Stone, for the vendors.

John D. Spence, for the purchaser.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 30TH MAY, 1896.

DOLL v. HOWARD.

Contract—Fraud—Carrying on business after knowledge of misrepresentations.

Action by the indorsee of a promissory note against the maker. The defence was fraud on the part of the payee, and that the plaintiff was not the holder in due course or an indorsee for value. The alleged fraud was that the note was given to W. F. Doll, the payee, the husband of the plaintiff, in part payment of certain stock in the Winnipeg Jewellery Company, and that the defendant was induced to buy the stock through untrue representations made by him as to the value of the stock-in-trade of the business carried on by the company; as to the assets generally, and as to the liabilities; that he represented that the shares of the company were worth par value, whereas they were not worth anything, and had no real value. Evidence was given as to the alleged representations and their untruth. The trial Judge found that the representations were made by Doll, and that when he made them he knew them to be untrue; but the defendant, after he became aware of the misrepresentations, did not repudiate the contract, but continued to carry on

the business, and renewed some of the notes, as he stated, to "stand off" Doll until he could get further evidence.

Held, that a contract induced by fraud is not void, but voidable at the option of the party deceived: *Campbell* v. *Fleming*, 1 A. & E. 40; *Urquhart* v. *Macpherson*, 3 App. Cas. 831; *Walton* v. *Simpson*, 6 O. R. 218. If the party elects to avoid the contract and repudiate it, he should do so as soon as he learns of the fraud practised upon him: *Sharpley* v. *South and East Coast R. W. Co.*, 2 Ch. D. 663.

Where a man once has notice that he has been defrauded, and does not repudiate the contract, the subsequent discovery of the fraud will not justify his doing so.

In this case the business was carried on for over two years after the defendant knew of the misrepresentations. In consequence of his delay and acts of acquiescence, he had lost his right to succeed.

Verdict for the plaintiff for the amount of the note and interest, with costs.

Martin and *Mathers*, for the plaintiff.

Howell, Q.C., and *Hough*, Q.C., for the defendant.

[5TH JUNE, 1896.

McMILLAN v. RURAL MUNICIPALITY OF PORTAGE LA PRAIRIE.

Municipal corporation—Liability for injury through defective highway—By-law.

County Court appeal. Action to recover damages for the loss of a horse occasioned, as the plaintiff claimed, by the defendants' neglect to keep a highway in repair.

It was tried by a jury, who found that the road and culvert when the accident occurred were not in a proper state of repair; that the defendants knew they were out of repair for such a length of time as should have enabled them to repair; that the accident and the death of the horse resulted from their being out of repair; and that the plaintiff was not guilty of contributory negligence. A verdict was entered for the plaintiff.

The defendants appealed, and relied as a defence to the action upon a by-law passed by them, which the plaintiff con-

tended was *ultra vires*. By 58 & 59 V. c. 32, s. 14, s. 593, of the Municipal Act was amended, and the following paragraph added:—"For regulating and prohibiting the passage of traction engines, threshing machines, or other heavy vehicles or machines over highways, and bridges upon highways, and for providing a penalty in case of the violation of the provisions of such by-law."

The defendants passed a by-law, the first clause of which, relied on as a defence, was as follows:—"That no traction engine, steam engine, threshing machine, or water tank shall pass or be transported over any of the highways or bridges upon any highways within the municipality except at the sole risk of the owner of such engine, machine, or water tank." It was in connection with the transportation of a threshing machine that the accident in question occurred.

Held, that the by-law was not a defence. It was rather a refusal by the municipality to exercise the power conferred by the Act, than a *bona fide* exercise of it. The by-law neither regulates nor prohibits the passage of machines, and would appear to be only an attempt to escape the liability to keep highways in repair under s. 618 of the Municipal Act, and the consequences of neglecting to do so.

Appeal dismissed with costs.

Anderson, for the plaintiff.

James, for the defendants.

[DUBUC, J., 26TH MAY, 1896.

GOVENLOCK v. FERRY.

Pleading—Statement of defence — Order to strike out—Appeal—Part of order acted upon—Waiver—Issue raised by counterclaim one for trial by jury.

Appeal from an order of a local Judge striking out the 12th paragraph of the defendant's statement of defence. A preliminary objection was taken that the defendant, having complied with the order, could not appeal against it.

The order provided that the 5th paragraph of the statement of defence might be amended, and the defendant having taken the benefit of the order by amending, the plaintiff urged that the defendant should be precluded from appealing: *Royal City*

Planing Mills Co. v. *Woods*, 6 Man. L. R. 62; *International Wrecking Co.* v. *Lobb*, 12 P. R. 207; *Re Charles Stark Co.*, 15 P. R. 451.

Held, that the objection should be overruled. In the cases cited the order appealed from was considered as a whole, granting one relief, and the appellant having taken the benefit of the relief was held to have waived his right of appeal. In this case there was a marked difference. The order dealt with various points, and the assenting to or compliance with a particular provision of the order should not preclude the defendant from attacking any other portion of the order which he might think objectionable.

The plaintiff brought his action to recover possession of certain lands. By the 12th paragraph of his statement of defence, by way of counterclaim, the defendant claimed damages for illegal seizure, distress, and sale of his goods under an alleged claim for rent. The 12th paragraph was struck out by the local Judge on the ground that it being an issue which, by s. 49 of the Queen's Bench Act, 1895, should be tried by a jury, unless jury trial is waived by the parties, it would complicate matters, and it ought to be left to be disposed of in an independent action.

Held, that the appeal should be allowed; the real point involved was whether the counterclaim was so disconnected with the cause of action as to which the plaintiff was seeking relief, that there would be difficulty or inconvenience in having both tried and disposed of at the same time. If, as sworn to, the counterclaim arose out of one connected series of transactions, founded upon the terms and provisions of one particular agreement referred to in the statement of claim, it was not only natural and proper but even desirable that they should be disposed of by one trial: *Dockstader* v. *Phipps*, 9 P. R. 204; *Goring* v. *Cameron*, 10 P. R. 456; *Turner* v. *Hednesford Gas Co.*, 3 Ex. D. 145.

The fact that the issue raised by the counterclaim was one to be tried by a jury, unless jury trial was waived, while the action of the plaintiff was not one of those contemplated to be tried by a jury, was not a sufficient ground for striking out the counterclaim.

As it was a matter of discretion, and the plaintiff had some grounds for resisting the appeal, there should be no costs to either party.

Clark, for the plaintiff.

Wilson, for the defendant.

Supreme Court of Canada.

EXCHEQUER COURT.] [18TH MAY, 1896.

MOSS v. REGINAM.

Constitutional law—Navigable waters—Title to soil in bed of—Crown—Dedication of public lands by—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.

The title to the soil in the beds of navigable rivers is in the Crown in right of the Provinces, not in right of the Dominion.

Dixon v. Snetsinger, 23 C. P. 235, discussed.

The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.

Under 23 V. c. 2, s. 35, power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and under it the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.

If a Province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge, that it could not object to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance, though of very great public benefit, and the obstruction of the slightest possible degree.

Judgment of the Court below affirmed.

Robinson, Q.C., for the appellant.

Leitch, Q.C., for the respondent.

ONTARIO.]

COWAN v. ALLEN.

Will—Construction of—Executory devise over—Contingencies—"Dying without issue"—"Revert"—Dower—Annuity—Election by widow—Devolution of Estates Act, 49 V. c. 22—Conditions in restraint of marriage—Added parties—Rule 48—Practice.

A testator divided his real estate among his three sons, the portion of A. C., the eldest son, being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of $50 per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said $50 on her marriage." A. C. died after the testator, leaving a widow, but no issue.

Held, reversing the judgment of the Court of Appeal, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time, and not in the lifetime of the testator only; that it was no fit ground for departing from this *prima facie* meaning of the terms of the gift, that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C. by this construction, as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee, and if paid by him, his personal representatives on his death could enforce repayment to his estate.

Held, also, that the widow of A. C. was entitled to dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands.

The mortgagee of the reversionary interest of one of his brothers in the lands devised to A. C. was improperly added in

the Master's office as a party to an administration action, and could take objection at any time to the proceeding, either by way of appeal from the report or on further directions; she was not limited to the time mentioned in Rule 48, which refers only to a motion to discharge or vary the decree.

Moss, Q.C., and *R. R. Hall*, for the appellants.

Shepley, Q.C., and *D. Burk Simpson*, for the respondent Allen.

W. R. Riddell, for the respondent Jeanne Cowan.

NEW BRUNSWICK.]

NEW BRUNSWICK RAILWAY CO. v. KELLY.

Registry laws—Registered deed—Priority over earlier unregistered conveyance—Notice—Suit to postpone.

In 1868 N. conveyed a parcel of land to a railway company, who did not register their deed. In 1872 he made a deed in favour of K. of land which the company claimed was comprised in their conveyance, and a suit in equity was brought praying for a decree postponing the later deed, which was registered, to that of the company. To prove notice to K. of the earlier conveyance, two witnesses swore that in conversation with them K. had admitted knowledge that the company owned the land.

Held, affirming the decision of the Supreme Court of New Brunswick, 33 N. B. Reps. 110, that it was necessary for the company to prove actual notice that would have made the conduct of K. in taking and registering her deed fraudulent; that the witnesses as to the admissions were not connected with the property, and their evidence would not prove even constructive notice; and that, giving them entire credit, their evidence was not sufficient.

Blair, A.-G., for the appellants.

Pugsley, for the respondent.

PRINCE EDWARD ISLAND.]

OWEN v. OUTERBRIDGE.

Chartered ship—Perishable goods—Ship disabled by excepted perils—Transhipment—Obligation to tranship—Repairs—Reasonable time—Carrier—Bailee.

If a chartered ship be disabled by excepted perils from com-

pleting the voyage, the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight.

The option to tranship must be exercised within a reasonable time, and if repairs are decided upon, they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods.

Quære, whether the ship-owner is obliged to tranship.

If the goods are such as would perish before repairs could be made, the ship-owner should either tranship or deliver them up or sell, if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable. And if in such a case the goods are sold without the consent of their owner, the latter is entitled to recover from the ship-owner the amount they would have been worth to him if he had received them either at the port of shipment or at their destination at the time of the breach of duty.

Judgment of the Court below affirmed.

Davies, Q.C., for the appellant.

Peters, Q.C., A.-G., for the respondent.

NORTH-WEST TERRITORIES.]

DINNER v. HUMBERSTONE.

Constitutional law—Municipal corporations—Powers of legislature—Monopoly—License—Highways and ferries—Navigable streams—By-laws and resolutions—Inter-municipal ferry—Tolls—Disturbance of licensee—Damages—North-West Territories Act, R. S. C. c. 50, ss. 13, 24—B. N. A. Act, s. 92, s.-ss. 8, 10, 16—Rev. Ord. N. W. T., 1888, c. 28—N. W. T. Ord. No. 7, 1891-92, s. 4.

The Legislative Assembly of the North-West Territories has power to legislate upon the subject of ferries within its territorial jurisdiction, by authority of the North-West Territories Act, R. S. C. c. 50, and the orders in council passed under the provisions of that Act respecting the jurisdiction of the Legislative Assembly as to municipal institutions and matters of a local and private nature within the North-West Territories, and

can properly delegate such power to a municipality incorporated by special Ordinance.

Semble, that such powers may also result from the authority thereby granted in respect to the issuing of licenses for raising revenues for territorial or municipal purposes.

The municipality of the town of Edmonton has under the 4th section of its charter of incorporation, N. W. T. Ord. No. 7, 1891-92, and of the Ferries Ordinance, Rev. Ord. N. W. T. c. 28, which is incorporated with the town charter, power to grant licenses of exclusive rights to ferry across the Saskatchewan river, a navigable stream within the North-West Territories, having a terminal point upon the boundary of the municipality, and may exercise such powers, prescribe the limits of the ferry, and establish tolls thereon, subject to the conditions imposed upon the Lieutenant-Governor in Council by the Ferries Ordinance, by the issuing of a license to such effect, and without the necessity of passing a by-law, in the same manner as might have been done by the Lieutenant-Governor in Council under the Ferries Ordinance.

The appellants and other defendants formed a "club" or partnership, calling themselves "The Edmonton Ferry Company," for the purpose of building, establishing, and operating a ferry within the limits assigned to the plaintiff in the license to him by the municipality, granting him exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by another subscription for a second share, getting by it 100 more tickets to be used in the same manner, and so on *ad infinitum*, the number of shares that might thus be taken being unlimited. The club supplied their ferrymen with a list of membership, and established and operated their ferry without any license, within a short distance of one of the plaintiff's licensed ferries; thereby, as he alleged, disturbing him in his exclusive rights.

Held, affirming the judgment of the Court below, that the establishment of the defendants' ferry, and the use thereof by

members and others under their club regulations, was an infringement of the plaintiff's rights under his license, and that he was entitled to recover damages sustained by reason of such infringement.

E. D. Armour, Q.C., for the appellants.

Taylor, Q.C., for the respondent.

WILKIE v. JELLETT.

Real Property Act— Registration — Execution — Unregistered transfers— Equitable rights—Sales under execution—R. S. C. c. 51—51 V. c. 20.

Notwithstanding the provisions of s. 94 of the Territories Real Property Act, as amended by 51 V. c. 20, an execution creditor can only affect or sell the real estate of his debtor subject to the charges, liens, and equities which affect it in the hands of the execution debtor.

Purchasers holding lands subject to the Territories Real Property Act under unregistered transfers are entitled to be protected in their title as equitable owners and chargees.

The provisions in the Territories Real Property Act respecting the registration of executions against lands do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor, though if the sheriff sells, the purchaser, by priority of registration of the sheriff's deed, would under the Act take priority over previous unregistered transfers.

Judgment of the Court below, 15 Occ. N. 315, affirmed.

S. S. Taylor, Q.C., for the appellants.

Foy, Q.C., and *Chrysler*, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[FERGUSON, J., ROBERTSON, J., 10TH APRIL, 1896.

BAVIN v. BAVIN.

Alimony—Cruelty—Condonation of—Subsequent misconduct.

The condonation by a wife of acts of cruelty and ill-treatment by the husband, which would justify her leaving her husband and claiming alimony, is conditional on the non-recurrence of such misconduct, and is removed by subsequent ill-treatment and threats after such condonation.

Legal cruelty considered and defined.

Decision of MEREDITH, J., reversed.

Scane and *W. M. Douglas*, for the plaintiff.

J. J. Warren, for the defendant.

[MEREDITH, C.J., ROSE, J., 15TH JUNE, 1896.

REGINA v. SIMPSON.

Pharmacist—Sale of poisons—Summary conviction—Evidence.

Case stated by the police magistrate for the city of Toronto under s. 900 of the Criminal Code.

An information was laid against the defendant for that he did unlawfully *keep open shop* for retailing, dispensing, and

compounding poisons, contrary to the form of the Pharmacy Act and amendments thereto. The magistrate, having dismissed the information, stated the case for the decision of the Court, at the request of the prosecutor.

It appeared that the defendant entered into an agreement with L. to conduct and manage the drug and patent medicine branch of his departmental store in the city of Toronto. The defendant was not himself a pharmacist. L. was a duly qualified pharmaceutical chemist, registered under the Pharmacy Act, and holding a certificate under s. 18. He received from the defendant a weekly salary and a small profit on the sales of poisons. The defendant was the absolute owner of the business and stock, supplied all the money, and carried on the business in his name. The offence charged was a sale by the defendant, through L., of certain scheduled poisons. The magistrate held that there was no violation of the Act; that the defendant had a right to carry on the business in his name so long as the public was protected by having a registered pharmaceutical chemist as the salesman.

The case was argued before the Court on the 15th June, 1896.

Osler, Q.C., and *E. T. Malone*, for the private prosecutor.

Shepley, Q.C., and *Ludwig*, for the defendant.

The following authorities were referred to: *Pharmaceutical Society* v. *London and Provincial Supply Assn.*, 4 Q. B. D. 313, 5 Q. B. D. 310, 5 App. Cas. 857; *Templeman* v. *Trafford*, 8 Q. B. D. 397; *State* v. *Norton*, 67 Iowa 641; *Pharmaceutical Society* v. *Wheldon*, 24 Q. B. D. 683; *Regina* v. *Williams*, 10 Mod. 63; *King* v. *Dixon*, *ib.* 335; *Regina* v. *Warren*, 16 O. R. 590.

The Court held that the defendant kept open shop within the meaning of s. 24 of the Pharmacy Act, R. S. O. c. 151; and remitted the case to the magistrate to convict and fine the defendant.

[BOYD, C., 7TH FEBRUARY, 1896.

CLARKE v. REID.

Landlord and tenant—Assignment for creditors—Landlord's preferential lien —58 V. c. 26, s. 3, s.-ss. 4, 5.

Under 58 V. c. 26, s. 3, s.-ss. 4 and 5, the preferential lien for rent extends not only to a year's rent prior to the assignment for creditors, but to three months' rent thereafter, whether the assignee retains possession or not; and in case the assignee elects to retain possession, the landlord's lien extends for such further time after the three months as the assignee may so retain possession.

W. J. Clarke, for the plaintiff.

M. D. Fraser, for the defendant.

[18TH MARCH, 1896.

YOUNG v. ERIE AND HURON R. W. CO.

Mandamus—Requisites for—Rule 1112—Damages—Railways—53 V. c. 28, s. 2 (D.)

The prerequisites to be observed to obtain a prerogative writ of mandamus are not essential where there is a right of action for a mandamus, namely, where under Rule 1112 the plaintiff is personally interested in the fulfilment of a duty of a quasi-public character, as in this case the omission of a railway company to properly fence their tracks.

The damages under s. 29 of 53 V. c. 28 (D.) are limited to injuries caused to animals by the company's trains or engines; and therefore damages incurred in watching cattle by reason of the bad state of the fences are not recoverable.

Fraser, Q.C., for the plaintiff.

A. W. Anglin, for the defendants.

[ARMOUR, C.J., 20TH MAY, 1896.

SEYFANG v. MANN.

Chose in action—Assignment of—Set-off.

By an agreement for the dissolution of a firm, it was provided that "all claims and demands, notes, bills, and book accounts belonging to said firm above mentioned, are to be collected by the plaintiffs, who are the owners thereof."

Held, a valid assignment to the plaintiffs, under the Chose in Action Act, of a debt due by the defendant; and in an action by the plaintiffs to recover such debt, the defendant could set off a claim for damages arising by reason of a breach of the agreement under which the debt arose.

The difference between the Imperial and Ontario Chose in Action Acts pointed out.

V. Cronyn and *F. P. Betts*, for the plaintiffs.

Hellmuth and *Ivey*, for the defendant.

[FALCONBRIDGE, J., 15TH JUNE, 1896.

TRUSTS CORPORATION OF ONTARIO v. RIDER.

Chose in action—Parol assignment of—R. S. O. c. 122, s. 7.

Notwithstanding that in the revision of 1887, the Ontario enactment in respect to the assignability of choses in action, R. S. O. c. 122, s. 7, provides that every debt and chose in action "arising out of contract shall be assignable by any form of writing," etc., whereas in the revision of 1877, as in the original statute, 35 V. c. 12, s. 1, the words were "every debt and chose in action arising out of contract shall be assignable at law by any form of writing," etc., it is not necessary under the former enactment, any more than it was under the latter, that an assignment should be in writing; and *held* in this case a parol assignment of book debts was valid and binding.

F. A. Anglin, for the plaintiffs.

D. Urquhart, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 21ST APRIL, 1896.

HANNAGHAN v. HANNAGHAN.

Parties—Partition suit—Wife of tenant in common.

The wife of a tenant in common of lands sought to be sold in a partition suit is a proper and necessary party to the suit.

W. W. Allen and *R. A. Borden*, for the plaintiff.

W. B. Chandler, for the defendants.

In re C. F., AN INFANT.

Infant—Adoption—Illegitimacy—Consent.

The Court has no authority under the provisions of the Equity Act, 1890, to give leave for the adoption of an illegitimate child without the consent of both its father and mother.

A. W. MacRae, for the petitioner.

ROGERS v. SCHOOL TRUSTEES OF DISTRICT No. 2, BATHURST.

Injunction—Public officers—Wrongful acts—Information—Attorney-General—Amendment.

A suit to restrain public officers from the commission of

wrongful acts which injuriously affect the public as a whole, should be on behalf of all the public, and by information by the Attorney-General on their relation.

A bill may by amendment be turned into an information by the Attorney-General, upon his consent being obtained.

Skinner, Q.C., and *Fowler*, for the plaintiffs.

Currey, Q.C., and *Lawlor*, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

[THE JUDGES IN BANC, 2ND JUNE, 1896.

REGINA v. BREWSTER.

Criminal procedure—N. W. T. Act, s. 67—"Election" of accused to be tried by Judge summarily—Case reserved—Jurisdiction of trial Judge, after notice of motion for new trial—"May."

Case reserved by ROULEAU, J., on the following facts:—

On 7th January, 1896, B. was charged with having stolen cattle of the value of about $800. He elected to be tried by a Judge with the intervention of a jury. The jury failed to agree on a verdict, and were discharged, the accused being remanded until 19th February, 1896. On that date he was again brought up, when he applied to withdraw his former consent to be tried by a Judge and jury and to substitute therefor his consent to be tried by a Judge summarily without a jury, and requested to be so tried. This application the trial Judge refused, and tried the accused with the intervention of a jury.

The jury having brought in a verdict of guilty, and sentence having been postponed, the accused obtained leave to move the Court to set aside the verdict and for a new trial. Subsequently

on the application of the prisoner's counsel, opposed by the Crown prosecutor, the trial Judge reserved the following questions of law for the opinion of the Court of Appeal :—

Where an accused person, under s. 67 of the amended North-West Territories Act, consents to be tried by a Judge alone in a summary way, without the intervention of a jury, is the Judge bound to comply with the prisoner's consent?

Can the prisoner withdraw his first consent given on a trial which was abortive, and substitute therefor another consent at the second trial to be tried in a summary way by the Judge alone without the intervention of a jury, and in such case is the Judge bound also to comply with that consent?

The case was argued on the 1st June, 1896.

McCaul, Q.C., for the Crown, objected that no application having been made or objection reserved at the trial under s. 743, s.-s. 3, of the Code, and the prisoner having served notice of motion to set aside the verdict under s. 747 of the Code, the trial Judge had no jurisdiction to entertain the prisoner's application to reserve a case.

Objection overruled.

Lougheed, Q.C., for the prisoner, contended that s. 67 of the N. W. T. Act, as amended, gave the prisoner the right to elect to be tried either with or without a jury. The word "may" is imperative. The provision was intended for the advantage of the prisoner, and should be favourably construed in his interest: *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214. The proceedings on 19th February, 1896, were a new trial, and the Judge should have asked the prisoner to elect.

McCaul, Q.C., for the Crown. The only object of s. 67, as amended, is to save trouble and expense. No option is given to the prisoner as under the Code, ss. 765-767 (cf. 32 & 33 V. c. 35, ss. 1-3). "Consent" does not imply a request or election; it means "to concur," "to yield," "to acquiesce," etc.: Worcester. There is nothing in the context or object of the Act to suggest that "may" is not merely permissive: *Julius* v. *Bishop of Oxford*, 5 App. Cas. 214, per Cairns, L.C. There was no new trial; issue had been joined: Code, s. 728; *Morin* v. *Reginam*, 18 S. C. R. 412; Archibald's Crim. Pldg., "Trial."

On the 2nd June, 1896, RICHARDSON, J., delivered the judgment of the Court, holding that s. 67 of the N. W. T. Act, as amended, does not give any option or right of election to a prisoner charged with an offence coming under its terms, to claim to be tried by the Judge summarily. It merely authorizes the Judge, if in his discretion he sees fit, to assume the province of a jury, provided the accused consents.

There is nothing in the context requiring a different interpretation of the word "may" than the definition given in the Interpretation Act, R. S. C. c. 1, s. 7, s.-s. (4).

Supreme Court of Canada.

ONTARIO.] [18TH MAY, 1896.

CRAWFORD v. BRODDY.

Will—Construction of—Inconsistent clauses—Death without issue—Executory devise over—Conditional fee—Life estate—Estate tail.

A testator died in 1856, having previously made his last will, which was subdivided into numbered paragraphs and dated on the 27th May, 1852. By the third clause he devised lands to his son F. on attaining the age of 21 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 21 years;" and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be equally divided among the survivors." F. attained the age of 21 years, and died in 1893, unmarried and without issue.

Held, reversing the decision of the Court of Appeal, 22 A. R. 307, 15 Occ. N. 171, that the subdivision of the will into sections or paragraphs could not authorize a departure from the general rule as to the construction of wills according to the ordinary grammatical meaning of the words used by the testator; and that, as there would be no absurdity, repugnance, or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to all the property devised to the testator's sons and daughters by all the preceding clauses of the will.

Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee, and that, thus, the first devisee took an estate in fee, subject conditionally to the executory devise over.

Chrysler, Q.C., for the appellants.

T. J. Blain and *W. H. McFadden*, for the respondents.

RENNIE v. BLOCK.

Chattel mortgage—Mortgagee in possession—Trespass—Negligence—Wilful default—Sale under power—"Slaughter sale"—Practice—Parties—Agent or bailiff—Assignment for the benefit of creditors—Revocation of.

A mortgagee in possession selling mortgaged goods, which constitute the general stock of a trader, must conduct the sale in such a manner as a merchant would do in the ordinary management of his business; and where the goods are sold recklessly or improvidently, at unusually low prices and without taking proper precautions to prevent them being lost or damaged, the mortgagee is wilfully in default and liable to account not only for what he actually received, but also for what he might have obtained for the goods, of which he was the trustee, had he acted with proper regard for the interest of the mortgagor.

Where the plaintiff's right of action accrues from the wilful default of a mortgagee in possession, the agent or bailiff acting for the mortgagee is not a proper party to be joined as a defendant in the suit.

After the commencement of the action the plaintiff made a general assignment of his estate for the benefit of his creditors, but at the first meeting of the creditors they all refused to execute or accept the benefits thereof, whereupon the assignee notified the plaintiff in writing of such refusal and that the assignment had not been registered, but no formal reconveyance was made.

Held, that, under the circumstances, the plaintiff was not precluded from proceeding with his action, and that the execution of a written instrument was not necessary to restore the assignor to his original rights.

Judgments of the Courts below reversed.

O'Donohoe, Q.C., and *Meek*, for the appellant.

Watson, Q.C., for the respondents.

[6TH JUNE, 1896.

STEPHENS v. BOISSEAU.

Assignments and preferences—Surplus proceeds of sale of mortgaged goods—Appropriation of payments—Set-off—Redemption.

A trader carrying on business in two establishments mortgaged both stocks to B. as security for indorsements on a com-

position with his creditors and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months afterwards, the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, and applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days afterwards B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for the benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods, under an order of Court, the balance remaining due on his mortgage: *Horsfall* v. *Boisseau*, 21 A. R. 663. The assignee of the mortgagor then brought this action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, and which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, 23 A. R. 230, *ante* 160, that there was no preference to B. within R. S. O. c. 124, s. 2; that his position was the same as if his whole debt, secured and unsecured, had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to the payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

Gibbons Q.C., for the appellant.

Kappele, for the respondent.

PAVEY v. DAVIDSON.

Action—Jurisdiction to entertain—Mortgage of foreign lands—Action to set aside—Secret trust—Lex rei sitæ.

An insolvent firm assigned for the benefit of creditors. Shortly after the assignment, a brother of E. D., a member of the firm, died in Oregon, U. S., and left real estate there, which he devised to his parents for life, and at their death to E. D., who some months afterwards sold his interest to his father, who mortgaged the lands to P. An action was brought by creditors of the insolvent firm to have this mortgage set aside as fraudulent, and a demurrer to the statement of claim was allowed: *Burns* v. *Davidson*, 21 O. R. 547. That action was then abandoned, and this action brought, in which it was alleged that P. took the mortgage as trustee only for E. D., in pursuance of a fraudulent scheme to hinder, delay, and defraud the creditors of the firm, and it was asked that P. be declared a trustee for D. of the said mortgage and the moneys secured thereby. A demurrer to this statement of claim was allowed by Armour, C.J., but his judgment was reversed on appeal.

Held, reversing the decision of the Court of Appeal, 23 A. R. 9, *ante* 41, that the action would not lie; that the above allegation could only be read as one impeaching the mortgage transaction as fraudulent for having been made on a secret trust; that, so far as the lands were concerned, the validity of the transaction depended on the law of Oregon, and it was not alleged that according to that law a constructive trust would arise by reason of the intent to hinder and delay creditors, and the Court could not assume that the law of Oregon corresponded to the statutory law of Ontario; that the debt could not be separated from the security, and it was doubtful if the action would lie, even if only an attachment of the debt had been asked for; and that the action was in substance an attempt to get satisfaction by way of equitable execution for debt out of a mortgagee's interest in foreign lands.

Purdom, for the appellants.

Gibbons, Q.C., for the respondents.

LONG v. CARTER.

Principal and agent—Assignments and preferences—Advances to agent to buy goods—Trust goods mixed with those of agent—Replevin—Equitable title.

If an agent is intrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of procedure in Ontario, an equitable title to chattels will support an action of replevin.

Judgment of the Court of Appeal, 23 A. R. 121, *ante* 42, affirmed.

Gibbons, Q.C., for the appellant.

Crerar, Q.C., for the respondents.

WILLIAMS v. LEONARD.

Chattel mortgage—Description—Bills of Sale Act, R. S. O. c. 125—Appeal—Order to amend pleadings—Interference with—Debtor and creditor—Purchase by creditor—Consideration—Existing debt.

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Company," describing the premises on the north side of King street, in the City of London, and in a schedule, referred to in the mortgage, was this additional description: "and all machines . . in course of construction, or which shall hereafter be in course of construction or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor . . or which are now or shall be on any other premises in the said city of London."

Held, affirming the decision of the Court of Appeal, 17 P.R. 73, *ante* 34, and of a Divisional Court, 16 P. R. 544, 15 Occ. N. 284, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could, the description was not sufficient within the meaning of the Bills of Sale Act, R. S. O. c. 125, to cover machines so manufactured.

The Supreme Court will not interfere on appeal with an order made by a provincial Court granting leave to amend the pleadings, such order being a matter of procedure within the discretion of the Court below.

