Canada Law Journal.

VOL. XXXIII. APRIL 17, 1897. NO. 8.

The Act to provide for the consolidation of the statutes of Ontario having passed, and the work being well under way, we may hope that at the close of the year we shall have this most helpful revision on our book shelves. We are glad to notice that Mr. J. T. Garrow, Q.C., of Goderich, was, on March 30, ult., added as a Commissioner. No better appointment could have been made. He is an able lawyer with wide experience and of sound judgment, and will add strength to the Commission.

Alimony is defined to be "that allowance which is made to a woman for her support out of her husband's estate, when she is under the necessity of living apart from him." It seems logical that women, who desire the rights of, and who take the place which has heretofore been accorded to those of the sterner sex, should also feel some of their responsibilities, and a case in point has been referred to in a Chicago legal journal which suggests that legislation should give alimony to the husband for his support out of the wife's estate, when he finds it necessary to leave her roof. It is a poor rule that does not work both ways.

Something novel in the way of new trials in criminal cases has recently taken place in Chicago. A prisoner who had been found guilty by a jury was granted a new trial on account of the inefficiency of the counsel who had defended him. A general application of this rule would, perhaps, be very popular with a large number of criminals, but we fail to

see where the learned judge who granted the new trial got his authority for such a proceeding. The *Albany Law Journal* remarks that up to the present time "neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, is reason sufficient for setting aside a judgment or granting a new trial. Any other course would be apt to lead to collusion and confusion in the administration of justice, and for this reason courts are strongly disposed to hold parties as bound by the acts of their attorneys in their behalf in all cases where they are authorized to appear, and in which no fraud is shown, the client being left to his remedy against the attorney for negligence."

There has recently been a discussion in the British House of Commons in reference to appellate jurisdiction in criminal cases. The object of the bill, however, is not the establishment of a Court for reviewing verdicts, but a Court in which sentences can be revised. The question is often asked why a man should have the right of appeal in a dispute as to a small sum of money, and be denied the privilege when his life is at stake. Our namesake in England gives the answer when it says that appeals do not lie from lower courts to higher ones on question of fact, and that "in appeals from the High Court the judges of the Court of Appeal have made it a rule not to disturb the verdict of a jury, unless it can be shown that twelve reasonable men could not arrive at such a decision. If such a test were applied in criminal cases a successful appeal would be nearly impossible. In questions of law an appellate tribunal already exists in the Crown Cases Reserved." The debate on this bill, introduced by Mr. Pickersgill, was a very interesting one, and can be found in full in the English *Law Journal* for March 27th.

A valued contributor takes exception to Mr. Morse's criticism of Lord Watson's remarks (ante p. 223.) He thinks the latter was right to draw public attention to the inappro-

priate language of the statutes of the Dominion and the Provinces of Ontario and Quebec in question. "It is surely," he remarks, "one of the duties of the highest tribunal in the empire to see that constitutional forms are duly observed. The British Constitution makes the Sovereign Herself the Supreme Court of Appeal from all Courts in the various colonies and dependencies of the empire, and although it surrounds Her with advisers to enable Her properly to execute that appellate jurisdiction, it is well that we should be reminded that the appeal is not to the advisers, but to the Sovereign Herself. If these slipshod statutes had been suffered to pass unnoticed, they would, perhaps, have furnished a precedent for similar legislative blunders in the future." It is certainly singular that those responsible for the drafting of the statutes of the Dominion and the Provinces of Ontario and Quebec should all have been equally blind to so palpable an error, but Lord Watson's strictures were possibly a little ponderous in comparison to the size of the offence.

PROFESSIONAL RECIPROCITY.

The legal profession has one great disadvantage as compared with almost every other walk in life, and this disadvantage is one which perhaps seldom occurs to a young man about to choose a career. Generally speaking, when a man has acquired an aptitude or skill in any calling except law, he is at liberty to exercise it for his profit in whatever part of the world he happens to be. He may be required to first pass an examination, as is ordinarily the case when a doctor wishes to practice abroad, but subject to such reasonable restriction, he is generally free to dispose of his services wherever he can find the greatest demand and the best market. The lawyer is less happily circumstanced. Like the agricultural laborer of the middle ages in England, he is forbidden to migrate in search of work, and his sphere of profitable usefulness is limited to his own country, state or

province. He goes abroad on pain of perhaps having to begin life again at the beginning. This disadvantage partly arises from the difference which exists between the subject matter of law and of other professions, the laws of men being diverse while the laws of nature are uniform. A Quebec lawyer would be helpless in Ontario, but a Quebec doctor not necessarily so. But admitting such necessary limitations. it still seems that the lawyer's sphere is unnecessarily narrow, and might fairly and with advantage be extended in certain cases.

With certain well known exceptions, such as Scotland and Quebec, the laws of the various parts of our empire, and, indeed, of the English-speaking world, are alike founded on one basis, the Common Law of England, and despite various statutory modifications in different colonies, (and these have been by no means on dissimilar lines) the body, essence and terminology of all these systems remain substantially the same. The colonial student still learns his law from Anson, Pollock and similar text-books, and is rather annoyed at having to discover for himself which of the statutes mentioned are not in force in his locality. A competent lawyer familiar with the laws of England or of any colony, would have no difficulty in fitting himself, in a very short time, for the practice of law in a new part of the empire. Such being the case it seems hard that the lawyer, obliged, perhaps, by reasons of health, to live abroad, should be denied the privilege of exercising his profession except on condition of serving his articles over again.

These remarks have been suggested by a movement now on foot for affording lawyers the advantage of a wider field. It is understood that a proposition, emanating from the English Colonial Office, and having for its object reciprocal legislation, is now under consideration by the Law Society of Upper Canada. It is suggested that solicitors of certain colonies should be permitted to practice in England on passing an examination and paying fees; like advantages being afforded by the colony to English solicitors. A somewhat similar arrangement is at present in force as

between England and some of the Australian colonies, and there seems no very cogent reason why Ontario should hesitate to accept a fair measure of reciprocity. There is a large and growing body of Canadian agency work to be done in England, and it would be an advantage to have Canadians there to do it. We need not fear serious competition here on the part of the expensively educated English solicitor, accustomed to a much higher scale of fees than ours, and generally incapable of adapting himself to Canadian methods, and who has, besides, so many newer and less crowded fields open to him? There are always those who are alarmed at any suggestion of change, but this at least is certain, that English doctors have not, as yet, made any great use of advantages similar to those suggested. The sixtieth anniversary of Her Majesty's reign is a fitting occasion for a step tending to bring together the professions in the colony and the motherland.

IS PERSONATION AN OFFENCE UNDER THE MUNICIPAL ACT?

By the repeal of sub-sec. 2 of s. 210 of The Consolidated Municipal Act of 1892, by s. 4 of The Municipal Amendment Act of 1896 (59 Vict., c. 51), a nice question arises as to the real effect of the repealing statute.

Does it revive that portion of s. 167 of the first mentioned Act relating to personation and penalties therefor, (*e*), which was held in *Reg.* v. *Rose*, 27 O.R. 195, and followed by Snider, Co. J., of Wentworth, in *Reg.* v. *Carter*, 32 C.L.J. 337, to be repealed by the above mentioned sub-sec. 2 of s. 210, of the Act of 1892?

The Chancellor in his judgment in the former case, at p. 197, cites and follows Martin, B., in *Robinson* v. *Emerson*, 4 H. & C. 352. "When a statute prohibits a particular act and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offence, the latter statute operates as a repeal of the former."

It will be noticed that the Act of 1896 does not expressly revive any portion of s. 167 of the Act of 1892, and according to the Imperial Act 13 & 14 Vict., c. 21, s. 5, commonly called Lord Brougham's Act, where an Act repealing in whole or in part a former Act, is itself repealed, the last repeal does not revive the Act or provision before repealed, unless words be added reviving them. Does this rule apply to a repeal by implication? *Mirfin* v. *Atwood*, L.R. 4 Q.B. 333, is an authority that it does. It was there held that the statute of Gloster had been repealed by the restrictive sections in the former County Courts Act, and that 13 & 14 Vict., s. 5, above referred to, prevented the statute of Gloster reviving on the repeal of those enactments by 30 & 31 Vict., c. 142.

