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JUDGMENT IN DEFAULT OF DEFENCE.

Some apparent difficulty appears to exist in the minds of some practitioners as to the proper procedure to be followed in obtaining judgment against defendants who do not appear, in cases to which the special indorsement procedure does not apply, and where there are other defendants on the record as against whom the cause is to brought to trial. With the view of preventing delays and difficulties in such cases the judges of the High Court have recently framed a regulation for the guidance of the officers of the court in passing records, which we publish in another column, and which is to take effect at the beginning of the new year. Under this regulation it will be necessary that the record should in future show on its face that the action is ripe for hearing against all defendants, as against whom judgment is sought. And hereafter cases are not to be entered for trial till the pleadings are properly closed as to all parties. We may observe that a perusal of the Rules of Court will show that the procedure intended to be followed in such cases is very simple, and is based on the pro confesso procedure of the former Court of Chancery.

In all cases where a motion for judgment is necessary against a non-appearing defendant, he must be served with the statement of claim, because the motion for judgment must be based on the allegations in the statement of claim. The statement of claim, however, need not be served on a non-appearing defendant personally, but, under Rule 330, may be posted in the office whence the writ issued. If the non-appearing defendant does not put in a defence the plaintiff may then under Rules 263, 586 note the pleadings closed as to that defendant, and he is then to be deemed to admit all the statements of fact set forth in the statement of claim. The action is then ready for hearing on motion for judgment as against such defendant. It is possible that in an action for foreclosure or sale, where the writ has been indorsed under Rule 141, it may not be necessary to serve a non-appearing defendant

with a statement of claim where there are other defendants who appear and defend, but this is not very clear, and, even in such a case, it would seem to be safer to follow the practice above laid down.

Notwithstanding the simplicity of this procedure cases have been brought to trial against appearing defendants without previously serving the statement of claim on, or noting the pleadings closed as against, the non-appearing defendants, and in consequence delay has taken place in issuing the judgment until the defect in the proceedings has been remedied and the action brought into a condition that it could properly be heard and judgment pronounced pro confesso against the defendants not defending.

CHURCH LAW.

Considerable discussion has taken place in the daily press as to the soundness in law of the Bishop of Toronto's position touching the appointment of a rector of St. James' Cathedral. The case does not involve any very abstruse question of ecclesiastical law.

In England, in virtue of the jus patronatus, the right to present a clergyman to the cure of souls is, in the majority of cases, not in the hands of the Bishops but in the Crown, in certain corporations, or in private persons (Cf. Burns' Ecc. Law, i. 5 d; Phill. Ecc. Law Vol. I. 330, 331; Blunt's "Book of Ch. Law", cap. III.). The jus patronatus is of ancient origin and largely grew out of the founding of churches by private persons, who naturally enough claimed, and were accorded, the right to have a voice in the selection of the clergy who should minister to them. But this affords us no criterion in the settlement of the St. James' controversy, as to which we must look at the Act of 32 Vict. c. 51. The position of matters in the Church at the time of its enactment would also be instructive for a thorough examination of the subject.

The above Act incorporated the Synod of the Diocese of Toronto and united the Church Society of the Diocese of Toronto therewith. Under the powers conferred the Synod proceeded to pass its canons, among which we find the following (sec. 3 of Consolidated Canons of 1894):—"On the vacancy of any rectory, incumbency or mission within the diocese (with the exception of missions sustained, in whole or in part, by the Mission Board, the

mode of appointment to which missions shall continue as heretofore), the appointment to the vacancy shall rest in the Bishop of the diocese ; it being, however, provided that, before making such appointment, the Bishop shall consult with the churchwardens of the said parish or mission, and with the lay representatives of the same, provided that such lay representatives are resident within the said parish or mission".

Now, under this canon it is abundantly clear that the right of appointment rests with the Bishop ; but before he makes the appointment he is obliged to "consult with" the churchwardens and lay-delegates. The word used is one in common use, but it is important to get at its full force. In the "Century Dictionary" Vol. II. p. 1219, the meaning of the word "consult" (followed by "with") is "to seek the opinion or advice of another for the purpose of regulating one's own action or judgment". That is also the meaning of the Latin original. The Bishop is therefore bound to seek the opinion or advice of the appropriate officials of the Church for the purpose of regulating his action or judgment ; but is he bound to follow such opinion or advice or pay any attention to it in the exercise of his right to appoint ?

In *Johnson* v. *Glen*, 26 Gr. 162, the subject was touched upon, and a suggestion thrown out that there was room for argument that the Bishop has not the absolute right claimed for him. The following passage occurs in the judgment :—"There does not appear to be anything in the canon to sanction the claim of the Bishop, in some of the correspondence, that he alone has the right of nomination, or, as it is expressed, that the initiative belongs to him, nor that the feelings and wishes of the congregation are only to find expression in the shape of 'specific objections' to his nominee. A person may be wholly unsuitable to meet the requirements of the parish, and yet it may be impossible to set forth the grounds of unsuitableness so as to be intelligible to other men. The popular antipathy may be, to use the language of Dr. Chalmers, 'too shadowy for expression, too ethereal to be bodied forth in language. . . . Not in Christianity alone but in a thousand other subjects of human thought, there may be antipathies and approvals, resting on a most solid and legitimate foundation not properly, therefore, without reasons deeply felt, yet incapable of being adequately communicated.'"

It was not necessary in the above case to decide what the Bishop's rights would have been had there been a consultation within the meaning of the canon, for it was held that there was no such consultation, the matter having been discussed by correspondence. We would, however, venture to think that notwithstanding the strength of the word "consult" and the argument that its use precludes the thought of the consultation being an empty form—a mere interview—that nevertheless the wording of the canon is too definite and positive to be overcome, and that the Bishop, if he so chooses, may exercise his own judgment, even in contravention of the wishes and opinion of the representatives of the congregation.