A purchaser of goods from the maker of a chattel mortgage, in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within s. 5 of the Bills of Sale Act.

McEvoy, for the appellant.

Gibbons, Q.C., for the respondents.

QUEBEC.]

LAINE v. BELLAND.

Fixtures—Machinery—Destination—Agreement — Mortgage — Registration.

An action was brought by L. to revendicate an engine and two boilers under the *condition resolutoire* contained in a written agreement, providing that until fully paid for they should remain the property of L., and that all payments on account of the price should be considered as for rent for their use; and further that upon default L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a saw-mill, which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building, but the engine had been taken out, and was lying in the mill-yard, outside of the building. Whilst in this condition, the defendants hypothecated the mill property to the respondent, and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered.

The respondent intervened in the action of revendication, and claimed that the machinery formed part of the freehold, and was subject to his hypothec upon the lands.

Held, that, notwithstanding the conditions in the agreement, the dealings that had taken place between L. and the defendants, and the consent by L. that the machinery should remain affixed in the mill, constituted an absolute sale thereof so long as it continued incorporated with the freehold, and, in so far as regarded the rights of persons who were not parties to the agreement, the engine and boilers had become immovables by destination and formed part of the real estate.

That such parts of the machinery as were actually attached to the mill or built into the foundations at the time of the hypothecs were charged thereby as part of the freehold, and that the conditions in this agreement did not confer any privilege upon the unpaid vendor which would deprive the registered hypothecary creditor of the priority he had acquired under the provisions of the law relating to the registration of real rights.

Wallbridge v. *Farwell*, 18 S. C. R. 1, followed.

Belleau, Q.C., for the appellants.

Robitaille, for the respondent.

Nova Scotia.] [18th May, 1896.

CITY OF HALIFAX v. LITHGOW.

Municipal corporation—Repair of streets—Pavements—Assessment on property owner—Double taxation—24 V. c. 89—53 V. c. 60, s. 14.

By s. 14 of the Nova Scotia statute 53 V. c. 60, the city council of Halifax was authorized to borrow money for covering the sidewalks of the city with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the cost, on the ground that his predecessor in title had in 1867, under the Act 24 V. c. 89, furnished the material to construct a brick sidewalk in

front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless, and dangerous.

MacCoy, Q.C., for the appellants.

Bell, for the respondent.

[6TH JUNE, 1896.

WARNER v. DON.

Fixtures—"Personal chattels"—Delivery—Conveyance—Registration—Mortgage.

The "fixtures" included in the meaning of the expression "personal chattels" by s. 10 of the Nova Scotia Bills of Sale Act are only such articles as are not made a permanent portion of the land, and may be passed from hand to hand without reference to, or in any way affecting, the land; and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands, and also fixtures thereon, does not require to be registered under the Nova Scotia Bills of Sale Act, R. S. N. S., 5th ser., c. 92, and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage, and those covered by a mortgage made by the owner of the fee.

Judgment of the Court below affirmed.

Harris, Q.C., for the appellant.

Harrington, Q.C., for the respondents.

NEW BRUNSWICK.]

RICHARDS v. BANK OF NOVA SCOTIA.

Principal and agent — Agent's authority — Acting beyond scope — Representation.

The manager of a branch of a bank induced the drawee of a draft to accept by representing that the bank held goods as security for it, and when the goods were sold the draft would be protected. This representation was made to serve the interests of the manager himself, who was speculating in the goods, as well as the interests of his brother. The bank sued the acceptor on the draft, who pleaded that he was induced to accept by the fraud of the manager and for the accommodation of the bank.

Held, affirming the decision of the Supreme Court of New Brunswick, that the representation made to further the private ends of the manager himself, or of a third person, could not be said to be the representation of the bank; and that it was immaterial whether or not the acceptor believed the agent had authority to make it.

Held, also, that if the manager was the bank's agent to present the draft and procure its acceptance, the bank was only affected with the agent's knowledge of what was material to the transaction and what it was his duty to make known to his principals.

Blair, Q.C., A.-G., and *Pugsley*, Q.C., for the appellant.

Borden, Q.C., and *Coster*, for the respondents.

NORTH-WEST TERRITORIES.] [18TH MAY, 1896.

HOWLAND v. GRANT.

Bankruptcy and insolvency—Composition and discharge—Acquiescence in—New arrangement—Waiver of time clause—Principal and agent—Deed of discharge — Notice of withdrawal from agreement — Fraudulent preferences.

Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented.

Held, that a creditor who had benefited by the realization of the assets, and by his action gave the body of the creditors reason to believe that he had adopted the new arrangements, could not repudiate the transaction upon the ground that the new arrangements were not fully understood, without at least a surrender of the advantage he had received through them.

The debtor's assent to allow such repudiation and grant better terms to the one creditor, would be a fraud upon the other creditors, and as such inoperative and of no effect.

Judgment of the Court below affirmed.

Kappele, for the appellants.

Lougheed, Q.C., for the respondent.

[6TH JUNE, 1896.

CONGER v. KENNEDY.

Constitutional law—Marital rights— Married woman — Separate estate— Jurisdiction of Territorial Legislature—Statute, interpretation of— R. S. C. c. 50—N. W. T. Ord. No. 16 of 1889.

The provisions of Ordinance No. 16 of 1889 respecting the personal property of married women are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the Order of the Governor-General in Council passed under the provisions of the North-West Territories Act, R. S. C. c. 50. The provisions of Ordinance No. 16 are not inconsistent with ss. 36 to 40 of the North-West Territories Act.

The words "her personal property" used in Ordinance No. 16 are unconfined by any context, and must be interpreted as having reference to all the personal property belonging to a woman married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted.

Brittlebank v. *Grey-Jones*, 5 Man. L. R. 33, distinguished.

Judgment of the Court below reversed.

Hogg, Q.C., for the appellant.

Armour, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [30TH JUNE, 1896.

McGUINNESS v. DAFOE.

Justice of the peace—Felony—Issue of warrant—Absence of written information—Notice of action.

A justice of the peace, who, knowing that a sworn information is necessary, issues his warrant for the arrest of a person charged with felony without requiring an information, is liable in trespass.

A notice of action alleging that the defendant on the 8th September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused the plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th September, maliciously, illegally, and wrongfully, and without any reasonable and probable cause, caused the plaintiff to be brought before him, and to be committed for trial, and to be confined in the common gaol, is sufficient.

Judgment of the Queen's Bench Division, 27 O. R. 117, *ante* 51, affirmed.

W. R. Riddell and *H. E. Rose*, for the appellant.

Clute, Q.C., and *J. A. MacIntosh*, for the respondent.

SMITH v. TOWNSHIP OF ANCASTER.

Municipal corporations—Way—Toll-roads.

This was an appeal by the plaintiff from the judgment of the

Queen's Bench Division, 27 O. R. 276, *ante* 106, and was argued on the 2nd and 3rd June, 1896.

Lynch-Staunton, for the appellant.

W. Cassels, Q.C., for the respondents.

The appellant's counsel stated that the toll-gate in question had been moved to a point within the township of Ancaster, and asked to have the judgment of ROBERTSON, J., fixing the rate of toll, restored.

On the 30th June, 1896, the Court gave judgment, holding that the appellant had obtained by the judgment appealed from full relief in respect of the one toll-gate attacked, and dismissed the appeal with costs.

Ch. D.]

HENDERSON v. HENDERSON.

Limitation of actions—Purchase of farm—Mortgage to secure purchase money—Possession by son of purchaser—Payment of mortgage—Effect of discharge.

In March, 1881, the plaintiffs' testator purchased a farm, and had it conveyed to himself, giving to the vendor a mortgage to secure $3,600, part of the purchase money. In April, 1881, one of his sons, with his assent, went into possession upon the understanding that he should apply the profits derived from the farm, after providing for his own living, towards payment of the mortgage, and there was some evidence that the father promised that when the mortgage was paid the son should have the farm, subject to payment of an annuity to his father and mother. The son contributed from time to time $1,800 towards payment of the mortgage, which, the balance being made up by the father, was paid off on the 30th March, 1886, a statutory discharge acknowledging payment by the father being on that day made and registered. The father after this declined to convey the farm to the son and promised to leave it to him by his will, but died in 1894, leaving a will in favour of the plaintiffs. The son continued in possession of the farm until his death in 1892, and the defendants, to whom he devised his property, continued in possession after his death, this action being brought to eject them. From time to time during the lifetime of the son the

father had spent a few days at the farm, but had not actively interfered in the management.

Held, reversing the judgment of the Chancery Division, 27 O. R. 93, 15 Occ. N. 397, that title had not been acquired as against the father and his devisees.

Per BURTON and MACLENNAN, JJ.A.—The execution and registration of the discharge gave, in any event, a new starting point for the statute.

Watson, Q.C., and *L. M. Hayes*, for the appellants.

E. B. Edwards, for the respondents.

C. P. D.]

TRUSTS CORPORATION OF ONTARIO v. HOOD.

Principal and surety—Assignment of mortgage—New mortgage—Reservation of rights.

A covenant by the assignor of a mortgage with the assignee that the mortgage moneys shall be duly paid makes the assignor a surety for the mortgagor; but he is not discharged by the assignee extending the time for payment and taking from the mortgagor a new mortgage on the same land to secure the debt, there being at the time, although by parol only, an express reservation of rights against the assignor.

Judgment of the Common Pleas Division, 27 O. R. 135, *ante* 55, affirmed; OSLER, J.A., dissenting.

Osler, Q.C., and *Ball*, Q.C., for the appellants.

Aylesworth, Q.C., for the respondents.

BROUGHTON v. TOWNSHIPS OF GREY AND ELMA.

Municipal corporations—Drainage by-laws—Initiating township—Contributory township.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, 26 O. R. 694, 15 Occ. N. 292, and was argued on the 8th June, 1896.

J. P. Mabee, for the appellant.

Garrow, Q.C., for the township of Grey.

G. G. McPherson, for the township of Elma.

On the 30th June, 1896, the appeal was dismissed without costs, the members of the Court being divided in opinion, HAGARTY, C.J.O., and OSLER, J.A., thinking that the appeal should be allowed, and BURTON and MACLENNAN, JJ.A., that it should be dismissed, the action, in their opinion, being unnecessary. See now 57 V. c. 56.

SPROULE v. WATSON.

Evidence—Will—Letters probate—Testamentary capacity.

Letters probate issued by the proper Surrogate Court are, notwithstanding the Devolution of Estates Act, only *prima facie* evidence, as far as real estate is concerned, of the testamentary capacity of the testator, and in an action asserting title to real estate under the will, the defendant is entitled to give evidence to show want of testamentary capacity.

Judgment of the Common Pleas Division affirmed.

W. M. Douglas and *Frank Ford*, for the appellant.

Watson, Q.C., and *J. M. Rogers*, for the respondents.

BOYD, C.]

CONSUMERS' GAS COMPANY OF TORONTO v. CITY OF TORONTO.

Assessment and taxes—Toronto Gas Company—Mains and pipes.

The mains and pipes of the Consumers' Gas Company of Toronto laid under the public streets are assessable for municipal taxation under the Consolidated Assessment Act, 1892, 55 V. c. 48.

Toronto Street R. W. Co. v. *Fleming*, 87 U. C. R. 116, considered.

Judgment of BOYD, C., 26 O. R. 722, 15 Occ. N. 271, affirmed; OSLER, J.A., dissenting.

McCarthy, Q.C., *S. H. Blake*, Q.C., and *W. N. Miller*, Q.C., for the appellants.

Robinson, Q.C., and *Caswell*, for the respondents.

ARMOUR, C.J.]

ROGERS v. TORONTO PUBLIC SCHOOL BOARD.

Negligence—Unsafe premises—Volunteer.

A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in a reasonably safe condition, but one who visits them for his own purposes, and without the knowledge of the occupant, does so at his own peril.

The superintendent of a coal company, without the knowledge of the defendants, went to a school house to look at the coal-bins in order to decide how he could most conveniently deliver coal ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar.

Held, reversing the judgment of ARMOUR, C.J., that he could not recover damages.

Robinson, Q.C., and *F. E. Hodgins*, for the appellants.

Osler, Q.C., and *H. S. Osler*, for the respondents.

FERGUSON, J.]

JOHNSTON v. CONSUMERS' GAS COMPANY.

Toronto Gas Company—Reserve fund—Plant renewal fund.

The judgment of FERGUSON, J., 27 O. R. 9, was reversed, on the ground that there being no admission in the stated case of any over-payment by the plaintiffs, they had no *locus standi*.

McCarthy, Q.C., *S. H. Blake*, Q.C., and *W. N. Miller*, Q.C., for the appellants.

Robinson, Q.C., and *J. MacGregor*, for the respondents.

ROBERTSON, J.] [29TH OCTOBER, 1895.

COWAN v. ALLEN.

Will—Construction—Executory devise—Dower—Practice—Administration—Judgment—Adding parties.

A testator, after devising specifically described properties to each of his three sons, each devise being subject to charges in

favour of named beneficiaries, proceeded as follows: "I will and bequeath that should any of my three sons die without leaving issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." One son, after the testator's death and after accepting the devise to him, died without lawful issue, leaving a widow.

Held, per HAGARTY, C.J.O., and OSLER, J.A., that this clause took effect upon the son's death, and gave an executory devise over.

Per BURTON and MACLENNAN, JJ.A., that the clause was limited to death in the testator's lifetime.

In the result the judgment of ROBERTSON, J., was affirmed.

Held, also, *per* HAGARTY, C.J.O., and OSLER, J.A., that notwithstanding the executory devise the deceased son's widow was entitled to dower; BURTON and MACLENNAN, JJ.A., expressing no opinion on this point.

Per MACLENNAN, J.A.—If a person is improperly made a party in the Master's office after judgment in administration proceedings, he is not limited to moving against the order making him a party, but may appeal from the report.

Moss, Q.C., and *R. R. Hall*, for the appellants.

Shepley, Q.C., for the respondent Allen.

W. R. Riddell, for the respondent Jean Cowan.

[30TH JUNE, 1896.

TOWNSHIP OF LOGAN v. HURLBURT.

Public Health Act—Person suffering from infectious disease—Failure of board of health to isolate—Consequent spread of disease.

The directions of s. 84 of the Public Health Act, R. S. O. c. 205, are imperative, and where, instead of acting as directed in that section, the members of a local board of health allow a person suffering from an infectious disease to go into an adjoining municipality, they are liable to repay to that municipality moneys reasonably expended in caring for the sick person and preventing the spread of the disease.

Judgment of ROBERTSON, J., affirmed; HAGARTY, C.J.O., dissenting.

Idington, Q.C., for the appellants.

Aylesworth, Q.C., and *F. H. Thompson*, for the respondents.

JAMIESON v. LONDON AND CANADIAN LOAN AND AGENCY COMPANY.

Landlord and tenant—Lease—Mortgage of lease—Assignee of term.

A mortgage of lease, after reciting the lease, granted and mortgaged to the mortgagees, a loan company, their successors and assigns forever, the lease and the benefit of all covenants therein contained, and all that parcel of land (describing it), *habendum* unto the mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the lease, less one day thereof, and all renewals and substituted estates and right of renewal and other interests of the mortgagor:—

Held, reversing the judgment of ROBERTSON, J., that the one day excepted might be taken as the last day of the term, and that the mortgagees were not assignees of the term and liable for the rent.

Robinson, Q.C., and *Arnoldi*, Q.C., for the appellants.

E. D. Armour, Q.C., and *W. H. Irving*, for the respondent.

HIGH COURT OF JUSTICE.

[FERGUSON, J., ROBERTSON, J., 10TH APRIL, 1896.

LEE v. ELLIS.

Principal and surety—Advance to wife—Charge on her estate—Covenant of husband and wife—"Ordinary legal rights"—Account.

A married woman, who, under the terms of her father's will, was entitled to receive her share of his estate on coming of age, agreed, on attaining her majority, with the other beneficiaries,

to postpone the division. An agreement was afterwards executed between the husband, the wife, and the trustee of the estate, whereby, after reciting the above facts, the trustee agreed to advance her certain moneys, which she agreed to repay within a specified period, the advance being made a charge on her share of the estate. The agreement also provided that the amount of the advance should be deducted from her share in case of non-payment, or of a division of the estate prior to the date fixed for repayment. The husband was a party to the agreement for the purpose only of joining in the covenant, and it was expressly agreed therein that none of the provisions of the indenture should "in any wise affect or prejudice the ordinary legal rights" of the trustee to enforce payment.

Held, that, notwithstanding the latter clause, the husband was liable as a surety only, and that he was entitled to be exonerated by his wife, and to the benefit of her property in the trustee's hands, and to an account in regard thereto from the date of the covenant sued on.

Moss, Q.C., for the plaintiff.

Marsh, Q.C., for the defendant T. D. Ellis.

[BOYD, C., FERGUSON, J., MEREDITH, J., 11TH MAY, 1896.

THOMPSON v. DOYLE.

Husband and wife—Gift of chattels—Creditors—Evidence.

Where a wife claimed, as against her husband's execution creditors, certain chattels, to wit, a piano, a buggy, and a cutter, as a gift from him to her while they were living together :—

Held, that the onus of proof of right to the goods was upon her, and there being no writings and no witnesses, her own evidence, not even corroborated by that of her husband, was not sufficient to satisfy the onus. It was at least essential to make out some clear, distinct act by which the husband divested himself of the property.

An appeal by the plaintiff, the claimant, from the judgment of the Junior Judge of the County Court of York in favour of the defendants, execution creditors, upon an interpleader issue directed to try the right to a piano, a buggy, and a cutter seized by the sheriff under the defendants' execution, and claimed by the wife of the execution debtor. The facts sufficiently appear in the judgments.

The appeal was argued on the 28th February, 1896.

Aylesworth, Q.C., for the appellant.

M. Wilkins, for the defendants.

Judgment was delivered on the 11th May, 1896.

BOYD, C.—The County Judge has, upon the evidence, concluded that the wife's title is not made out. I agree with his conclusion, though I do not reach it in the same way, and I think the evidence by which that title is supported is unsatisfactory in the highest degree: *Re Miller*, 1 A. R. at p. 396. As against creditors of the husband, the wife rests a case of gift or ownership upon her own uncorroborated testimony. The evidence of value passing from the wife, as of her separate property, is altogether too shadowy to be counted as a material factor in the case. And, so far as the alleged gift is concerned, I think *Schaffer* v. *Dumble*, 5 O. R. 716, well decided, holding, as it does, that under our system a gift *inter vivos* of a personal chattel of ordinary family use is not permitted by the common law and is not assisted by the statute. The enabling provisions which increase the capacity to take and hold property by married women do not extend to the case of property received from the husband. The validity of such dealings between husband and wife remains as before the Act, unassisted by legislation: R. S. O. c. 132, s. 4, s.-ss. 2 and 4. There is, therefore, legal unity between them, and the difficulty of proving in any clear and satisfactory way that there has been a donation of personal chattels, such as a piano, a horse and buggy, becomes, as against creditors, a task of great difficulty, and this is rightly so where there are no writings and no witnesses. There should be evidence, above suspicion, showing not only a transfer of the property, but also a sufficient delivery of possession. It appears to be at least essential to make out some clear distinct act by which the husband divests himself of the property.

In a very late case respecting articles such as the present, the Court of Appeal laid it down that the difficulty of making out a case of gift between husband and wife arose, not from the legal relations between them, but from the fact of their living together. It was necessary for the wife to show that the husband had done that which amounted to delivery. If the facts proved were equally consistent with the idea that he intended to deliver so as to be her property, and with the idea that he in-

tented to keep as his own property, then the wife failed to make out her case: *Bashall* v. *Bashall*, 11 Times L. R. 152 (1894). See also *Phillips* v. *Rarnet*, 1 Q. B. D. 436; and *Walter* v. *Hodge*, 2 Swanst 92; *Hoyes* v. *Kindersley*, 2 Sm. & Giff. 195.

There is "abundant lack" of evidence, both in quantity and quality, to make good this claim as against the creditors, and I wonld affirm the judgment with costs.

MEREDITH, J.—The onus of proof of right to the goods in question was upon the appellant, who was the plaintiff in the issue, and the only ground upon which she attempts to support her claim to them is that her husband is in equity a trustee for her of them. Apparently the goods were his; he purchased them, and they were kept and used just as they would have been if his. The attempt is to show that, practically speaking, they were gifts from the husband to the wife, while living together as man and wife, which, though ineffectual at law, are good in equity, in the way I have mentioned. But, to establish such a trusteeship, clear and satisfactory evidence is, under the circumstances of this case, especially, needful. Some difficulties in regard to the note, with the proceeds of which the piano was purchased, had arisen, and it was speedily changed from the husband's note to the note of the innocent transferee, Heintzman, who had subsequently to defend his title to it as such transferee, the result of the transfer being the acquisition by the husband or wife of the piano in question, and the receipt by the husband of the amount of the note, over and above the price of the piano, in cash. The evidence in support of the claim is very far from being clear or by any means satisfactory to my mind. The onus of proof was not, in my judgment, satisfied. The claim is attempted to be supported on the wholly uncorroborated testimony of the appellant, which, if true, should have been in all respects fully corroborated by her husband; who was not even called as a witness. In my judgment, the learned County Court Judge erred in accepting the wife's testimony alone, in the circumstances of the case, as proving sufficiently the circumstances related by her; accepting them as accurate, it would be difficult, since the case of *Kent* v. *Kent*, 19 A. R. 352, for this Court to say that the husband could not be treated as a trustee of the goods in question for the wife. In

my opinion, the learned Judge erred in his finding as to the fact, and in his views of the law applicable to such finding, but in the result was right in finding against the claimant upon the issue tried. The appeal, therefore, should be dismissed.

FERGUSON, J., concurred.

[BOYD, C., FERGUSON, J., 24TH JUNE, 1896.

LEITCH v. MOLSONS BANK.

Executors and administrators—Distribution pari passu—Action by administratrix to recover excess.

D. C. Leitch, being guarantor of the indebtedness of his brother A. J. Leitch to the defendants, who were pressing the latter for payment, agreed to buy the latter's stock in trade, giving a number of notes of $100 each, which were to be deposited and were deposited with the defendants, and when paid the proceeds applied towards the liquidation of the indebtedness to the defendants. D. C. Leitch afterwards sold the stock and died, and part of the purchase money on the latter sale being paid to the plaintiff, his administratrix, was employed to retire some of his notes to A. J. Leitch, the proceeds being applied to reduce the indebtedness to the defendants.

The plaintiff had before this given the usual notice for creditors, and the time for putting in claims had expired. She afterwards became aware of two claims against the estate, including a large one by A. J. Leitch, and now sued the defendants to recover the money she had paid as above, or the excess over the defendants' proper *pro rata* share.

Held, affirming the decision of MACMAHON, J., that the action must be dismissed.

Per BOYD, C.—The widow, having duly advertised for creditors under the statute, was justified in making payments as on a solvent estate. The estate was discharged, although the creditors coming in after the statutory period may have the right to follow the payment to the defendants if so advised.

J. A. Robinson, for the plaintiff.

J. S. Robertson, for the defendants.

[Boyd, C., Ferguson, J., Robertson, J., 24th June, 1896.

SANDUSKY COAL CO. v. WALKER.

Company—Promoters—Liability for goods supplied.

A steamer was purchased for the benefit of all the shareholders of a projected company, to be organized for the purchase and running of it, and was held by one of the subscribers as trustee for the others. The boat was run for their benefit in advance of incorporation, as all knew. All were aware of these operations, and all admitted under their hands that they were jointly interested in the steamer. Most of them took part more or less in the operations of the company, attending meetings, and directing affairs on the steamer or in the conduct of the office business. All would have expected to share in the profits had any been made.

Certain coal was supplied for the use of the boat on the order of the captain or manager of the boat, who stated that the trustee of the boat would pay the bill. The price of the coal being sued for, certain of the subscribers to the stock of the company, which was never actually incorporated, paid the amount of the bill.

Held, that there was a right of contribution to the amount of the coal bill against all the other subscribers to the stock.

Held, also, that the contribution should be without reference to what had been paid on shares, the liability not arising in respect of calls upon the shares, though the amount of shares subscribed by each might well regulate the quantum of contribution as between those jointly liable.

W. R. Riddell, for the defendants McKay and others.

W. Cassels, Q.C., for the defendant Walker.

J. L. Murphy, for the defendants Woollett and Drummond.

A. H. Clarke, for the defendants Grenville and others.

J. P. Mabee, for the defendant Dease.

[ARMOUR, C.J., 18TH MAY, 1896.

McCULLOUGH v. NEWLOVE.

Interest—Work and services—Reference—58 V. c. 12, s. 118 (O.)

On a reference in an action in which money is claimed for work and services, agreed to be paid for at a fixed rate, the referee may, under 58 V. c. 12, s. 118 (O.), allow interest on the amounts claimed from the time they became payable.

Watson, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *W. H. Blake*, for the defendant.

[MEREDITH, C.J., 14TH JULY, 1896.

In re TORONTO, HAMILTON, AND BUFFALO R. W. CO. AND BURKE.

Railways—Arbitration—51 V. c. 29, s. 150 (D.)—"Opposite party"—Mortgagor and mortgagee.

Certain land having been taken by the company for the purposes of the railway, an offer of a sum of money as compensation therefor was made to Burke, the owner of the equity of redemption, and Farr, the mortgagee, jointly. The mortgagee accepted the offer, but the owner of the equity stood out for a larger sum. Thereupon the company gave notice of arbitration under the Dominion Railway Act, and appointed an arbitrator; Burke appointed an arbitrator on his behalf; and the two so appointed named a third. The board thus constituted proceeded to take evidence; but the company, not being satisfied that the proceedings were regular, made a motion for appointing a sole arbitrator under the statute, as in a case of default of appointment by the land-owner.

Held, that the words "opposite party" in s. 150 of the Act, 51 V. c. 29 (D.), must be read distributively so as to include both mortgagor and mortgagee, and that both not having concurred in the appointment of an arbitrator, the case was in the same position as if no arbitrator had been appointed by the land-owner; and an order was made appointing a sole arbitrator.

D'Arcy Tate, for the company.

Teetzel, Q.C., for Burke.

P. D. Crerar, for Farr.

[FERGUSON, J., 3RD JUNE, 1896.

In re PLUMB.

Trusts—Marriage settlement—Mortgage investments—Loss on realization—Apportionment between tenant for life and remaindermen.

Where trustees of a marriage settlement had invested the trust fund on mortgages, upon which loss was inevitable:—

Held, on petition to the Court for advice, that such loss should be apportioned between the tenant for life and the remaindermen; that when on realization of any security a loss occurred, accounts must be taken, (1) of the amount required to pay off the security in full; (2) of what portion of such amount, if it had been paid, would have been payable to the tenant for life, and what portion would have belonged to the principal of the trust fund; (3) of what interest upon the security had already been paid to the tenant for life; and, after such accounts had been taken, the amount actually realized from the security should be added to the amount already paid to the tenant for life, and the total divided between the tenant for life and the estate in proportion to the amount they would have been entitled to if the whole of the security had been paid in full, the tenant for life standing charged as to her portion thereof with the amounts already paid to her.

Re Foster, 45 Ch. D. 629, and *Re Moore*, 54 L. J. Ch. N. S. 432, followed.

H. D. Gamble, for the trustees.

H. J. Scott, Q.C., for the tenant for life.

F. W. Harcourt, for the infant remaindermen.

[MACMAHON, J., 11TH MAY, 1896.

POCOCK v. CITY OF TORONTO.

FERRIER v. CITY OF TORONTO.

Municipal corporations—Licenses—Petty chapmen—Ultra vires—Damage.

A municipal corporation, whose existence is derived solely from the statutes creating it, is not liable for damages arising out of the enforcement of a by-law passed under a misconstruction

of its powers, unless such liability is expressly or impliedly imposed by the statute.

A city corporation, acting in excess of its powers, passed a by-law amending an existing by-law for licensing peddlers, prohibiting them from peddling on certain streets, and the officers of such corporation, in carrying out the by-law, declined to issue licenses except in the restricted form, which the plaintiff refused to accept, and, while attempting to peddle without a license, was interfered with by the police, over whom the corporation had no control.

Held, that the corporation were not liable.

Neither does any liability arise where a licensee, who has taken out a license in the restricted form, is damnified by being prevented by the police from peddling on prohibited streets.

DuVernet, for the plaintiffs.

Fullerton, Q.C., and *H. L. Drayton*, for the defendants.

IN CHAMBERS.

[MEREDITH, J., 8TH JUNE, 1896.

MULLIGAN v. HENDERSHOTT.

Partition—Summary application—Mortgagee.

A mortgagee whose title has not been perfected by foreclosure or otherwise is not entitled to an order for partition or sale upon summary application under Rule 989.

Tremeear, for the plaintiff.

F. W. Harcourt, for the defendants, infants.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 16TH JUNE, 1896.

THOMAS v. GIRVAN.

Costs—Mortgage—Redemption suit—Interest—Exercise of power of sale.

A mortgagee will not be deprived of his costs in a redemption suit because it was made necessary by a dispute as to the rate of interest to which he was entitled in point of law, or because of his proceeding to exercise a power of sale contained in the mortgage after the mortgagor had offered to redeem if informed of the amount due.

A. A. Stockton, Q.C., for the plaintiff.

C. A. Palmer, Q.C., for the defendant.

[21ST JULY, 1896.

SMITH v. SMITH.

Partition—Standing grass—Sale by Court.

During the pendency of a partition suit the Court will not order the sale of standing grass and payment of the proceeds into Court, unless that course is necessary in the interest of all the co-tenants.

W. B. Chandler, for the plaintiff.

M. G. Teed, for the defendant.

POIRIER v. BLANCHARD.

Injunction—Dissolution—Suppression of facts.

It is not a ground for the dissolution of an *ex parte* injunction that the plaintiff suppressed facts which, though material as between the plaintiff and a person not a party to the suit, are not material as between the plaintiff and defendant in the suit.

M. G. Teed, for the motion.

G. G. Gilbert, Q.C., contra.

MANITOBA.

In the Queen's Bench.

[FULL COURT, 29TH JUNE, 1896.

ROBERTSON v. BRONDES.

Trial—Queen's Bench Act, 1895, s. 49—Rule 983—Action of seduction—Trial by jury—Introduction of new practice—Effect of, as to pending business—"Up to"—Findings of jury—Interference by Court.