Again in *Mount* v. *Taylor*, L.R. 3 C.P. 645, the judges in effect held that the above rule applied in such cases by holding that it does not apply when the first Act is only modified by the second by the addition of conditions, and the enactment which imposes these was itself afterward repealed, and that in such a case the original enactment would revive. Smith, J., in his judgment says, "Assuming Lord Brougham's Act to apply to cases of implied repeal, it brings us back to the question whether the 13 & 14 Vict., c. 61, did repeal the statutes of Gloster as regards the class of cases within which the present one falls."

It would appear, therefore, that neither that portion of s. 167, relating to personation, nor s. 210 is now in force. No doubt the legislature intended to revive the repealed portion of s. 167, but it is doubtful if it has done so, and it is therefore doubtful if a conviction could now be made, or sustained if made under this section for the offence of personation.

JNO. G. FARMER.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

EXECUTOR—BANKRUPTCY OF EXECUTOR—INJUNCTION—JURISDICTION.

In *Bowne* v. *Phillips*, (1897) 1 Ch. 174, a motion for an interlocutory injunction was granted by Kekewich, J., restraining one of two executors who had become bankrupt from intermeddling with his testator's estate until further order. A similar jurisdiction was exercised in *Harrold* v. *Wallis*, 9 Gr. 443, and *Johnson* v. *McKenzie*, 20 O.R. 131, and see 59 Vict., c. 18, s. 4 (O.)

MORTGAGOR AND MORTGAGEE—MORTGAGE—TRADE FIXTURES - GAS ENGINE—REMOVAL OF FIXTURES AS AGAINST MORTGAGEE

Hobson v. Gorringe, (1897) 1 Ch. 182, involves a similar point to that discussed in *Rogers* v. *The Ontario Bank*, 21 O.R. 416. In this case a mortgagor entered into a contract on the hire and purchase system, for a gas engine for the purpose of carrying on his business as a saw miller; the engine was placed on the mortgaged premises on a bed of concrete, in which were imbedded two iron plates from which iron bolts projected, which passed through corresponding holes in the base plate of the engine, and to which the engine was secured by nuts tightly screwed down. The engine had affixed to it a plate on which it was stated that it was the property of the vendor, whose name and address were stated. The vendee subsequently executed a mortgage of the property to a mortgagee without notice of the agreement, and the mortgagee having entered into possession of the mortgaged premises, including the gas engine, the present action was brought by the vendor of the engine, who contended that the question of fixture or no fixture depended on the intention of the party affixing it, and that in the present case the mortgagor had no intention that the engine should become part of the freehold —and that even if it were a fixture the mortgagee was not

entitled as against the true owner, as by leaving the mortgagor in possession he impliedly authorized him to carry on his business in the ordinary way, and that the engine must be presumed to have been brought on the mortgaged land on the terms of the hiring agreement, by his leave and license. But the Court of Appeal (Lord Russell, C.J., and Lindley and Smith, L.JJ.,) decided that the engine had become a fixture and as such had become part of the freehold, and that the mortgagee was entitled to it as against the vendor, and that the intention of the mortgagor when originally placing the engine on the premises could not effect the mortgagee, who took his mortgage without notice of the agreement, and the judgment of Kekewich, J., in favor of the mortgagee, was affirmed.

REVENUE—PROBATE DUTY—LOCAL SITUATION OF ASSETS—SHARE OF RESIDUE—SUCCESSION DUTY ACT, 1892—(55 VICT., c. 6; 58 VICT., c 7; 59 VICT., c. 5 (O).)

Sudeley v. *Attorney-General*, (1897) A.C. 11, which was known in the Court below as *Attorney-General* v. *Sudeley*, (1896) 1 Q.B. 354, and which was noted ante vol. 32, p. 354, has received the approval of the House of Lords. A will was submitted to probate and one of the assets of the testatrix's estate consisted of her right to a residuary share of her deceased husband's estate, which was composed largely of mortgages of property in New Zealand. At the time of the testatrix's death her husband's estate had not been fully administered, and the clear residue had not been ascertained, and no appropriation had been made of any part of the estate to answer particular shares of the ultimate residue. The House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten and Davey) agreed with the majority of the Court of Appeal that the right of the wife's executors was not to one-fourth or any part of the New Zealand securities in specie, but merely to require the executors of her husband's estate to administer it and receive from them one-fourth of the clear residue when ascertained, and that this was an English asset of the wife's estate and was not "property locally situate out of the jurisdiction." See *Smelting Co.* v. *Commissioners of Inland Revenue*, ante p. 231.

COMPANY—ONE MAN COMPANY—LIMITED LIABILITY—FRAUD UPON CREDITORS—COMPANIES ACT, 1862 (25 & 26 VICT, C. 89), SS. 6, 8, 30, 43.

In *Salomon* v. *Salomon*, (1897) A.C. 22, the House of Lords (Lords Halsbury, L.C., Watson, Herschell, Macnaghten and Davey) have unanimously reversed the decision of the Court of Appeal in *Broderip* v. *Salomon*, (1895) 2 Ch. 323 (noted ante, vol. 31, p. 510), where it was held that it was contrary to the true intent of the Companies Act, 1862, to permit a joint stock company to be formed by a trader selling his business to a company, consisting only of himself and six members of his own family. The House of Lords was unable to find in the circumstances of the case any evidence of any fraudulent scheme on the part of the trader; and the formalities of the Companies Act having been duly complied with, it was held that the company was legally and effectually constituted, and that the vendor of the business could not be made personally liable for the debts of the company, either on the ground taken by Williams, J., that he was the principal, and the company his mere agent or nominee; nor yet on the ground taken by the Court of Appeal, that the formation of the company was a fraudulent device on the part of the trader to enable him to carry on business in the name of the company, with a limited liability, and to obtain as a debenture holder of the company, a preference over the ordinary creditors of the company.

ADMIRALTY—COLLISION—DAMAGES—CONTRACT TO PAY "ALL DAMAGES"—STATUTORY LIMITATION OF LIABILITY—MERCHANT SHIPPING AMENDMENT, 1862 (25 & 26 VICT., C. 63), S. 54.

Clarke v. *Dunraven*, *The Satanita*, (1897) A.C. 59, is the case known when before the Probate and Admiralty Division as *The Satanita*, (1895) P. 248, noted ante, vol. 31, p. 475, in which the House of Lords (Lords Halsbury, L.C., Herschell, Macnaghten, Shand and Davey) have affirmed the judgment of the Court below. The case originated from the collision which took place between the yachts "Valkyrie" and "Satanita" during a race; the owners of both yachts had entered into an agreement to be bound by club sailing rules; and by these rules the owner of any yacht disobeying any of

the rules was to be liable for "all damages arising therefrom." The collision was occasioned by the "Satanita's" breach of one of the sailing rules; and the question was whether the agreement to be bound by the sailing rules overrode the provisions of the Merchants Shipping Act, 1862, which limits the liability to £8 per ton. The House agreed with the Court below in answering that question in the affirmative.

DEFAMATION—LIBEL—PRIVILEGED OCCASION—EXCESS OF PRIVILEGE—MALICE.

In *Nevill* v. *The Fine Art and General Insurance Co.* (1897) A.C. 68, it is not surprising to find that the House of Lords (Lords Halsbury, L.C., Macnaghten, Shand and Davey) have affirmed the decision of the Court of Appeal (1895), 2 Q.B. 156. It may be remembered that the action was brought for defamation, and that the alleged libel was contained in a circular issued by the defendants to persons who had insured with the defendants through the plaintiff as their agent, announcing that the agency of the plaintiff at his office "had been closed by the directors." The Judge at the trial ruled that the circular was capable of a defamatory meaning. The jury found it was, in fact, defamatory, and gave a verdict for the plaintiff for £100, for which judgment was awarded for the plaintiff; this judgment the Divisional Court set aside, and this decision is upheld on the ground that the statement was not capable of a defamatory meaning—that it was, in fact, true, that the occasion was privileged, that the finding of the jury as to excess of privilege in the absence of any finding of actual malice, was insufficient to entitle the plaintiff to succeed, their Lordships being of opinion that there was no evidence of malice.