THE MANUFACTURING CONDITION IN LICENSES TO CUT PINE TIMBER.

We publish elsewhere a brief statement of the effect of the elaborate judgment in which Mr. Justice Street recently upheld the validity of the provincial legislation, prescribing that licenses to cut pine timber on Crown lands shall be issued subject to the conditions that the logs shall be manufactured into sawn lumber in Canada. (*Smylie* v. *The Queen*, post p. 761). The case will presumably be carried up to the higher courts, and until the Privy Council has finally determined the question at issue, the present settlement of the rights of the parties concerned can only be regarded as provisional. But as the claims of the petitioners were presented by the ablest constitutional lawyer in the Dominion, it may reasonably be supposed that very little that could possibly be urged in their behalf was left unsaid, and that any arguments which may hereafter be offered to sustain their position will differ rather in form than in substance from those which were submitted to Mr. Justice Street. This circumstance will perhaps serve as a sufficient justification for making a few comments upon the case which would otherwise seem somewhat premature.

As the provisions of the Order in Council of Dec. 17th, 1897, by which the "manufacturing condition" was first imposed were subsequently ratified by an Act passed a month later by the Ontario Parliament, the doctrine laid down in *L'Union St. Jacques* v. *Belisle*, L.R. 6 P.C. 31, and kindred decisions, necessarily debarred the petitioners from impugning the validity of the condition merely

on the ground that it was an interference with vested rights, though this conception of the situation was emphasized by their counsel for another purpose. The case, therefore, was argued with reference to three questions: (1) What was the nature and extent of the rights conferred by the licenses, as originally issued? (2) Were those rights cut down and modified by the Order in Council and the Act of Parliament above referred to? (3) Was the Provincial Parliament exceeding its powers when it passed that Act? The contentions of the petitioners under these three heads were as follows: (1) That the effect of the original license was to invest the licensees with certain definite rights as to the cutting of timber on the specified areas of Crown lands, and that they were absolutely entitled to a renewal of these licenses at the end of each year, provided they paid the stipulated dues and complied with such directions, fairly coming under the category of "regulations", as might from time to time be promulgated by executive officers of the Province of Ontario. (2) That the "manufacturing condition" does not come under that category, and therefore impaired the value of the rights accruing under the license in a manner which the licensees had not taken, and were not bound to take, into their calculations at the time they invested their capital. (3) That, even if these contentions were not sustainable, the Order in Council and the Act of Parliament introducing the "manufacturing condition" were not intended by the Executive and the Legislature to apply to any licenses except those which might be issued in future years. (4) That the petitioners were, in any event, entitled to succeed, for the reason that the Provincial Parliament, in undertaking to pass a law, the necessary and contemplated effect of which was to prevent the exportation of logs in their unsawn condition, were trenching upon the legislative domain of the Dominion Parliament, to which, by sec. 91, sub-sec. 2, of the British North American Act, has been assigned the exclusive authority to regulate trade and commerce.

All these contentions Mr. Justice Street has answered in the negative, and we have no hesitation in saying that we regard the reasoning of his lucid and carefully prepared opinion as unanswerable. The legal position of the Crown seems to us quite impregnable, and must remain so unless the case of the petitioners can be strengthened by the production of additional arguments based upon grounds which are not as yet apparent. As the full text of the

judgment will soon be in the hands of the profession, it is needless to follow Mr. Justice Street step by step through his discussion of the principles involved. It will not be amiss, however, to offer a few brief remarks designed to place in an even stronger light than has been done by this opinion the untenable character of the petitioners' claim.

In dealing with their first and second contentions both court and counsel have never lost sight of the fact that one of the parties was the Crown. Yet it seems to us that the decision should have been the same even if the licensor had been a private person. The revocability of a license being one of its distinctive characteristics, (see *Wood* v. *L itter*, 13 M. & W. 838), a different quality is not predicated of it except for some special reason, and it is safe to assert that the very clearest evidence of intention would be necessary to induce a court, in any ordinary case, to infer the creation of a license which would not only curtail some of the most essential incidents of a freehold, but invest the licensee with the right to demand that this situation should be prolonged indefinitely. The petitioners wholly failed to suggest any sufficient grounds for drawing the conclusion that their licenses placed them in a position which can only be compared to that implied by the enjoyment of a copyhold or an Ulster tenant-right. On the contrary the entire contents of these licenses and the instruments on which they are based point almost irresistibly to the inference that the licensor did not intend to call into existence a contract carrying with it an indefeasible right of renewal. It seems impossible to contend that even a private person can be regarded as having issued a license susceptible of being perpetuated simply at the will of the licensee, when he categorically declares that it expires on a certain date, and will only be renewed on condition that the licensee has complied with such regulations as may have been promulgated in the meantime with regard to the property. Against such a clear and specific reservation of a right to alter the terms of a license at the end of each year, it is submitted that even the doctrine of equitable estoppel could not prevail, any more than that doctrine would ensure to the benefit of a contractor on a railway or other public work who might have been dismissed by the supervising engineer acting under discretionary powers vested in him by the contract. In the latter case the party suffering from the enforcement of an

authority reserved by the terms of the agreement itself would be deemed to have accepted the disadvantages as well as the advantages of the situation and to have no claim to relief, and there is no apparent reason why the licensee in the present instance should not be equally debarred from all remedy under similar circumstances. The special point emphasized by Mr. Robinson, that the "manufacturing condition" cannot reasonably be included in the category of "regulations," strikes us as being at least open to dispute upon general principles. But whatever importance might otherwise be attached to this agreement, we venture to think that it loses all weight when a perusal of sec. 1 of chap. 23, of the Consolidated Statutes of Canada, the provision in force when the petitioners' licenses were issued, shows that licenses were to be granted "subject to such *conditions*, regulations, and *restrictions* as may from time to time be established by the Governor in Council." Such words are, it is clear, amply sufficient to cover an alteration in the terms of the license like that which is impugned.