This action was commenced before the Queen's Bench Act, 1895, came into force. Neither party had, according to the practice then in force, expressed an intention or made an application to have the case tried by a jury. The cause of action, seduction, was one of those which, by s. 49 of the Queen's Bench Act, must be tried by a jury. The plaintiff entered the record for trial as a jury case, and served notice of trial. It was accordingly tried by a jury, and the plaintiff had a verdict.

The defendant, who at the trial objected to the case being tried by a jury, moved against the verdict on the ground that there was a mistrial, inasmuch as the trial was had before a Judge with a jury, while the case was a non-jury one, no jury having been demanded, no order for a jury having been obtained, and no other order having been made which would warrant the case being tried by a jury.

Rule 983 provides that with respect to pending business the procedure is to be as follows: (*a*) In all cases the action, suit, matter, or proceeding shall be continued up to the trial or hearing according to the previous practice of the Court, and afterwards according to the provisions of the Act.

Held, that the expression "up to" in the Rule should be construed as exclusive; the previous practice should prevail until the time arrives for the trial or hearing, and the new practice then comes into play. It could not be held that there had been a mistrial.

At the trial the defendant was examined, and emphatically denied that he was the father of the child as alleged, or that he had ever had intercourse with the woman, who was shown to be weak-minded and previously unchaste; but the jury believed the woman, notwithstanding the defendant's denial, and returned a verdict for the plaintiff for $500 damages.

Held, that upon the principle of such cases as *Metropolitan R. W. Co.* v. *Wright*, 11 App. Cas. 152, and *Commissioners for Railways* v. *Brown*, 18 App. Cas. 188, it was impossible for the Court to interfere with the verdict as against the weight of evidence.

Verdict sustained and application to set it aside dismissed with costs.

Martin and *Mathers*, for the plaintiff.

Ewart, Q.C., for the defendant.

REGINA v. CLOUTIER.

Municipal corporation—Early closing by-law—Uncertainty—Delegation of powers of council.

Appeal from an order of TAYLOR, C.J., dismissing a motion for a *certiorari* to remove a summary conviction with a view to having it quashed. The conviction was for a breach of a by-law of the city of Winnipeg, passed under the Shops Regulation Act, R. S. M. c. 140, as amended by 57 V. c. 32, s. 2. It was passed on 6th August, 1894, and provided that from and after the 15th day of that month, "All boot and shoe shops within the city of Winnipeg . . . shall be and remain closed on each and every day of the week between seven o'clock

of the afternoon of each day and five o'clock in the morning of the next following day, except as follows: namely, on Saturdays and on the day immediately preceding any civic holiday, or holiday as defined by the Manitoba Interpretation Act, and during the last three weeks in December, and during the days on which the exhibition of the Winnipeg Industrial Exhibition Association is being held."

It was contended that the by-law was void for uncertainty by reason of the exceptions it contained, and for delegation of the powers of the council of the city of Winnipeg, in that it provided that the same should not take effect upon any day on which the exhibition of the Winnipeg Industrial Exhibition Association was being held.

Held, that the by-law was illegal and void, and the conviction should be quashed, but without costs.

The council must determine specifically the portion of the year and the day or days of the week when the shops are to be closed, and a by-law like that in question, which excepts days by reference to uncertain events, leaves the operation of the by-law on any day or days so uncertain that there is really no positive enactment requiring shops to be closed on any particular day or days, or during any particular portion of the year. There might be numerous days on which the Winnipeg Industrial Exhibition Association would be holding exhibitions.

If there were absolutely fixed days for civic holidays and for the holding of such exhibitions, by reference to which the by-law could be interpreted, then the council would have positively determined the days which, by reference to these events, were to be excepted; but they have left this to be determined by events which may or may not happen, or which may happen at any time or times of the year, and on any day or days of the week.

The onus was upon the prosecutor to prove a by-law binding in effect, a by-law fixing the days when shops were to be closed; and if there were absolutely fixed days, by reference to which the exceptions could be definitely ascertained at the time of the enactment of the by-law, this should have been shown.

Munson, Q.C., for the defendant.

I. Campbell, Q.C., for the City of Winnipeg.

Culver, Q.C., for the Retailers' Association.

MILLER v. IMPERIAL LOAN AND INVESTMENT CO.

Mortgage—Distress for interest on goods of stranger—Action for damages.

The plaintiff sued in trespass and trover to recover damages for the seizure and sale of a crop of wheat that was seized and sold under a distress warrant issued and signed by the manager of the defendant company in Manitoba. One Robertson mortgaged the land upon which the crop was grown to the defendants for $2,000, and also mortgaged another parcel of land to them, in a separate mortgage, for $1,500. Robertson leased the land covered by the $2,000 mortgage to one Reid, and Reid subleased it to the plaintiff. The crop grown on the land in the season of 1894 belonged to the plaintiff.

In September 1894, the manager of the defendant company in Manitoba, acting on information he received from the head office of the company in Ontario, that interest was in arrear on each of Robertson's mortgages, issued a warrant directing a bailiff to levy a distress on Robertson's goods for the amount of the interest that was in arrear. Acting under this warrant, the bailiff seized and sold the plaintiff's crop on the west half of section 12; but he omitted to give the notice of distress and to have the appraisement of the goods made that is required by 2 W. & M. c. 5, s. 2, and Killam, J., who tried the case, held that the defendants were liable for the plaintiff's goods that she lost through the seizure and sale, and entered a verdict for the plaintiff.

In moving against the verdict, the objection chiefly urged by the defendants was that the plaintiff was not entitled under 11 Geo. II. c. 19, s. 19, to sue or recover in trespass or trover, but should have brought an action on the case, the damages recoverable in which would be only the special damage the plaintiff could prove.

In both mortgages given by Robertson there was an attornment clause, by which he agreed to become tenant of the land mortgaged to the defendants at a yearly rental of an amount that was the same as the yearly interest payable under the mortgage, and in both mortgages there was also the usual proviso that the mortgagees might distrain for arrears of interest.

The distress warrant was not produced, having been lost, and the bailiff was not asked whether he distrained for rent or

interest, but the inference from the evidence was that the distress was made for arrears of interest simply.

A levy on the plaintiff's crop for *interest* due by Robertson would be illegal under the Distress Act, R. S. M. c. 46, s. 2.

Held, that the defendants had failed to prove that the distress was made for rent justly due. The seizure and sale were wholly illegal, and the verdict for the plaintiff must stand.

Ewart, Q.C., and *Wilson*, for the plaintiff.

Clark, for the defendants.

COLQUHOUN v. SEAGRAM.

Equitable assignment—Book debts—Husband and wife—Interpleader issue—Fraudulent preference—Pressure—New trial.

Appeal from decision of TAYLOR, C.J., 15 Occ. N. 285.

The contention of the defence was that the assignment to the plaintiff, the wife, was a fraudulent preference, which should be held void under the Assignments Act, R. S. M. c. 7, s. 38.

The debtor stated that he made the assignment at the request of the solicitor for the plaintiff, and it was argued that this request was a sufficient pressure to rebut the presumption of voluntary preference. The motive of the debtor in making the assignment had to be determined from the facts and circumstances of the case, and the evidence on that point was very meagre and unsatisfactory.

Held, that the judgment appealed from should be set aside, as also the judgment of the County Judge, and a new trial ordered.

Howell, Q.C., for the plaintiff.

Ewart, Q.C., for the defendant.

POCKETT v. POOL.

Malicious prosecution—Assault—Criminal Code, s. 53.

In an action for malicious prosecution, the plaintiff recovered a verdict, and the defendant applied to set it aside and to enter a nonsuit or for a new trial.

The plaintiff and defendant were owners of adjoining parcels of land; the line between them was not straight, and a surveyor made a new survey and straightened the line.

In April, 1895, the plaintiff entered upon a portion of the land, which, according to the line run by the surveyor, formed part of his quarter section, and which had been ploughed by the defendant in the autumn before, as a portion of his land. When the plaintiff so entered, he was accompanied by his son, and they proceeded to sow the land. While they were thus employed the defendant came up, accompanied by two neighbours, and ordered the plaintiff to leave, which he refused to do, and went on to complete the sowing. The defendant then went before a magistrate and laid an information against the plaintiff for assault. The plaintiff was arrested and committed for trial, but upon his trial was discharged.

At the trial the jury, in answer to questions left to them by the Judge, found that the defendant was not justified in thinking, from the actions and conduct of the plaintiff when ordered off the land, that he would resist by force a forcible attempt on the part of the defendant to remove him, and that the conduct of the defendant in entering proceedings against the plaintiff was malicious.

The defendant's contention was that the plaintiff committed an assault within the meaning of s. 53 of the Criminal Code.

Held, that with regard to the meaning that should be given to that section, there must be the beginning to use, or the attempt to use, actual force to remove a trespasser, before there could be on his part such resistance that he could be deemed to commit an assault within the meaning of the section. The plaintiff did not resist any attempt to prevent his entry upon the land, for no such attempt was made. He entered by an opening in the fence made by the surveyor when running the new line, and no one was present when he did so. He did not resist any force used to remove him, for none was used, nor was there any attempt to remove him, beyond the defendant verbally requesting him to go off the land. He and the defendant were never nearer to one another than thirty feet.

The defendant had no reasonable and probable cause to lay an information for assault, and malice may be inferred from the

want of probable cause: *Pursell* v. *McNamara*, 9 East 361; *Williams* v. *Taylor*, 6 Bing. 183. The question of malice was one entirely and exclusively for the jury: *Mitchell* v. *Jenkins*, 5 B. & Ad. 588.

Motion dismissed with costs.

Howell, Q.C., for the plaintiff.

Wilson, for the defendant.

WATEROUS ENGINE WORKS CO. v. WILSON.

Statutes—Company—License—58 & 59 V. c. 4, s. 9—Retroactivity — Debt secured by note and agreement under seal—Statute of Limitations—Holder of note—Evidence of.

Appeal from decision of BAIN, J., *ante* 166.

The defendants contended that the note given for the engine sold, which was payable on the 1st January, 1887, was barred by the Statute of Limitations; that being the principal security, the right to enforce the agreement given as collateral security was also gone; and that the two documents were required to make the debt enforceable.

Held, that the Statute of Limitations does not extinguish the debt, it only bars the remedy: *Williams* v. *Jones*, 13 East 450. The agreement being under seal, the plaintiffs had ten years in which to bring their action. Under the statute the remedy on the note was gone, but the debt itself was not extinguished, and there was nothing to prevent the plaintiffs from enforcing their other remedy under the agreement: *Spears* v. *Hartley*, 3 Esp. 81.

Another point raised by the defence was that the plaintiffs were not the holders of the note. The evidence showed that the note was protested at the request of the Imperial Bank, and from this it was inferred that the bank was the holder thereof at its maturity. The plaintiffs did not prove that they were the holders of the note, they produced it and filed it in the Court, but no evidence was given tending to show who was, at the time of the commencement of the suit, or of the trial, the real holder. The point was not taken in the answer and was not raised at the trial.

Held, that the fact of the bank having been the holder of the note at maturity would be by no means conclusive against the

plaintiffs' right to enforce the charge on the lands. If such a defence had been set up, the plaintiffs might have been able to show that they were the real and sole holders of the note when the suit was begun, and no such defence having been raised by the answer, the plaintiffs were not called upon to show the actual state of the matter.

Appeal dismissed and decree affirmed with costs.

Ewart, Q.C., and *Sutherland*, for the plaintiffs.

Clark, for the defendants.

[10TH JULY, 1896.

HECTOR v. CANADIAN BANK OF COMMERCE.

Discovery — Affidavit of documents — Sufficiency of — Protection from production.

An order was made in this action, upon the application of the plaintiff, that the defendant bank produce before and leave with the prothonotary "upon oath all deeds, books, papers, writings and documents in their custody or power relating to the matters in question in this cause."

The bank filed an affidavit of the manager of the branch at Brantford, in which he stated that he had knowledge of all documents which were or had been in the custody or possession of the bank relating to the matters in question in the action, and that he was cognizant of the matters in question. He stated that the bank had in its possession and power the documents relating to the matters in question set forth in the first and second parts of a schedule attached to the affidavit, but objected to produce those mentioned in the second part, which were thus described:

"The books of the bank, consisting of deposit ledgers, liability ledgers, manager's register of collateral securities, letter-books; letters written from the manager at Brantford to the manager at Winnipeg, and from the manager at Winnipeg to the manager at Brantford; letters from the solicitors of said bank."

The objection to produce the books was on the ground of their being in constant use and of the consequent inconvenience of being deprived of them. The objection to produce the letters

was "that the same are privileged communications, relating solely to the bank's case and defence herein, and do not concern the plaintiff's case."

The plaintiff applied to the referee for an order requiring the bank to file a further and better affidavit with regard to the second part of the schedule, except as to the solicitors' letters, on the ground that the affidavit was insufficient and not in compliance with the order for production, and that the books were not identified or ear-marked in any way, and that the letters of the managers were not privileged, and no sufficient ground for their non-production was shown.

This application was refused by the referee, whose decision was affirmed, upon appeal, by TAYLOR, C.J.

The plaintiff then appealed to the full Court.

Held, that the affidavit was wholly insufficient in its description of the books containing entries relating to the matters in question: *Cooke* v. *Smith*, [1891] 1 Ch. 513. A party served with an order to produce is bound to describe documents sufficiently to enable the Court to enforce the order for production: *Taylor* v. *Batten*, 4 Q. B. D. 85.

Although the motion was for a better affidavit, the real question was whether the former affidavit showed sufficient ground for excusing the bank from producing the documents. That question was settled by the decisions in *Bewicke* v. *Graham*, 7 Q. B. D. 400, and *Budden* v. *Wilkinson*, [1893] 2 Q. B. 432, and the defendants were justified in withholding production. The affidavit in this cause, though worded somewhat differently, seemed to be practically the same as the affidavits in those cases, except in omitting the statement that the documents did not tend to impeach the defendants' case.

The orders of the Chief Justice and the referee should be varied by directing the defendants to file a further affidavit showing how many and which of the letter-books referred to in the former affidavit on production contained any entry relating to the matters in question in this cause, and by striking out so much of those orders as directed payment of costs, but in other respects the appeal should be dismissed without costs.

Mulock, Q.C., for the plaintiff.

Perdue, for the defendants the Canadian Bank of Commerce.

[TAYLOR, C.J., 23RD JULY, 1896.

In re ELLIOTT v. MAY.

Prohibition—County Court—Territorial jurisdiction—Waiver of objection—Boundaries of divisions—Judicial notice.

Application for prohibition. The action was commenced in the County Court of Brandon, upon a promissory note dated at Winnipeg and payable there. In the summons the defendant, the maker of the note, was described as "of Carberry." He resided and for some years had resided at the village of Carberry. A dispute note was filed, the ground of defence stated being that the defendant was not indebted to the plaintiff as alleged.

At a sitting of the Court on 4th February the case came on for trial, but the defendant was not represented.

The Judge entered a verdict for the plaintiff; but, as, from circumstances connected with the service of the summons, it seemed possible that the defendant might have been misled as to the date of trial, the Judge stayed proceedings till the next Court day to permit the defendant to apply to re-open the case.

On the next Court day a solicitor appeared for the defendant and applied to have the case re-opened. He also applied to amend the dispute note, and at the same time raised, although not by the dispute note, the want of jurisdiction, claiming that it was apparent on the face of the proceedings. The Judge re-opened the case and directed it to be tried at the next sitting of the Court. He allowed an amendment of the dispute note, but declined to entertain the question of want of jurisdiction, holding that defence to have been waived. He also held that, although he should take judicial notice of the boundaries of the County Court divisions, at any rate within his own district, he could not take notice of the fact, if it was a fact, that Carberry was in one division and not in another.

Instead of proceeding with the trial the defendant moved for a writ of prohibition.

From the affidavits filed for the defendant there could be no doubt that he had resided at the village of Carberry for a number of years past, and was so residing when the action was brought. That being the case, the County Court of Brandon had no jurisdiction.

Held, that the motion for prohibition must be refused with costs.

The want of jurisdiction was not apparent on the face of the proceedings; the description of the defendant as "of Carberry" did not necessarily mean "of the village of Carberry." There might be other places called Carberry, and one of these might be within the Brandon County Court division: *Reg.* v. *Grannis*, 5 Man. L. R. 153; *Kearney* v. *King*, 2 B. & Ald. 301.

Here the defendant appeared and filed a dispute note for the purpose of entering into the merits of the action, and did not thereby raise the question of jurisdiction.

This was not a case in which granting prohibition would be in the interests of justice. The defendant was sued in a division just adjoining the one in which he resided, he did not suggest any injury or inconvenience on that account, and he had waived the right to object. To grant prohibition would be to decide the action in his favour, as the Statute of Limitations would be a complete answer to any fresh action the plaintiff might bring.

Thomson, for the plaintiff.

Andrews, for the defendant.

[KILLAM, J., 20TH JULY, 1896.

CLEMONS v. MUNICIPALITY OF ST. ANDREWS.

Stay of proceedings—Costs of former action unpaid.

Appeal from an order of the referee. The plaintiff brought an action to recover the value of land claimed to have been sold for taxes when none were in arrear. The defendants demurred to the declaration, and judgment was entered for them upon the demurrer: *ante* 148.

The plaintiff then brought a new action under the Queen's Bench Act, 1895, in which he claimed a declaration of right to compensation and damages; whereupon the defendants moved for an order that the proceedings be perpetually stayed, [illegible] ground that the matters in question had already been [illegible] and disposed of by a judgment of this Court [illegible] that all proceedings be stayed until the pl[illegible] given to the defendant security for costs, the [illegible] action being still unpaid, or that the proceedi[illegible] the costs of the former action be paid.

The referee made an order that all proceedings be stayed until the plaintiff should have satisfied the judgment recovered by the defendant against the plaintiff for costs in the former suit. The plaintiff appealed.

KILLAM, J., said that the case was similar in principle to *Corbett* v. *Warner*, L. R. 2 Q. B. 108, and referred to the following language of Mellor, J.: "The proceeding is ancillary to an action similar to that in which the plaintiff has already failed; and he has not shown any case to rebut the *prima facie* presumption that it is vexatious and harassing to bring this action until he has satisfied the costs of the former litigation."

Appeal dismissed with costs.

Whitla, for the plaintiff.

Perdue, for the defendants.

[BAIN, J., 25TH JUNE, 1896.

DIXON v. WINNIPEG ELECTRIC STREET R. W. CO.

Master and servant—Workmen's Compensation for Injuries Act, 1893, and amendment—Action not commenced within time limited—Nonsuit—Statutes—Retroactivity.

The plaintiff sued to recover damages for injuries received while working on the defendants' line. At the trial, in answer to questions submitted to them, the jury found that the plaintiff was injured by a fall from a pole, caused by an electric shock; that there was negligence in turning on the electric current when the plaintiff had been informed that the wire was "dead," and there was no contributory negligence on the plaintiff's part; and they assessed the damages at $1,320. The jury negatived the only allegation in the plaintiff's statement of claim on which it could be argued that the defendants were liable to him at common law.

The defendants contended that the plaintiff could not recover under the provisions of the Workmen's Compensation for Injuries Act, 1893, both because the action was not commenced within six months from the occurrence of the accident which caused the injury, and because it was not proved that notice that injury had been sustained was given to the defendants within twelve weeks from the occurrence of the accident.

The accident happened on 26th May, 1894, and the action was not commenced until 1st October, 1895.

At the time the accident happened and until 29th March, 1895, s. 7, as it stood in the original Act, was in force, and provided that "an action for the recovery under this Act of compensation for injury shall not be maintainable unless notice that injury has been sustained is given within twelve weeks and the action is commenced within twelve months from the occurrence of the accident causing the injury." By 58 & 59 V. c. 48, s. 2, this section was repealed and the following substituted therefor: "No action for the recovery of compensation under this Act shall be maintainable unless commenced within two years from the occurrence of the accident causing the injury." This amendment was assented to on 29th March, 1895.

Held, that if the case were governed by the provisions of the original section, the giving of the notice of injury and the commencement of the action within six months after the accident, were conditions precedent to the plaintiff 's right to sue. The amending statute was not retrospective in its terms. The effect of holding that the case was governed by the later statute would be to alter rights that existed before the statute was passed.

Judgment of nonsuit must be entered.

Howell, Q.C., and *Machray*, for the plaintiff.

Munson, Q.C., for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

[RICHARDSON, J., 3RD JULY, 1896.

BROOKS v. BROOKS.

Husband and wife—Separate estate of wife—Personal property—Jus disponendi—Domicil—Law of Ontario.

An action of detinue, tried before RICHARDSON, J., without a jury. The facts appear in the judgment.

Norman Mackenzie, for the plaintiff.

Secord, Q.C., for the defendants.

RICHARDSON, J.—The plaintiff here alleges that the defendants detain from him twenty-seven head of cattle, his property, and claims a return or their value, and $50 damages for detention.

In defence the defendant Mary Brooks asserts:—

(1) That she is the wife of the plaintiff;

(2) That the cattle sued for are not the plaintiff's;

(3) That the cattle are the proceeds of wages, personal earnings, and profits arising from the occupation or trade of raising cattle, butter making, and otherwise, which she has heretofore carried on, and now carries on, separately from her husband, and investments of such wages, earnings, money, and property.

Both defendants deny the several acts complained of.

The defendant J. W. Brooks denies that the cattle are the plaintiff's property.

In reply the plaintiff admits that the defendant Mary Brooks is his wife, and otherwise joins issue.

The controversy between these litigants is thus defined:—

Both defendants deny the act, *i.e.*, the detention of the plaintiff's property, as also that the cattle for whose detention the action is brought belong to the plaintiff; and Mary Brooks, who by the record is admitted to be the plaintiff's wife, asserts that the cattle in question are her separate property, derived from the occupation of cattle raising and butter making, which she carried on separately from her husband.

It is to be observed that the plaintiff claims to be the owner absolutely of the cattle, the subject of the suit, and that the defendant Mary Brooks by her first defence, which the plaintiff admits on the record to be true, asserts that she is the plaintiff's wife, and were there no other defendant or other defences on the record, the crucial point upon which the result of the suit depended would have been whether the objection raised on the argument by Mr. Secord, the defendants' counsel, that a man cannot successfully maintain an action against his own wife for detention of his property against his will, must prevail. Failing to discover any authority for such an action, I should have felt bound to give effect to Mr. Secord's contention, leaving the plaintiff, if so advised, to move to have my opinion reversed on appeal. But there is another defendant, J. W. Brooks, who in positive terms contests the plaintiff's ownership of the cattle. Thus it happens that the plaintiff's rights have to be determined by the evidence.

From this evidence I find as facts:—

1. The plaintiff and defendant were residents of Ontario, and were married there in October, 1869, and until they removed to the Territories in 1887 they constantly resided there.

2. When the plaintiff married the defendant, she owned a cow, a heifer, some sheep and pigs. The increase of the cow and heifer, together with other cattle representing the proceeds o ithe sheep and pigs and their offspring, less some disposed of in Ontario, and one since bought in the Territories, are the cattle in question in the suit.

The law in force in Ontario at the time of the marriage, relating to married women, was 22 V. c. 34, by s. 1 of which every woman who marries after its passing "shall and may, notwithstanding her coverture, have, hold, and enjoy all her . . .

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 12th FEBRUARY, 1896.

In re TAYLOR.

Sheriff—Fees—Land Titles Act, s. 92—Tariff, ss. 186, 187—Conflict—Powers of Legislature.

The deputy sheriff at Edmonton, under items 186 and 187 of the tariff of sheriff's fees, made certain charges for registering executions pursuant to s. 92 of the Land Titles Act, which provides: "The sheriff, or other duly qualified officer, after the delivery to him of any execution or other writ affecting land, if a copy of such writ has not already been delivered or transmitted to the registrar, shall, on payment to him of fifty cents by the execution creditor named therein, provided the said writ is in force, forthwith deliver, or transmit by registered letter, to the registrar a copy of the writ and all indorsements thereon, certified under his hand and seal of office."

Held, on review of taxation, that the delivering to the registrar at the Land Titles office of a certified copy of an execution was not a seizure by the sheriff; and that, as s. 92 of the Land Titles Act prescribed a certain fee for the doing of an act, it was not competent for the Legislative Assembly to prescribe a higher fee; and, therefore, the deputy sheriff was not, under the circumstances, entitled to the fees prescribed by items 186 and 187 of the tariff.

J. C. F. Bown, for the deputy sheriff.

S. S. Taylor, Q.C., for the execution creditors.

Supreme Court of Canada.

ONTARIO.] [20TH MAY, 1896.

MANLEY v. LONDON LOAN CO.

Mortgage—Payment of prior incumbrance—Interest—Assignment of mortgage —Purchaser of equity of redemption.

Judgment of the Court of Appeal, 23 A. R. 139, *ante* p. 86, affirmed.

Gibbons, Q.C., for the appellants.

W. H. Blake, for the respondent.

[21ST MAY, 1896.

BRIDGEWATER CHEESE FACTORY CO. v. MURPHY.

Company—Banks—Bills of exchange and promissory notes—Discount by president—Payment to creditors of company—Right to debit company's account.

Judgment of the Court of Appeal, 23 A. R. 66, *ante* p. 86, affirmed.

E. G. Porter and *W. Cross*, for the appellants.

Moss, Q.C., and *S. Masson*, for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

DIVISIONAL COURT.] [12TH MAY, 1896.

SMITH v. LOGAN.

Judgment—Appearance—Default—Tender — Notice — Irregularity— Motion for judgment.

Until the law stamps have been attached to or impressed upon the paper upon which a judgment is drawn up, there is no complete, effective, or valid judgment; and an appearance tendered after all the work of signing judgment for default has been completed, except the attaching of the stamps, should be received and entered.

Where an appearance, though tendered before, is not entered by the officer until after judgment, it cannot become an effective appearance until after the judgment has been set aside; and, therefore, the defendant cannot be said to be in default for not giving notice of appearance on the day on which it is entered, pursuant to Rule 281.

Where the plaintiffs insist upon the regularity of a judgment as a judgment in default of appearance, they are not in a position to take the alternative and inconsistent course of moving for judgment under Rule 739, treating the appearance as regular.

Decision of the Court below, 17 P. R. 121, *ante* p. 82, reversed.

W. H. Blake, for the appellant.

Aylesworth, Q.C., for the respondents.

CLARKSON v. DWAN.

Summary judgment—Writ of summons—Special indorsement—Interest—Promissory notes—Amendment.

The indorsement of a writ of summons, by which sums were claimed for interest upon promissory notes largely in excess of anything which could possibly be done except by virtue of some special contract, which was not alleged :—

Held, not a good special indorsement.

McVicar v. *McLaughlin*, 16 P. R. 450, distinguished.

Held, also, BURTON, J.A., dissenting, that the special indorsement was bad, and no amendment could be permitted, for the reasons given in the Court below, reported 17 P. R. 92, *ante* p. 52.

A. R. Lewis, Q.C., for the appellants.

F. A. Anglin, for the respondent.

MACMAHON, J.]

SALES v. LAKE ERIE AND DETROIT RIVER R. W. CO.

Amendment—New defence—Court of Appeal.

The defendants were sued as common carriers for breach of contract to carry and deliver safely the plaintiffs' goods. It was charged in the alternative that if the defendants had become warehousemen of the goods, their loss and destruction by fire was caused by the defendants' negligence. The defendants denied the contract, and averred that the goods were safely carried to their destination, but that the plaintiffs left them in the defendants' hands at their own risk, and, if they were destroyed, it was without any negligence on the defendants' part. The only question raised at the trial was whether the fire by which the goods were destroyed was caused by the negligence of the defendants, and that question was found against them by the trial Judge, in accordance with the evidence. On appeal to the Court of Appeal the defendants for the first time sought to defend under the special conditions on the bills of lading, by which, it was contended, they were exempted from liability for loss by negligence in the character of bailees or warehousemen, and for loss by fire.

Held, that the very right and justice of the case did not require the Court to permit the defendants to raise the new defence by amendment.

Browne v. *Dunn*, 6 R. 67, applied and followed.

Wallace Nesbitt, for the appellants.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 18TH MAY, 1896.

REGINA v. BRENNAN.

Criminal law—Murder—Manslaughter—Criminal Code, s. 229—Provocation—Assault—Legal right—New trial.

The defendant was tried upon an indictment for the murder of S. It was not denied that he had killed S., but it was urged that, by s. 229 of the Criminal Code, the offence was reduced to manslaughter as having been committed "in the heat of passion caused by sudden provocation." There was evidence that, before the killing, S. had laid hands on the defendant and put him out of his (S.'s) house. The Judge at the trial directed the jury that S. was at the time he was killed "doing that which he had a legal right to do," and that there was, therefore, no provocation and no question of fact to be submitted to the jury to reduce the crime to manslaughter.

Held, misdirection; for whether or not the deceased at the time he was shot was doing what he had a legal right to do depended upon whether, if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting, the deceased had, before laying hands upon him, ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether, if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the defendant's contention on these points.

New trial directed, upon an appeal under s. 744 of the Criminal Code.

Lount, Q.C., for the defendant.

J. R. Cartwright, Q.C., for the Crown.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 21ST MAY, 1896.

LEA v. LAING.

Security for costs—Rule 1243—Costs of former action unpaid—Solicitor—Want of authority.

Upon an application by the defendant under Rule 1243 for security for costs, upon the ground that the costs of a former action brought against him by the same plaintiff for the same cause, and discontinued, remained unpaid, the plaintiff contended that the former action, though brought by a solicitor in his name, was brought without his authority.

Held, that there should be no discussion as to the incidence of the costs of a prior action, known to the plaintiff, when the proper steps to get rid of these costs have not been taken by the plaintiff, prior to the launching of the second action.

N. F. Davidson, for the plaintiff.

Aylesworth, Q.C., and *F. J. Travers*, for the defendant.

[MEREDITH, C.J., ROSE, J., 16TH JUNE, 1896.

In re TORONTO, HAMILTON, AND BUFFALO R. W. CO. AND HENDRIE.

Appeal—Divisional Court—Railway Act—Order of Judge—Persona designata.