COMPANY—"FLOATING SECURITY"—DEBENTURES—MORTGAGE OF ASSETS OF COMPANY—PRIORITY.

In *Government Stock Co.* v. *The Manila Railway Co.*, (1897) A.C. 81, debentures were made a charge on all the property of a joint stock company, but were subject to a condition that notwithstanding the charge created by the debentures, the company might, in the course of its business,

sell or otherwise deal with its property until default should be made in payment of the interest for three months after the same should have become due, or until an order or resolution for winding-up. After an instalment had been due for more than three months, but before the debenture holders had taken any proceedings to enforce their security, the company by an issue of bonds mortgaged certain specific assets, and the question in the case was simply whether or not the debentures were entitled to priority over the bonds. The House of Lords (Lords Halsbury, L.C., Macnaghten, Shand and Davey) affirmed the judgment of the Court of Appeal (1897) 2 Ch. 551 (noted ante vol. 31, p. 599), holding that they were not, but that until some steps were taken by the debenture holders to enforce their charge and prevent the company dealing with the property, the debentures continued "a floating security" and the debenture holders were not entitled to an injunction to restrain the company from paying interest to the bondholders.

CHEQUE—PAYEE OF CHEQUE A FICTITIOUS OR NON-EXISTING PERSON—DRAWER, INTENTION OF—BONA FIDE HOLDER FOR VALUE—BILLS OF EXCHANGE ACT, 1882—(45 & 46 VICT., C. 61), SS. 2, 7 (3), 73—(53 VICT., C. 33, SS. 7 (3), 72 (D.)).

Clutton v. *Attenborough*, (1897) A.C. 90, which was noted, when before the Court of Appeal (1895) 2 Q.B. 306, ante vol. 31, p. 506, turns on the construction of the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61) ss. 2, 7 (3) 73; (53 Vict., c. 33, ss. 7 (3), 72, D). The facts of the case were not complicated. A clerk of the plaintiff's, with the object of committing a fraud on his employers, represented that work had been done for them by one Brett, in whose favor he induced the plaintiffs to sign cheques. There was in fact no such person as Brett, and the fraudulent clerk having secured possession of the cheques indorsed them in the name of Brett, and negotiated them with the defendants, who gave value for them in good faith. The bank on which the cheques were drawn having paid the amount of the cheques to the defendants, the plaintiffs brought the present action to recover the amount so paid, as money paid under a mistake of fact.

The Court of Appeal held that upon a proper construction of the Bills of Exchange Act the cheques in question were made payable to a fictitious person within the meaning of s. 7 (3) (see 53 Vict., c. 33, s. 7 (3) (D.), and therefore the cheques were under that section payable to bearer, and the fact that the drawers thought that Brett was an existing person was immaterial.

SHIP—MARITIME LIEN FOR DAMAGES OCCASIONED BY A COLLISION

Currie v. *McKnight*, (1897) A.C. 97, was an appeal from a Scotch court, but inasmuch as the point of law involved is one in which the law of Scotland and England are the same, it may be useful to note it here. The question was whether the appellant was entitled to a maritime lien. The facts were that the crew of the ship upon which the lien was claimed, had cut the cables of the appellant's ship, and she had been driven on shore and damaged, and the House of Lords (Lords Halsbury, L.C., Watson, Morris, and Shand,) determined that there was no lien for the damage thus occasioned, because liens for damages to ships by reason of a collision only arise where the damage is caused by the ship itself on which the lien is claimed; the wrongful act of the crew is not sufficient to give a lien on the ship for damages resulting from such wrongful act.

NUISANCE—OBSTRUCTION OF STREET—TRAMWAY—SNOW AND SALT—INJUNCTION.

Ogston v. *Aberdeen District Tramways Co.*, (1897) A.C. 111, as the name of the case imports, was also an appeal from a Scotch Court—the point involved, however is one of general interest. The action was brought by the plaintiff, who carried on business in Aberdeen to restrain the defendants, a tramway company, from clearing their lines of rails when there is snow upon the ground in such a way as to impede and obstruct the general traffic upon the public thoroughfares. The injunction was specifically asked against heaping up snow which the defendants removed from their lines on to other parts of the streets, and allowing it to lie there; and also against scattering salt upon the snow, and thus forming

a noxious mixture which caused serious injury to horses and other animals. The municipal authority made no objection to the defendants' proceedings, and the defendants endeavored to shelter themselves from liability to the plaintiff on that ground. The House of Lords (Lords Halsbury, L.C., Watson, Shand, and Davey,) reversed the decision of the Scotch Court dismissing the action, and held that the defendants' act amounted to a legal nuisance, which was not sanctioned by either the defendants' Special Act or the General Tramways Act, and that the default of the municipality did not affect the defendants' primary liability, and the plaintiffs were declared to be entitled to an injunction (or interdict, as it is termed in Scotch law), as claimed. We may, however, note that Lord Halsbury points out that if the question had arisen in England, it is doubtful whether the obstruction as proved was such as a private person could sue to abate without further proof of peculiar damage to himself. Probably under English law the action should be brought in the name of the Attorney-General.

WATER—DIVERSION OF WATER—"STREAM"—LEASE—COVENANT.

McNab v. *Robertson*, (1897) A.C. 129, is another appeal from a Scotch Court. The plaintiff was a lessee of a distillery with thirteen acres of land and two ponds, "together with a right to the water in the said ponds and in the streams leading thereto." The defendant, the lessor, sunk a tank on ground outside of the demised premises and drew off from certain marshy ground water percolating therefrom underground, which would otherwise have found its way into the ponds; and the point in controversy was whether this percolating water was "a stream" leading to the pond, and their Lordships (Lords Watson, Shand and Davey) held that it was not, but Lord Halsbury, L.C., dissented and thought that the words "in the streams leading thereto" were sufficient to cover all sources by which the ponds were supplied with water, whether above or below ground.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Quebec.] [Jan. 25.

SALVAS *v.* VASSAL.

Title to land—Sale absolute in form—Right of redemption—Effect as to third parties—Pledge.

Real estate was conveyed to Salvas by notarial deed, absolute in form but containing a provision that the vendor should have the right to a re-conveyance on paying to Salvas the amount of the purchase money within a certain time. Salvas subsequently advanced the vendor a further amount and extended the time for redemption. The vendor did not pay the amount within the time, and the property having been seized under execution issued by Vassal, a judgment creditor of the vendor Salvas filed an opposition claiming it under the deed.

Held, reversing the judgment of the Court of Queen's Bench, that the sale to Salvas was vente à réméré and was not to be treated as a pledge and set aside on proof that the vendor was insolvent when it was executed.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Lavergne*, for appellant.

Crepeau, Q.C., and *Beaudin*, Q.C., for respondent.

Quebec.] [Jan. 25.

MURPHY *v.* LABBE.

Lessor and lessee—Use of premises—Destruction by fire—Negligence—Burden of proof—Art. 1629 C.C.

Premises were leased to be used as a furniture factory, the lease containing the usual covenants as to repair. The premises were destroyed by fire, of which it proved to be impossible to discover the origin. In one of the rooms there was a quantity of cotton waste saturated with oil, but nothing to connect it with the fire. In an action by the lessor for the restoration of the premises or equivalent damages,

Held, STRONG, C.J., dissenting, that there was no obligation on the lessee by virtue of Art. 1629 C.C., to excuse himself from liability by proving that the fire occurred from causes beyond his control; that negligence must be established against him as in other cases of the kind; that he is not liable if he proves that he has used the premises in the manner a prudent owner would use them; and that the presence of the saturated cotton waste was of itself no evidence of negligence.