The force of these considerations is greatly increased when we come to apply them to a grant by the Crown of a license to do certain acts with respect to its own property, especially when that property is forest timber.

In the first place the effect of the enabling statutes and the other instruments on which the petitioners base their claim is placed still further beyond dispute by vouching in aid the well-known canon of construction which, in cases where the Crown is the grantor, demands the application of a doctrine precisely the reverse of that which is embodied in the maxim, *Verba chartarum fortius accipiuntur contra proferentem.* (Broom's Maxims, p. *607). It is in fact somewhat surprising that neither the counsel nor the court made any reference to a principle of such controlling importance, especially when it was expressly urged that "the injustice of interfering with the vested rights of existing licensees obliged the court to place the strictest possible construction against the Crown upon the Act and the Order-in-Council, as being ex post facto legislation." The really important question in this connection was obviously, what were the rights conferred by the original license? This, Mr. Justice Street points out, but he fails to notice that, if the principle of strict construction is to be imported into the controversy at all, the only effect must be to strengthen the position of the Crown.

The nature of the subject-matter of the license also raises an additional presumption in favor of the Crown. It would be wholly unjustifiable to impute to a legislative body or to executive officials a forgetfulness of the fact that circumstances may arise at some future time which will indicate that, in the interests of the State, the cutting of timber in particular localities should be partially or entirely prohibited for a longer or shorter period. Indeed it is notorious that persons whose judgment in such matters is of value have already been urging that a Forestry Law, of which it is clear that some such prohibition would constitute not the least important part, should be enacted without delay. Yet if we accept the argument of the petitioners in its entirety, the Crown has forever divested itself of the right of protecting the public by any provision of this character, so far as regards the timber limits covered by licenses similar to theirs. Even if, as Mr. Blake in his argument took care to point out, the whole course of legislation in this Province did not show unmistakably that the policy of the various law-making bodies has been to grant privileges in respect to timber lands on such a basis that "the executive should always have a free hand to deal with them when the season was over," we should still maintain that a theory which conducts us to such preposterous conclusions must be unsound.

Since then, it must, as we think, be conceded on general principles that this right of the Provincial Government to prohibit entirely the cutting of timber always remains in reserve, it cannot be presumed, in the absence of the clearest evidence, that it has ever contemplated the issue of any licenses which would curtail its liberty of action in this respect, or, to state the matter in a form which expresses the dilemma with greater technical correctness, would expose it to the imputation of bad faith if it put its undoubted plenary powers into operation. The applicability of this consideration to cases like the present is obvious. The greater includes the less. The inference is irresistible that, as the Provincial Government must be supposed to keep constantly in view the necessity for a complete resumption of control, it is impossible to argue that there can have been any intention to create a bar to such resumption which would have left the Province a most undesirable choice of alternatives, viz., the voting of an indemnity to persons deprived of their licenses, or the passing of a measure which, while within the legislative competence, would be a gross

breach of fair dealing. For judicial purposes, it is submitted, we are bound to assume that the licensees understood this situation, and therefore accepted their licenses in view of the possibility that those licenses might as any time be either cancelled entirely or fenced about with restrictions which would diminish the value of their rights, their only resource in that event being an appeal to "the infallible justice of the Crown." (See *Craig* v. *Templeton*, 8 Gr. 483).

In approaching the constitutional aspects of the case we think it desirable at the outset to clear away a misconception which we suspect, tends with many persons to obscure the real nature of the situation, and may have even procured the petitioners a certain amount of sympathy. It does not follow that, because their claim is rejected partly on the ground that the Provincial Parliament has been acting within its constitutional powers in imposing the manufacturing condition," they should be looked upon as persons who have suffered an essential wrong from which they would otherwise have been secure. It is not and cannot be denied that the power to secure by appropriate means the same ultimate results as those aimed at by the "manufacturing condition," resides in some one of the Canadian law-making bodies. Anyone, whether he be a citizen or an alien, who engages in the business of lumbering within the Dominion invests his capital upon the understanding that the power may possibly be exercised. Persons in the position of the petitioners have of course a perfect right to demand the determination of the question whether a measure like the one under discussion is properly or improperly enacted by the Provincial Parliament. But it is clear that, if their privileges were at any time liable to be curtailed by the passage of such a measure, their appeal to constitutional doctrines is, if we consider the purpose for which those doctrines are invoked, nothing better than an attempt to take advantage of a mere technicality, and that their claim for redress is wholly without merit, in so far as may be supposed to depend upon the ground that they have been subjected to burdens greater than those which they could have been expected to take into their calculations when they received their licenses.

The argument that the "Manufacturing Condition" is virtually equivalent to a prohibition against the export of a certain article, and therefore invalid as being an invasion of the legislative

domain of the Dominion Parliament has a certain superficial plausibility. But it is only necessary to recur, from a slightly different standpoint, to the considerations already dwelt upon in order to understand its inherent ineffectiveness. As Mr. Justice Street very pertinently points out, the Provincial Parliament and Provincial officials are here dealing with the property of the political entity of which they are the legislative and the executive agents. That the provision of the British North American Act relating to the regulation of trade and commerce is applicable only to private property, and was not intended to trench upon the prerogative powers of the Provinces, can hardly, we think, be disputed. There is nothing to prevent the Ontario Parliament from enacting that the cutting and manufacture of timber shall be a State industry, operated by its own employés, and determining, as an incident of such operation, the stage of manufacture at which such employés shall be permitted to export the timber. This would, in a certain sense, amount to a regulation of trade and commerce, but manifestly such legislation is essentially nothing more or less than a declaration of the will of the State that its property shall be disposed of in a certain manner. And if the Provincial Parliament has the right to prescribe that government employees, in the conduct of the business of the State, shall comply with a "manufacturing condition," it seems wholly unreasonable, not to say absurd, to argue that, if it chooses to delegate its rights as regards the cutting of timber to private persons, it may not impose upon them a similar condition.