A Judge making an order under s. 165 of the Dominion Railway Act, 51 V. c. 29, for payment out of Court of compensation moneys, acts, not for the Court, but as *persona designata* by the statute; and no appeal to a Divisional Court lies from his order.

Canadian Pacific R. W. Co. v. *Little Seminary of Ste. Thérèse*, 16 S. C. R. 606, followed.

E. Martin, Q.C., for the land-owners.

D'Arcy Tate, for the railway company.

[Boyd, C., 4th May, 1896.

VAN TASSELL v. FREDERICK.

Will—Construction—Devise—Estate—Defeasible fee—"Die without issue"—Share.

A testator, dying in 1888, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, *habendum* to the said F. and J., "as tenants in common, their heirs and assigns forever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act as to entails by registering his conveyance within six months.

Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation.

Roe d. Sheers v. *Jeffery*, 7 T. R. 589, and *Greenwood* v. *Verdon*, 1 K. & J. 74, followed.

Chadock v. *Cowley*, 3 Cro. Jac. 695, distinguished.

Little v. *Billings*, 27 Gr. at p. 357, commented on.

Deroche, Q.C., and *Aylesworth*, Q.C., for the plaintiff.

W. N. Ponton and *O'Flynn*, for the defendants.

[Ferguson, J., 5th June, 1896.

NOVERRE v. CITY OF TORONTO.

Municipal corporations—Negligence—Way—Opening—Invitation—Accident—Land adjoining highway.

Where the plaintiff was injured by a fall upon a track leading to his own premises, which was not a street or way completed for use or opened for public travel, as he knew, and no

invitation or inducement was held out by the defendants to the public to travel upon it:—

Held, that he could not recover damages for his injury.

Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land.

Laidlaw, Q.C., for the plaintiff.

Fullerton, Q.C., for the defendants.

IN CHAMBERS.

[MEREDITH, C.J., 11TH JUNE, 1896.

In re BOKSTAL.

Creditors' Relief Act—Fund in Court—Payment out—Execution creditors—Sheriff—Distribution.

Where the surplus proceeds of a mortgage sale were paid into Court by the mortgagees, and claimed by execution creditors of the mortgagor, whose executions were in the hands of the sheriff at the time of the sale:—

Held, following *Dawson* v. *Moffatt*, 11 O. R. 484, and having regard to the provisions of s. 24 of the Creditors' Relief Act, R. S. O. c. 65, that the fund in Court should be paid to the sheriff for distribution in accordance with the provisions of that Act.

L. G. McCarthy and *Geary*, for the execution creditors.

F. C. Cooke, for the mortgagor.

[FERGUSON, J., 18TH AUGUST, 1896.

In re WEST TORONTO DOMINION ELECTION.

PRESTON v. OSLER.

PRESTON v. CLARKE.

In re LONDON DOMINION ELECTION.

FEWINGS v. BEATTIE.

Parliamentary elections — Petition—Preliminary objections — Intituling of petition—Forum for deciding objections—Presentation of petition—Proper officer—Registrar.

Motion by the respondent in each case to set aside the service of the alleged petition on the ground that no petition was presented to the Court, as required by the Dominion Controverted Elections Act and amending Acts, and the Rules of Practice of the Supreme Court of Judicature for Ontario, or, in the alternative, to hear and decide in a summary manner upon the preliminary objections presented by the respondent to the alleged petition, as provided by s. 12 of the Dominion Controverted Elections Act.

The preliminary objections were, that the alleged petition was never presented by delivering the same at the office of the clerk of the court, as required by the Controverted Elections Act and amending Acts, and that the office of the Registrar of the High Court of Justice for Ontario, at Osgoode Hall, Toronto, was not the proper office where the petition should be presented.

The petition was intituled "In the High Court of Justice," without stating any Division of that Court.

Held, sufficient.

2. *Held*, that the Judge, though not a Judge upon the rota, had jurisdiction to hear and decide these motions: ss. 2 and 12 of R. S. C. c. 9. The cases did not fall under the provisions of s. 2 of 50 & 51 V. c. 7, substituting a section for s. 4 of R. S. C. c. 9.

3. By s. 9 (c) of R. S. C. c. 9, "presentation of a petition shall be made by delivering it at the office of the clerk of the court during office hours, or in any other prescribed manner."

By s. 1 (i) of 50 & 51 V. c. 7, "the expression 'clerk of the court' means the Clerk of the Crown, Chief Clerk, Registrar of the Court, or in Ontario of any Division of the High Court of Justice, or the Prothonotary, or any officer of the Court prescribed for the purpose in question."

In Ontario there are two Registrars of the High Court (Rule 1404), and of these the Registrar first appointed shall be deemed the senior Registrar.

Mr. Holmested was the first appointed Registrar, and therefore the senior Registrar. These petitions were delivered at his office during office hours.

Rule No. 1 of the Queen's Bench Rules of the 13th February, 1875, which are still in force, provides that on the presentation of an election petition there shall be left with "the clerk of the court" a copy thereof, etc.

Order 618 of the Court of Chancery (Election Court Rule), which is still in force, declares that for all purposes other than the purposes there described, the "clerk of the court" shall be the Registrar of the Court of Chancery.

It was undisputed that Mr. Holmested was Registrar of the Court of Chancery, and that the order appointing him had not been revoked or abrogated. It was also undisputed that he was appointed Registrar of the Chancery Division of the High Court, and that that appointment had not been rescinded, unless by implication.

By Rule 1393 it was provided that the duties performed in the offices of the Registrars of the Queen's Bench, Chancery, and Common Pleas Divisions, shall be assigned to and thereafter performed in the Central Office, except so far as *special duties* are, by the Rules *or other lawful authority*, assigned to such officers or any of them.

Held, that the provisions of this Rule did not alter or change the matter. The duties referred to that were thereafter to be performed in the Central Office might well be considered to be duties appertaining to the Ontario Courts, or business in some way connected therewith, and Dominion legislation should be considered lawful authority to designate the officer with whom a controverted Dominion election petition should be filed or presented. Mr. Holmested, the senior Registrar, was the "clerk of

the court," within the meaning of s. 1 (i) of 50 & 51 V. c. 7; and the petitions were properly presented to him.

W. M. Douglas and *F. Denton*, for the petitioners.

Bristol, for the respondents.

IN THE FIRST DIVISION COURT IN THE COUNTY OF SIMCOE.

[BOYS, JUN. CO. J., 18TH JULY, 1896

SEWREY v. BURK.

FORWARD v. BURK.

LEWIS v. BURK.

BAKER v. BURK.

Division Courts—Attachment of debts—Priorities—Actions began in wrong Court—Waiver by garnishees—Effect of transfer to proper Court—Splitting demand—Debt attached due to one of two primary debtors—Particulars of demand—Amount claimed.

All the above cases were entered as garnishee cases before judgment, the Grand Trunk Railway Company being garnishees. The Lewis, Forward, and Baker cases were wrongly sued in the 1st Division Court, the cause of action in each case having arisen in the jurisdiction of the 6th Division Court, and the station agent at Barrie of the garnishees served instead of their agent at Hawkstone, which was admittedly their station nearest to the place where the cause of action arose.

The garnishees admitted liability in these three cases, but the primary debtor having disputed the jurisdiction in the same, the solicitor for the primary creditors therein applied on affidavit under s. 87 of the Division Courts Act, and had them transferred to the proper Court.

The Sewrey case was properly sued in the 1st Division Court in the jurisdiction whereof the cause of action arose, and the garnishee summons therein was served on the Barrie station agent, who was the nearest agent of the garnishees to the place where the cause of action arose.

The service on the garnishees in the Lewis, Forward, and Baker cases was prior to that in the Sewrey case.

Sewrey claimed priority over the others on the fund in the garnishees' hands.

C. W. Plaxton, for the primary creditor Sewrey. He is entitled to priority, on the ground that the service on the garnishees in the other cases was invalid, as s. 185 (2) of the Division Courts Act was not complied with. The statute is imperative, not directory: Maxwell on Statutes, 2nd ed., pp. 456 *et seq.* A garnishee proceeding is *in rem*. The jurisdiction is as to the *fund* and not as to the *person*; hence the voluntary admission made by the garnishees could not give the Court jurisdiction, nor can the garnishees waive material defects in the service of the summons and submit themselves to the jurisdiction of the Court to the predjudice of other attaching creditors: see Am. & Eng. Encyc. of Law, vol. 8, p. 1121, tit. "garnishment." If the return fails to show a proper execution of the writ by service upon the garnishee according to law, no valid attachment can be based thereon: *ib.*, p. 1126. Under s. 188 of the Division Courts Act, Sewrey, as being a *party interested*, may show just cause why the debt should not be paid over to the other primary creditors. See also D. C. Rules 28 and 212. An abandonment of the excess in the Baker case should be, in the first instance, on the face of the claim, and the discretion of the Judge at the trial should not be exercised to the prejudice of other suitors.

A. E. H. Creswicke, for the other primary creditors. Sewrey is a stranger to these proceedings, and not entitled to set up a defence under s. 188 of the Division Courts Act. The summons served in the Sewrey case does not correspond with the claim, but is for a debt due *two* debtors, while the debt is owing to only one of them. A person seeking to take advantage of a technicality must be technically correct in his own proceedings. The cases having been transferred to the proper Court under s. 87, any defect in the service was cured thereby. He referred to *Re McCabe* v. *Middleton*, 27 O. R. 170; *Bland* v. *Andrews*, 45 U. C. R. 436; *Re Guy* v. *Grand Trunk R. W. Co.*, 10 P. R. 372. As to question of jurisdiction in Baker's case, see *Stogdale* v. *Wilson*, 8 P. R. 5, and *Re White* v. *Galbraith*, 12 P. R. 513. The garnishees only could object to the mode of service, and they waived all objections by appearing.

Plaxton, in reply. The Baker claim has since been prosecuted under the Creditors' Relief Act and judgment obtained. The claim is therefore *res judicata*, and can no longer be dealt with in the Division Court: see R. S. O. c. 63, s. 18 (2). Full force and effect can now be given to the primary debtor's plea of splitting demands duly entered in this action. *Re McCabe* v. *Middleton* merely holds that a garnishee case may be transferred under s. 87 of the Division Courts Act. The order of transfer made in the above cases did not *validate* the service on the garnishees therein, but the cases were transferred with all their defects. The utility of that section is apparent in the case of costs, and also where a claim would otherwise be barred by the Statute of Limitations. The Legislature could never have intended to confer upon the Court power to make a bad service good. The transfer may be made at any time, even *before* service of the summons. There is no weight in the objection as to informality of the summons, which was owing to a mistake of the Division Court clerk. The *claim* is correct, and the claim and summons should be sued together. See also D. C. Rules 236 and 238.

Boys, Jun. Co. J.—The garnishees in these four cases were served in January, 1896, in the last three named, and in the first (*Sewrey* v. *Burk*) the garnishees were served on the 8th February, 1896.

As the four cases then stood, *Sewrey* v. *Burk* would be entitled to rank first upon the fund due by the garnishees, for the other cases were served in the wrong Court, under the requirements of s. 185 (2) of the Division Courts Act. But on 2nd March, 1896, applications were made in these three suits to have them transferred under s. 87 to the Division Court in which they ought originally to have been entered, and they were transferred accordingly. One of several questions raised is whether the Sewrey case now loses its position as regards the money due by the garnishees, or whether it still retains its priority. I have no reason to suspect that the three suits, or any of them, were entered in the wrong Division Court otherwise than by a mistake.

Still, it seems rather startling to hold that a suit can be entered by mistake, or otherwise, in any Division Court, no matter how near or how far off from the one in which there is jurisdiction, and then at any time, on being transferred to the Court that has jurisdiction, it will lose nothing as regards ranking on

any fund in the hands of a garnishee, no matter what other suits properly entered may have intervened, and have obtained a lien on, and perhaps preserved, the fund, which might otherwise have ceased to be available. Yet this must be the law if the interpretation I am asked to put upon s. 87 is the true one.

I must also ignore the provision of s. 185 (2), which states the summons "shall be issued" out of the Division Court for the division in which the cause of action arose, and hold that its issue from another Division Court is now good, and practically has always been good. And I must, contrary to the well-known principles of equity, ignore the rights of the vigilant in favour of the careless or negligent.

It may be said that s. 87 provides for such cases as these by allowing the transfer only to be made on such terms as the Judge shall order; and I must say, if the effect of my order is as contended for, and the matter had been brought to my notice, I should have introduced a condition that the transfer should not affect the position of other claims upon the fund garnished; and, if necessary, I will now amend the order *nunc pro tunc*, but I do not myself consider it is necessary. I think s. 87 was never intended to do more than prevent the trouble and expense of beginning a suit, wrongly entered, over again; and perhaps, than prevent the *debtor* from gaining any advantage by the mistake.

I decide therefore that the case of *Sewrey* v. *Burk* retains its priority, but give no decision on the point whether it would have had any priority if the transfer of the other suits had been made before the service of the garnishees in the Sewrey suit.

In the *Baker* v. *Burk* suit the cause of action appears to have been split. This was brought before the Court by plea, and shown by the statement of claim, which on its face purports to be "part account of goods supplied."

As regards the point taken that Sewrey's claim is upon a joint debt, while the debt sought to be attached is one due by the garnishees to only one of the debtors, I think there is no objection to this. A debt owing to two cannot be attached to satisfy a claim against one of these two; but it does not follow that a debt owing to one of two debtors to a plaintiff cannot be attached to pay the share of that one owing on the joint liability.

The statement of claim annexed to the summons in Sewrey's case leaves the amount claimed in blank; but, as the writ shews the amount, and also the statement of items annexed, and which is referred to in the statement of claim, I do not think this objection should prevail. The garnishees will therefore pay the claims up to the sum of $200, the amount in their hands, in the following order:—1st, *Sewrey* v. *Burk*; 2nd, *Forward* v. *Burk*; 3rd, *Lewis* v. *Burk*.

In the case of *Baker* v. *Burk* I can make no order or judgment in consequence of the claim having been split.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH AUGUST, 1896.

JACKSON v. RICHARDSON.

Mortgage—Agreement to pay compound interest—Charge upon land—Evidence.

A. and his wife gave a mortgage bearing date 25th January, 1867, on land belonging to the former to secure the payment of £332 16s. with lawful interest on 1st June, 1867, accompanied by A.'s bond in the same terms. In 1875 the mortgage and bond became vested in the plaintiff. On 12th June, 1880, A. executed a bond to the plaintiff, reciting that there was due on the original bond on 31st December, 1879, for principal and interest, $1,971.90, and providing that, in consideration of time for its payment, annual interest thereon should be paid at seven per cent., and that the annual interest, as it accrued due, if it were not paid, should become principal and bear interest as such. In 1867 and 1873 A. acknowledged by memoranda indorsed on the mortgage the amount due thereon, and in both cases the amount was computed by charging compound interest at six per cent. with yearly rests. On 18th August, 1887, the balance due on 31st December, 1886, was struck by charging compound interest

at seven per cent. with yearly rests from 31st December, 1879, the time when the balance stated in the second bond was struck, and an acknowledgment stating the amount due on the mortgage was signed by A. upon the mortgage.

In a suit for foreclosure, after A.'s death, in 1895, against his widow, to whom the equity of redemption in the mortgage had nominally been assigned:—

Held, that there was evidence of an agreement by A. from the acknowledgments indorsed on the mortgage to charge the land with the payment of compound interest at six per cent. with yearly rests up to 31st December, 1886, and that the land was so charged; but that the agreement in the second bond only created a personal liability, and that the mortgage bore simple interest at six per cent. from 31st December, 1886.

Powell, Q.C., for the plaintiff.

M. G. Teed, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[SCOTT, J., 11TH AUGUST, 1896.

BANGS v. BROWN.

Bailment—Horse—Lien—Agistment.

This was an action for the value of a horse converted by the defendant; the facts were that one William Brown (not the defendant) left the plaintiff's horse with one Stewart, of Fort Saskatchewan, with instructions to deliver it to the plaintiff upon the plaintiff paying to Stewart for William Brown $15, for finding the horse and bringing him to Fort Saskatchewan. Stewart told the plaintiff, who refused to pay any amount, but subsequently offered $5, which Stewart refused, but afterwards

consented to accept, and took the horse to Alfred Brown, the defendant, who was a livery stable keeper in Edmonton, and instructed the defendant to keep the horse until the $5 was paid. The defendant notified the plaintiff of the whereabouts of the horse, and demanded the $5, and the keep of the horse, and asserted a right to detain the horse until at least the keep was paid, and subsequently advertised and sold the horse for feed and keep under c. 30 of the Ordinances of 1892 of the North-West Territories, entitled "The Livery and Boarding Stable Keepers' Ordinance," s. 3 of which reads as follows, "Any keeper of a livery stable or a boarding or sale stable may detain in his custody and possession any animal, vehicle, harness, furnishings, or other gear appertaining thereto, and personal effects of any person who is indebted to him for stabling, boarding, or caring for such animal."

The cause was tried before SCOTT, J., at Edmonton at the March sittings, 1896.

S. S. Taylor, Q.C., for the plaintiff, contended:

(1) That the defendant had no lien under the above Ordinance, because he received the horse as a wrong-doer, knowing that it was being wrongfully held by Stewart.

(2) That the defendant was not acting in his capacity as a livery stable keeper in receiving the horse in question, but in the capacity of special custodian for a special purpose not connected with his business as a liveryman, in the usual course of the business, and consequently did not come within the jurisdiction of the Ordinance.

(3) That at common law liverymen have no lien, and the defendant only got one, if at all, under the Ordinance, which for the reasons above stated did not apply to protect him.

J. C. F. Bown, for the defendant, urged the protection of the Ordinance.

SCOTT, J.—As Stewart had no authority either express or implied from the plaintiff to deliver the horse to the defendant, the latter was not entitled at common law or under the Ordinance as against the plaintiff, to any lien upon it, either for the $5, or for its keep while in the defendant's possession.

Judgment for the plaintiff for the value of the horse.

Exchequer Court of Canada.

[McDougall, Local Judge, 26th August, 1896.

SIDLEY v. "THE DOMINION."

SIDLEY v. "THE ARCTIC."

Ship—Master's wages and disbursements — Co-owners—Mortgagee—Action in rem—Costs.

The plaintiff, John Sidley, was the owner of thirty-two shares of each of the vessels "The Dominion" and "The Arctic." The defendant Elizabeth J. Peters was the owner of the other thirty-two shares of each ship. In the first case G. P. Magann, the mortgagee of thirty-two shares owned by the defendant Peters, was also a defendant. The plaintiff was master of "The Dominion," and the first action was brought on a claim for master's wages, disbursements, and also for an account. The second action was brought for an account. Both vessels were sold by the marshal, and the proceeds remaining in Court were not sufficient to pay the amount found due to the plaintiff on the taking of the accounts.

Argument was heard on the 12th June, 1896.

Mulvey, for the plaintiff. The master is entitled to a lien for wages and disbursements, although he is also co-owner: *The Feronia*, L. R. 2 Ad. & Ec. 65. A mortgagor cannot give a mortgagee higher rights against part owners than he, the mortgagor, himself had: *Alexander* v. *Simms*, 18 Beav. 80; *Cato* v. *Irving*, 5 DeG. & Sm. 210; *The Chieftain*, Br. & L. 104. In an action *in rem* the Court has jurisdiction to give judgment for costs against the defendant personally: *The Hope*, 1 W. Rob. Ad. 156; *The Volant*, *ib.* 387. Both co-owners must pay all their liabilities owing by them jointly before any of their costs will be paid out of the proceeds of assets, and all costs must be borne equally: *Ross* v. *White*, [1894] 3 Ch. D. 326, and cases therein referred to.

Kyles, for the defendant Peters. The plaintiff is not entitled to costs. Accounts were not furnished before bringing action: *The Fleur de Lis*, 1 Asp. 149. The claim of the plaintiff was greatly reduced. For that reason he is not entitled to costs: *The William*, Lush. Ad. 199; *The Ellen Dubh*, 5 Asp. M. C. 154; *The Leumella*, Lush. Ad. 147; *The Englishman*, 38 L. T. N. S. 756.

A. C. Macdonell, for the defendant Magann. The mortgagee is entitled to priority over the plaintiff: *The Orchis*, 15 P. D. 38. The defendant is entitled to his costs of intervening: *The Sherbro*, 5 Asp. N. S. 88. The Court has jurisdiction to make a personal order against the defendant Peters for amount of claim: 56 V. c. 24, s. 35.

Cur. ad. vult.

McDOUGALL, Local Judge:—As a result of the trial of these two actions, tried together by consent, and both being actions *in rem*, between co-owners, one of them including a claim of the plaintiff (though part owner) for wages and disbursements as master of "The Dominion," I have found upon the taking of the accounts a balance in favour of the plaintiff for $956.93.

Both vessels have been sold under the directions of the Court, and the gross proceeds of both vessels was the sum of $1,400 only. Deducting the costs of sale, there will not be sufficient balance of the proceeds in Court to satisfy the plaintiff's claim, apart from any question of costs.

There is no reason why the rule as to the incidence of costs in partnership actions adopted by the courts of law should not apply to actions between co-owners in the Admiralty Court. That rule appears to be, where there are assets, to direct the payment of the costs of taking the partnership accounts out of the partnership assets.

Where there is a deficiency of assets, the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and the defendant. The Court of Admiralty has power to make an order that the costs of a proceeding shall be paid personally by the owners; at least, that is the rule in damage actions: *The Dundee*, 1 Hagg. Ad. 109; *The John Dunn*, 1 W. Rob. Ad. 159; *The Volant*, *ib.* 387; *Ex p. Rayne*, 1 Q. B. 982.

I cannot see any reason for not following this practice in actions for an account between co-owners.

I make the following order as to the disposition of the proceeds of the sale of these two vessels:

1. The costs of the sale of "The Arctic" will be paid out of the proceeds of that vessel, so far as the proceeds will allow. I understand that in the case of that ship the sale did not produce sufficient funds to pay these costs in full.

2. In the case of "The Dominion," the costs of the sale shall be first paid out of the proceeds.

3. The claim of the plaintiff, as far as the proceeds will allow, he producing a voucher of payment to Magann of the sum of $363.79, which sum forms part of his claim as awarded him. In this case, too, I believe, after paying the costs of the sale, there will not remain sufficient funds to pay the plaintiff's claim in full.

4. The total amount of the party and party costs of both the co-owners (there are only two) parties in each action shall be taxed, and the plaintiff Sidley, or Peters, the other co-owner, as the case may be, must pay to the said Peters or the plaintiff Sidley the difference between one moiety of the total amount of the party and party costs and his own party and party costs: *Austin* v. *Jackson*, 11 Ch. D. 942 *n*; *Hamer* v. *Giles*, 11 Ch. D. 942; *Potter* v. *Jackson*, 13 Ch. D.

The only remaining question is as to the costs of the intervening mortgagee, Magann. As the claim of the plaintiff for wages and disbursements absorbs the whole fund, Magann's mortgage only covering thirty-two shares, the plaintiff is entitled to be paid in priority to the mortgage.

I dismiss the claim of the mortgagee intervening against the *res* or proceeds, without

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

STREET, J.] [12TH MAY, 1896.

RUTHERFORD v. RUTHERFORD.

Parties—Action to realize charge on land—Subsequent incumbrancers—Right to vary judgment—Amount of charge—Marshalling.

Testator devised his farm to his son, "subject to the following conditions," that his widow should have the use of half the farm during life or widowhood, and that one-fifth of the value of the farm should be paid to his two daughters. By a subsequent clause of the will, he directed that at the death of his wife the half that she occupied should "be equally divided or the value thereof between my three children."

The widow occupied the west half. The son incumbered both halves in favour of different mortgagees. In an action brought by one of the daughters against the son, it was alleged that by agreement the value of her legacy had been ascertained at $400, and judgment was given declaring her entitled to a charge upon the east half for $400, directing a reference to add incumbrancers and take accounts, and in default of payment to sell the land.

Upon motion by the incumbrancers upon the east half, who were added as parties in the Master's office, to set aside or vary the judgment:—

Held, reversing the decision of STREET, J., that there was no necessity, and no right on the part of the added parties, to alter or vary the judgment to enable them to obtain their rights as against the amount of the charge fixed thereby as between the plaintiff and the defendant.

2. That the added parties had the right of marshalling; but the plaintiff, having obtained a regular judgment, had a superior equity to theirs, and they had no right to deprive her of it, nor to involve her in the expense of construing the testator's will, and ascertaining what rights of the defendant in the west half were subject to the charge. If they chose, they could redeem the plaintiff, and, standing in her place, at their own expense have recourse to the west half.

Moss, Q.C., for the appellant.

Watson, Q.C., and *Edmison*, for the respondents.

IN CHAMBERS.

[OSLER, J.A., 11TH JULY, 1896.

DAVIDSON v. FRASER.

Appeal bond—Supreme Court of Canada—Condition.

The condition in a bond filed upon appeal to the Supreme Court of Canada was to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed.*"

Held, that this was not in substance the same as the statutory condition to "pay such costs and damages as may be awarded against the appellant by the Supreme Court;" and the italicized words added a condition not required by the Supreme Court Act, and by which the respondents ought not to be hampered.

G. G. Mills, for the plaintiffs.

J. Grayson Smith, for the defendants.

HIGH COURT OF JUSTICE.

[BOYD, C., FERGUSON, J., ROBERTSON, J., 24TH JUNE, 1896.

BANK OF TORONTO v. KEILTY.

Summary judgment—Rule 739—Defence—Disclosure of facts—Appeal—Judge in Chambers—Divisional Court.

In answer to a motion by the plaintiffs for summary judgment under Rule 739 in an action upon a promissory note made

by the defendant in favour of a trading company and indorsed by them to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the reasons or grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up.

Held, that the defendant had not shewn satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend.

An order of a Judge in Chambers, made upon appeal from an order of the Master in Chambers, allowing summary judgment under Rule 789 to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court.

W. R. Riddell, for the plaintiffs.

F. Denton, for the defendant.

[FERGUSON, J., ROBERTSON, J., 30TH JUNE, 1896.

BOSWELL v. PIPER.

Attachment of debts—Rule 935—Garnishee "within Ontario"—Foreign insurance company—55 V. c. 39, ss. 14, 17.

The garnishees, an English insurance company, had an agent or attorney and a chief agency in Ontario, and service of process could be made upon such attorney for the purposes mentioned in ss. 14 and 17 of 55 V. c. 39, the Ontario Insurance Corporations Act.

Held, that the garnishees were not "within Ontario," within the meaning of Rule 935.

Canada Cotton Co. v. *Parmalee*, 13 P. R. 308, followed.

County of Wentworth v. *Smith*, 15 P. R. 372, distinguished.

G. L. Lennox, for the plaintiff.

S. W. McKeown, for the claimant Harthill.

W. Gow, for the garnishees.

[ARMOUR, C.J., FALCONBRIDGE, J., STREET, J., 1ST SEPTEMBER, 1896.

In re MOLPHY, BECKES v. TIERNAN.

Appeal—Master's certificate—Divisional Court.

An appeal does not lie to a Divisional Court from the decision of a Judge in Court upon an appeal from a Master's report.

The certificate of a Master is a report, and is subject to the same rules as to appeal as an ordinary report.

E. R. Cameron, for Elizabeth Molphy.

F. A. Anglin, for the executors.

[MEREDITH, C.J., ROSE, J., 15TH SEPTEMBER, 1896.

CAMPAU v. RANDALL.

Summary judgment—Rule 739—Special appearance—Defence of want of jurisdiction—Judicature Act, 1895, s. 124—Absence of defence on the merits.

Action upon a foreign judgment. Both plaintiff and defendant resided out of the jurisdiction; neither of them was a British subject; and the cause of action upon which the judgment was recovered arose out of Ontario. The plaintiff's right, if any, to sue in this Province depended upon s. 124 of the Judicature Act, 1895. The defendant entered a special appearance, and raised, by pleading, the question of jurisdiction.

Upon an appeal from an order affirming an order refusing summary judgment under Rule 739:—

Held, that, although the defendant failed to shew that he had a good defence to the action on the merits, and disclosed no facts that would have entitled him to defend in an ordinary action, yet the discretion exercised below should not be interfered with, having regard to the special nature of the jurisdiction conferred by s. 124, and the provision requiring, even where no appearance is entered, the plaintiff's claim to be proved before he obtains judgment.

J. B. Clarke, Q.C., for the plaintiff.

L. G. McCarthy, for the defendant.

GRAHAM v. COMMISSIONERS FOR QUEEN VICTORIA NIAGARA FALLS PARK.

Negligence — Niagara Falls Park Commissioners—50 V. c. 13, ss. 3, 4, 10—Obligation to maintain fence — Public way — Nonfeasance — Persons resorting to park—Licensees — Status of commissioners — Liability of Crown for acts of servants.

By s. 3 of the Queen Victoria Niagara Falls Park Act, 1887, the lands selected for the park were vested in the defendants as trustees for the Province.

The plaintiff was injured by an accident due to a fence along the edge of the cliff forming the bank of the Niagara river being in an insecure and defective condition, owing to an unauthorized act of a railway company. The place of the accident was not within the limits of the lands mentioned in s. 3, but upon lands which became vested in the defendants by force of the provisions of s. 4, and upon a public way reserved thereout by s.-s. 5. The fence had been built before, and was existing at the time the park was vested in the defendants. The plaintiff was in the park either under s. 10, providing that the grounds shall be open to the public, or in the enjoyment of the public way provided by s. 4.

Held, that, in the absence of any statutory provision expressly or impliedly casting upon the defendants the duty of keeping the public way in repair or the obligation to maintain a fence or railing upon the edge of the cliff, no such duty or obligation towards the plaintiff existed.

Whether the defendants were to be regarded as servants of the Crown or not, no action lay against them for not keeping the fence in repair. If it were viewed as a protection for the travelling public in the use of the public way, the absence or insufficiency of which might, in the case of a municipal corporation, render it liable as for a default in discharging its statutory duty to keep its highways in repair, the defendants were not liable; for the condition of the fence was not due to misfeasance, but to nonfeasance, the unauthorized act of the railway company not being chargeable to the defendants as an act of misfeasance on their part.

Gibson v. *Mayor of Preston*, L. R. 5 Q. B. 218; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524; *Sydney* v. *Bourke*, [1895] A. C. 433, followed.