Held, also, that the evidence of workmen of the lessee should not be discredited because they might possibly have feared convicting themselves of imprudent acts.

Beique, Q.C., and *Trenholme*, Q.C., for appellant.

Lafleur and *Fortin*, for respondent.

Quebec.] [Jan. 25

CITY OF QUEBEC *v.* NORTH SHORE RY. CO.

Construction of deed—Ambiguous expressions—Conduct of parties—Presumptions.

On the 21st of August, 1882, the Government of Quebec acquired by deed from the City of Quebec all the proprietary rights that the city had in lands designated on the cadastre as No. 1937, "situated between St. Paul, St. Roch and Henderson streets and the river St. Charles, with the wharves and buildings thereon erected," concerning which there had previously been negotiations and some correspondence between the Government and the city, but the deed, however, did not follow precisely the designations or terms referred to in the correspondence. On the same day, by another deed, the Government conveyed the same property to the respondent, and subsequently the property passed to the Canadian Pacific Railway under the provisions of 47 Vict. (D) c. 87, s. 3, 48 and 49 Vict. (D.) c. 58, s. 3. Upon the execution of the deeds mentioned the respondent took possession of the grounds and wharves which have been occupied firstly by the respondent and then by the Canadian Pacific Railway ever since that time. In August, 1894, the respondent brought an action to recover part of the lands alleged by them to have been included in the description contained in the deed, which had not been delivered to them, but had remained in the possession and occupation of the city and others to whom the city had sold the same. The difficulty arose from the ambiguity in the description arising from the fact that Henderson street did not run to the river, but only to a public highway known as Orleans Place, the limits of which were not in direct prolongation of Henderson street as actually used for a thoroughfare. The respondent claimed that from the correspondence pending the negotiations it appeared that the intention of the parties to the deed was that the boundary should be by Henderson street and the line of the western limit of that street as then in use prolonged into the River St. Charles, which would entitle them to an additional strip of land and a wharf commonly called the Gas Wharf, of which they had been improperly deprived during a period of over twelve years through unlawful occupation by the city, and those to whom the city sold the property after having conveyed it to the Government by that description.

Held, that in the absence of other means of ascertaining the intention of the parties, ambiguities in the designation of lands should be interpreted against the vendee, and in favor of the vendor and his assigns.

Held also, that the prior correspondence did not contain a concluded agreement between the parties and could not be used to contradict or modify the deed.

In cases of ambiguous descriptions in deeds of lands, the manner in which the parties to the deed have occupied and dealt with property which might be affected thereby is strong proof of the boundaries of the land intended to be conveyed, and sufficient in law to justify the presumption that the parties by their subsequent occupations correctly executed their intentions at the time of the passing of the deed.

Held, per GWYNNE, J., that whatever, if any, right, title or interest, in the disputed portion of the lands did pass by the first deed to the Quebec Government, had become vested in the Canadian Pacific Railway Co., in virtue of the statutes and instruments executed thereunder, and consequently the respondents had no right of action whatever to have it declared that they had any right, title, interest or claim thereto.

Pelletier, Q.C., for appellant.

Langelier, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Practice.] [March 2.

IN RE WILSON, TRUSTS CORPORATION OF ONTARIO *v.* IRVINE.

Appeal—Surrogate Court—Time—Security—Deposit of cheque—Affidavit—R.S.O. c. 50, s. 33—Surrogate Rule 572.

The plaintiffs, desiring to appeal to the Court of Appeal from an order of the Judge of a Surrogate Court made on the 4th October, 1895, served notice of appeal on the fifteenth day thereafter, and on the same day deposited with the Registrar of the Surrogate Court as security a cheque for $100 payable to the order of the Registrar. The cheque was not marked by the bank, and was not cashed or presented for payment by the Registrar, who simply retained it in the office. No other security was given, and no affidavit of the amount of the property to be affected by the order was filed:

Held, that what was done was not such a compliance with the requirements of Rule 572 of the Surrogate Rules of 1892, that the appeal was thereby lodged and brought within fifteen days, as required by s. 33 of the Surrogate Courts Act, R.S.O. c. 50; and the appeal was quashed with costs.

D. W. Saunders, for the plaintiffs.

Du Vernet, for the defendant.

Practice.] [March 16.

D'IVRY *v.* WORLD NEWSPAPER COMPANY OF TORONTO.

Discovery—Defamation—Production of documents—Privilege—Criminating answers—R.S.O., c. 61, s. 5—Incorporated company - Indictment.

A person is protected against answering any question not only that has a direct tendency to criminate him, but that forms one step towards doing so, but the person, or, in the case of a corporation, an officer, must pledge his oath to his belief that such would or might be the effect of his answer, and it must appear that such belief is likely to be well founded.

The statute, R.S.O., c. 61, s. 5, has merely embodied the existing law as to the protection of a witness against answering questions tending to criminate, though including the case of a party examined as a witness, or for the purpose of discovery.

In regard to the production of documents the same privilege exists as in regard to questions put to a witness or party.

The proposition that a corporation is not liable to an indictment for libel is at least so doubtful that it would not be proper to compel a newspaper publishing corporation to make production of documents which might subject them to a criminal prosecution.

Pharmaceutical Society v. *London and Provincial Supply Association*, 5 App. Cas. 857, specially referred to.

Legislation suggested, similar to 32 & 33 Vict., c. 24 (Imp.), to afford an easy means of proving by whom a newspaper is published.

H. M. Mowat, for the plaintiff.

King, Q.C., for the defendants.

Practice.] [March 18.

IN RE CASSIE, TORONTO GENERAL TRUSTS CO. *v.* ALLEN.

Costs—Will—Appeal—Costs out of estate—Watching brief.

The costs of opposing an unsuccessful appeal from a judgment establishing a will and codicil were ordered to be paid to the respondents, who were the executors, and certain legatees, out of the estate, in the event of their not being able to make them out of the appellant; the costs of the executors to be only as on a watching brief.

W. R. Riddell, for the appellant.

H. Cassels and *W. E. Chisholm*, for the respondents.

HIGH COURT OF JUSTICE.

Divisional Court.] [Jan. 18.

HUTCHINSON *v.* LA FORTUNE.

Will—Proceeds of real estate equally divided between wife and brother and sister—Half share.

Where testator by his will directed his real estate to be sold and the proceeds to be equally divided between his wife and his brother and his sister, the wife takes a one-half share, and his brother and sister the other half share between them.

W. A. Dowler, for the plaintiff.

W. M. Douglas, for the defendant.

MEREDITH, J.] [Jan. 22.

RE HAY AND THE CORPORATION OF LISTOWEL.

Municipal institutions—Debentures for electric light works—Limitation to twenty years—Con. Mun. Act, 1892, s. 340.

A by-law passed for the construction of water works and gas or electric light works made the debentures to be issued thereunder payable in thirty years from the date on which the by-law took effect.

Held, that the by-law was bad, for under s. 34 (O.), of the Con. Mun. Act, 1892, 55 Vict., c. 42, the time for the payment of debentures for electric light works, is limited to twenty years.

W. M. Douglas, for the plaintiff.

Aylesworth, Q.C., and *Walter Read*, contra.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [March 8.

GARDINER *v.* MUNRO.

Accounts—Loans and advances—Securities—Bonus and commissions—Renewals.

Where securities are of a speculative or unsatisfactory nature bonuses or commissions actually deducted by the lender at the time of the advances are properly chargeable.

Where no money passes on the renewal of mortgages or promissory notes bonuses or commissions charged in addition to interest, are not properly chargeable.

Leitch, Q.C., and *C. A. Myers*, for the plaintiff.

Moss, Q.C., and *I. Hilliard*, for the defendant.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [March 8.

STRUTHERS *v.* MACKENZIE.

Company—Purchase of goods on credit—Statutory inability to buy on credit—Acceptance of draft in name of company—Implied representation of authority at law—R.S.O. c. 166, s. 13.