THE SAW LOG CASE.

SMYLIE v. THE QUEEN.

As our readers are doubtless aware the judgment of Mr. Justice Street on the petition of right presented by certain American holders of timber licenses in the Province of Ontario claiming the right to export saw logs upon the conditions stated in the licenses at the time of the purchase of the limits, uncontrolled by any conditions inserted in subsequent renewals of the license, was against the petitioners upon all the points submitted. That the case was ably argued may be assumed from the fact that Mr. Christopher Robinson, Q.C., was leading counsel for the suppliants, and that Mr. S. H. Blake, Q.C., led for the Ontario Government.

The case of the suppliants rested largely upon two grounds: 1. That having purchased the limits upon certain conditions set out in the license, which is by custom renewable from year to year, they should not be bound by other conditions injuriously affecting their rights subsequently inserted without their consent, and without compensation for the injuries so sustained. 2. That the action of the Provincial Government in prohibiting the export of the logs was ultra vires as infringing upon the power to regulate trade and commerce exclusively vested in the Dominion Government.

We will first briefly refer to the second ground of complaint upon which the judgment is clear and we think conclusive.

The Government of Ontario does not prohibit the exportation of lumber. In effect it simply says that it shall not be exported in the shape of logs. The license does not vest the timber absolutely in the holder of the license. It gives him the right to cut timber during the period for which the license is issued, subject to certain conditions. Those condition complied with, the holder of the license can deal with the timber as he pleases, and may export it or sell it at home as suits his convenience. If the contention of the suppliants was allowed to prevail a very serious interference with the rights of the province to deal with its own property would be established. The same rule would apply to minerals, and to many other articles. As was well put by Mr. Justice Street, the Dominion Government could have no power to decide in what way the property of the province should be dealt with, and if the province is not to have the power of regulating the manner in which its undoubted property is to be disposed of, in whom is that power to be vested? Furthermore the power of the Dominion to regulate trade and commerce is not confined to articles of export; and the contention of the suppliants, if carried to its logical conclusion, would establish the right of the Dominion Government to set aside any regulation of the province which affected the purchase or sale of its property. The point is an important as well as an interesting one, especially in view of the recent regulations by the Provincial Government regarding nickel and other minerals, and is, in our opinion, not dependent upon the rights of the holders of timber licenses under the terms of their licenses.

Into the other questions a very different element enters, and one not so easily disposed of. That element is the equitable right of the owner of the limit to a property which he purchased upon

the supposition that he could be always free to deal with it as he intended to deal with it at the time of the purchase, and in consideration of which he paid a price possibly higher than he would have paid had he foreseen the change in the conditions subsequently made.

This is at first sight a very plausible, but, as a little consideration will show, a very superficial and very erroneous view of the question. In the first place, as the judgment clearly points out, it is opposed to the strictly legal aspect of the case. In popular language and in accordance with the view of the lumberman, we speak of the license holder as though he were the absolute owner of the property described in the license, which is a contradiction in terms. Legally he has no right outside of the terms of his license, which is not a conveyance of the timber, but merely a right to cut and remove it. Leaving, however, this part of the case, upon which it is unnecessary to dwell, we turn to the equitable view, in which, if anywhere, the strength of the case of the suppliant lies. Is he then such an innocent purchaser as to be entitled to have, as he asks, the strictest possible construction placed against the Crown upon the Act and upon the Order in Council, under authority of which the license is issued, as being ex post facto legislation, and a violation of the terms upon which he obtained his rights, whatever they may be.

In answer to this it may be said that the purchaser of the limit always had in mind not only the possibility but the probability of the export of logs being by some means prevented. He knew that the Dominion Government had imposed an export duty, and he had, as he supposed, protected himself by legislation in his own country against such a thing being done in the future. And having taken this precaution he thought he was safe in running the risk of anything else being done to prevent him from pursuing his own interest in a way which he well knew was exceedingly detrimental to the interest and opposed to the policy of those with whom he was dealing, and which they were sure to put a stop to by any legitimate means in their power. And now that a means has been found of preventing him from using his property in a manner injurious to the country in which it is situated, he appeals to the sense of justice in the Government of Ontario to protect him in doing that which he knew beforehand they might if so disposed

prevent him from doing and which, by the terms of the license under which he holds the property, they had a legal right to do.

We should be sorry even to seem to argue that any action on the part of the American Government would justify ours in retaliating upon private citizens for injuries sustained by the people of this province. That however is not the point; but merely the construction of a contract entered into by keen business men thoroughly understanding their position and making the best terms they could for themselves under the circumstances. No one was better informed than were the American purchasers of timber limits of the real state of things. They knew as well the risk they were taking in the respect we are considering as they knew the risk of their rafts being broken up in the middle of Lake Huron. The whole course of the legislation prompted by them has been such as to justify the people of this province in standing strictly upon their legal rights, and also in believing that the circumstances and conditions under which these licenses were granted warrant them in refusing to accept what they claim as an equitable plea, which however in effect work a great wrong to this country.

W. E. O'BRIEN.

Archibald B. McCallum, of the village of Paisley, in the Province of Ontario, barrister-at-law, has been appointed to be Judge of the District Court of the Provisional Judicial District of Manitoulin, in the Province of Ontario, and a Local Judge of the High Court of Justice for Ontario.

D. F. McWatt of the town of Barrie, barrister-at-law, has been appointed Senior Judge of the County of Lambton and a Local Judge of the High Court of Justice for Ontario.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

ADMINISTRATION WITH WILL ANNEXED—EXECUTORS, POWERS AND DUTIES OF—LAW OF CHILI—EVIDENCE—GRANT TO WIDOW.