If, on the other hand, the defendants' liability was based upon the allegation of a duty to maintain the fence for the protection of those resorting to the park, the plaintiff's case also failed; for no charge was made for the privileges which she enjoyed, and she occupied at most the position of a bare licensee, as to whom there would be no duty in respect of a bare defect of construction or repair which the defendants were only negligent in not finding out or anticipating the consequences of.

Southcote v. *Stanley*, 1 H. & N. 247; *Ivay* v. *Hedges*, 9 Q. B. D. 80; *Schmidt* v. *Town of Berlin*, 26 O. R. 54; and *Moore* v. *City of Toronto*, *ib.* 59 *n.*, followed.

Held, also, having regard to the various provisions of the Act of 1887, that the defendants were intended to act in the discharge of their duties thereunder "as an emanation from the Crown," or that it was intended to make the Government the principal, and the commissioners merely a body through which its administration might be conveniently carried on. There was no negligence on the part of the commissioners, but the negligence was that of the subordinate officers who had been appointed under the provisions of the Act, and the effect of a recovery would be to charge the property of the Crown vested in the defendants with damages and costs for a wrong committed by a servant of the Crown, for which the Crown was not by the law of this Province liable.

Mersey Docks Co. v. *Gibbs*, L. R. 1 H. L. 93; *The Queen* v. *Williams*, 9 App. Cas. 418; and *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795, distinguished.

The enactment in Ontario of legislation establishing the liability of the Crown for wrongs committed by its servants, suggested.

Aylesworth, Q.C., and *F. W. Hill*, for the plaintiff.

Irving, Q.C., and *W. M. German*, for the defendants.

[BOYD, C., 25TH JUNE, 1896.

STARK v. ROSS.

Receiver—Ex parte order—Costs—Review.

After judgment a receiver may be appointed *ex parte* in case of emergency, or where there is danger apprehended in the disposal of property.

Re Potts, [1893] 1 Q. B. at p. 662, and *Minter* v. *Kent, etc., Land Society*, 11 Times L. R. 197, referred to.

And where *ex parte* orders were made in respect of two parcels of stock which the plaintiff feared might be disposed of if notice were given, and in both cases costs were given to the applicant:—

Held, that the disposition of the costs should not be reviewed on motion to continue the receiver.

Moss, Q.C., for the plaintiff.

Langton, Q.C., for the defendant.

[FERGUSON, J., 10TH SEPTEMBER, 1896.

In re TORONTO, HAMILTON, AND BUFFALO R. W. CO. AND KERNER.

Railways and railway companies—Legislative authority—Alteration of grade of street—Arbitration and award—Appeal—Dominion Railway Act, 1888, s. 161, s.-s. 2—Damages—"Structural damages"—"Personal inconvenience."

Held, that the railway company, though incorporated by 47 V. c. 75 (O.), was, by 54 & 55 V. c. 86 (D.), subject to the

legislative authority of the Parliament of Canada, and its power to do the work of altering the grade of a street, in the doing of which the damages claimed by a land-owner arose, was under s. 90 of the Dominion Railway Act, 1888; and the rights of the parties in an arbitration to ascertain such damages were governed by the provisions of that Act.

And where the arbitrator awarded that the land-owner had suffered no damage:—

Held, that, having regard to the provisions of s. 161, s.-s. 2, no appeal lay from the award.

Held, also, that the arbitrator had no power to allow the land-owner "structural damages" caused to his buildings, or damages for "personal inconvenience" by reason of his means of access being interfered with.

Ford v. *Metropolitan R. W. Co.*, 17 Q. B. D. 12, distinguished as to the former kind of damages, and followed as to the latter.

Bruce, Q.C., for John Kerner.

D'Arcy Tate, for the railway company.

IN CHAMBERS.

[BOYD, C., 15TH JUNE, 1896.

WILSON v. MANES.

Security for costs—Appeal to Divisional Court—Judgment at trial—Rule 1487 (803).

Rule 1487 (803) does not interfere with the previous and still existing right to appeal from the udgment of the trial Judge to a Divisional Court. The words "appeal from a single Judge" mean from a Judge presiding in Court, and not at the trial of a cause. A party has the right to prosecute an appeal from the judgment at the trial to a Divisional Court without terms being imposed as to giving security for costs.

Semble, that security should not be "specially ordered," under Rule 1487 (803), upon an appeal by the defendant, where substantial questions arise and the action is of a penal character.

Aylesworth, Q.C., for the aintiff.

W. E. Middleton, for the defendant.

[MEREDITH, C.J., 8TH SEPTEMBER, 1896.

MOONEY v. JOYCE.

Parties—Causes of action—Joinder—Rule 300.

Two plaintiffs joined in an action a claim by one for $500 damages for the wrongful interference of the defendants with him in the completion of a building, and for assaulting and arresting his servant and co-plaintiff, and a claim by the other for $2,000 damages for the same assault and arrest.

Held, that each was a separate and distinct cause of action, and they could not properly be joined, under Rule 300.

Smurthwaite v. *Hannay*, [1894] A. C. 494, and *Carter* v. *Rigby*, [1896] 2 Q. B. 118, followed.

Booth v. *Briscoe*, 2 Q. B. D. 496, distinguished.

L. G. McCarthy, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

[FERGUSON, J., 14TH SEPTEMBER, 1896.

CLARK v. VIRGO.

Costs—Taxation—Two defendants appearing by same solicitor—Appeal—Extension of time—Solicitor's mistake—Objections to taxation—Question of principle—Rules 1230, 1231.

An action against two defendants, who defended by the same solicitor, was dismissed as against one with costs, and judgment was given for the plaintiff against the other with costs.

Held, that the successful defendant should on taxation be allowed the costs of services, if any, appertaining wholly to his own defence, and at most only a proportionate part of the costs of services appertaining to both defences, as in *Heighington* v. *Grant*, 1 Beav. 228.

Time for appealing from taxation extended, as a matter of discretion, where, by the mistake of the solicitor, the appeal was at first brought on in due time in the wrong forum, and after that, but too late, in the proper forum.

Where the principle on which the taxing officer acts is objected to, that is to say, his mode or method of proceeding in

taxing the bill, it is not necessary for the party proposing to appeal to carry in written objections before the officer, as provided for by Rule 1230, to enable him to review his taxation, under Rule 1231.

D. L. McCarthy, for the plaintiff.

W. H. P. Clement, for the defendant E. E. Virgo.

[15TH SEPTEMBER, 1896.

In re BRODERICHT v. MERNER.

Division Court—Garnishee plaint—Application to remove into High Court—Judgment against primary debtor only—R. S. O. c. 51, s. 79.

An application under s. 79 of the Division Courts Act, R. S. O. c. 51, to remove an action from a Division Court into the High Court will not lie after judgment in the Division Court; and this rule will be applied where the action in the Division Court is brought under s. 185, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined.

Gallagher v. *Bathie*, 2 U. C. L. J. N. S. 73, applied and followed.

W. M. Douglas, for the plaintiff.

W. H. P. Clement, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 15TH SEPTEMBER, 1896.

WALSH v. NUGENT.

Practice—Suit by administratrix—Joinder of husband—Will—Non-payment of legacy—Bill by legatee—Admission of assets.

W. by his will appointed his wife sole executrix, and left

her the residue of his estate after payment of three legacies. The executrix proved the will and paid one of the legacies. She died intestate, and the defendant took out letters of administration of her estate. The plaintiff, a married woman, who was one of the unpaid legatees under W.'s will, obtained letters of administration *de bonis non* of W.'s estate and filed a bill against the defendant to have the estate administered in equity, an account taken of the unadministered assets received by the defendant, and payment of the same to the plaintiff. There was no allegation in the bill that one of the legacies had been paid and that this was an admission of assets for the payment of all of them. The plaintiff did not make her husband a party to the suit. The defendant in her answer claimed that there were no assets to pay the legacies, as W. at the time of his death was indebted to his wife for advances out of her own property, which with some other debts exceeded the value of his estate.

Held, (1) That the bill should be amended by making the plaintiff's husband a co-plaintiff.

(2) That the plaintiff was not entitled to a decree against the defendant for payment of her legacy without a reference being had and an account taken, when the bill did not charge that the testator's executrix had admitted assets and become personally liable by paying one of the legacies, and the defendant had expressly denied that there were any assets for the payment of the legacies.

C. A. Palmer, Q.C., and *A. H. Hanington*, Q.C., for the plaintiff.

D. Mullin, for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

ARMOUR, C.J.] [30TH JUNE, 1896.

GREEN v. McLEOD.

Evidence—Corroboration—Executors and administrators—Action by administratrix—Inference—Probability.

The "material evidence" in corroboration required by the Evidence Act, R. S. O. c. 61, in an action by or against the heirs, executors, administrators, or assigns, of a deceased person, may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness' statement.

In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the moneys in question were paid in due course to the deceased is sufficiently corroborated by showing that the deceased, a close, careful, intelligent man, who lived for over a year after the transactions in question, and during that time saw and conversed with many persons, made no complaint of the non-receipt of the money.

Judgment of ARMOUR, C.J., affirmed.

Ball, Q.C., and *Aylesworth*, Q.C., for the appellant.

Osler, Q.C., and *W. T. McMullen*, for the respondent.

MEREDITH, C.J.]

FLEMING v. LONDON AND LANCASHIRE LIFE ASSURANCE CO.

Life insurance—Premium—Payment—Promissory note of third person—Discount of note of insured.

To cover the first premiums upon two policies of assurance, the assured gave to the company's agent his promissory note and the promissory note of his brother, payable to the agent's

order. Each policy contained a provision that in the event of non-payment of a note given for a premium, the policy should become void. The agent discounted the notes with his own bankers, and in his return to the company treated the premiums as paid, and the company took from him his own note in their favour to cover the balance due by him, which included other premiums. The notes given by the assured and his brother to the agent were not paid, and after their maturity and dishonour the assured died.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that what took place between the company and the agent was not equivalent to payment of the premiums, and that, there being no misapplication by the agent or misleading of the assured, his representatives could not recover.

Per OSLER and MACLENNAN, JJ.A., that by discounting the notes the agent received payment of the premiums, as between himself and the company, and the subsequent non-payment of the notes was entirely a matter between the agent and the makers.

In the result the judgment of MEREDITH, C.J., 27 O. R. 477, *ante* 188, in favour of the assured's representative, was affirmed.

Robinson, Q.C., and *W. Nesbitt*, for the appellants.

Osler, Q.C., and *J. R. Roaf*, for the respondent.

STREET, J.]

NIAGARA DISTRICT FRUIT GROWERS' ASSOCIATION v. WALKER.

Principal and surety—Guarantee bond—Non-disclosure.

An agent was engaged by the plaintiffs from year to year for four years to sell fruit on their behalf on commission, one of the terms of the engagement being that all moneys received by him on behalf of the plaintiffs should be paid in from day to day to their credit in a named bank. The agent made default in this respect, and a large balance was due by him to the plaintiffs at the end of each of the first three years, and the plaintiffs at the end of each year took his note for the amount due, payable in the next year. In each year he gave a bond to the plaintiffs to secure the faithful performance of his duties and the prompt

payment of moneys received. The defendants were the sureties in the bond given in the fourth and previous years, and entered into the contract of suretyship without making any inquiries from the plaintiffs. This action was brought against them to recover the balance due.

Held, reversing the judgment of STREET, J., that the plaintiffs should have informed the sureties of the previous defaults, and not having done so could not enforce the bond.

E. D. Armour, Q.C., and *McBrayne*, for the appellants.

Moss, Q.C., and *G. W. Meyer*, for the respondents.

IN CHAMBERS.

[MACLENNAN, J.A., 8RD OCTOBER, 1896.

GRAHAM v. TEMPERANCE AND GENERAL LIFE ASSURANCE CO.

Appeal—Court of Appeal—Judgment on preliminary issue—Order of Divisional Court—Leave to appeal—Judicature Act, 1895, ss. 72, 73.

Having regard to the provisions of ss. 72 and 73 of the Judicature Act, 1895, an appeal lies to the Court of Appeal, without leave, from the judgment upon the trial of a preliminary issue directed by an order in Chambers; but leave is necessary for an appeal from an order of a Divisional Court affirming an order in Chambers, where the appellant is the same party who appealed to the Divisional Court, and the order appealed from was pronounced after, although the appeal was taken and heard before, the coming into force of the Act of 1895.

C. D. Scott, for the plaintiff.

W. H. Blake, for the defendants.

[24TH OCTOBER, 1896.

BOURNE v. O'DONOHOE.

Appeal—Court of Appeal—Order of Divisional Court affirming Chambers orders—Leave to appeal—Special circumstances—Terms.

An appeal lies to the Court of Appeal from an order of a Divisional Court dismissing an appeal from an order of a Judge in Chambers dismissing an appeal from an order of the Master

in Chambers dismissing a motion to set aside judgment by default of defence in an action for the recovery of land; but only upon leave to appeal being obtained.

Construction of ss. 72 and 78 (as amended) of the Judicature Act, 1895.

And leave to appeal was granted where the omission to file the defence was a mere slip of the solicitor; the application for relief was made promptly; and it appeared that in a previous action the Court had stayed proceedings under the power of sale contained in the mortgage upon which this action was brought, and had required an action of ejectment to be brought.

Terms of payment of costs and security for costs imposed.

Masten, for the plaintiffs.

Meek, for the defendant.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., 15TH SEPTEMBER, 1896.

In re BRANTFORD ELECTRIC AND POWER CO. AND DRAPER.

Landlord and tenant—"Buildings and erections"—Payment for—Fixtures and machinery.

A covenant in a lease to pay for "buildings and erections" covers and includes fixtures, and machinery which would have been fixtures but for the Ontario Act 58 V. c. 26, s. 2 (*c*).

Order of FALCONBRIDGE, J., affirmed.

Wilkes, Q.C., and *A. E. Watts*, for the company.

James Harley and *E. Sweet*, for Draper.

In re MAGANN AND BONNER.

Landlord and tenant—Overholding tenant—County Court Judge—Order for possession—Wrongful holding—Evidence.

A County Court Judge should not act under the Act respecting Overholding Tenants, R. S. O. c. 144, as amended by 58 V. c. 18, s. 23, and 59 V. c. 42, s. 4, by ordering the issue of a

writ for possession, unless it clearly appears that the tenant "wrongfully holds" against the right of the landlord, and that the case clearly comes under the true intent and meaning of s. 2 of the Act.

J. MacGregor, for the tenant.

Worrell, Q.C., for the landlord.

MEREDITH, C.J., ROSE, J., MACMAHON, J.]

MUNRO v. WALLER.

Landlord and tenant—Covenant not to assign without leave—Short Forms Act—Re-assignment to original lessee.

The words "any person or persons" in the long form of the covenant not to assign or sub-let without leave in the Act respecting Short Forms of Leases, R. S. O. c. 106, include the original lessee; and where an assignment from the original lessee has been made, with the consent of the landlord, a re-assignment to the original lessee without the consent is a breach of the covenant.

McCormick v. *Stowell*, 138 Mass. 431, not followed.

Varley v. *Coppard*, L. R. 7 C. P. 505, and *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461, referred to.

Judgment of STREET, J., affirmed.

C. Millar, for the plaintiff.

D. Urquhart, for the defendant.

WOLFF v. McGUIRE.

Landlord and tenant—Receipt for rent—Lease or agreement—Implied covenant—Tenant-like user—Permissive waste—Voluntary waste—Fire.

The plaintiff rented premises to the defendant for a month, giving the following receipt for the rent: "October 20, 1894. Received from A. G. McGuire the sum of $9, in full payment for rent of stable from the 25th October, 1894, to November 25, 1894," and the defendant took possession. During the month the premises, being uninsured, were destroyed by fire. In an action by the landlord against the tenant for damages:—

Held, that the receipt was a lease and not an agreement for a lease, and that possession being taken under it, the only covenant to be implied was that the tenant would use the premises in a tenant-like manner, and would not commit voluntary waste; and that the tenant was not liable for permissive waste; and that an accidental fire without negligence is permissive, not voluntary, waste.

Judgment of FALCONBRIDGE, J., affirmed.

McCarthy, Q.C., for the appeal.

Wallace Nesbitt, contra.

[22ND OCTOBER, 1896.

AIKINS v. DOMINION LIVE STOCK ASSOCIATION OF CANADA.

Club—Committeemen—Liability—Amendment — Parties — Co-contractors—Application to add—Affidavit—Costs.

Where credit is given to an abstract entity such as a club, the creditor may look to those who in fact assumed to act for it and those who authorized or sanctioned that being done, at all events where he did not know of the want of authority of the agent to bind the club; ROSE, J., dissenting.

Review of English cases on this subject.

The liability in such cases is not several, but joint.

By analogy to the old practice, where a plea in abatement for non-joinder of co-contractors was pleaded, a defendant now moving to stay proceedings until the co-contractors are added as parties should show by affidavit the names and residences of the persons alleged to be joint contractors whom he seeks to have added, and the same liability as to costs, in case persons are added who turn out not to be liable, should be entailed upon him.

In an action begun against an unincorporated company, as a partnership, to recover a sum for costs paid by the plaintiffs, an order in Chambers allowing the plaintiffs to amend by adding as defendants certain members of the executive committee of the company, and to charge them in the alternative

as personally liable by reason of their having sanctioned the arrangement between the plaintiffs and the association, was affirmed without prejudice to the defendants applying to add parties.

W. R. Smyth, for the plaintiffs.

Allan McNab and *L. G. McCarthy*, for the defendants.

[BOYD, C., 19TH OCTOBER, 1896.

ROBINSON v. DUN.

Libel—Mercantile agency—Confidential report—Privilege—Reasonable care.

In an action of libel brought by a trader against the conductors of a mercantile agency, it appeared that the libellous matter was sent to a few subscribers on their personal application. The information on which the statement complained of was founded in reality related to another trader of the same name as the plaintiff.

Held, that the publishing of the information was a matter of qualified privilege, but that the want of reasonable care in collecting the information was evidence of malice, which destroyed the privilege.

Todd v. *Dun*, 15 A. R. 85, followed.

Cossette v. *Dun*, 18 S. C. R. 222, discussed.

Gibbons, Q.C., for the plaintiff.

W. Nesbitt and *R. McKay*, for the defendants.

[FERGUSON, J., 19TH OCTOBER, 1896.

JOHNSTON v. HENDERSON.

Auctioneer—Conversion of goods—Chattel mortgagee.

In an action for the wrongful conversion of goods brought by a chattel mortgagee against auctioneers, it appeared that the defendants, at the instance of the mortgagor, though in the name of another, sold the goods in the usual way of auctioneers' sales, under the hammer, at the house of the mortgagor, and gave possession to the purchasers, excepting some articles that

were too heavy for immediate removal, professing to have dominion over the goods and to pass the property and give possession to the purchasers.

Held, upon the evidence, that the chattel mortgage was, as between the mortgagor and the mortgagee, at the time of the sale by the defendants, in full force, and the plaintiff was the owner of the goods to the extent of the amount necessary to satisfy the unpaid balance owing to him, as against the mortgagor, or any mere wrongdoer, not being, or claiming under, a creditor of the mortgagor, or a subsequent purchaser in good faith; and that the defendants were liable for the conversion of the goods.

Cochrane v. *Rymill*, 27 W. R. 776, 40 L. T. N. S. 744, followed.

National Bank v. *Rymill*, 44 L. T. N. S. 767, and *Barker* v. *Furlong*, [1891] 2 Ch. 172, distinguished.

E. B. Ryckman and *A. T. Kirkpatrick*, for the plaintiff.

Charles Macdonald, for the defendants.

[FALCONBRIDGE, J., 8TH SEPTEMBER, 1896.

BEATY v. GREGORY.

Mortgage—Covenant—Trustees of church—Personal liability.

The plaintiff conveyed lands to the defendants as trustees of the Parkdale Baptist Church, and took a mortgage back from them to secure the purchase money, the mortgagors being, besides their individual descriptions, expressed to be "trustees under R. S. O. 1887, chapter 237, of the Parkdale Baptist Church," which mortgage contained the usual covenants, and was executed by the defendants individually, with individual seals. There was no corporate seal.

Held, that the defendants were not personally liable.

The words "trustees," etc., were meant to limit and qualify the character in which they were to be held answerable, and sufficiently indicated that they did not mean to bind themselves personally. The plaintiff had his remedy against the church, which was a quasi-corporation by virtue of R. S. O. c. 237.

J. B. Clarke, Q.C., and *Swabey*, for the plaintiff.

Moss, Q.C., and *D. Urquhart*, for the defendants.

[STREET, J., 23RD OCTOBER, 1896.

MOORHOUSE v. KIDD.

Principal and surety—Contribution between co-sureties—Failure to realise on security.

The plaintiff and defendant were co-sureties for payment of a debt, which the plaintiff paid, and claimed contribution from the defendant. At the time the sureties became bound, the debtor gave them as indemnity a second mortgage on lands in Manitoba. When the plaintiff paid the debt, the mortgage deed passed into his custody. The defendant, when called upon for contribution, instead of paying, insisted that the plaintiff should realize upon the security or hand it over to the defendant to proceed upon; but the plaintiff refused to take either course. At this time the mortgaged property was sufficient to cover the first mortgage and the sum paid by the plaintiff; but when this action was begun, it had become so depreciated in value as to be insufficient to cover the first mortgage.

Held, that the defendant was not relieved from liability by the plaintiff's neglect or refusal to sell the mortgaged property. The plaintiff, having paid the debt, stood in the creditor's place as a creditor of the defendant.

Re Parker, [1894] 3 Ch. 400, followed.

Chrysler, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

IN CHAMBERS.

[BOYD, C., 24TH OCTOBER, 1896.

CRERAR v. HOLBERT.

Parties—Causes of action—Joinder.

The statement of claim alleged that two of the defendants, by fraudulent representations, induced the plaintiffs to enter into an agreement for the purchase of a horse; that one of these defendants, in the name of his partner, a third defendant, having agreed to become a co-partner with the plaintiffs in the purchase, made a fraudulent profit by way of commission out of

the transaction; that these three defendants transferred promissory notes, made by the plaintiffs with the intention of carrying out the transaction, to the fourth and fifth defendants, who had notice of the fraud; and the plaintiffs claimed to have the agreement declared fraudulent and void and ordered to be cancelled; to have the notes declared void and ordered to be cancelled; or to have the first three defendants ordered to indemnify the plaintiffs against the notes; damages for the false representations; or that the defendants alleged to have received a commission should be ordered to account to the plaintiffs therefor.

After the parties had been for more than six months at issue, the defendants applied to strike out the statement of claim as embarrassing.

Held, that the transaction complained of was one that should be investigated in all its parts on the one record, and that no peculiar difficulty would arise in dealing with it as a whole, and then following such details as might be pertinent.

J. H. Moss, for the plaintiffs and the defendants McDonald and Grenier.

R. McKay, for the defendants Holbert, Eby, and Vance.

W. H. Blake, for the defendants J. & R. Forbes.

[FERGUSON, J., 18TH SEPTEMBER, 1896.

LOCKHART v. WAUGH.

Costs—Taxation—Successful defence upon one ground—Costs relating to other grounds.

It was adjudged that the plaintiff should pay to the defendants so much of the costs of the action (upon a building contract), reference, and appeal, as were occasioned by reason of the plaintiff claiming to be allowed as against the defendants, for extra work, anything in addition to the sums allowed therefor by the architect.

Held, that in taxing costs under this direction, the officer was in error in disallowing to the defendants the costs of witnesses called to shew the value, etc., etc., of the extras that had been disallowed to them by the architect's certificate, which was

attacked by the plaintiff. The defendants were not called upon to stand upon a single item of evidence, though in the end it might appear that the item would have been sufficient for their purposes.

E. G. Rykert, for the plaintiff.

Aylesworth, Q.C., for the defendants.

PIPER v. BENJAMIN.

Notice of trial—Irregularity—Close of pleadings.

A pleading in reply, which was more than a simple joinder of issue, was served by the plaintiffs on the 30th June, 1896. No further or other pleading having been delivered, and no extension of time for further pleading having been granted, the plaintiffs, on the 4th September, 1896, between three and four in the afternoon, served a notice of trial for the 14th September, 1896.

Held, irregular.

S. W. McKeown, for the plaintiffs.

J. B. Holden, for the defendant.

[ROBERTSON, J., 26TH SEPTEMBER, 1896.

In re CANADIAN PACIFIC R. W. CO. AND CARRUTHERS.

Interpleader—Bailees—Right to order—Inability to deliver specific property—Claim for unliquidated damages.

Where grain was shipped over a railway under a contract which provided that it might be deposited in the railway company's elevators in common with other grain of like grade, and at its destination was claimed by the indorsee of the bill of lading, and also by an investment company claiming under a mortgage from the shipper, an interpleader order was made, upon the application of the railway company as carriers or bailees,

notwithstanding that the specific grain could not be delivered, owing to its having been mixed with other grain in the elevator, as permitted by the contract, and notwithstanding that the investment company's claim was, as contended, one for unliquidated damages for conversion of the grain.

Attenborough v. *St. Katharines Dock Co.*, 3 C. P. D. 450, followed.

Aylesworth, Q.C., for the railway company.

Marsh, Q.C., for the claimant Harris.

C. W. Kerr, for the claimants the Scottish American Investment Company.

NEW BRUNSWICK.

In the Supreme Court.

[6TH NOVEMBER, 1895.

MURRAY v. DUFF.

Pleading—Amendment.

The defendants were allowed, after the hearing of the argument, to amend by adding a plea.

Ex parte BISHOP.

Canada Temperance Act—Summary conviction for two offences—Imprisonment—Concurrent sentences—Habeas corpus.

The applicant was summarily convicted, at the same time, of two offences against the Canada Temperance Act, viz., for selling liquor and for keeping it for sale, and it was adjudged that in default of the payment of the fines imposed, or distress, that he be imprisoned in the common gaol of the county of Westmoreland for the space or term of three months for each offence. Having served one term, he applied to LANDRY, J., for

an order in the nature of a writ of *habeas corpus*, who granted the same, and now referred the matter to the Court. The principal ground relied upon for discharge was that the justices not having stated that the second sentence was to commence at the expiration of the first, they ran concurrently.

Referred back to LANDRY, J., to refuse application.

[7TH NOVEMBER, 1895.

Ex parte EMMERSON.

Certiorari—Practice—Affidavits.

On motion a rule nisi for a certiorari granted at the last term was discharged, because a copy of the original proceedings was not attached to the affidavits upon which the rule was granted, nor was their absence accounted for, and the affidavits did not attempt to disclose what the proceedings were.

[16TH NOVEMBER, 1895.

MURRAY v. DUFF.

Crown grant—21 Jac. I. c. 14—Information of intrusion—Adverse possession against Crown—Evidence—Will proved and recorded before death of testator—55 V. c. 11, s. 2 (N.B.)

The Imperial statute 21 Jac. I. c. 14 is in force in this Province; therefore, a grant of land, of which possession has been out of the Crown for twenty years previous to the issuing thereof, is invalid without the Crown's title being first established by an information of intrusion.

Per TUCK, J., that under 55 V. c. 11, s. 2 (N.B.), a will proved before a notary public, and recorded during the lifetime of the testator, was properly admitted in evidence.

LOVITT v. SNOWBALL.

Costs—Taxation—Witness fees—Affidavit of belief—Rule of Court—Statute—Retroactivity.

1. Sections 1 and 2 of 58 V. c. 14 (N.B.) are retrospective.

2. *Per* VANWART and LANDRY, JJ., TUCK, J., dissenting, that the uncontradicted affidavit of a solicitor, that he verily believes that G. travelled a distance of 750 miles for the purpose of giving evidence, etc., is not sufficiently positive to warrant the clerk taxing witness fees thereon.

3. *Per* TUCK, J., that where it is enacted, "it shall be the duty of the Court to prescribe, by rule of Court, a form for the judgment in this section," and no such form has been prescribed, the Court may now order one to be made.

GASS v. FORD.

Costs—Certificate for—Action of tort—C. S. N. B. c. 60, s. 42.

Section 42 of C. S. N. B. c. 60, as to certificate for costs, applies to actions for torts.

RITCHIE v. LAWLOR.

Bail—Discharge of—Delay—Excuse.

The plaintiff allowed seven months to elapse after special bail was put in, before entering the cause and filing the affidavit to hold to bail; alleging, as an excuse, that the defendant's attorney had offered, but failed, to give a confession of judgment.

Held, that the delay was unnecessary, the excuse insufficient, and the bail were entitled to be discharged.

GLIDDON v. TOWN OF WOODSTOCK.

Municipal corporation—Obstruction of street—Negligence—Misdirection—Evidence.

In an action for negligently obstructing a public street with a hydrant and two posts, so as to be dangerous to persons

passing along the street in the dark, and suffering the hydrant and posts to remain upon the street during the dark, without a light, or means to prevent persons from striking the same:—

Held, *per* BARKER, LANDRY, and VANWART, JJ., TUCK and HANINGTON, JJ., dissenting, that the placing of the posts near the hydrant was evidence from which the jury might find negligence, and that it was not misdirection in the learned Judge to so instruct them.

Held, also, that it was not misdirection to leave to the consideration of the jury whether a line between the sidewalk and roadway should not have been made by the defendants.

Held, also, *per* HANINGTON, BARKER, LANDRY, and VANWART, JJ., that evidence showing other accidents from the same cause was properly admitted.

TRUE v. TRUE.

Estoppel—Trover—Receipt—Abandonment—Settlement.

Whether or not there is an estoppel is a question of fact for the jury, and, they having found affirmatively, the Court refused to disturb the verdict.

BANK OF NOVA SCOTIA v. RICHARDS.

Principal and agent—Agent's authority—Representations by agent—Constructive notice.

Where an agent's authority is questioned, and where the circumstances are such as to put the party on inquiry, both as to the truth of the representations and the agent's authority, and he makes no inquiry, but chooses to rely on the agent's statement, he must be held liable to the same extent as though he knew the facts.

HARRISON v. McLEAN.

Writ of summons—Special indorsement—Bill of exchange—Acceptance.

The indorsement of a writ of summons alleged that the defendant accepted the bill of exchange sued on, but did not state that he did so under initials and name.

Held, sufficient as a special indorsement.

IN EQUITY.

[BARKER, J., 23RD OCTOBER, 1896.

BRADSHAW v. FOREIGN MISSION BOARD.