The plaintiff sued the manager, treasurer and directors of a co-operative association for the price of goods supplied to the association, on credit. By reason of R.S.O. c. 166, s. 13, under which the association was incorporated, it could not buy goods on credit. The plaintiff rested his case on an implied representation or warranty by the defendants of the authority of the association to purchase the goods on credit.

Held, that the plaintiff could not recover as no action could be maintained upon an implied representation or warranty of authority in law to do an act, but only upon an implied representation or warranty of authority in fact to do it; and, moreover, the plaintiff must be taken to have known of the statutory inability.

Held, also, that although the goods, having been sold by the association, the proceeds were applied to relieve the defendants from a personal liability under which they were for the price of other goods purchased by the association, yet as they do not themselves benefit by the purchase of the plaintiff's goods, the plaintiff could not recover on this ground.

Held, lastly, that though one of the defendants accepted drafts of the plaintiff drawn on the association for the association, this defendant was

nevertheless not liable upon the implied representation or warranty of authority of the association to accept such drafts, because this too was on a point of law.

G. C. Gibbons, for the plaintiff.

Hanna, for the defendants.

ROSE, J.
London Assizes. [March 16.

PIPER *v.* LONDON STREET RY. CO.

Evidence—Negligence—By-law.

Action for damages for personal injury to plaintiff through being struck by a street car, the alleged negligence of defendants being that the car was being run at an excessive rate of speed.

Held, that an agreement ratified by municipal by-law between the municipal corporation and defendants, limiting the rate of speed, was inadmissible as evidence that a higher rate of speed was negligent.

E. Meredith, Q.C., and *Cameron*, for plaintiff.

Hellmuth, for defendants.

STREET, J.] [March 18.

HOFFMAN *v.* CRERAR.

Discovery—Production of documents—Affidavit—Privilege—Confidential communications—Solicitor and client—Application for better affidavit.

In an affidavit of a party on production of documents, a certain letter was described by its date, and as being from a firm of solicitors to the deponent, who said that he objected to produce it, because it was a communication between solicitor and client, and was privileged.

Held, doubting, but following *Hamlyn* v. *White*, 6 P.R. 143, that the statement was sufficient to protect the document from production.

In the same affidavit two other letters were described by their dates, and as being from a solicitor to a firm of solicitors, and a copy of a letter written in answer to one of them was similarly described. These documents, the affidavit stated, were in the possession of the solicitors for the deponent and others in another action, and he objected to produce them, and claimed privilege for them "on the ground that they are communications between solicitor and client, and between my solicitors and others in the course of their conducting my business."

Held, that these letters not being written to or by the deponent, there was no reasonable intendment that the deponent was the "client" referred to, nor that they were necessarily confidential because they were written by the deponent's solicitors to other persons in the course of their conducting his business; and the opposite party was entitled to a better affidavit on production, in which the deponent might set up other grounds of protection.

It is irregular to go into the merits upon an application for a better affidavit.

Morris v. *Edwards*, 23 Q.B.D. 287, followed.

D. L. McCarthy, for the plaintiff.

J. H. Moss, for the defendant Crerar.

MEREDITH, C.J.] [March 19.

CAMERON *v.* ELLIOTT.

Venue—Change of—County Court action—Rule 1260—Second application—Appeal—Law Courts Act, 1895, s. 9 (2).

Where in a County Court action an application has been made to the Master in Chambers, under Rule 1260, to change the place of trial, no appeal lies from his order; and a second application for the same purpose not based upon any new state of facts arising since the first application was made, will not be entertained by a Judge in Chambers.

McAllister v. *Cole*, 16 P.R. 105, followed.

Milligan v. *Sills*, 13 P.R. 350, not followed, with the concurrence of the Judges who decided it, pursuant to s. 9 (2) of the Law Courts Act, 1895.

W. E. Middleton, for the plaintiff.

Mr. Beatty (*W. J. Elliott*), for the defendant.

ROSE, J., In Chambers. [March 30.

REG. EX REL. WATTERWORTH *v.* BUCHANAN AND CUTHBERT.

Municipal elections—Deputy returning officer—Absence during part of polling-day—Irregularity—Saving clause—Consolidated Municipal Act, 1892, s. 175.

At an election of county councillors one of the deputy returning officers for a town in the county was absent from his booth on three separate occasions during polling-day. There was was no suggestion of bad faith. The first and second absences were on account of illness; on the third occasion he went out to dinner and voted in another place. The first absence was for about ten minutes, during which the booth was locked up, with the poll-clerk and constable inside, in charge. The deputy swore that no voter came in till he returned. In his second and third absences the town clerk took his place. During the second no votes were cast, but during the third there were several. The town clerk placed the deputy's initials on the back of the ballots given to such voters, and the consequence was that these ballots were upon a judicial investigation identified and separated, and it appeared that during the third absence nine votes were cast for the relator and nine for the respondent. Upon the whole the respondent had two more votes than the relator, and by s. 13 of the County Councils , 1896, there being two county councillors to be elected, a voter could give both his votes to one candidate.

Held, that the absences and what was done during the absences did not affect the result of the election, and applying the saving provisions of s. 175 of the Consolidated Municipal Act, 1892, that it should not be declared invalid.

W. T. McMullen, for the relator.

Aylesworth, Q.C., for the respondent, Buchanan.

ROSE, J.] [March 31.

BRILLINGER *v.* AMBLER.

Landlord and tenant—Distress for rent—Set-off—Notice—Illegal distress—Double value—R.S.O., c. 143, s. 29—2 W. & M., sess. 1, c. 5, s. 5.

Where, after goods of the tenant had been seized by the landlord as a distress for rent, a notice of set-off was given by the tenant, pursuant to R.S.O., c. 143, s. 29, but the landlord continued in possession and sold the goods.

Held, in an action for illegal distress, in which it was found that the tenant was entitled to set off a debt in excess of the rent due, that he was not entitled to recover double of the value of the goods under 2 W. & M., sess. 1, c. 5, s. 5; for, under that enactment, the seizure must be unlawful as well as the sale; and here the distress when made was not unlawful, the landlord becoming a trespasser only when he remained in possession after the notice.

Strathy, Q.C., for the plaintiff.

H. Lennox, for the defendant.

FERGUSON, J.] [April 2.

WIGLE *v.* VILLAGE OF KINGSVILLE.

Municipal corporations—Contract—Necessity for by-law—Resolution of council—Consolidated Municipal Act, 1892, ss. 281, 288.

A by-law of a village corporation authorized the raising, by way of loan, of a certain sum for the purpose of mining and supplying the village with natural gas, and the issue of debentures therefor.

Held, having regard to s. 282 of the Consolidated Municipal Act, 1892, that a by-law was necessary to authorize the making of a contract for the mining work to be done, and that this by-law did not authorize it.

Held, also, that a resolution of the council, though entered in the minute book and containing the contract at full length, and having the seal of the corporation attached to it, could not be considered a by-law because it was not signed as required by s. 288.

E. S. Wig[illegible], for the plaintiff.

A. H. Clarke, for the defendants.

ROSE, J.] [April 5.

LEYBURN *v.* KNOKE.

Notice of trial—Jury sittings—Non-jury sittings—Default—Judicature Act, 1895, s. 88—Rule 647.

Where an action is to be tried without a jury, and two spring or autumn sittings have been appointed at the place of trial, one for the trial of actions with a jury, and the other without a jury, the plaintiff, although by s. 88 of the Judicature Act, 1895, he can have his action tried at the jury sittings, is not in default under Rule 647 by reason of his not giving notice of trial therefor, where the non-jury sittings, for which he intends to give notice of trial, is to be held at a later date.

D. L. McCarthy, for the plaintiff.

R. Hodge, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 19, 1896.

TAYLOR *v.* MCKINNON.

Assignment for the benefit of creditors—Distribution of assets—Action to recover—Question of fraudulent intent—Burden of proof as to—Bona fide takers for value—Where property has passed into the hands of—Equitable relief—Power of Court to appoint receiver—Appointment of.