In the goods of Whitelegg (1899) P. 267, was a case in which a grant of administration with the will annexed was made to the testator's widow under the following circumstances: The testator died domiciled in Chili, leaving a will appointing two executors, one of whom died without taking probate. The other could not be found. The only property in England consisted of a debt. Proof was given by a notary public (not a qualified Chilian lawyer), and accepted by the Court, that by the law of Chili the duties of an executor in that country were confined to seeing that the estate was duly administered by the acting heiress, who in this case was the testator's widow.

CHARITY—WILL—FAILURE OF GIFT—SPECIFIED OBJECTS NOT CHARITABLE—COSTS.

Hunter v. *Attorney-General* (1899) A.C. 309, was known in the courts below as *Re Hunter*, *Hood* v. *Attorney-General*. The House of Lords (Lords Halsbury, L.C., and Lords Watson, Shand and Davey) have now reversed the decision of the Court of Appeal (1897) 2 Ch. 105, (noted ante, vol. 33, p. 727) and restored the judgment of Romer, J. (1897) 1 Ch. 518, (noted ante, vol. 33, p. 493). The case turns upon the construction of a will, whereby the testator bequeathed his residuary property "legally applicable to charitable purposes" to trustees to apply the income or any portion of the capital—(1) for or towards the purchase of advowsons or presentations, or (2) in erecting or contributing to the erection, or improvement, or endowment of churches, or schools, or (3) in paying or contributing towards the payment of the salaries of rectors, vicars, or incumbents, schoolmasters or teachers, on certain specified conditions as to the doctrines held and taught by such clergy, schoolmasters and teachers. These conditions the House of Lords held could not be applied to the purchase of

advowsons and presentations, and although they conceded that a charitable bequest might be declared as to advowsons and presentations, as held by Kay, J., *In re St. Stephen, Coleman St.*, 39 Ch. D. 492, yet they held in this instance none had been in fact declared, and no "necessary implication" of one could be drawn from the terms of the will: a bequest to apply money in or towards the purchase of advowsons and presentations simpliciter not being a good charitable bequest, and there being no general trust for charity binding the whole fund, their Lordships held that as the bequest failed in part it must fail altogether, and that the residuary estate was undisposed of. The Attorney-General, who appeared in support of the judgment of the Court of Appeal, was held entitled to be paid his costs out of the fund, notwithstanding that he had failed on the appeal, but the Lord Chancellor said it was not to be taken as an absolute precedent that in all such cases the Attorney-General was entitled to his costs out of the estate. The largeness of the amount involved, and the fact that the Court of Appeal had decided in favour of the validity of the bequest, being points which weighed with the court in granting him costs in the present case.

TRADE MARK—DESCRIPTIVE NAME—INJUNCTION.

The Cellular Clothing Co. v. *Maxton* (1899) A.C. 326, is a decision of the House of Lords (Lord Halsbury, L.C., and Lords Watson, Shand and Davey) on an appeal from the Scotch Court of Session, the point involved being, however, one of general interest. The action was brought to restrain the use of the word 'cellular' as applied to clothing, the plaintiffs claiming that they had applied the word to cloth manufactured by them in a certain way for ten years past, and thereby acquired the right to use it as a trade name distinguishing their particular goods. The defendants (a wholesale firm) had recently applied the word to cotton and woollen goods sold by them. Their Lordships affirmed the decision of the Court of Session, dismissing the action on the ground that the word "cellular" is an ordinary English word, which appropriately and conveniently described the cloth sold by the defendants, and that the term had not been proved to have acquired a secondary or special meaning as signifying only the goods of the plaintiff, as was the case in *Reddaway* v. *Banham* (1896) A.C. 199.

EQUITABLE RIGHT—UNDERGROUND TRESPASS—FRAUD - STATUTE OF LIMITATIONS—CHAMPERTY.

Bulli Coal Co. v. *Osborne* (1899) A.C. 351, is a decision of the Judicial Committee of the Privy Council (Lords Macnaghten, Morris and James) on appeal from the Supreme Court of New South Wales. The appeal arose in a winding-up matter. The Bulli Coal Co. had been ordered to be wound up, and Osborne claimed to prove a claim for damages under the following circumstances. Osborne had in 1893 leased to the Bellambi Coal Co. a tract of fifty acres of what was then supposed to be virgin coal-bearing land. After the execution of the lease, it was discovered that the Bulli Coal Co. had been, for a series of years prior to the lease, extending from 1878 to 1880, fraudulently and secretly trespassing on the property and abstracting coal therefrom. It was then agreed between Osborne and the Bellambi Company that Osborne should take proceedings against the Bulli Co. to recover damages for the trespasses thus committed by them, that he should employ for that purpose the solicitor of the Bellambi Co., and that that company should be entitled to 92½ per cent. of the amount secured from the Bulli Co., and should indemnify Osborne against all costs of the proceedings. The claim of Osborne was resisted on behalf of the Bulli Company on the ground that the agreement between Osborne and the Bellambi Co. was champertous, but this was subsequently abandoned, and in the opinion of the Judicial Committee was untenable; it was also contended that Osborne's claim for damages was barred by the Statute of Limitations, and this was the point mainly relied on by the appellants. Their Lordships' conclusion was that in the present case the trespass was proved to have been knowingly committed, and that fact constituted a fraud which prevented the running of the statute until Osborne discovered the fraud, and, therefore, that the claim was not barred.

B.N.A. ACT 1867, SS. 91, 92—RAILWAY—LEGISLATIVE POWERS AS REGARDS RAILWAYS—MUNICIPAL LEGISLATION AFFECTING DOMINION RAILWAY.