New trial—Issues tried by jury—Evidence—Misdirection—Equity practice.

It is largely in the discretion of a Court of equity to refuse or grant a new trial of issues tried before a jury; and where evidence has been improperly admitted or rejected, if the findings are satisfactory to the Court, and are the same that ought to have been made if there had been no improper admission or rejection of evidence, and the Court is satisfied that justice on the whole has been done, a new trial will not be granted.

In a Court of equity, misdirection is not a ground for a new trial as a matter of right, if it is of such a nature that it ought not properly to have influenced the jury in its finding, and justice has been done between the parties.

Pugsley, Q.C., and *C. A. Stockton*, for the plaintiff.

Gilbert, Q.C., *C. A. Palmer*, Q.C., and *M. McDonald*, for the defendant.

LAUGHLAN v. PRESCOTT.

Discovery—Interrogatories—Information—Relief.

It is not enough for a defendant, in answer to interrogatories as to facts not within his own knowledge, to answer according to his information merely; he must answer as to his belief as well.

C. A. Palmer, Q.C., and *Montgomery*, for the plaintiff.

Gilbert, Q.C., for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 1ST OCTOBER, 1896.

FAIRCHILD v. CRAWFORD.

Execution—Lost writ—Issue of new writ.

A writ of *fieri facias de bonis* was issued in 1892, renewed in 1894, and again in 1896. After the last renewal the plaintiff's attorney returned it to the sheriff through the post-office, but it never reached the hands of the latter, and all efforts to trace it proved unavailing. The records in the prothonotary's office showed that the writ had been regularly renewed and was still in force. The plaintiff moved for the issue of a concurrent writ.

Held, that the plaintiff might have an order for the issue of a new writ *nunc pro tunc*; such writ to bear the same indorsements and the evidence of renewal marked by the proper officer, as in the case of the original which had been lost. The order might also provide that the writ now issued should have the same force and effect as the original writ would have.

The following authorities were referred to: *Rex* v. *Sheriff of Kent*, 1 Marsh. 289; Herman on Executions, s. 87; *White* v. *Lovejoy*, 8 Johns. 448.

Haney, for the plaintiff.

[9TH OCTOBER, 1896.

REGINA v. CAVELIER.

Criminal law—Prisoner tried and committed on a Sunday—Illegality—Habeas corpus—Admission of evidence other than the commitment—Affidavit.

This was a summons to show cause why a writ of *habeas corpus* should not issue for the discharge of Edouard Cavelier, a prisoner committed under a magistrate's warrant for trial on a charge of stealing wheat.

Upon obtaining the summons, an affidavit of the prisoner was filed, stating that he was arrested late on the evening of Saturday the 26th September, and taken before H. H. Barnes, a justice of the peace for the county of Brandon, who, without the prisoner's consent, began the preliminary inquiry into the charge made, at two o'clock in the morning of Sunday the 27th September, and proceeded with such inquiry continuously until it was finished, soon after daylight on the same morning, when a warrant of commitment was made out, and he was the same day conveyed to gaol; that he had no opportunity of obtaining counsel or advice, nor of obtaining the attendance of witnesses on his behalf; that he was not offered an opportunity of giving evidence on his own behalf; that he was arrested in the municipality of Winchester, and the inquiry was held by the magistrate in that municipality, which did not form a portion of the county of Brandon. Annexed to the affidavit was a properly verified copy of the warant of commitment, which, after reciting that "Edward Cavelier" had been charged, etc., commanded the constable to take "the said Charles Cavelier" and convey him to gaol. This warrant was dated 27th September, and signed "H. H. Barnes, J.P. for the county of Brandon."

Four objections were taken to the regularity and legality of the proceedings: (1) In holding the preliminary inquiry, Barnes was acting as a justice for the county of Brandon, and the warrant of commitment shows he was so acting, but the inquiry was held in the municipality of Winchester, which forms no part of the county of Brandon, so he had no jurisdiction. (2) The warrant was directed to the keeper of the common gaol at Brandon, and not to the keeper of the Western District gaol, the only gaol to which the prisoner could be committed. (3) The warrant ordered "Charles Cavelier" to be taken and detained, but Edouard Cavelier, the applicant, was detained under it. (4) The preliminary inquiry, which resulted in the applicant's committal, was held and the warrant was signed on a Sunday, but the inquiry was a judicial act, and, having been held on a Sunday, it was void, and, therefore, there was nothing to uphold the warrant.

The question was raised whether the prisoner's affidavit could be read as evidence, or must the attention of the Court be confined to the warrant of commitment.

Held, that the prisoner's affidavit could be read on the present motion; it did not directly contradict the return, but rather alleged an extrinsic fact, as it were, confessing and avoiding it: *Re Clarke*, 2 Q. B. 619; *Eggington's Case*, 2 E. & B. 717.

There was evidence that the preliminary inquiry was wholly proceeded with on Sunday, and to do so was more than an irregularity. The making of such an inquiry was a judicial act, and no judicial act ought to be done on Sunday: *Re Cooper*, 5 P. R. 256.

Since the Criminal Code was passed, the warrant, although issued on a Sunday, is good under s. 564, s.-s. 3. Section 729 deals only with matters before a jury; it cannot have the effect of making a judicial act, such as the taking of a preliminary inquiry, on a Sunday, good.

As the prisoner was entitled to be discharged under the fourth objection, it was unnecessary to consider the others.

An order might issue making the summons absolute, and ordering the prisoner to be discharged without the writ of *habeas corpus* actually issuing, or his being personally brought before the Court.

Crawford, Q.C., for the applicant.

Maclean, for the Crown.

[KILLAM, J., 19TH OCTOBER, 1896.

In re MARQUETTE DOMINION ELECTION.

In re MACDONALD DOMINION ELECTION.

Parliamentary elections—Petition—Dominion Controverted Elections Act—Affidavit of petitioner—Alleged insufficiency of—Application to dismiss petitions—Preliminary objections—Necessity for.

In both these cases applications were made to stay all proceedings upon the petitions and to strike the same off the files of the Court, on the ground that the affidavits of the respective petitioners filed with the petitions were false, and were not such affidavits as were required by the Dominion Controverted Elections Act, and were no affidavits within the meaning of the Act, and that the presentation of the petition in each case was

an abuse of the powers and process of the Court. With the petition in each case was filed an affidavit of the petitioner, to the effect that he had good reason to believe, and did believe, that the several allegations contained in his petition were true.

In one case no preliminary objections were presented and no answer was filed; in the other, preliminary objections were presented and overruled, but no answer was filed. In each case, before notice of the application, the time for answering had expired and the petition was at issue under the Dominion Controverted Elections Act, R. S. C. c. 9, s. 13.

The petitioners had been examined, and the evidence relied on in proof of the falsity of the affidavits was that contained in the depositions of the petitioners.

Held, that the objection on which the applications were based, if it were one that could be considered, should be raised as a preliminary objection under s. 12 of the Dominion Controverted Elections Act, R. S. C. c. 9.

Applications dismissed with costs to the petitioners in any event.

J. S. Tupper, Q.C., and *C. H. Campbell*, Q.C., for the respondents.

H. M. Howell, Q.C., for the petitioners.

[BAIN, J., 6TH OCTOBER, 1896.

CROTHERS v. MONTEITH.

Liquor License Act—R. S. M. c. 90, s. 35—Vagueness of section—Application to cancel license—Power implied.

The plaintiff was a hotel-keeper holding a license under the Liquor License Act, R. S. M. c. 90; the defendants were the license commissioners for district No. 8 in Manitoba.

Section 35 of the Act provided "that once in every year after the first year of license, a petition by eight out of the nearest twenty householders against any license can be presented and will have the effect of cancelling such license." The plaintiff had licenses for the years 1894 and 1895, and held one for the current year, expiring on 31st May, 1897. After the

granting of the last mentioned license a document was presented to the defendants, the license commissioners, which purported to be drawn up under the provisions of s. 85 of the Act, asking that the license held by the plaintiff be cancelled. The plaintiff was served with a copy of the document and with a notice that the petition would come up for hearing before the commissioners; he then filed his statement of claim, contending that, on account of the vagueness and uncertainty of the section of the statute, there was no means by which a license could be cancelled after it was granted, and the commissioners had no power to cancel his license; and he prayed an injunction to restrain them from cancelling the same.

Although the statute contained specific directions as to what was to be done in the case of granting, or protesting against the granting, of a license, the only clause relating to the cancellation of a license, or the presentation of a petition to cancel same, was the one quoted above.

Held, that the action must be dismissed with costs.

The petition against the plaintiff's license had been presented under s. 85 of the statute. The object the Legislature had in passing the enactment was manifest; the words used showed clearly what was intended; and there need be no difficulty in holding that, if any action on the part of the license commissioners or other officials under the Act was necessary to give effect to the section, the authority to take such action would be implied.

The expression "once in every year" meant once in every license year. The licenses granted under the Act all expire on 31st May in each year after they are granted, and the license year begins on the 1st of June; this was the first petition that had been presented against the plaintiff's license in the present license year. There was no evidence before the Court that would justify the supposition that at the meeting to consider the petition, the commissioners would take any action that would be illegal or contrary to the directions of the statute.

Wade, for the plaintiff.

Maclean, for the defendants.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 25TH AUGUST, 1896.

KELLY v. VERSTRAETE.

Pleading—Payment into Court—Defence—Embarrassment—Costs.

The plaintiff brought an action for the amount of an account for feed and care of horses, and also for the amount of a promissory note, in all $113.

The defendants, among other defences, pleaded the following: "That they, while denying all liability, bring into Court the sum of $10, and say that this sum is sufficient to pay the plaintiff's claim and costs."

S. S. Taylor, Q.C., for the plaintiff, moved to strike out this defence as embarrassing.

J. C. F. Bown, for the defendants, contra.

SCOTT, J.—I have already held in the case of *Kelly* v. *Howey*, *ante* 174, in this Court, an action of tort, that such a defence is embarrassing, because Order XXII., Rule 6, shows that the money paid in must be paid in respect of the cause of action, and not in respect of costs, because under sub-clause (*a*) of Rule 6, the plaintiff may accept the amount paid into Court in satisfaction of his claim, and in that event would be entitled to tax his costs.

Mr. Bown, for the defendants, contends that there is a distinction between an action of tort and the present case; that here the payment is in respect of a certain portion of the claim, and it is a simple matter of subtraction to ascertain how much is paid on account of the debt, the costs being a fixed sum.

I think, however, that in both cases the principle is the same.

The order will go to strike out the paragraph objected to; the defendants to have leave to amend as they may be advised, up to four days after vacation; costs of the application to be costs in the cause to the plaintiffs in any event, on the final taxation.

Supreme Court of Canada.

[18TH OCTOBER, 1896.

In re PROVINCIAL FISHERIES.

Constitutional law—Canadian waters—Property in beds—Public harbours —Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation —R. S. O. c. 24, s. 47—55 V. c. 10, ss. 5-13, 19, 21 (O.)—R. S. Q. Arts. 1375-1378.

The beds of public harbours not granted before Confederation are the property of the Dominion of Canada.

Holman v. *Green*, 6 S. C. R. 707, followed.

The beds of all other waters belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.

Per GWYNNE, J.—The beds of great lakes, rivers forming the boundary between Canada and the United States or between two Provinces, rivers navigable above tide waters, rivers to the extent to which tide waters reach Dominion seacoasts, and Provincial lakes and rivers not granted before Confederation, are subject to the jurisdiction and control of the Dominion Parliament, so far as required for creating future harbours, erecting beacons, or other public works for the benefit of Canada, under the B. N. A. Act, s. 92, item 10, and for the administration of the Fisheries.

The Act respecting certain works constructed in or over navigable rivers, R. S. C. c. 92, is *intra vires* of the Dominion Parliament.

Per STRONG, C.J., and KING, J.— A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, and the grantee may build thereon subject to compliance with R. S. C. c. 92,

and to his obtaining an order in council from the Dominion Government authorizing the work, provided it does not interfere with the navigation of such lake or river.

Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown. The right of fishing is an incident of the property in the soil.

Robertson v. *The Queen*, 6 S. C. R. 52, followed.

The Dominion Parliament cannot authorize the giving, by lease, license, or otherwise, of the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the Provinces under the B. N. A. Act. The legislative authority of Parliament under s. 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries, under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries; may impose fees for such license, and prohibit all fishing without it; and may unconditionally prohibit particular classes, such as foreigners, from fishing. The license as required will, however, be merely personal, conferring qualification, and can give no exclusive right to fish in a particular locality.

The rule that riparian proprietors own *ad medium filum aquæ* does not apply in case of the great lakes or navigable rivers. Where beds of such rivers have not been granted, the right of fishing is public and not restricted to waters within the ebb and flow of the tide.

A provincial Government may grant the bed of lakes and navigable non-tidal rivers as to which the restrictions in Magna Charta do not apply. Such grant will carry with it the right of fishing, unless the same is reserved, or such right may be granted without the bed.

The provisions of Magna Charta are in force in the Provinces of Canada, except Quebec, and restrict the right of either the Dominion or province to grant the beds of, or fishing rights in, tidal waters.

Section 4 and other portions of R. S. C. c. 95, so far as they attempt to confer exclusive rights of fishing in Provincial waters, are *ultra vires;* GWYNNE, J., dissenting.

Notwithstanding the provisions of the Magna Charta, the Dominion Parliament can grant the exclusive right to fish in public harbours and in waters in unsurrendered Indian lands: B. N. A. Act, s. 91, item 4.

Per GWYNNE, J.—Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the B. N. A. Act, s. 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per STRONG, C.J., TASCHEREAU, KING, and GIROUARD, JJ., that R. S. C. c. 24, s. 47, and ss. 5 to 13, inclusive, 19 and 21 of the Ontario Act of 1892, are *intra vires*.

Per STRONG and KING, JJ.—They are *intra vires*, but may be superseded by Dominion legislation on the same subject.

R. S. Q. Arts. 1375 to 1378, inclusive, are *intra vires*.

Per GWYNNE, J.—R. S. O. c. 24, s. 47, is *ultra vires*, so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R. S. Q. Arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not, they are *ultra vires*.

Robinson, Q.C., and *A. H. F. Lefroy*, for the Dominion of Canada.

Irving, Q.C., *S. H. Blake*, Q.C., and *J. M. Clark*, for the Province of Ontario.

Casgrain, Q.C., A.-G., for the Province of Quebec.

Longley, A.-G., for the Province of Nova Scotia.

Irving, Q.C., and *J. M. Clark*, for the Province of British Columbia.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

STATED CASE.] [10TH NOVEMBER, 1896.

In re QUEEN'S COUNSEL.

Constitutional law—Appointment of Queen's counsel.

The Lieutenant-Governor in Council has the right to appoint members of the bar of Ontario to be Her Majesty's counsel, and to give these persons the right of pre-audience in the Courts of the Province.

Per BURTON, J.A.—The Lieutenant-Governor in Council has the exclusive right to make such appointments.

Irving, Q.C., for the Attorney-General for Ontario.

H. J. Scott, Q.C., for the Attorney-General for Canada.

DIVISIONAL COURT.]

GUROFSKI v. HARRIS.

Fraudulent conveyance—13 Eliz. c. 5—Intent to defeat—Action of tort—"Creditor"—Preference.

An appeal by the plaintiff from the decision of a Divisional Court, 27 O. R. 201, *ante* 111, was dismissed with costs, the Court agreeing with the judgment appealed from.

F. E. Titus and *S. H. Bradford*, for the appellant.

Watson, Q.C., for the respondents.

FLEMING v. EDWARDS.

Fraudulent conveyance—Voluntary conveyance—Grantor's intention to embark in hazardous business.

A voluntary conveyance of part of his estate by a retired and successful hotel-keeper to his wife, made at a time when he was in solvent circumstances, but was, after some months of idleness, about to take up the hotel-keeping business again, was upheld as against subsequent creditors, the grantor's subsequent insolvency being caused by loss by fire.

Judgment of a Divisional Court reversed.

Robinson, Q.C., and *C. J. Holman*, for the appellant.

F. J. Travers and *J. A. Mills*, for the respondents.

BOYD, C.]

CAVANAGH v. PARK.

Master and servant—Workmen's Compensation Act—Notice of action—Notice of objection thereto—Pleading—55 V. c. 30, s. 14.

The provisions of s. 14 of the Workmen's Compensation for Injuries Act, 55 V. c. 30, are not complied with by alleging in the statement of defence that the notice of action relied on by the plaintiff is defective, or that notice of action has not been given. The defendant must give formal notice of his objection, if he intends to press it.

Judgment of BOYD, C., affirmed.

H. D. Gamble and *H. L. Dunn*, for the appellant.

Pegley, Q.C., for the respondent.

ROBERTSON, J.]

GRIMES v. MILLER.

Arrest—Malicious prosecution—Trespass—Justice of the peace—Damages.

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction commits the accused to gaol, is not liable

to an action for malicious prosecution; the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution.

There was evidence upon which the jury might have reasonably found that the complainant before laying the information assisted in arresting the plaintiff. The case was left to the jury, by ROBERTSON, J., as one of trespass and malicious prosecution, and they found a general verdict in the plaintiff's favour for $200 damages.

Held, HAGARTY, C.J.O., dissenting, that there must be a new trial.

F. E. Titus and *S. H. Bradford*, for the appellants.

DuVernet and *F. McMichael*, for the respondent.

JOHNSTON v. DOMINION GRANGE MUTUAL FIRE INS. Co.

Fire insurance—Change material to the risk.

A provision in a policy of fire insurance permitting the insured to use, "for the purpose of threshing the crops on the premises, a steam thresher with an efficient spark arrester" does not by inference prohibit the use of a steam engine in connection with a machine for crushing grain.

The use of a steam engine on one occasion in connection with a machine for crushing grain is not a change material to the risk within the meaning of the statutory condition. That condition refers to some structural alteration in the premises, or habitual or permanent alteration in the nature of the work or business carried on.

Judgment of ROBERTSON, J., affirmed.

Aylesworth, Q.C., for the appellants.

Shepley, Q.C., for the respondent.

MACMAHON, J.] [7TH NOVEMBER, 1896.

MARTIN v. SAMPSON.

Chattel mortgage—Affidavit of bona fides—Money not actually advanced.

The affidavit of *bona fides* attached to a chattel mortgage,

duly executed and filed; stated that the mortgagor was justly and truly indebted to the mortgagee in a named sum. A loan was made in good faith upon the security of the chattel mortgage, but the money was not paid over for five days after the affidavit was made.

In an action by the assignee for the benefit of creditors of the mortgagor, under a subsequent assignment, to set aside the mortgage :—

Held, reversing the judgment of MACMAHON, J., 27 O. R. 545, that the mortgage was valid.

Per BOYD, C., and ROBERTSON, J.—The truth or untruth of the affidavit is important only as bearing on the question of fraud or *mala fides*. The untruth of the affidavit, if it is formally in conformity with the statute, gives no ground for avoiding the instrument. It would require some express legislative provision to the effect that a false affidavit should *per se* vitiate the security.

Per MEREDITH, J.—The affidavit of *bona fides* was literally true, the effect of the covenant to pay contained in the mortgage being to create a present legal indebtedness.

H. Cassels, for the appellant.

J. J. Scott, for the respondent Martin.

H. Brock, for the respondent Angus.

BADAMS v. CITY OF TORONTO.

Municipal corporations—Negligence—Defect in sidewalk beyond line of highway.

A sidewalk put down by the defendants extended beyond the true line of the highway and up to the outside wall of a shop, the owner of which cut the sidewalk and let into it a grating for the purpose of lighting his cellar. The grating was not guarded, and no notice was given to the public that it and part of the sidewalk was upon private property. The plaintiff stepped upon the grating, which was in a defective condition, and was injured.

Held, per BOYD, C., and ROBERTSON, J., that it was a question for the jury whether the danger was so close to the highway as

to render travel unsafe, and whether the defendants had reasonable notice of the danger.

Per MEREDITH, J.—A corporation cannot escape liability by shewing merely that the injury happened at a point which, on actual survey, is found to be without the true lines of the highway, though until then supposed to be and treated as if within them. The defendants, having constructed a somewhat costly sidewalk, in effect thereby said, this is part of the public highway which we are bound to keep in repair, and which we set apart for the use of pedestrians.

W. R. Riddell and *D. Urquhart*, for the plaintiffs.

Robinson, Q.C., and *W. C. Chisholm*, for the defendants.

[10TH NOVEMBER, 1896.

McCAUSLAND v. HILL.

Covenant — Restraint of trade — Company — Abandonment of corporate powers—Covenant between intending shareholders—Right of shareholders to enforce after incorporation.

A covenant by a merchant carrying on a general business throughout the Dominion of Canada in all kinds of glass, not to be "in any way directly or indirectly engaged, concerned, or interested, in the business of buying, selling, or dealing in clear plate glass," in the Dominion of Canada for twenty years, made for adequate consideration, upon the formation by himself and other dealers in glass of a company to deal in clear plate glass in the Dominion of Canada, is good.

Acting as agent or traveller for a firm dealing in clear plate glass in the Dominion of Canada is a breach of the covenant.

An agreement by a company incorporated under the Dominion Joint Stock Companies' Letters Patent Act for the purpose of manufacturing, importing, and dealing generally in mouldings, picture frames, mirrors, plate glass, sheet glass, etc., etc., for the sale of its stock of plate glass to a company to be formed, with a covenant not to compete in the plate glass business with that company for twenty years, is valid, and is not an *ultra vires* abandonment of its powers.

One party to an agreement made between a number of dealers in plate glass for the formation of a company to take over the plate glass business of each of them, each dealer covenating not to compete with the new company when formed, may be restrained by the other parties to it from breach of the covenant, even after the formation of the new company, the parties complaining being at the time of the action shareholders in that company; HAGARTY, C.J.O., dissenting on this point.

Judgment of MACMAHON, J., affirmed.

Biggs, Q.C., and *Lewis*, Q.C., for the appellant.

Ritchie, Q.C., and *Ludwig*, for the respondents.

MEREDITH, J.]

MAY v. LOGIE.

Will—Devise—Construction—Ambiguity—Elliptical sentence—Absence of material words.

A testator, after declaring the will in question to be his last will, and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate, both real and personal, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

Held, affirming the judgment of MEREDITH, J., 27 O. R. 501, *ante* 196, that the intention to devise his property to his wife could be fairly gathered from this language of the testator.

J. A. Donovan, for the appellant.

W. Mortimer Clark, Q.C., and *Shepley*, Q.C., for the respondents.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., ROSE, J., MACMAHON, J., 15TH SEPTEMBER, 1896.

IRVINE v. MACAULAY.

McLELLAN v. MACAULAY.

Limitation of actions—Payment of instalment of purchase money—Possession—Time statute commences to run.

The defendant's predecessor in title, having had certain

negotiations for the purchase of land in 1840, went into possession; and subsequently by a new agreement dated 6th March, 1852, agreed to purchase the land and pay for it in six annual instalments, with interest, on the 1st day of November in each year, the first instalment to be paid on the 1st November, 1853. He remained in possession, and paid that instalment on 1st November, 1853, but nothing more thereafter.

Held, that the Statute of Limitations did not begin to run until one year from the date of the payment made, viz., on 1st November, 1854, when the next payment became due and default was made; and that an action to recover possession begun on 19th October, 1874, was commenced in time; and that the plaintiff was entitled to recover.

Judgment of ROBERTSON, J., reversed.

Clute, Q.C., for the plaintiff.

Shepley, Q.C., and *H. W. Delaney*, for the defendants.

[BOYD, C., ROBERTSON, J., MEREDITH, J., 22ND SEPTEMBER, 1896.

KERVIN v. CANADIAN COLOURED COTTON MILLS CO.

Master and servant—Negligence—Workman's death—How occasioned—Evidence—Jury—Conjecture.

In an action against a manufacturing company for damages for the death of an employee, the evidence showed that two large wheels, forty-five feet apart, were placed partly in a trench in the floor of the basement of a mill for the purpose of driving a wide belt, and revolved at the rate of about 220 times a minute.

The deceased was employed to oil the bearings and see they did not heat. His dead body was found much injured close to one of them; but there was no evidence of how he had met his death. The wheels were not guarded by fencing; but there was evidence that the deceased had on previous occasions crossed the trench on two planks placed there between the upper and lower moving belt.

Held, MEREDITH, J., dissenting, that there was evidence proper to be submitted to the jury.

Per MEREDITH, J.—No matter how gross the negligence, no action lies unless it was the cause of the injury. There was no direct proof; it was but conjecture of possibilities and probabilities upon which a guess, not a reasonable conclusion from evidence, could be based. The jury are not at liberty to guess, and a verdict supported entirely upon mere surmise cannot stand. The case ought not to have been left to them.

D. B. Maclennan, Q.C., and *Aylesworth*, Q.C., for the plaintiffs.

McCarthy, Q.C., and *R. A. Pringle*, for the defendants.

[ARMOUR, C.J., FALCONBRIDGE, J., 9TH NOVEMBER, 1896.

TRUSTS CORPORATION OF ONTARIO v. CLUE.

Married woman—Separate estate—Liability—Promissory note.

A married woman who had no other means was intrusted by her husband with all his wages, and made all the purchases of furniture, etc., for the house, also a piano, and she borrowed money on a promissory note made by her and her husband, which was used to pay off a mortgage on the furniture which had been signed by her.

Held, in an action on the note, that she had separate estate and was liable.

Judgment of the County Court of Bruce reversed.

Aylesworth, Q.C., for the appeal.

W. R. Riddell, contra.

[13TH NOVEMBER, 1896.

McQUARRIE v. BRAND.

Evidence—Admissibility of—Promissory note—Parol understanding—Contract.

The defendant, being indebted to F., gave her a note for the amount, and F. agreed that if the defendant supported a relative of hers during life, and paid the interest on the note,

when the death happened, the note would be considered paid. The relative was supported by the defendant for six years, and died. F. died soon after, and her executors brought this action to recover the amount of the note.

Held, that the contract set up by the defendant was a contract independent of the note, and rested upon a separate, distinct, and good consideration.

Held, also, that oral evidence in support of it was admissible and did not vary the terms of the note. The contract having been completely performed, the evidence did not seek to vary the terms of the note, but to show that it was satisfied by performance of the defendant's contract. The action was therefore dismissed with costs.

Judgment of the County Court of Perth reversed.

W. N. Miller, Q.C., for the plaintiffs.

Masten, for the defendant.

[ARMOUR, C.J., STREET, J., 14TH NOVEMBER, 1896.

In re JENISON.

Water and watercourses—Water privilege—Owner of—Riparian proprietor—Use and improvement of privilege—R. S. O. c. 119.

The respondent was the owner of twelve and a half acres of land abutting on the chain reserved by the Crown for a common and public highway along the Kaministiquia river, and had been granted a license to use the interest of the Crown in such chain reserve.

Held, that such ownership and license constituted him a riparian proprietor as to that part of the river flowing past the twelve and a half acres and the chain reserve.

Adjoining that part of the chain reserve lying between the twelve and a half acres and the river, was a water privilege, consisting of the fall in the river, when in its natural state, as it passed along the chain reserve, and being the difference of level between the surface where the river first touches such portion of the chain reserve and the surface where it leaves it.

Held, that the respondent was the owner of such water privilege within the meaning of R. S. O. c. 119, and entitled to the benefit of that Act in respect thereof.

The respondent proposed to place his dam at the upper end of his water privilege, and it did not appear that he was the owner or legal occupant of any water privilege above the intended dam.

Held, that he was not a person desiring to use or improve a water privilege of which he was the owner or legal occupant, and was therefore not entitled to an order under the Act.

W. Cassels, Q.C., and *T. A. Gorham*, for the appellants.

Aylesworth, Q.C., for the respondent.

J. R. Cartwright, Q.C., for the Attorney-General for Ontario.

[MEREDITH, C.J., ROSE, J., 16TH NOVEMBER, 1896.

HARGRAVE v. ELLIOT.

Assignments and preferences—R. S. O. c. 124, s. 7—Creditor—Right of action—Fraudulent sale of assets of estate—Assignee.

Section 7 of the Assignments Act, R. S. O. c. 124, applies only to transactions made or entered into by the insolvent; and a creditor of the insolvent has a right of action in his own name against the assignee to set aside a sale of the assets of the estate as fraudulent.

Kilmer and *W. H. Irving*, for the plaintiff.

Delamere, Q.C., for the defendant Elliot.

F. J. Travers and *Keyes*, for the defendant Barber.

[BOYD, C., 8TH OCTOBER, 1896.

BANK OF TORONTO v. HAMILTON.

Mistake—Banks—Recovery back of money—Error in telegraphing credit.

The defendant sold cattle to one Halliday for $2,827, the condition being that if the purchase money was not paid, the defendant was to resume possession of the cattle. Halliday came to Elliott with a shipping bill of the cattle and asked an advance upon that security. Elliott agreed to advance $2,000,

and issued a cheque for that amount payable to the Bank of Toronto at Montreal, on account of the defendant. Elliott, handing the cheque to the plaintiffs at Montreal, requested them to telegraph the $2,000 to the defendant's credit at Toronto, but, by a mistake in transmitting the message, the amount was received in Toronto as $3,000. The defendant came to the bank in Toronto, and, being told that $3,000 was at his credit, drew it out and allowed the cattle to be shipped away from Montreal. The plaintiffs had no notice of the transaction out of which the credit arose.

After the cattle had been shipped, the plaintiffs, having discovered their mistake, demanded from the defendant repayment of the $1,000, which he refused to make, except as to the difference between the $2,827 and the $3,000.

Held, that the defendant's right to retain the money as against the bank and Elliott was no stronger than Halliday's would have been, and that the defendant had no right to retain the overplus of the money paid by reason of the mistake of the plaintiffs.

T. P. Galt and *Wallace Nesbitt*, for the plaintiffs.

Moss, Q.C., for the defendant.

[22ND OCTOBER, 1896.

ELLIS v. TOWN OF TORONTO JUNCTION.

Police magistrate—Appointment without salary—Salary given and subsequently withdrawn.