On the 22nd Nov., 1892, N. M. made a deed of assignment for the benefit of creditors to S.W.C., of all his real and personal estate, with preferences in favor of the People's Bank of Halifax and the firm of W. C. & Sons, for the sums of $200 and $1,201, respectively. The deed was attacked by creditors as fraudulent and void under the statute 13th Eliz., c. 5, and a levy was made by the sheriff under execution on a quantity of the goods assigned, in December, 1892.

By a decision of the Supreme Court of Nova Scotia, delivered May 12th, 1894 (27 N.S.R. 53), the assignment was held good, but on appeal to the Supreme Court of Canada this decision was reversed, and the assignment was held bad under the provisions of the statute, 13th Eliz., as disturbing, hindering, delaying and defrauding creditors.

In the meantime, between the delivery of the judgment of the Supreme Court of Nova Scotia and the judgment of the Supreme Court of Canada, the assignee paid to the People's Bank of Halifax the sum of $200, for which the bank was preferred, and on the order of N.M., the debtor, paid to the firm of W. C. & Sons the sum of $169, cash received by him as assignee, and, so far as he could do so, assented to a transfer from N. M. to the firm of W. C. & Sons of book debts, judgments, etc., to the amount of $700, in part payment of their claim.

The plaintiffs in the present action, who sued on behalf of themselves and all other creditors who might contribute towards the costs of the action, claimed, among other things, to have the deed set aside as fraudulent and void under the statute, an account from the defendants, S.M.C., the firm of W. C. & Sons, and the Peoples Bank, of all property, moneys, etc., received or paid by them under the provisions of the deed of assignment, payment of the plaintiff's claims out of any property or moneys so received, and the appointment of a receiver.

The debtor, N. M., owed a number of local creditors small amounts, and instead of preferring them individually W. C. & Sons undertook to pay the amounts due to them, and were preferred for an increased amount in the assignment, to cover the indebtedness which they undertook to pay. In respect to the $603 of the amount, W. C. & Sons made themselves directly liable to the creditors by acceptances and otherwise, but in respect of the sum of $280 due to other creditors, while they agreed to pay, no agreements with the creditors were actually entered into. The preference for the latter amount was disputed.

Held, that as between plaintiffs and the People's Bank the question was whether the bank was a taker for valuable consideration, bona fide and without notice of the fraud; that if, when the bank took the proceeds in payment of their claim, they were not privy to the intent of the debtor to hinder and delay creditors, they would not be affected by the fact that the deed was void under the statute as against other parties. That, there being valuable consideration, there must have been an actual and express intent to defraud creditors, and the party accepting the proceeds must be shown to have been privy to such intent. That the burden of showing such want of good faith was upon the plaintiffs. That to show such want of good faith it must have been shown that the agent of the bank was aware that the whole amount of the indebtedness that W. C. & Sons agreed to pay had not been secured, and that novation had not taken place. That the facts relied upon as constituting the retention of a benefit not having been brought to his attention, and the trial judge having found against the question of notice, there was no participation in the fraud on the part of the bank, and the transaction, so far as they were concerned, was clearly good.

Held, otherwise as to W. C. & Sons, who were parties to the transaction.

Held, also, as to the payment by the assignee on the order of the debtor, to W. C. & Sons, of the sum of $167, and the transfer of the choses in action, that the transactions were bad and could not stand. That W. C. & Sons were not bona fide takers for value, but were parties to the statutory fraud, and that the money and the chosses in action could therefore be followed, and be made liable to the process of creditors in satisfaction of their claims.

Held, also, as to payments made by the debtor directly to creditors without passing through the hands of the assignee, that such sums were not recoverable from the assignee (*a*) because they had not passed through his hands, (*b*) because they had gone into the hands of bona fide takers for value without notice, and (*c*) because the property out of which the proceeds were realized had also presumably gone into the hands of bona fide purchasers for value without notice.

Held, also, that the assignee was not personally liable on account of having parted with property that he had in his hands (*a*) because he was not a trustee for creditors who repudiated the deed, and could not be made to account as such, and (*b*) because plaintiffs were only creditors when the assignment was made and could have nothing more than judgment and execution against the debtor's property wherever it could be found.

Held, also, that all conveyances interposed by the debtor between execution and the property were void under the statute, but that if the property was beyond the reach of an ordinary execution the Court could afford relief in the form of an equitable execution, if it had the necessary materials before it, but only to obtain property or proceeds which could be followed.

Held, also, that where there are materials, and there is nothing available for legal execution, there may be in the one action a prayer to set aside the deed, and a prayer for a receiver.

Held, also, that as the suit was brought on behalf of all the creditors, the proceeds recovered should be distributed pro rata, except that those who had acquired liens must be satisfied to the extent of the liens.

McNeil, Q.C., for plaintiffs.

Borden, Q.C., *Jas. McDonald* and *H. A. Lovett*, for defendants.

Full Court.] [Jan. 12.

JOHNSON *v.* FITZGERALD.

Guarantee—Special indorsement in action on—Should set out consideration—Indorsement set aside and action dismissed—Judgment of County Court Judge affirmed—Amendment.

Plaintiff's writ was specially indorsed as follows: "The plaintiff's claim is against the defendant upon a guarantee in writing, of the 6th day of November, 1895, by which defendant agreed to see that plaintiff was paid ten dollars per month on the following note: 'Ten months after date I promise to pay to the order of Walter Johnson, one hundred dollars, payable ten dollars per month, without interest, at Caledonia Corner, for value received.' Particulars,—

To instalments due to July 6th, 1896	$80
By instalments paid to April 6th, 1896	50
Amount due	$30

"No instalments have been paid since April 6th, 1896, and defendant refuses to perform his guarantee. The plaintiff claims $30."

The statement of claim was struck out by the Judge of the County Court, and plaintiff's action was dismissed, on the ground that the action was based upon the guarantee, but no consideration was stated, and it did not appear whether the guarantee was under seal or not.

Held, affirming the judgment of the County Court Judge, that a special indorsement, equally with every other statement of claim, must show a cause of action, and that in order to constitute a good special indorsement in an action upon a guarantee, it was necessary to show the consideration upon which it was alleged to have been made.

Held, also, that there was nothing stated from which consideration might or must be inferred.

Held, also, that the word "guarantee" did not of itself import consideration.

Held, also, that the plaintiff not having asked for leave to amend below, must be deemed to have taken his chances upon the case he made, and that such leave should not be granted now.

Held, also, that the Judge below adopted the correct course, upon the conclusion he reached, in dismissing the action.

Per WEATHERBE, J., dissenting,

Held, that the indorsement was sufficient, but, if not, the defect was a mere slip, as to which the County Court Judge should have suggested an amendment, and that he erred in dismissing the action.

W. B. A. Ritchie, Q.C., for plaintiff.

W. A. Henry, for defendant.

Full Court.] [Jan. 23.

AUCHTERLONY *v.* PALGRAVE GOLD MINING CO.

Mortgagor and mortgagee—Agreement for compromise of claim—Discretion of Judge at Chambers to order stay—Held properly exercised.

Plaintiffs having obtained orders for judgments in two foreclosure suits, an agreement was entered into in writing between the parties for a settlement of the suits, extending the time for payment, and providing for the payment of different sums at different dates, and providing that when the defendant company paid the balance of the amount due upon the judgments, the plaintiff should at once pay to F. the difference between the sum of $15,000 and the amount of the judgments. The defendant company made one payment, but failed to make the other within the time agreed upon, and plaintiff proceeded to enforce the judgments and advertised the properties for sale. Before the day of sale defendant offered to pay the balance due, but in making such payment, claimed the right, under a verbal agreement, to pay the difference between the $15,000 and the balance due on the judgments by a cheque of F., that sum being at once payable to him by plaintiff under the terms of the written agreement. Plaintiff having refused to accept payment in this way, an order was obtained from a Judge at Chambers staying the sale for a period of 90 days to enable the rights of the parties to be ascertained.

Held, HENRY, J., dissenting, that the order for the stay was clearly within the discretion of the Judge who granted it, and that such discretion was properly exercised.