In *Canadian Pacific Railway Co.* v. *Notre Dame* (1899) A.C. 367, the Judicial Committee of the Privy Council (The Lord Chancellor and Lords Watson, Hobhouse, Macnaghten, Morris, Shand and Davey) were called upon again to determine what are the legislative powers of the Dominion and Provincial Legislatures regarding Dominion Railways under ss. 91, 92, of the B.N.A. Act,

and their Lordships hold that under s. 91, s-s. 29, and s. 92, s-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair and alteration of the Canadian Pacific Railway; and the Provincial Legislature has no power to regulate the structure or repair of any ditch forming part of its authorized works; but it is within the power of a Provincial Legislature to make regulations for the keeping of such ditches, within its territorial jurisdiction, clean and free from obstructions.

GUARANTEE—BOND—CONSTRUCTION—RECITAL IN BOND.

Australian Joint Stock Bank v. *Bailey* (1899) A.C. 396, is an appeal from the Supreme Court of New South Wales, and the only question involved was the construction of a bond. The facts were as follows: The respondent with others gave a joint and several guarantee to the appellant bank limited to £2,500, in respect of overdrafts by a customer of the bank. Subsequently, the respondent, with others, gave a joint and several bond to the bank, reciting a desire for advances to the same customer, and securing the payment of the balance of the account current. The action was brought both on the guarantee, and the bond; the guarantee was held to be invalid, and the defendant claimed that his liability on the bond was limited to the amount due over and above that intended to be secured by the guarantee. This contention was based on the ground that the bond contained a recital that the obligors were desirous to obtain advances "in addition to the sum" secured by the guarantee: but inasmuch as the condition of the bond clearly covered the whole balance due in respect of all moneys advanced by the bank to the customer in question, the committee was of opinion that its operative effect could not be restricted by the recital, and allowed the appeal and reversed the judgment of the court below.

WILL—EVIDENCE OF EXECUTION OF WILL—DENIAL BY ATTESTING WITNESS—TESTAMENTARY CAPACITY.

Pilkington v. *Gray* (1899) A.C. 401, was an appeal from the Chancery Court of Bermuda. The action was to establish a will, and for administration of the testator's estate, in which one of the defendants contested the validity of the will, both on the ground of its not having been duly executed, and because of the testator's alleged want of testamentary capacity. Probate had been granted

on the evidence of the two attesting witnesses, one of whom in the present action retracted the evidence formerly given by him, and swore in effect that the signatures of the testator and witnesses had been forged. The other attesting witness was not called on, but his absence was held to be sufficiently accounted for. Notwithstanding the above evidence, the court below had disbelieved the witness, and had confirmed the probate, and the Judicial Committee (Lords Hobhouse, Morris and Davey, and Sir R. Couch) affirmed the decision. The evidence in support of the alleged want of testamentary capacity merely consisted of proof that the testator was eccentric in his acts and conduct, and in the opinion of the committee was wholly insufficient.

FRAUDULENT PREFERENCE—CONVEYANCE TO MAKE GOOD BREACH OF TRUST.

Sharp v. *Jackson* (1899) A.C. 419, is the case known in the courts below as *New Prance & Gerrard's Trustee* v. *Hunting* (1897) 1 Q.B. 607 and 2 Q.B. 19 (noted ante, vol. 33, pp. 520, 649. It may be remembered that the sole point was whether a conveyance of property made on the eve of insolvency by a trustee who had committed breaches of trust, in order to make good to his cestui que trust such breaches of trust, without any pressure or request by the cestui que trust, was a fraudulent preference within the meaning of the Bankruptcy Act. The Court of Appeal held that it was not, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris and Shand) now affirm that decision.

PRACTICE—JURISDICTION—SERVICE OF WRIT—FOREIGN CORPORATION DOING BUSINESS IN ENGLAND—AGENT—OFFICER—RULE 55—(ONT. RULE 159).

In *La Compagnie Générale Transatlantique* v. *Law*,—*La Bourgogne* (1899) A.C. 431, the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris and Shand) gives its approval to the decision of the Court of Appeal (1899) P. 1 (noted ante, p. 187) that where a foreign corporation does business in England in such a way as to be resident there, it may be sued there and the writ may be served on its officer in England.

CERTIORARI—JURISDICTION OF INFERIOR COURT.

Skinner v. *Northallerton C.C. Judge* (1899) A.C. 439, may be usefully referred to on the practice as to certiorari. A judge of the County Court had, in a bankruptcy proceeding pending before

him, issued a warrant for the arrest of the bankrupt for not attending to be examined in respect to his affairs. The bankrupt then applied to the High Court for a certiorari to bring up the warrant for the purpose of quashing it on the ground of want of jurisdiction. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Shand and Brampton) unanimously upheld the decision of the Court of Appeal dismissing the motion, on the ground that the judge of the County Court clearly had jurisdiction in the proceeding in which the order was made, and that if it were wrong it could be corrected only by application to himself. This establishes the well-settled practice on this point that certiorari only lies where the inferior tribunal is acting without jurisdiction, and cannot be used as a substitute for an appeal.

COMPANY—FLOATING CHARGE—DEBENTURES—SALE OF BUSINESS—INJUNCTION.