The plaintiff was appointed police magistrate for the town of Toronto Junction by commission of the Lieutenant-Governor, expressed to be without salary, in 1892, the town council having previously, in 1890, requested that a police magistrate should be appointed. In 1890 the population was under 5,000; but in 1892, when the appointment was made, it was over 5,000; and on the plaintiff demanding $800 per annum as salary, asserting that it was his due under R. S. O. c. 72, the town council at first paid him this salary. In 1894, having first in vain tried to get the plaintiff to resign, the town council resolved to pay him

only $400 a year, which the plaintiff agreed to accept. In 1895 the town council resolved to discontinue the plaintiff's salary altogether.

Held, that the plaintiff not having been appointed as a salaried official, had no right to a salary as one of the incidents of his office, and R. S. O. c. 72, s. 28, did not apply; and the town council were entitled to act as they had done.

Raney, for the plaintiff.

Going, for the defendants.

[ROBERTSON, J., 26TH SEPTEMBER, 1896.

In re ERMATINGER AND TILSONBURGH, LAKE ERIE, AND PACIFIC R. W. CO.

Trustee—Compensation—Railway company—Trustee of bonus debentures—R. S. O. c. 110.

Petition of C. O. Ermatinger for compensation for his services as trustee in respect to the debentures mentioned in the various municipal by-laws set out and confirmed in 58 V. c. 118 (O.), whereby the said debentures, which had been voted by the respective municipalities as a bonus to a certain railway company, were to be held by the petitioner until completion of the railway as in the said by-laws respectively mentioned, and then delivered to the railway company, which, however, had assigned them to the Imperial Bank of Canada.

Held, that the petitioner was a trustee within the meaning of R. S. O. c. 110, and was entitled to compensation thereunder for his services in connection with the holding of the said debentures.

Moss, Q.C., and *D. W. Saunders*, for the petitioner.

J. Bicknell, for the Imperial Bank of Canada.

C. W. Kerr, for the railway company.

[STREET, J., 10TH OCTOBER, 1896.

CERRI v. ANCIENT ORDER OF FORESTERS.

Life insurance—Benefit society—Misrepresentation as to age—Good faith—52 V. c. 32, s. 6.

The Ontario Insurance Amendment Act, 1889, 52 V. c. 32,

applies to benefit societies: and where a man was admitted to the defendants' Order on the strength of a representation as to age, which was false, but made in good faith and without any intention to deceive:—

Held, that by virtue of 52 V. c. 32, s. 6, the contract of insurance was not advoided thereby.

If the true age of the deceased had been stated, he could not have been admitted to the Order, and therefore could not have effected any insurance.

Held, nevertheless, being a member in good standing at the time of his death, and his membership not having been attacked in his lifetime, his certificate of insurance was not avoided by this fact.

G. G. Mills and *A. Mills*, for the plaintiff.

Aylesworth, Q.C., for the defendants.

IN CHAMBERS.

[STREET, J., 9TH NOVEMBER, 1896.

CAMPBELL v. WHELER.

Costs—Discretion—Judicial officer—Appeal—Interference—Rule 1170 (a).

The Court will not interfere with the discretion exercised as to costs, unless the Judge whose order is appealed from has proceeded upon some erroneous principle of law, or upon some misapprehension of the facts of the case.

Young v. *Thomas*, [1892] 2 Ch. 134, followed.

It is not intended by Rule 1170 (*a*) that the discretion of the appellate tribunal should be substituted for that of the judicial officer whose decision is appealed from.

A. G. Murray, for the plaintiff.

W. J. Elliott, for the defendants.

[12TH NOVEMBER, 1896.

McKINNON v. CROWE.

Judgment debtor—Examination of—Order for—Judgment for costs—Interpleader proceedings—Motion to commit—Rules 926, 932, 1360—Concealment of property.

A person who was a judgment debtor in respect only of the

costs of interpleader proceedings was examined as a judgment debtor under an order made by a Judge, in presence of her counsel, after argument. Upon a motion to commit her under Rule 932, upon the ground that it appeared from her examination that she had concealed or made away with her property to defeat or defraud the plaintiff, it was objected on her behalf that Rule 1360, substituted for 926, which gives a judgment creditor for costs only, a right to examine his debtor, does not apply to interpleader proceedings.

Held, that the objection should have been urged upon the application for the order for examination, and was not now open.

The judgment debtor, upon hearing that judgment had gone or was about to go against her, turned all the property she had into money and sent it to a friend in a foreign country, where it remained; and upon her examination refused or professed to be unable to give any information as to where it was. After she had had ample opportunity to become aware of her position, but had done nothing towards satisfying the plaintiff's claim, an order was made for her committal to gaol for three months and for payment by her of the costs of the motion.

Aylesworth, Q.C., for the plaintiff.

Biggs, Q.C., for the judgment debtor.

[18TH NOVEMBER, 1896

BARBER v. TORONTO R. W. CO.

Jury notice—Motion to strike out—Non-repair of highway—Law Courts Act, 1896, s. 5.

In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city, owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel.

Held, that the action must be treated as one for non-repair of a street within the meaning of s. 5 of the Law Courts Act, 1896; and a jury notice was therefore irregular and should be struck out.

It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion.

Raney, for the plaintiffs.

J. Bicknell, for the defendant company.

W. C. Chisholm, for the defendant corporation.

[THE MASTER IN CHAMBERS, 29TH OCTOBER, 1896.

PICKEREL RIVER IMPROVEMENT CO. v. MOORE.

Discovery—Production of documents—Penalty—Double tolls—R. S. O. c. 160, s. 42.

The double tolls imposed by s. 42 of the Timber Slide Companies Act, R. S. O. c. 160, for false statements, are imposed by way of punishment, and not as compensation; and therefore an action to recover such double tolls is an action for a penalty, in which discovery of documents will not be enforced.

Biggs, Q.C. for the plaintiffs.

J. Bicknell, for the defendants.

In the Fourth Division Court in the United Counties of Northumberland and Durham.

[KETCHUM, JUN. J., 16TH NOVEMBER, 1896.

WOOD v. BRUNT.

Chattel mortgage—Affidavit of execution—Omission of date—Defect—57 V. c. 37, ss. 2, 5—Taking possession—Effect of.

The affidavit of execution of a chattel mortgage, made after 1st January, 1895, when the Bills of Sale and Chattel Mortgage

Act, 1894, took effect, omitted to state or "contain" the date of the execution of the mortgage, which, by s. 2 of that Act, it is required to contain.

Held, a fatal defect, which made the mortgage absolutely null and void as against creditors, under s. 5.

The defendant, the chattel mortgagee, took possession of the goods under his mortgage, rightfully as against the mortgagor, before the plaintiffs, execution creditors of the mortgagor, obtained their judgment upon which their execution issued, but after they became simple contract creditors.

Held, following *Clarkson* v. *McMaster*, 25 S. C. R. 96, that the taking possession did not make the mortgage valid as against the plaintiffs.

A. A. Smith, for the plaintiffs.

R. R. Loscombe, for the defendant.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 29TH OCTOBER, 1896.

BERGMAN v. SMITH.

Trial—Application for jury—Counterclaim—Warranty.

The plaintiff, who described himself as an "Electro-Therapeutist," sued the defendant for professional services alleged to have been rendered to the defendant's wife and daughter. The defendant, besides denying all the allegations in the statement of claim, set up by way of counterclaim that the plaintiff warranted that he would effect a permanent cure of his wife and daughter by his method of treatment within a certain limited time, and he claimed damages for a breach of warranty. The defendant moved for an order directing that the case should be tried by a jury, urging that, even if the counterclaim was not an action for breach of warranty within the wording of s. 49 of the Queen's Bench Act, 1895, yet there the Legislature had expressed itself in favour of a question as to a breach of warranty being submitted to the decision of a jury.

Held, that the action was not for breach of warranty. In the Queen's Bench Act, 1895, and the Rules, "action" means a civil proceeding commenced by statement of claim. A civil proceeding is never commenced by counterclaim. The Act has not said that any action in which a question of breach of warranty arises shall be tried by a jury. No special ground had been shown why the case should be tried by a jury, and the onus was on the party desiring to have it so tried: *Case* v. *Laird*, 8 Man. L. R. 461; *Woollacott* v. *Winnipeg Electric Street R. W. Co.*, 10 Man. L. R. 482.

Wade, for the plaintiff.

Howell, Q.C., for the defendant.

[5TH NOVEMBER, 1896.

BANK OF MONTREAL v. CONDON.

Voluntary conveyance—Enforcing judgment—Interest in lands—Conveyance to third party—Q. B. Act, Rules 804-7.

The plaintiffs in June, 1893, recovered a judgment against E. Condon and G. Black. The plaintiffs alleged that in February, 1892, Black made a disposition of a parcel of land by causing a conveyance of it to be made to his wife in her own name, and that this was done voluntarily to defraud the plaintiffs.

In May, 1896, the plaintiffs served Black and his wife with a notice of motion calling upon them to show cause why the land in question should not be sold to realize the amount due upon the judgment. Black and his wife filed affidavits setting out that the land was bought and a house built by the wife with her own money obtained from the estate of her father, and that in April, 1896, she entered into an agreement for sale of the land to one Burton.

In September a notice of motion was served upon Burton calling upon him to appear and state the nature and particulars of his claim to the land, and notifying him that an order might be made pursuant to Rules 804, 805, 806, and 807 of the Queen's Bench Act, 1895, with reference to his claim to the land. Burton showed he was in possession of the land; that his purchase was *bona fide;* and that he was desirous of carrying the same out.

The motions against Black and wife and Burton came on together, and the plaintiffs claimed to be entitled to have an issue to try the question as to the alleged fraudulent disposition of the property between husband and wife.

The referee held that as soon as it appeared that Mrs. Black had sold the property, it became impossible for the plaintiffs to work out the relief sought, and dismissed the motion with costs to Burton. The plaintiffs appealed.

Held, that the wife had no beneficial interest in the land, either for herself or her husband; the most she had was a vendor's lien, and that was not an interest in land: *Parke* v. *Riley*, 3 E. & A. 215. It was only to interests in land that the Rules in question apply, and they could not be invoked in a case like the present.

Munson, Q.C., for the plaintiffs.

Martin, for the defendants.

STONEHOUSE v. McGILLIVRAY.

Ejectment—Title under a lease—Judgment—Nonsuit—Defective title of lessor—Company.

This was an action for the recovery of the possession of land, brought by the plaintiff, who claimed the same under a lease from the Canada North-West Land Company dated 23rd March, 1896. Since bringing the action he had contracted with the company for the purchase of the land.

A Crown patent was produced dated 1st May, 1891, granting the land to the Canada North-West Land Company. The company from which the plaintiff obtained his lease was incorporated by an Act of the Dominion Parliament, assented to on 1st April, 1898; it was incorporated for the purpose of acquiring the business and property of an English company bearing the same name.

Held, that there must be a nonsuit with costs, but, under Rule 656, it should not have the effect of a judgment upon the merits for the defendant.

The patent produced must be one granting the land to the English company, for the Canadian company was not then in

existence. The Act did not vest the lands of the English company in the Canadian company, and there was no evidence that the Canadian company had ever exercised the powers given by their Act or purchased or acquired the land in question. If they had not done so, they had no title to the land, and could not make a valid lease of it to the plaintiff.

All that the plaintiff had proved here was that he claimed under a lease from a company which was not shown to have any title to or interest in the land of which he sought the recovery.

Perdue and *Hart-McHarg*, for the plaintiff.

Howell, Q.C., and *Machray*, for the defendant.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

IN CHAMBERS.

[SCOTT, J., 2ND NOVEMBER, 1896.

CLEVELAND v. THOMSON.

In re CLINK.

Evidence—Motion—Affidavits in reply.

On motion by the plaintiff to add G. I. C. as a party defendant after judgment, to commit him for a breach of injunction against "the defendant, her servants, workmen, and agents," previously granted, and for a mandatory injunction to compel him to restore to its original site a certain building removed by him :—

Held, that affidavits not strictly in reply could not be read by the defendant in rebuttal of affidavits filed by the respondent in answer to the original case made by the plaintiff in support of her application.

Gilbert v. *Comedy Opera Co.*, 16 Ch. D. 594, considered.

McCarthy, Q.C., and *Costigan*, Q.C., for the plaintiff.

McCaul, Q.C., for G. I. Clink.

Supreme Court of Canada.

QUEBEC.] [5TH NOVEMBER, 1896.

TURCOTTE v. DANSEREAU.

Appeal—Amount in controversy—Judicial proceeding—R. S. C. c. 135, s. 29—54 & 55 V. c. 25, s. 4—Action on promissory notes—Opposition to vacate judgment.

In an action on promissory notes, amounting with interest to the time of issuing the writ to $1,997.92, the conclusions of the declaration asked for judgment for principal and interest from that date until payment. Judgment was entered by default for over $2,000 in October, 1889. In April, 1892, the defendant filed an opposition to vacate the judgment and setting up exceptions and pleas to the action. The opposition was dismissed by the Superior Court and Court of Queen's Bench, and an appeal having been taken to this Court, the respondent moved to quash it for want of jurisdiction.

Held, that the opposition was a "judicial proceeding" under s. 29 of the Supreme and Exchequer Courts Act, and subject to appeal to this Court; that the amount in controversy on such appeal was the amount due on the judgment attacked by the opposition at the date of the decision of the Court of Queen's Bench dismissing it; and, as that amount was over $2,000, the appeal would lie.

Motion to quash refused with costs.

Lajoie, for the motion.

Languedoc, Q.C., contra.

NEW BRUNSWICK.]

TORROP v. IMPERIAL INS. CO.

Fire insurance—Condition in policy—Breach—Change of interest—Chattel mortgage—Waiver of forfeiture—Powers of agent.

A fire insurance policy on a spool factory and machinery contained a condition providing that if the property should be sold or conveyed, or the interest of the parties therein changed, the policy should be void.

Held, affirming the decision of the Supreme Court of New Brunswick, that a chattel mortgage of the property executed by the assured was a "change of interest" within the meaning of such condition, and forfeited the policy.

Held, further, that an agent whose powers were limited to receiving applications to be forwarded to the head office, and collecting the first premiums on delivery of the policy when issued, had no authority to waive the forfeiture caused by the breach of said condition.

McLean, for the appellant.

Pugsley, Q.C., and *Hanington*, Q.C., for the respondents.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [25TH NOVEMBER, 1896.

FROWDE v. PARRISH.

An appeal by the defendants from the judgment of BOYD, C., 27 O. R. 526, *ante* 249, was dismissed with costs, this Court agreeing with the judgment below.

T. W. Howard, for the appellants.

J. J. Maclaren, Q.C., for the respondent.

FERGUSON, J.] [20TH NOVEMBER, 1896.

JOHNSTON v. CONSUMERS' GAS CO. OF TORONTO.

Amendment—Adding plaintiff—Attorney-General—Final judgment.

A motion made by the plaintiffs after the judgment of this Court, 23 A. R. 566, *ante* 283, for leave to amend by adding the Attorney-General as a party plaintiff, in order to meet the difficulty raised by the judgment that the plaintiffs had no *locus standi*, was refused, upon the ground that such an amendment could not be made after final judgment.

Moss, Q.C., and *J. MacGregor*, for the plaintiffs.

McCarthy, Q.C., and *W. N. Miller*, Q.C., for the defendants.

HIGH COURT OF JUSTICE.

[BOYD, C., MEREDITH, J., 2ND NOVEMBER, 1896.

RUSTIN v. BRADLEY.

County Court—Jurisdiction—Small legacy charged on land—Equitable relief—Stay of proceedings.

In an action to recover a legacy of $5 charged on land, brought in a County Court:—

Held, that a County Court had jurisdiction under s.-s. 18 of s. 8 of 59 V. c. 19 (O.), as the plaintiff was seeking equitable relief.

An order should have been made in the Court below staying all proceedings in the action forever on payment by the defendant of the small amount claimed by the plaintiff without costs.

Judgment of the County Court of York varied accordingly.

T. Hislop, for the plaintiff.

D. C. Ross, for the defendant.

[3RD NOVEMBER, 1896.

REGINA v. LORRAINE.

Criminal law—Lotteries — Art association—"Property"—Pictures—Part value in money—Criminal Code.

The defendant was convicted by a police magistrate for that he did "unlawfully sell and barter a certain card and ticket for advancing, lending, giving, selling, and otherwise disposing of certain property, to wit, pictures or one-half the stated value of each picture in money, by lots, tickets, and modes of chance."

Held, that "property" in s. 205, s.-s. 1 (*b*), of the Code is not to be read "specific property," and that the essence of that enactment lies in the disposal of *any* property by mode of chance.

Held, also, that there was evidence to show that money might be had instead of pictures by the winning tickets, and that destroyed the privilege in favour of the dissemination of works of art under s.-s. 6 (*c*), and even if the society reserved an option as to giving cash, that only added to the precariousness of the whole transaction and constituted another chance.

Rule *nisi* to quash conviction discharged.

J. R. Cartwright, Q.C., for the Crown.

F. A. Anglin, for the defendant.

[ARMOUR, C.J., FALCONBRIDGE, J., 9TH NOVEMBER, 1896.

REGINA v. McMILLAN.

Municipal corporations — By-law — Early closing — Excepted times — Uncertainty.

On a motion to quash a summary conviction under a municipal by-law providing for the closing of shops for the sale of watches and jewellery at a certain hour every day, "excepting Saturdays, the days immediately preceding public holidays, the days during which the Central Canada Exhibition Association is being held, and the last two weeks of the month of December," on the ground that the by-law was invalid for uncertainty:—

Held, that the by-law was valid.

W. H. P. Clement, for the motion.

H. M. Mowat, contra.

[Boyd, C., Ferguson, J., Robertson, J., 17th November, 1896

PAYNE v. CAUGHELL.

Way—Public road—Municipal corporation—Power to lease to private person.

Prior to the 13th May, 1851, the London and Port Stanley Road belonged to the Government of Canada, as one of the public works. On that day the Government, by an order-in-council or proclamation, issued under the authority of 12 V. c. 5 and 13 & 14 V. c. 14, granted the road, for valuable consideration, to the county of Middlesex. The part of the road lying within the limits of the county of Elgin afterwards fell into the hands of the corporation of that municipality, who, on the 16th February, 1857, leased it to the defendants' predecessor or assignor for the term of 199 years.

Held, that the county corporation had the power to sell or lease the road to any such grantee or lessee as is mentioned in the above statutes, and the further power to let to farm the tolls on the road, but had not the power to lease or sell the road, or any part of it, to a private person; and, therefore, the defendants had no title to the road, and were not justified in obstructing it by bars and exacting tolls upon it.

James A. McLean, for the plaintiff.

Laidlaw, Q.C., and *J. Bicknell*, for the defendants.

[Boyd, C., 21st November, 1896.

GUNDRY v. JOHNSTON.

Bankruptcy and insolvency—Assignment for benefit of creditors—Composition arrangement—Distinction—R. S. O. c. 124, s. 13—Penalty.

A trader, being unable to pay his debts as they matured, executed an instrument in writing headed "memo. of agreement," by which he transferred to the defendant all his estate, and directed him to submit to the creditors an offer of seventy-five cents on the dollar upon their claims, to sell the estate, pay the percentage to the creditors out of the proceeds of the sale, and pay the residue to the debtor. It was recited in the instrument

that the object was to realize seventy-five cents on the dollar and thus enable the debtor to get a discharge. By the last clause it was declared that the transfer was under R. S. O. c. 124 and amendments. The creditors agreed to accept the percentage offered, and the sale and realization of the assets went forward on that condition, although in the outcome much less was obtained out of the estate.

At the trial of an action under s. 13 of R. S. O. c. 124 for penalties for not publishing notice of and not registering this instrument, evidence was given by its draftsman that it was intended to recite in the last clause that the transfer was not under R. S. O. c. 124 and amendments, but the word "not" was omitted by mistake.

Held, that, regarded as a whole, the instrument was an arrangement by way of composition rather than an absolute assignment under the Act; and so regarded the last clause was nugatory, if not insensible, and its true explanation was supplied by the evidence of the draftsman; and the instrument was, therefore, not an assignment for the general benefit of creditors under the Act, and s. 13 did not apply to it.

Garrow, Q.C., and *Dancey*, for the plaintiff.

Watson, Q.C., for the defendant.

[FERGUSON, J., 12TH OCTOBER, 1896.

HALL v. PUBLIC SCHOOL TRUSTEES FOR THE UNITED SCHOOL SECTION 2 OF THE TOWNSHIP OF STISTED.

Public schools—Accommodation—54 V. c. 55, s. 40, s.-s. 3—Children whose parents or guardians are residents of the school section—Child "boarded out" by charitable institution.

The plaintiff was an inmate of one of Dr. Barnardo's homes, and was placed with one S., his next friend in this action, under "a boarding out undertaking" in writing, reciting that he was under the guardianship of the manager of the home, by which S., in consideration of a monthly payment, engaged with the manager to receive him as one of his family, to provide food, clothing, etc., and secure his regular attendance

at school, etc., etc. S. was not appointed guardian of the plaintiff under R. S. O. c. 142, or R. S. O. c. 187, or otherwise.

This action was brought to compel the school board of the school section in which the plaintiff resided with S. to allow him to attend the school, and if necessary to provide accommodation for him.

By 54 V. c. 55, s. 40, s.-s. 8, it is the duty of school trustees to provide adequate accommodation for two-thirds of the children between the ages of five and sixteen "whose parents or guardians are residents of the school section."

Held, that the word "guardian" in the statute is not used in a colloquial or in any other than its legal sense, and in that sense S. was not the plaintiff's guardian.

Quære, whether the Barnardo home or the manager had the power to appoint a guardian to the plaintiff.

Held, also, that the school accommodation being exhausted by children whose parents or guardians resided in the school section, the defendants were not bound to provide accommodation for the plaintiff.

Coatsworth, for the plaintiff.

Shepley, Q.C., for the defendants.

[ROSE, J., 19TH NOVEMBER, 1896.

HARRISON v. PRENTICE.

Seduction—Right of action—Service—Pregnancy—Costs.

In an action of seduction, it appeared that the connection took place while the plaintiff's daughter resided at service with the defendant, and there was no evidence of any possible loss of service by the father, and there was neither birth of a child nor pregnancy:—

Held, that the father had no right of action either at common law or under the Act respecting seduction, R. S. O. c. 58.

Kimball v. *Smith*, 5 U. C. R. 82, and *L'Esperance* v. *Duchene*, 7 U. C. R. 146, followed.

The jury having given a verdict for the plaintiff, and it appearing that shortly after the alleged connection, and while in the service of the defendant, her uncle, the daughter became with child by the defendant's son, the action was dismissed without costs.

E. G. Porter, for the plaintiff.

W. B. Northrup, for the defendant.

IN CHAMBERS.

[BOYD, C., 18TH NOVEMBER, 1896.

ZAVITZ v. DODGE.

Costs—Taxation—Apportionment—Common defence by several defendants.

An action by a judgment creditor against three defendants, one of whom was the judgment debtor, to set aside a conveyance as fraudulent, was dismissed with costs, but with the direction that the costs of the judgment debtor should be set off against the judgment recovered by the plaintiff. There was a common defence by one solicitor for all three defendants, and no separate proceedings for the benefit of particular defendants.

Held, upon appeal from taxation, that a set-off of one-third of the whole costs taxed to the defendants should be allowed.

Re Colquhoun, 5 De G. M. & G. 35, and *Clark* v. *Virgo*, 17 P. R. 260, followed.

Folinsbee, for the plaintiff.

Talbot Macbeth, for the defendants.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J., 17TH NOVEMBER, 1896.

REGINA v. BEALE.

Summary conviction—Motion to quash—Forum—Full Court—Costs where motion refused for want of jurisdiction—Notice of motion—Rule nisi—Grounds for motion—Rule for certiorari.

Application to quash a summary conviction of the defendant under s. 337 of the Criminal Code. A preliminary objection was taken that the application must be to the full Court, and that a single Judge sitting on a Wednesday under Rule 162 of the Queen's Bench Act, 1895, had no jurisdiction to hear it.

Held, that an application to quash a conviction under the Criminal Code was not one which could be brought before a single Judge; there was no jurisdiction to entertain it: *Re Boucher*, 4 A. R. 191; *Regina* v. *McAuley*, 14 O. R. 643; *Regina* v. *Beemer*, 15 O. R. 266. The motion should be refused and with costs: *Great Northern Committee* v. *Inett*, 2 Q. B. D. 284.

The application was also open to the objection taken, that it was by notice of motion, and not by rule *nisi* or summons, as Rule 416 did not apply. No ground for moving was specified in the Rule for the *certiorari*; this would seem to be fatal: Paley on Convictions, 6th ed., p. 457.

NORTH-WEST TERRITORIES

In the Supreme Court.

NORTHERN ALBERTA JUDICIAL DISTRICT.

[Scott, J., 10th November, 1896.

REGINA v. McDONALD.

Criminal law—Evidence—Confession—Admissibility—Inducement—Mis-statement.

The prisoner was charged with stealing a post letter from a post-office box, it being supposed that he had a key to the box. Previous to the prisoner's arrest, Mr. Phinney, a post-office inspector, accompanied by a sergeant of the North-West Mounted Police, who had acted as a detective in the case, called on the prisoner at his house, and at the trial the Crown proposed to prove by the sergeant a confession of guilt made by the prisoner on this occasion.

On cross-examination of the sergeant by counsel for the prisoner as to inducements held out to the prisoner, the witness said that the prisoner knew he was a detective; that he introduced Mr. Phinney as an assistant-inspector in the post-office department; that Mr. Phinney opened the conversation by saying, "Well, I've come to talk over mail matter. There has been some mail missing from Dr. L.'s box, and, as you have the key, I want to know what you know about it." The prisoner replied, "I have not had the key for over two years, and I don't know anything about it." Mr. Phinney then said, "Mail has been taken out of that box, and we have very strong evidence that you are the party that took it." The prisoner still denied

it. Mr. Phinney said, "I don't believe you. Decoy letters have been put in the box, and you must not think that they were not watched." The witness would not swear that Mr. Phinney did not say, "There is no use your denying it; you were seen taking the letters out of the box." The witness said that Mr. Phinney used words to this effect, "You may as well tell us what you did with those letters as to have it brought out in a Court of law."

Argument was then heard as to whether the evidence of the alleged confession could be received.

Costigan, Q.C., and *P. J. Nolan*, for the prisoner, cited, *Regina* v. *Thompson*, 9 Times L. R. 485; *Rex* v. *Mills*, 6 C. & P. 146; *Regina* v. *Warringham*, 15 Jur. 318.

A. L. Sifton, for the Crown.

SCOTT, J. (having reserved his ruling till the following day).—I have carefully considered the arguments of counsel with regard to the admissibility of the evidence of the alleged confession, as well as the cases which have been cited, and have come to the conclusion that such evidence cannot be received. According to our law, a confession, to be receivable in evidence, must be free and voluntary, and the onus lies on the prosecution to prove that no inducement has been held out or threat made. In this case it was proved that a person in authority had stated to the accused, "You may as well tell us as have it come out in a Court of law," which may be fairly interpreted, "If you don't tell us, it will come out in a Court of law." Moreover, the accused was told that he had been seen taking letters, which was a misstatement, there being no such evidence adduced, and the Crown prosecutor having admitted that there was no such evidence to adduce. This looked like attempting to obtain a confession by false pretences, and was most improper and unwarranted. I must decline to hear any evidence of the alleged confession.

[ROULEAU, J., 27TH NOVEMBER, 1896.

WEST v. HOLDEN.

Trial—Excluding witnesses—Parties—Husband and wife—Interpleader.

At the trial of an interpleader issue, in which the claimant,

the wife of the execution debtor, was plaintiff, counsel for her in opening announced that both she and her husband would be called as witnesses. The husband was called first, and at the conclusion of his examination in chief, counsel for the defendants asked to have the plaintiff excluded from the Court.

Held, following *Outram* v. *Outram*, W. N. 1887, p. 75, that the plaintiff should be excluded, more especially as she claimed by gift from her husband, the witness under examination.

C. C. McCaul, Q.C., for the plaintiff.

P. McCarthy, Q.C., for the defendants.

INDEX-DIGEST OF CASES.

NOTED, DIGESTED, AND REPORTED IN THIS VOLUME.

AND ALSO OF THE CASES PUBLISHED DURING 1896 IN THE OFFICIAL REPORTS OF THE SUPREME COURT OF CANADA, AND OF THE PROVINCES OF ONTARIO, NOVA SCOTIA, NEW BRUNSWICK, MANITOBA, AND BRITISH COLUMBIA.

NOTE:—Where the number of a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1896.

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.*
N. B. Reps.—*New Brunswick Supreme Court Reports.*
N. B. Eq. Reps.—*New Brunswick Equity Reports.*
Man. L. R.—*Manitoba Law Reports.*
Brit. Col. L. R.—*British Columbia Law Reports.*

ABANDONMENT.

See Insurance, 18, 20—Mineral Lands, 1—Partnership, 5.

ABDUCTION.

See Criminal Law, 1.

ABSCONDING DEBTOR.

Right of creditor acquiring title from, to recover against sheriff levying subsequently—Costs of action:
Mahon v. *Crowe*, 28 N. S. Reps. 250.

ACCELERATION.

See Landlord and Tenant, 11—Will, 4.

ACCIDENT.

See Crown, 1—Municipal Corporations, 24-34—Negligence, 1, 2, 4, 5—Railways and Railway Companies, 10, 14, 16—Street Railways, 2, 3, 4.

ACCORD AND SATISFACTION.

ACCOUNT.

ACQUIESCENCE.

ACTION.

ADMINISTRATION.

AMENDMENT.

See Action, 3—Appeal, 5, 21—Discovery, 4—Game, 2—Injunction, 7—Notice of Motion, 2—Order of Court, 3—Particulars, 2—Parties, 4, 12, 15, 16—Partnership, 7—Payment—Pleading, 1, 2, 3, 6, 12, 18—Summary Conviction, 6—Summary Judgment, 12—Trusts and Trustees, 10.

ANIMALS.

See Bailment—Game.

ANNUITY.

See Revenue, 5—Will, 13.

ANSWER.

See Costs, 6, 8—Discovery, 10—Pleading, 11.

APPEAL.

APPEAL—*Continued.*

3. To Court of Appeal—Judgment on preliminary issue—Order of Divisional Court—Leave to appeal—Judicature Act, 1895, ss. 72, 73:
Graham v. *Temperance and General Life Assurance Co.*, 345; 17 P. R. 271.