R. E. Harris, Q.C., and *C. H. Cahan*, for plaintiff.
Jos. Kenny, for defendant.

WEATHERBE, J., In Chambers. [Feb. 6.

LOWTHER *v.* LOGAN.

Dominion Controverted Election Act—Time for presenting petition—When last day falls on Sunday, the following day too late.

In this case the election was held on June 23rd, and the petition against the member elect was presented on August 3rd. R.S.C. c. 20, s. 5, as amended, requires the petition where there has been a contest to be presented within forty days after polling. The fortieth day fell on Sunday and the petition was presented the following day. The question as to whether the presentation was in time was raised by preliminary objection.

Held, that the presentation was too late. S. 7, sub-secs. 26 and 27 of the Interpretation Act relate to procedure. *Dechene* v. *The City of Montreal*, App. Cas. 1894, p. 640, is binding.

H. Mellish, for respondent.
J. A. Chisholm, for petitioner.

TOWNSHEND, J., In Chambers. [March 19.

KAULBACH *v.* NAAS.

Writ of possession after sheriff's sale under execution—Registered judgment against land, of which a portion is in possession of third party at time judgment registered.

A purchaser of land at sheriff's sale applied for a writ of possession under R.S. N.S., c. 124, s. 21. The person against whom the writ was sought, a son of the defendant, claimed a portion of the land sold, by possession. In 1869 or 1870 he put a house on the land he claimed, and has since lived in it, extending his occupation from time to time by cultivation, etc. He swore the land was given to him by his father, the defendant, in 1869 or 1870, in consideration of his remaining at home to help work the farm after coming of age. No deed was given. Judgment was entered and recorded against the father, November 3rd, 1871.

Held, that the effect of the registration of the judgment was to bind all lands of defendant, including the land in possession of his son. The N. S. Registry Act, c. 84, R.S. N.S., s. 21, provides that a judgment after registration shall bind all the lands of the judgment debtor "as effectually as a mortgage." So long as the judgment was kept alive no possession could avail against it. *Grindlay* v. *Blaikie*, 19 N.S.R., 27, and *Miller* v. *Duggan*, 23 N.S.R., and 21 S.C.R. 33, cited and followed. Writ of possession allowed.

Chesley, for applicant.

Owen, Q.C., contra.

Province of New Brunswick.

SUPREME COURT.

BARKER, J. In Equity. [March 16.

WILLIAMS *v.* RAWLINS.

Practice—Dismissal of bill—No step taken for a year before application.

This was an application made on the 16th of March, 1897, by the defendant, to dismiss the plaintiff's bill. The bill was filed on the 25th of September, 1895, and answer was filed on the 10th of December following. The plaintiff joined issue by replication served on the 24th Dec. following. Owing to the poverty of the defendant and his absence from the province, no further step was taken. For the plaintiff it was contended on the authority of *Hodges* v. *Barton*, 8 Ir. Eq. Rep. 38, and *Blakeney* v. *Blakeney*, 13 Ib. 84, that the case was out of Court, over a year having elapsed since any proceeding had been taken in the suit by either party.

Held, that the bill being on file, the plaintiff should proceed to hearing on filing replication, or bill be dismissed.

McLEOD, J.
Northumberland Circuit.

ALLISON *v.* MASTERMANS. March, 1897.

Implied contract.

Plaintiff erected for defendants a pulp mill. There was no contract between them. Defendants said to plaintiff, "Go on and build." In the course of construction the defendants wrote: "I shall make our private business between you and I perfectly satisfactory to you when I go down." Defendants moved for non-suit on the ground of there being no contract between the parties.

Non-suit refused.

Pugsley, Q.C., for the plaintiff.

Gregory, Q.C., for defendants.

McLEOD, J.,
Northumberland Circuit.

March, 1897.

REGINA *v.* SMITH.

Criminal law—Threats—Confession.

Smith was a clerk in a post office. Stephen J. King was inspector of this office. He discovered irregularities and questioned Smith about them. Smith admitted that he delayed letters. The inspector said, "If you have tampered with the contents it will go hard with you." Smith then made a confession.

The Court refused to allow evidence of confessions subsequent to the threat.

Carleton, for the Crown.

Pugsley, Q.C., for the prisoner.

BARKER, J.,
in Equity.

[March 16.

MUTUAL LIFE INSURANCE CO. *v.* McANN.

Practice—Service of notice on defendant instead of solicitor.

This was a motion to take the bill in this suit pro confesso against the defendant for want of an answer. The affidavit of service of notice disclosed that it was served on the defendant instead of his solicitor, owing to the fact that the latter had permanently removed from the province.

Motion allowed.

Ruel, for the motion.

BARKER, J.
In Equity.

[March 16.

LAUGHLAN *v.* PRESCOTT.

Crown land lumber licenses—Agreement to assign—Priority of assignment without notice of agreement—Stifling competition at public sale—License to cut lumber not an interest in land.

In 1893 one M. purchased at a Crown land sale a right to cut lumber on certain Crown lands, and a license was issued to him dated September 1st, 1893, with certain regulations incorporated therein, and the license was to be in force until August 1st, 1894. One of the regulations is as follows: "Licenses may be assigned by writing, signed by the licensee, and the assignee shall within reasonable time give notice of such assignment and its date to the Surveyor-General. The assignment shall take effect from the date upon which

notice thereof shall be received at the Crown land office, unless the Surveyor-General, within ten days thereafter, refuse his assent thereto." Another regulation provides that "Licensees who have paid their stumpage dues in full, and have otherwise fully complied with all the conditions of their licenses, on or before the first day of August in each year, shall be entitled to annual renewals on the payment of the mileage thereon. One L., the plaintiff's rather, being desirous of securing certain lumber privileges in an area included in the license to M., entered into an arrangement with M. before the sale that he, M., should buy in the block, and afterwards transfer to L. the privileges he desired. Immediately after the sale the agreement was drawn up, dated 31st of August, 1893, reciting the sale to M., and that M. had agreed to sell to L. for the term for which licenses issue, and renewals, to cut lumber in certain area, L. paying to M. forty dollars, and agreeing to pay M. the renewal mileage each year, and M. agreeing to renew all licenses. This agreement was filed at once in the Crown land office, and the $40 was paid to M., as well as $20 in August, 1894, as L.'s share of the renewal mileage. L.'s right was transferred by him to the plaintiff's on the 10th of February, 1894, by writing, but this assignment was never filed in the Crown Land office. On the 16th of November, 1894, M. transferred his license to the defendants for valuable consideration, and the renewal for 1894 was issued by the Crown Land department to them on production of the assignment. The defendants had no knowledge at the time of the sale to them of plaintiffs' rights, or of the agreement by M. with L.

Held, (1) That agreement made prior to purchase of license between M. and L. was not illegal and void as a stifling of competition at a public sale of Crown Land licenses. Per BARKER, J.: "If a block of Crown land is put up for license and A. wants a part of it and B. the remainder, neither wanting the whole, it is not against public policy for them to arrange for one to bid in the whole and then divide it."

(2) That an assignment of a license to cut lumber for one year, though capable of removal, is not an assignment of an interest in land, and need not be under seal and registered as a conveyance of land.

(3) That there was no duty upon the defendants to search at the Crown Land office for any dealings by M. with the license to him, he having the original license in his possession and there being no suspicious circumstances to put them upon an inquiry.

Palmer, Q.C., and *Montgomery*, for plaintiffs.

Gilbert, Q.C., and *W. A. Trueman*, for defendants.

ANON.

McLEOD, J., in Chambers, [March 22.

Practice—Parish Court—Confession of judgment—Signing judgment on day other than return day of summons.

On being served with a summons in an action in the parish of Norton Civil Court the defendant gave a confession in writing, upon which judgment was signed prior to the return day of the summons.

Held, that the judgment could only be signed on the return of the summons.

Baird, for plaintiff.

Flower, for defendant.

BARKER, J.
In Equity.

[March 24.

MCNEILL *v.* SIMON.