In *Re Borax Co., Foster* v. *Borax Co.* (1899) 2 Ch. 130, the plaintiffs were the holders of debentures which were a charge by way of floating mortgage on the assets of the company, and mature in case of a winding-up. The company had power to amalgamate with, or sell its assets to, another company of the same kind, and, in pursuance of this power, contracted to sell its assets to another company, and the plaintiffs in this action claimed an injunction against the company to prevent it parting with its assets. North, J., granted the injunction on the ground that the sale of the entire assets of the company was equivalent to a discontinuance of the business of the company, and entitled the non-assenting debenture holders to prevent the sale being carried out without due provision being first made for the payment of their claims.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

It has been debated whether Lieut. Winston Spencer Churchill, of the Fourth Queen's Own Hussars, who went to South Africa at the outbreak of the war in the capacity of newspaper correspondent, so far infringed the recognized rules of war by employing arms against the Boers as to render his life forfeit to his captors. We think he did not. He simply laid down the status of a non-combatant, and assumed that of a combatant—so becoming liable to be treated as an ordinary prisoner of war in case of capture. (Hall's Intern. Law, 3rd ed. 403.) He did not incur the punishment of one who had been guilty of a breach of faith (Grotius: iii., 4, § 17); nor that of one who had violated any express or implied pledge. (Bynkershoek: Quaest, J.P., i., 1.). He merely accompanied the British troops, and fought with them. "A combatant is any person directly engaged in carrying on war, or concerned in the belligerent government, or present with its armies and assisting them." (Woolsey's Intern. Law, 6th ed., § 134, p. 214.) While a non-combatant may not practice a fraud upon the enemy and save his skin if captured, yet the law holds him in no parlous case if he, like Lieut. Churchill, forgets under the stress of circumstances that the pen is mightier than the sword, and goes berserk in the thick of a very pretty fight.

* * * To anyone reading with care the extremely painstaking and exhaustive arguments of counsel before the Archbishops of Canterbury and York at the Lambeth "hearing" in May last, it would seem impossible that a reported case of any moment bearing on the questions at issue could have been overlooked; yet such seems to have been the fact. In a case involving the impugned ceremonial use of incense and processional lights set for argument recently before Mr. H. C. Richards, Q.C., M.P., at one of the "Moots" at Gray's Inn, Mr. R. W. Burnie for the hypothetical defendant cited *Rex* v. *Sparks* in 3 Mod. 79, which the President of the "Moot" looked upon as sufficient authority to exculpate the defendant from the charge of infringing 1 Eliz., c. 2. The fact that Mr. Richards himself was one of the counsel retained at the Lambeth "hearing" renders the incident all the more note-worthy.

* * * It is always an unsettling thing to have one's guide in any province of science discredited in ever so slight a degree; but when the reputation of one who stands to us in the threefold relation of "guide, philosopher and friend" is impaired, it is disconcerting indeed. What Carlyle said of Goethe's work in the domain of pure intellectual culture admirably characterizes the sentiment we have all along entertained for Sir Henry Maine's achievement in the philosophy of law:—"Let us mark well the road he fashioned for himself, and in the dim weltering chaos rejoice to find a paved way." But as to Maine—great scholar though he was—we must confess that in the light of more recent research his "paved way" does not lead to the goal which he fancied he clearly perceived in exploiting his theories concerning "Village Communities" and the "Patriarchal System." The labours of McLennan and others in relation to the land systems of British India, have demonstrated the latter theory to be untenable; and now Mr. B. H. Baden-Powell has come to the front with a book entitled "Village Communities in India" in which he combats—and, in the opinion of the critics, successfully—Maine's hypothesis that the true Indian village communities, notwithstanding some minor divergences, resemble each other in two salient features which constitute the type, viz. (1) the land held in common; and (2) the village governed by a Council. This type, he maintained, was introduced into India by the Aryans. Mr. Baden-Powell shows that there are two distinct types of Indian village extant which cannot be traced back to any common origin, viz. the ryotwari village of Bengal and the Dekkhan, in which a system of land tenure by individual holdings prevails—the village being ruled by a single head-man; and the true communistic village of the Punjab, the North-West Provinces and Oudh, where the land is held in common, and the village governed by a Council. It was the latter type which Maine was familiar with and which he accepted as the universal one, forgetful for the nonce that in ethnological research one can never assure himself that he has reached a point where he can safely generalize.

* * * By the delivery of judgment in all argued cases on November 29th, the Supreme Court of Canada was able to boast, for the first time in its history, that its docket was tabula rasa.

* * * By warrant of the Admiralty, dated the 17th August last, the Exchequer Court of Canada was endowed with the jurisdiction of a Prize Court in time of war. The appeal from the court in such matters lies to Her Majesty in Council direct. (Naval Prize Act, 1864, sec. 5.) Apropos of this event we might quote from Lord Stowell, at 1 C. Rob. 350:—"It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own ; and what foreigners have a right to demand from it is the administration of the Law of Nations simply."

* * * The lawyer of literary tastes will find much to entertain him in Mr. Stephen Wheeler's recently published "Letters of Walter Savage Landor." Landor was a man of action as well as of letters ; and though the lack of amiability which characterizes his correspondence often offends the reader, yet the correctness of his views concerning the statesmen and state-craft of his time renders them extremely instructive. Anyone familiar with his "Imaginary Conversations" will not require to be told that the letters are marvels of style. He seems to have had a profound contempt for Lord Brougham, and in writing to the "Examiner" on an occasion when that journal was threatened with an action for libel by the Lord Chancellor, he thus pillories him : "The prosecution with which you are threatened by Lord Brougham might well be expected from every facette of his polygonal character. He began his literary and political life with a scanty store of many small commodities. Long after he set out, the witty and wise Lord Stowell said of him, that he wanted a little law to fill up the vacancy." Later on he asks : "What other man within the walls of Parliament, however hasty, rude and petulant, hath exhibited such manifold instances of bad manners, bad feelings, bad reasonings, bad language and bad law?" And he adds : "They who cannot be what they want to be, resolve on notoriety in any shape whatever!" We feel it necessary to explain, in justice to ourselves and the memory of Lord Brougham, that we offer this as a specimen of Landor's invective rather than his perspicacity in estimating the worth of public men. Of the latter quality Mr. Wheeler's book contains many instances, which we have no space to quote.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

Ont.] JAMIESON *v.* LONDON & CANADIAN LOAN & AGENCY CO. [Oct. 24.