4. Court of Appeal—Order of Divisional Court affirming Chambers orders—Leave to appeal—Special circumstances—Terms:
Bourne v. *O'Donohoe*, 345; 17 P. R. 274.

5. To Court of Queen's Bench, Manitoba—From County Court—Amendment—Time—Extension:
Boughton v. *Hamilton Provident and Loan Society*, 10 Man. L. R. 683.

6. To Court of Queen's Bench, Manitoba—From order of Judge of County Court transferring action to Queen's Bench—Jurisdiction—Transfer—Queen's Bench Act, 1895, s. 86:
Doll v. *Howard*, 96; 11 Man. L. R. 21.

7. To Divisional Court—Extending time—*Ex parte* order—Irregularity—Order made at hearing of appeal:
Varrelmann v. *Phœnix Brewery Co.*, 3 Brit. Col. L. R. 148.

8. To Divisional Court—Extending time for—Discretion:
Wilson v. *Marvin*, 3 Brit. Col. L. R. 327.

9. To Divisional Court—From County Court—Interpleader—Amount involved—County Courts Amendment Act, B.C., 1892, s. 3—County Courts Amendment Act, B.C., 1893, s. 17—Proof of service of interpleader summons—Decision of Judge as to—Finality of:
Boultbee v. *Rolls*, 4 Brit. Col. L. R. 187.

10. To Divisional Court—From County Court—Scope of appeal—Question of law—Findings of fact—County Courts Amendment Act, B.C., 1892, s. 3:
Confederation Life Association v. *McInnes*, 4 Brit. Col. L. R. 126.

11. To Divisional Court—From County Court—Weight of evidence—Nonsuit:
Mason v. *Oliver*, 2 Brit. Col. L. R. 328.

12. To Divisional Court—From decision of Judge upon point of law—Subsequent order dismissing action—Appeal from—Divisional Court not bound by former decision—Action ordered to go to trial—Appeal to full Court:
Edison General Electric Co. v. *Edmonds*, 4 Brit. Col. L. R. 354.

13. To Divisional Court—From *ex parte* order of Judge—Practice—Motion to rescind:
Hudson's Bay Co. v. *Haslett*, 4 Brit. Col. L. R. 351.

APPEAL BOND.

APPEARANCE.

APPORTIONMENT.

See Costs, 39—Landlord and Tenant, 8, 15—Trusts and Trustees, 5.

APPROPRIATION OF PAYMENTS.

See Principal and Surety, 4.

APPURTENANCES.

See Landlord and Tenant, 1.

ARBITRATION AND AWARD.

1. Appeal from award—Power to increase amount awarded—Appeal to Supreme Court of Canada—Power to still further increase amount awarded respondent, without cross-appeal:
   In re Christie and Town of Toronto Junction, 99; 25 S. C. R. 551.

2. Arbitrators' fees—Penalty—R. S. O. c. 53, s. 29:
   Jones v. *Godson*, 88; 23 A. R. 84.

3. Disqualification of arbitrator—Architect—Building contract—Probable bias:
   Neelon v. *City of Toronto*, 149; 25 S. C. R. 579.

4. Evidence of expert called in by arbitrators and umpire—Application to set aside award—Estoppel—Interpleader—Practice—Attachment of debts:
   Rogers v. *Commercial Union Assurance Co.*, 15 Occ. N. 228; 10 Man. L. R. 667.

5. Extension of time for making award—Method of extension prescribed by submission—Necessity for strictness in following—Irregularity—Waiver—Knowledge:
   MacKay v. *Nicol*, 28 N. S. Reps. 48.

6. Misconduct of arbitrator—Hearing statement of witness in absence of parties—Setting aside award—Power to make reference back—Appeal—Divisional Court:
   Wood v. *Gold*, 3 Brit. Col. L. R. 281.

7. Motion to set aside award—Time:
   In re Brower and Coughell, 249.

8. Revocation of submission—Rejection of evidence—Rentals of adjacent properties:
   In re Small and St. Lawrence Foundry Co., 216; 23 A. R. 548.

9. Submission procured by threat—Illegal contract not to prosecute criminally—Acquiescence—Waiver—Duress:
   Laperrière v. *Cadieux*, 94; 11 Man. L. R. 175.

ASSESSMENT AND TAXES.

See Constitutional Law, 1, 7, 9, 12—Landlord and Tenant, 13—Limitation of Actions, 6—Municipal Corporations, 2, 3, 5, 20—Sale of Land, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Assignments and Preferences, 1, 3-7, 13—Attachment of Debts, 1, 2—Bankruptcy and Insolvency, 1—Bills of Sale and Chattel Mortgages, 15—Execution, 3, 5—Landlord and Tenant, 2—Principal and Agent, 5.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

ASSIGNMENT OF CONTRACT.

See Principal and Surety, 1.

ASSIGNMENT OF LEASE.

See Landlord and Tenant, 4, 14.

ASSIGNMENT OF POLICY.

See Husband and Wife, 1—Insurance, 2, 3, 6, 9.

ASSIGNMENT OF MORTGAGE.

See Bills of Sale and Chattel Mortgages, 14—Mortgage, 10, 11, 16—Principal and Surety, 2.

ASSIGNMENTS AND PREFERENCES.

1. Action by creditor in assignee's name—R. S. O. c. 124, s. 7—Rights of creditor as to amount of recovery:
   MacTavish v. *Rogers*, 44; 28 A. R. 17.

2. Agreement between debtor and creditor—Conditional license to take possession of debtor's goods—Creditor's opinion of debtor's incapacity—*Bona fides* in forming opinion—Grounds—Replevin—Joint conversion:
   Francis v. *Turner*, 82; 25 S. C. R. 110.

3. Assignment for benefit of creditors—Claim for damages—Contestation of claim—R. S. O. c. 124—"Creditor:"
   Grant v. *West*, 216; 28 A. R. 583.

4. Assignment for benefit of creditors—Preference of certain creditors—Bill of sale—R. S. N. S., 5th series, c. 92—Necessity for affidavit under s. 4—Affidavit omitting to verify preferred debts—Preference of indorsers of accommodation paper:
   Kirk v. *Chisholm*, *McPhie* v. *Chisholm*, 28 N. S. Reps. 111.

5. Assignment for benefit of creditors—Preferences—R. S. N. S. 5th series, c. 92, ss. 4, 5, 10—Chattel mortgage—13 Eliz. c. 5:
   Kirk v. *Chisholm*, 26 S. C. R. 111.

6. Assignment for benefit of creditors—Release by creditors executing, limited to debts in respect of which creditors sign—Effect of—Assignment of legacy to one creditor—Judgment by confession—Application of legacy on judgment—Attachment by another creditor of legacy as a debt—Charge on lien—Notice to creditors:
   Banks v. *Mackintosh*, 27 N. S. Reps. 478.

7. Assignment for benefit of creditors—Sale of insolvent's estate—Secret profit by creditor—Inspector—Trusts—Account of profits—Reference:
   Segsworth v. *Anderson*, 24 S. C. R. 699.

ATTACHMENT.

ATTACHMENT OF DEBTS.

BAIL.

BAILMENT.

BANKRUPTCY AND INSOLVENCY.

BANKS AND BANKING.

BEHRING SEA AWARD.

BENEFIT SOCIETY.

BETTING.

BILLS AND NOTES.

BILLS OF SALE AND CHATTEL MORTGAGES—*Continued.*

See Assignments and Preferences, 4—Company, 4—Execution, 3—Fixtures, 2—Insurance, 5—Landlord and Tenant, 7—Sale of Goods, 1, 2, 6, 8.

BOARD OF HEALTH.

See Public Health, 3.

BOND.

Action on replevin bond—Satisfaction of judgment in replevin action—Payment in full of fine and costs upon conviction under which goods seized—Construction of receipt—Compromise—Authority of solicitors—Presumption:
McMillan v. *Giovanetti*, 28 N. S. Reps. 91.

See Costs, 35—Debentures—Principal and Surety, 3, 7.

BONUS.

See Municipal Corporations, 4, 5—Trusts and Trustees, 3.

BOOK DEBTS.

See Assignments and Preferences, 8, 9—Chose in Action, 8—Execution, 2.

BORNAGE.

See Title to Land.

BOUNDARIES.

See Plans and Surveys—Prohibition, 2—Schools, 2, 3, 5.

BROKER.

See Evidence, 8.

BUILDING CONTRACT.

See Arbitration and Award, 3—Chose in Action, 7—Contract, 2-5—Pleading, 15.

BUILDING LOAN.

See Mortgage, 4, 5.

BUILDINGS AND ERECTIONS.

See Covenant, 2—Landlord and Tenant, 13.

BY-LAW.

See Company, 9—Constitutional Law, 8—Liquor License Act, 1—Municipal Corporations, 1, 3-16, 19-22, 25.

CALLS.

See Company, 7.

CANADA TEMPERANCE ACT.

1. Costs—Motion to discharge prisoners upon *habeas corpus*:
Re Murphy, 28 N. S. Reps. 196.

2. Fines—County and town:
County of Charlotte v. *Town of St. Stephen, County of Charlotte* v. *Town of Milltown*, 14 Occ. N. 107; 32 N. B. Reps. 292.

CAPIAS.

CARRIERS.

CERTIFICATE OF ENGINEER.

CERTIFICATE OF LIS PENDENS.

CERTIFICATE OF TAXATION.

CERTIFICATE OF TITLE.

CERTIORARI.

CHARGE ON LAND.

CHARITABLE INSTITUTIONS.

CHATTEL MORTGAGE.

CHOSE IN ACTION.

COMMON SCHOOLS.

See Schools, 1.

COMPANY.

COMPENSATION.

COMPOSITION.

CONDITIONAL SALES.

See Fixtures—Principal and Agent, 6—Sale of Goods, 3, 5.

CONDUCT MONEY.

See Witnesses.

CONFESSION.

See Criminal Law, 2.

CONFESSION OF JUDGMENT.

See Assignments and Preferences, 6, 11.

CONFLICT OF LAWS.

See Constitutional Law, 6, 13.

CONSENT JUDGMENT.

See Assignments and Preferences, 11—Company, 3.

CONSENT ORDER.

See Order of Court, 1.

CONSTABLE.

1. Criminal Code, s. 575—*Persona designata*—Officers de facto and de jure—"Chief constable"—Appointment of deputy—Common gaming house—Confiscation of gaming instruments, moneys, etc.—Evidence—Canada Evidence Act, 1893, ss. 2, 3, 20, 31—Judgment *in rem*—*Res judicata*:
   O'Neill v. *Attorney-General for Canada*, 179; 26 S. C. R. 122.

2. Service of summons—Territorial jurisdiction of magistrate issuing summons—Service outside constable's own parish—Criminal Code, s. 375:
   Ex p. Doherty, 14 Occ. N. 105; 32 N. B. Reps. 375.

CONSTITUTIONAL LAW.

1. Assessment Act, C. S. B. C., 1888, c. 111, s. 3—*Intra vires*—Tax on mortgages as personal property—Direct tax—Exemption of mortgage company to amount of indebtedness in respect of money borrowed in England:
   In re Yorkshire Guarantee and Securities Corporation, 4 Brit. Col. L. R. 268.

2. Colonial Legislatures—Powers of—Authorizing service of process on persons out of the jurisdiction:
   McCarthy v. *Brener*, 201.

3. Executive councillors—Powers of—Letter of credit—Contract of member of executive by—Ratification by Legislature—Obligations binding on Province—Discretion of Government as to expenditure—Petition of right—Negotiable instrument—Bills of Exchange Act—Bank Act:
   Banque Jacques Cartier v. *Reginam*, 28; 25 S. C. R. 84.

COSTS.

COUNSEL FEES.

COUNTERCLAIM.

COUNTY COURT.

COVENANT.

CREDITORS' RELIEF ACT.

CRIMINAL CONVERSATION.

CRIMINAL LAW.

CRIMINAL PROCEDURE.

CROPS.

CROSS-APPEAL.

See Appeal, 37.

CROWN.

1. Contract for work and materials—Specifications—Interpretation of—Accident to subject-matter owing to cause not within contemplation of contracting parties—Allowance of interest against Crown—Computation:
   Lainé v. *The Queen*, 5 Ex. C. R. 103.

2. Dominion of Canada—Pollution of tidal river—Remedy by injunction—Right under statute to impose fine and imprisonment:
   Attorney-General for Canada v. *Ewen*, *Attorney-General for Canada* v. *Munn*, 3 Brit. Col. L. R. 468.

3. Expropriation of land for railway purposes—Owner left in possession of buildings on expropriated property—Use and occupation — Profits — Interest — Compensation for buildings destroyed by fire:
   Reg. v. *Clarke*, 5 Ex. C. R. 64.

4. Expropriation of land for railway purposes—Temporary enhancement in value of lands—Compensation—Interest:
   Reg. v. *Murray*, 5 Ex. C. R. 69.

5. Injurious affection of property by construction of public work —Damage peculiar to property in question—Compensation:
   Robinson v. *The Queen*, 4 Ex. C. R. 428.

6. Injurious affection of property by construction of public work —Destruction of highway—Measure of damages—Obstruction to navigation.
   Reg. v. *Moss*, 5 Ex. C. R. 30.

7. Injurious affection of property by construction of public work —Petition of right—Statute of Limitations—50 & 51 V. c. 16—Retroactive effect:
   Penny v. *The Queen*, 4 Ex. C. R. 428.

8. Liability of—Tort—Injury to person on Government railway—Undue rate of speed of train at crossing—50 & 51 V. V. c. 16, s. 16 (*c*):
   Connell v. *The Queen*, 5 Ex. C. R. 74.

9. Petition of right—Public work—Injury to property by—Obstruction of canal—Use of canal:
   Fairbanks v. *The Queen*, 24 S. C. R. 711.

10. Petition of right for services rendered to a Parliamentary committee—Liability:
    Kimmitt v. *The Queen*, 5 Ex. C. R. 130.

DAMAGES.

DEBENTURES.

DEBTOR AND CREDITOR.

DECEIT.

DECLARATION.

DECLARATION OF RIGHT.

DEDICATION.

DIVORCE.

DOCUMENTS.

DOMICIL.

DOMINION LANDS.

DONATIO MORTIS CAUSA.

DOWER.

DRAINAGE.

DURESS.

EARLY CLOSING.

EASEMENT.

EDUCATION.

EJECTMENT.

ESTREAT.

EVIDENCE.

EXAMINATION OF PARTIES.

EXCHEQUER COURT.

1. Admiralty jurisdiction—Claim by shipper for damages for negligence of owner of ship—Owner within jurisdiction—Appearance—Not a waiver of objection to jurisdiction:
   Rithet v. *The "Barbara Boscowitz,"* 3 Brit. Col. L. R. 445.

2. Jurisdiction—Action for penalties for infringement of revenue laws:
   Reg. v. *Allen*, 5 Ex. C. R. 144.

EXECUTION.

1. Claim of priority for wages—C. S. B. C. c. 42, s. 21—Claim arising against estate of deceased person for services rendered after decease:
   Gilmour v. *Gilmour*, 3 Brit. Col. L. R. 397.

2. Exemptions—Book debts—C. S. B. C. 1888, c. 57, s. 10:
   Hudson's Bay Co. v. *Hazlett*, 4 Brit. Col. L. R. 450.

3. Exemptions—Chattel mortgage—Assignment for creditors—Marshalling of assets:
   In re Haddon, 171.

4. Exemptions—Chattel ordinarily used in the debtor's occupation—Change of occupation:
   Wright v. Hollingshead, 46; 23 A. R. 1.

5. Exemptions—Homestead Act, B. C.—Assignment of equitable estate in trust for creditors—Sale of estate—Subsequent claim to exemption—Partnership goods:
   Pilling v. *Stewart*, 4 Brit. Col. L. R. 94.

EXECUTIVE COUNCILLORS.

EXECUTORS AND ADMINISTRATORS.

FALSE PRETENCES.

FELONY.

FENCES.

FERRIES.

FINAL JUDGMENT.

FINAL ORDER.

FINES.

FIRE.

FIRE INSURANCE.

FISHERIES.

FIXTURES.

GARNISHMENT.

See Attachment of Debts.

GAS COMPANY.

See Assessment and Taxes, 2, 3—Parties, 6—Toronto Gas Company.

GIFT.

Donatio mortis causa—Delivery, actual or symbolical, a requisite—Non-effect of mere words—Subject of gift in possession of donee:
McKinnon v. *McKinnon*, 28 N. S. Reps. 189.

See Executors and Administrators, 7—Husband and Wife, 2—Will.

GRANT.

See Landlord and Tenant, 1.

GUARANTY.

Promissory notes—Agreement to guarantee—Mistake—Reformation—Changing form of claim:
Sylvester v. *Porter*, 127; 11 Man. L. R. 98.

See Bills and Notes, 5—Indemnity—Municipal Corporations, 6—Principal and Surety, 7—Statute of Frauds.

GUARDIAN.

See Infant, 5—Schools, 4.

HABEAS CORPUS.

See Canada Temperance Act, 7—Criminal Law, 9—Infant, 3—Justice of the Peace, 6.

HARBOURS.

See Constitutional Law, 15.

HEALTH OFFICERS.

See Public Health, 1.

HIGH SCHOOLS.

See Schools, 2.

HIGHWAY.

See Constitutional Law, 8—Crown, 6—Damages, 3—Deed, 1—Jury Notice, 2—Master and Servant, 7—Municipal Corporations, 24-34—Statutes, 16—Way.

HOMESTEAD.

See Crown Lands, 3—Execution, 5.

HUSBAND AND WIFE.

See Alimony—Assignments and Preferences, 8—Bills of Sale and Chattel Mortgages, 5—Constitutional Law, 14—Costs, 34—Executors and Administrators, 8—Fraudulent Conveyance, 3, 4—Infant, 4, 6—Master and Servant, 4—Parties, 9, 11—Principal and Surety, 8—Trial, 12.

ILLEGALITY.

See Chose in Action, 6—Criminal Law, 9—Maritime Law, 9—Municipal Corporations, 13—Patent of Invention, 2—Sale of Goods, 1.

ILLEGITIMACY.

See Infant, 1.

IMPORTATION.

See Patent of Invention, 2—Revenue, 2.

IMPRISONMENT.

IMPROVEMENTS.

INCIDENTAL DEMAND.

INCOME.

INCOME TAX.

INDEMNITY.

1. Action *en garantie*—Incidental demand—Proceedings taken by warrantee before judgment on principal demand:
   Archibald v. *Delisle*, *Baker* v. *Delisle*, *Moat* v. *Delisle*, 15 Occ. N. 355; 25 S. C. R. 1.

2. Action *en garantie*—Relief over—Damages for obstruction of street:
   Montreal Gas Co. v. *St. Laurent*, 244; 26 S. C. R. 176.

3. Recovery of judgment against joint tort-feasors—Principal and agent—Indemnity of innocent agent by principal:
   Victoria School Trustees v. *Muirhead*, 4 Brit. Col. L. R. 148.

INDIAN LANDS.

INFANT.

1. Adoption—Illegitimacy—Consent:
   In re C. F., an Infant, 265; 1 N. B. Eq. Reps. 313.

2. Custody—Charitable institution—Right to indenture out:
   In re Robinson, 247; 27 O. R. 585.

3. Custody—*Habeas corpus*—Title—Affidavit:
   In re Ah Gway—Ex p. Chin Su, 2 Brit. Col. L. R. 343.

4. Custody—Husband and wife—Paternal right—Marital duty—Interest of infant:
   In re Armstrong, 9; 1 N. B. Eq. Reps. 208.

JUDICIAL SALE.

JURISDICTION.

JURY.

JURY NOTICE.

JUSTICE OF THE PEACE.

MERCANTILE AGENCY.

See Libel, 2.

MINERAL LANDS.

1. Mineral Act, B. C., 1891—Relocation—"Owner"—Staking—Excess of area—Abandonment—Public officer—Misuse of knowledge obtained in office:
   Granger v. *Fotheringham*, 3 Brit. Col. L. R. 590.

2. Mines and Minerals Act, 1892, ss. 91, 92, 94, 95, 98, 99—Construction of—Application for licenses to search subsequent to first right—When they commence to run—Appeal from decision of commissioner:
   In re Caldwell, 28 N. S. Reps. 240.

3. Mining areas—License to search—Applications for lands already under license—R. S. N. S. c. 7, s. 84—55 V. c. 1, s. 98—Construction of:
   McColl v. *Ross*, 28 N. S. Reps. 1.

4. Mining lease—Action against commissioner for refusing to register transfer—Mines and Minerals Act, R. S. N. S. c. 7, s. 130—47 V. c. 3, s. 1—Equitable interest not derived through a lessee—Absence of proof of nature or value of—Damages—Negligence—*Bona fide* transferee—Notice affecting subsequent transferees — Statutes — Repeal — Request for registration—Absence of—Executory right to registration—General request—Directions as to registration—Duty of party applying, to give—Duty of commissioner—Form of transfer:
   Fielding v. *Church*, 28 N. S. Reps. 136.

5. Statutory grant to railway company—Exception of precious metals—Interpretation of statutes—Right of free miners to enter on private property for mining purposes—Placer Mining Act, 1891, c. 26:
   Bainbridge v. *Esquimalt and Nanaimo R. W. Co.*, 4 Brit. Co L. R. 181.

See Appeal, 17—Discovery, 5—Time.

MISDIRECTION.

See Criminal Law, 13—Malicious Prosecution, 5—Master and Servant, 8—Municipal Corporations, 33, 37—New Trial, 2-8—Partnership, 6—Principal and Agent, 4—Railways and Railway Companies, 11.

MISREPRESENTATIONS.

See Insurance, 13—Principal and Agent, 4.

MISTAKE.

MONEY IN COURT.

MONOPOLY.

MORTGAGE.

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—*Continued.*

NEWSPAPER.

NEW TRIAL.

PARTICULARS.

PARTIES.

PARTITION.

PARTNERSHIP.

PASSENGER.

PATENT OF INVENTION.

PATENT OF LAND.

POWER OF SALE.

PRACTICE.

PREFERENCE.

PRELIMINARY OBJECTIONS.

PRESCRIPTION.

PRINCIPAL AND AGENT.

QUO WARRANTO.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See Constitutional Law, 11.

RAILWAYS AND RAILWAY COMPANIES.

RIPARIAN PROPRIETORS.

See Constitutional Law, 15—Water and Watercourses, 3.

RIVERS AND STREAMS.

See Constitutional Law, 8, 15—Crown, 2—Injunction, 6—International Law, 2—Water and Watercourses, 2.

RULE NISI.

See Certiorari, 2—Justice of the Peace, 1—Service of Papers, 2—Summary Conviction, 3, 5.

SALE OF GOODS.

1. Bills of Sale Act—Foreign bill of sale—Necessity for registration—Evasion of customs law—Second-hand machinery—Illegality—Avoidance of bill of sale to secure purchase money:
   Gosline v. *Dunbar*, 32 N. B. Reps. 325.

2. Bills of Sale Act—Verbal sale not prohibited—Vendor retaining possession under lease—Execution against goods of vendor—Claim by purchaser—Interpleader—Registration of lease:
   Esnouf v. *Gurney*, 4 Brit. Col. L. R. 144.

3. Conditional Sale—Contract lien—Vendor retaking possession—Lien on land—Action for price of goods—Damages for refusal to accept:
   Sawyer v. *Baskerville*, 10 Man. L. R. 652.

4. Contract—Conditions as to quality—Duty of purchaser where goods do not fulfil conditions—Laches—Failure to return goods—Effect of—Contract to sell on commission—Inference—Express contract to purchase—Waiver of contract—Order of vendor to agent to receive goods back—Non-delivery to agent—Value—Finding of trial Judge—Appeal:
   Burke v. *Roberts*, 27 N. S. Reps. 445.

5. Delivery—Condition as to retaking—Effect of—Rescission of contract—Fraud—Appeal—Interference with finding of trial Judge:
   White v. *Smith*, 28 N. S. Reps. 5.

6. Delivery and acceptance of cattle in satisfaction of debt—Marking by creditor—Cattle remaining in possession of debtor—Seizure under execution against debtor—Property passing—Good faith—Absence of fraud—Bill of sale—Non-production of:
   Kennedy v. *Whitlie*, 27 N. S. Reps. 460.

7. Right of unpaid vendor to have sale rescinded—Fraud—Evidence:
   Small v. *Glasel*, 28 N. S. Reps. 245.

SOLICITOR.

SPECIFIC PERFORMANCE.

STATUTE OF FRAUDS.

STATUTE OF LIMITATIONS.

STATUTES.

SUBSEQUENT INCUMBRANCES.

See Parties, 3.

SUCCESSION DUTIES.

See Revenue, 3, 4, 5.

SUMMARY APPLICATION.

See Trusts and Trustees, 6, 9.

SUMMARY CONVICTION.

1. *Certiorari*—Evidence—Motion to quash—Practising medicine—Ontario Medical Act, R. S. O. c. 148, s. 45:
   Reg. v. *Coulson*, 53; 27 O. R. 59.

2. Criminal Code, Part LV.—Right of appeal—Police magistrate—Mandamus:
   Reg. v. *Egan*, 180; 11 Man. L. R. 184.

3. Motion to quash—Forum—Full Court—Costs where motion refused for want of jurisdiction—Notice of motion—Rule *nisi*—Grounds for motion—Rule for *certiorari*:
   Reg. v. *Beale*, 395.

4. Municipal by-law—Public health—Overcrowding—Guilty knowledge:
   Re Wing Kee, 2 Brit. Col. L. R. 321.

5. Penalty in excess of jurisdiction—Rule *nisi* for *certiorari*—Right of magistrate to return amended conviction—Practice—*Certiorari*, to whom directed—Whether taken away by implication from statute giving right to appeal:
   Reg. v. *McAnn*, 4 Brit. Col. L. R. 587.

6. Permitting deer-hounds to run at large—56 V. c. 49, s. 1, s.-s. 2—Scienter—Evidence—Amendment—Criminal Code, s. 889—Quashing conviction—Costs—Protection:
   Reg. v. *Crandall*, 54; 27 O. R. 68.

See Bond—Canada Temperance Act, 6, 7, 8—Game, 1, 2—International Law, 2—Justice of the Peace, 1, 2, 6—Liquor License Act, 1, 2, 4—Medical Practitioner, 1, 2—Municipal Corporations, 10, 11, 16—Pharmacy Act—Prohibition, 4—Public Health, 2.

SUMMARY JUDGMENT.

1. Action on covenant to indemnify—Writ of summons—Special indorsement—Unliquidated demand—Variance between special indorsement and affidavit—Necessity for previous demand:
   Baker v. *Dalby*, 3 Brit. Col. L. R. 289.

TORT.

See Costs, 3—Crown, 8—Fraudulent Conveyance, 2—Parties, 2.

TOWAGE.

See Maritime Law, 13-17.

TRADE AND COMMERCE.

See Constitutional Law, 4.

TRADE-NAME.

Infringement—Literary publication—Geographical designation—Injunction:

Rose v. *McLean*, 113; 27 O. R. 325.

TRADING COMPANY.

See Company, 2, 11.

TRAMWAY COMPANY.

See Railways and Railway Companies, 4.

TRANSFER OF ACTION.

See Appeal, 6—County Court, 7—Division Court, 1, 3—Stay of Proceedings, 3.

TRAVELLING EXPENSES.

See Executors and Administrators, 6.

TREATIES.

See Constitutional Law, 5—International Law, 2.

TRESPASS.

See Arbitration and Award, 10—Arrest, 3—Bills of Sale and Chattel Mortgages, 15—Crown Lands, 1, 2—Deed, 2—Discovery, 5—International Law, 1—Limitation of Actions, 6—Malicious Prosecution, 1, 2—Master and Servant, 8, 9.

TRIAL.

1. Judge's charge—Reading parts of examination for discovery not put in by counsel:

   Adams v. *National Electric Tramway and Lighting Co.*, 3 Brit. Col. L. R. 199.

2. Jury—Application for—Counterclaim—Warranty:

   Bergman v. *Smith*, 383.

3. Jury—Failure to agree—Action tried before justices of the peace with a jury—Abortive trial—Justices *functi officiis*—Judgment signed by justices—*Res judicata*—Fresh summons—Effect of:

   Creelman v. *Stewart*, 28 N. S. Reps. 185.

TROVER.

TRUST COMPANY.

TRUSTS AND TRUSTEES.

USE AND OCCUPATION.

VACATION.

VENDOR AND PURCHASER.

VENDOR'S LIEN.

VENUE.

VOLUNTARY CONVEYANCE.

VOLUNTARY SETTLEMENT.

VOTERS' LISTS.

WAGES.

WAIVER.

WARRANT.

WARRANTY.

WASTE.

WATER AND WATERCOURSES.

WAY.

WILL.

WINDING-UP.

See Company, 12-18.

WITNESS FEES.

See Cost, 43—Executors and Administrators, 6.

WITNESSES.

Interlocutory motion—Affidavit made by defendant—Cross-examination—Defendant not entitled to conduct money:
Emerson v. *Irving*, 4 Brit. Col. L. R. 56.

See Evidence, 14, 17, 18—Mortgage, 1—Pleading, 10—Trial, 6, 12—Will, 20.

WORK AND LABOUR.

See Evidence, 18—Interest, 2—Mechanics' Liens—Warranty.

WORKMEN'S COMPENSATION ACT.

See Master and Servant, 10, 15—Statutes, 15—Street Railways, 2.

WRIT DE PRO. PROB.

See Replevin.

WRIT OF CA. RE.

See Arrest, 1.

WRIT OF CA. SA.

See Arrest, 5, 6—Judgment Debtor, 5, 6.

WRIT OF FI. FA.

See Execution.

WRIT OF SUMMONS.

1. Irregularity—Motion to set aside, for—Waiver—Conditional appearance—Motion to discharge interim injunction—Misjoinder of causes of action—Recovery of land—Other claims:
Fletcher v. *McGillivray*, 3 Brit. Col. L. R. 37.

2. Service—Copy—No indication that original sealed—Regularity of copy:
anada Settlers' Loan Co. v. *Steinburger*, 4 Brit. Col. L. R. 353.

3. Service out of jurisdiction—Issue without leave of a Judge—Irregularity—Substitutional service—Affidavit — Evasion of service:
Hull v. *Schneider*, 3 Brit. Col. L. R. 32.