Fraudulent conveyance—Suit to set aside—Plaintiff not a judgment creditor—13 Eliz., c. 5—Joinder of parties.

Plaintiff's bill sought to set aside as a fraudulent conveyance a transfer of land to the female defendant by her husband, who died intestate. Administration had not been taken out of his estate, and no action had been brought by the plaintiff to recover his debt. At the hearing of the suit objections were taken orally under sections 54 and 89 of the Equity Act, 1890, that the heir and personal representative of the deceased should have been joined in the suit, and that the suit could not be brought by the plaintiff until he obtained judgment on his debt, or made an effort, and was in process of obtaining it.

Ordered, on the undertaking of the defendant to take out administration of the estate of the deceased, that plaintiff enter an action for the recovery of his debt, and that until judgment therein be obtained, all proceedings in present suit be stayed.

Earle, Q.C., and *C. A. Stockton*, for plaintiff.

MacRae, for defendant.

BARKER, J.,
In Equity.

[March 26.

TOBIQUE VALLEY RY. CO. *v.* CANADIAN PACIFIC RY. CO.

Practice—Motion to dismiss suit at close of plaintiff's case.

At the conclusion of plaintiffs' case the defendants moved for a dismissal of the suit on the grounds of insufficiency of evidence in support of the bill, and a variance between the case set up in the bill and shown by the evidence.

Held, that the motion could not be received unless defendants elected to rest on the objections taken and not to enter upon their defence if the motion failed.

Palmer, Q.C., and *Straton*, for plaintiffs.

Earle, Q,C., and *McLean*, for defendants.

TUCK, C. J.,
In Chambers.

[April 7.

IN RE IRA CORNWALL CO., LTD.

Winding-up Act—Petition in name of firm—Application of Winding-up Act to company formed under Provincial Act.

This was a petition in the name of H. A. Lozier and Co. under the Dominion Winding-up Act, for a winding-up order against the Ira Cornwall Co., Ltd., a company incorporated under the Joint Stock Companies Act of New Brunswick. The petition was signed in the petitioners' firm name, and the affidavit attached to the petition was signed by one E. R. Thomas, who stated that he was a member of the petitioners' firm. For the company it was objected (1) that petition should set out the names of the petitioners' firm as in an ordinary action. By section 21 of c. 32 of 52 Vict. (D.) in amendment of the Winding-up Act, it is provided that all proceedings shall be

carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the Court. (2) That the Winding-up Act does not apply to a company incorporated under the Joint Stock Companies Act of New Brunswick.

Objections overruled.

C. A. Macdonald, for petitioners.

S. B. Bustin and *J. J. Porter*, for company.

COUNTY COURT.

FORBES, J., in Chambers. [March 23.

MALLISON *v.* HOFFMAN.

Practice—Common counts—Particulars.

In an action in the County Court for goods sold and delivered the writ containing the declaration had in addition to a count for goods sold and delivered, the common indebitatus counts for work and labor, money lent, money paid, etc., four hundred dollars. The particulars of claim indorsed on the writ contained an itemized account of goods sold and delivered, and also a repetition of the indebitatus counts.

Held, that the particulars given in support of the indebitatus counts were insufficient, and that they must be struck out, together with the indebitatus counts in the declaration, unless new particulars were put in.

Hanington, Q.C., for plaintiff.

Morrill, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

DUBUC. J.] [March 31.

DOUGLAS *v.* MANN.

Practice—Amendment—Partnership accounts—Production of documents.

At the trial in this case defendants' counsel asked leave to amend the statement of defence, by alleging that the plaintiff and defendants had been in partnership in a skating rink business, and that at the dissolution of the partnership an account was taken by which it was shown that the plaintiff was indebted to the defendants.

The accounts of the partnership business had been kept in a set of books to which the defendants had access, although they were no longer in their possession or control, and in obedience to an order for production the defendant Mann had made an affidavit in which he stated that he had no documents relating to the matters in dispute in his possession or power; and although the plaintiff wanted to see and inspect the books he was refused access to them.

Held, following *Mertens* v. *Haigh*, 11 W.R. 792, that the defendants

should not now be allowed the amendment asked for, and that the partnership accounts could not be gone into in this action, more especially as it was open to the defendants by an independent action to have the partnership accounts taken, and thereby to recover any amount that might be due to them.

Coldwell, Q.C., for plaintiff.

A. D. Cameron, for defendants.

Province of British Columbia.

SUPREME COURT.

BOLE, J., Local Judge. [Feb. 22.

ROBERTSON *v.* ATLAS CANNING COMPANY.

Practice—Execution—Stay of.

The application herein was to stay execution with respect to the costs of a previous non-suit as between the same parties pending trial of present action.

Held, following the analogy of the practice as to security for costs, which is not required to be given by a resident plaintiff unless he has divested himself of all interest or claim in the subject of the action, that execution should not be stayed.

Motion dismissed.

WALKEM, DRAKE, J. McCOLL, J. [March 4.

KINNEY ET AL. *v.* HARRIS ET AL.

Mining law—Practice—Appeal from County Court—Extending time for.

On March 11th, 1896, the plaintiffs obtained judgment in their favor in the County Court of Kootenay holden at Kaslo (mining jurisdiction), and on 13th March, 1896, the defendants gave notice of appeal to the then next sitting of the Full Court, but did not set down the appeal for hearing on account of their not having been able to get the notes of evidence from the judge.

The defendants now moved for leave to set down the appeal for hearing.

The preliminary objection was taken that by Mineral Act, 1888, s. 29, the appeal should be by case stated.

Held, that under this Act an appeal by case stated was not imperative. A motion should have been made for an extension of time for setting down the appeal at the sitting of the Court next after the notice of appeal.

Where an application is made after the expiration of the prescribed time within which a thing should be done, for an extension of time, the special circumstances must be much stronger than in a case in which the time has not yet elapsed at the date of the application for an extension of time.

Held, also, following *Trask* v. *Pellent*, 5 B.C.R., "that it is for the interest of the public that litigants should know as soon as possible when certainty has been reached," applies particularly in mining cases.

Motion dismissed with costs.

Cassidy, for defendants.

Duff, for plaintiffs.

BOLE, L.J.
Local Judge. [March 18.

THE QUEEN *v.* AH CHUE AND AH LOUIE.

Summary conviction—Jurisdiction of magistrate.

This was a motion on behalf of the prisoners for a writ of certiorari, to remove a conviction by a stipendiary magistrate, whereby the said prisoners were found guilty of having unlawfully received stolen goods, knowing the same to have been stolen, the value of the chattels being under ten dollars.

Held, that the jurisdiction of the magistrate in British Columbia, in all cases tried summarily under Part 55 of the Criminal Code, is absolute without the consent of the person charged.

Motion dismissed.

Corbould, Q.C., and *Grant*, for application.

Henderson, for the Crown.

DAVIE, C.J.] [March 30.

PAINCHAUD *v.* LANDSBERG.

Assignment for benefit of creditors—Repudiation of trust deed by creditor—Estoppel.

This was an action to recover $145.95 alleged to be due upon a bill of exchange accepted by the defendant.

That the balance claimed remained due upon the bill of exchange in question was admitted, but it was contended on behalf of the defendant that the plaintiffs by accepting a payment of forty cents on the dollar, being the equivalent of an amount offered and paid by the defendant to his creditors under an assignment for the benefit of his creditors, had released the demand, although the plaintiffs did not execute the assignment. It appeared that the plaintiffs' solicitor repudiated the trust deed and gave notice that nothing short of the full claim would be accepted; the defendant's assignees then paid him 60 cents on the dollar by a cheque which he afterwards received back.

Held, that in view of plaintiffs' repudiation of the deed and their refusal to accept the 60 per cent. offered, the subsequent payment of 40 per cent. could not be treated as such an acceptance as would estop plaintiffs' recovering the balance.

Gardner v. *Kleopfer*, 7 O.R. 613, distinguished.

Judgment for plaintiffs.

Thornton Fell, for plaintiffs.

S. Perry Mills, for defendant.