Mortgage—Assignment of lease—Liability of mortgagee—Discharge—Abandonment of security.

J. demised lands for a number of years with a provision against assignment by the lessor without his consent. The lessor assigned the lease by way of mortgage and the consent of J. was indorsed thereon. The mortgagee, in an action by J., was adjudged liable as assignee for payment of rent and taxes, and the lessor having died insolvent was about to register a statutory discharge of the mortgage when J. brought an action claiming a declaration that it could not be discharged without his consent and an injunction restraining the mortgagee from so doing.

Held, affirming the judgment of the Court of Appeal (26 Ont. A.R. 116; see also 34 C.L.J. 529) that under the Judicature Act the courts are bound to treat a mortgage as courts of equity have always done, as a mere accessory to the debt; that the lessor having consented to the specific assignment such consent included all such incidents as the law attaches to the covenants and agreements between the parties set forth in the deed as well as the covenants and agreements themselves; one of such incidents being that on repayment of the debt the mortgagee would be obliged to re-assign the mortgaged lands, the lessor could not prescribe the dealings between the parties as to the mortgage debt, and the mortgagee was free to release it if he chose; and that he did not require a further license from the lessor to do so. Appeal dismissed with costs.

S. H. Blake, Q.C., and *Irving* for appellant. *Robinson*, Q.C., and *Johnston* for respondent.

Ont.] LEWIS *v.* ALLISON. [Oct. 24.

Title to land—Description of lands—Construction of deed—Party wall—Tenants in common.

M., owner of two warehouses Nos. 5 and 7, divided by a party wall, executed a deed by way of marriage settlement on his daughter of No. 5, describing it by metes and bounds in such a way as not to include any portion of said wall, but supplementing such description by the words "said property being known as the warehouse No. 5 Wellington Street West." The trustees having conveyed the property by the same description, and M. having died, his executors as owners of warehouse No. 7 brought an action to establish their title to an interest in the party wall.

Held, reversing the judgment of the Court of Appeal, that as the surrounding circumstances clearly showed the intention of M. to convey the whole of warehouse No. 5 the extent of the conveyance could not be limited by the words of description; and as said wall was common to both properties the estate of M. had an undivided moiety in the ground covered by it as tenant in common. Appeal allowed with costs.

Mills for respondents.

Ont.] COCKBURN *v.* IMPERIAL LUMBER CO. [Oct. 24.

Saw-logs Driving Act — R.S.O. (1887) c. 121 — Detention — Remedy — Arbitration.

C. & Sons in driving logs down Bear Creek, District of Nipissing, found them stopped by a drive in front belonging to the Imperial Lumber Co., which had reached their destination and were held in the stream until they could be transported to the mill by means of a jack ladder. The logs of C. &. Sons were detained so long that they could not be driven further that season which caused considerable damage, and an arbitration was agreed on under the Saw-logs Driving Act, C. & Sons claiming damages for detention, and the company cross-claimed in respect to jams detaining another drive behind that of C. & Sons. The arbitrator disallowed the company's claim, and awarded C. & Sons some $1,100 for unnecessary and unreasonable detention. In an action on the award the company pleaded that the arbitrator had given compensation for delay caused by the mere fact that their drive was ahead of the other, and the Court of Appeal so held and gave judgment in their favour on the ground that C. & Sons' only remedy was by breaking the jam.

Held, reversing such judgment (26 Ont. A. R. 19) that C. & Sons had also a remedy by arbitration under the Act; that the Company had not made before the arbitrator the claim raised by the plea; and that they had failed to establish such plea on the trial. Appeal allowed with costs.

Gamble and *Dunn* for appellants. *Aylesworth*, Q.C., for respondents.

Ex. Court.] THE QUEEN *v.* YULE. [Oct. 24.

Constitutional law — B.N.A. Act, s. 111 — Franchise before Confederation — 8 Vict., c. 90 (D) — Liability of province — Arbitration — Condition precedent.

A toll bridge with its necessary buildings and approaches was built and maintained by Y. at Chambly in the Province of Quebec in 1845 under a franchise granted to him by an Act (8 Vict., c. 90) of the Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years the works should vest in the Crown as a free bridge for public use, and that Y. or his representatives should then be compensated for by

the Crown, provision being therein also made for ascertaining the value of the works by arbitration and award.

Held, affirming the judgment of the Exchequer Court of Canada (6 Ex. C.R. 103) that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late Province of Canada coming within the operation of the 111th section of the British North American Act 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property and that the fact that the liability was not presently payable at the date of the passing of the British North America Act, 1867, was immaterial. *Attorney-General of Canada* v. *Attorney-General of Ontario*, (1897) A.C. 199 followed.

Held, also, affirming the decision appealed from, that the arbitration provided for by the third section of the Act 8 V. c. 90, did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by Petition of Right, and that the suppliants claim for compensation under the provisions of the Act of 8 Vict., c. 90 was a proper subject of petition of right within the jurisdiction of the Exchequer Court of Canada. Appeal dismissed with costs.

Newcombe, Q.C., Deputy Minister of Justice, for appellant. *Lafleur*, Q.C., and *R. V. Sinclair* for respondent.

Ex. C.] THE QUEEN *v.* GRENIER. [Oct. 24.

Government Railway—Injury to employee—Lord Campbell's Act—Art. 1056. C.C.—Exoneration from liability—R.S.C. c. 38, s. 50.

Art. 1056 C. C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act. *Robinson* v. *Canadian Pacific Railway Co.* (1892) A.C. 481, distinguished.

A workman may so contract with his employer as to exonerate the latter from liability for negligence and such renunciation would be an answer to an action under Lord Campbell's Act. *Griffiths* v. *Earl Dudley*, 9 Q.B.D. 357, followed.

In sec. 50 of the Government Railways Act (R.S.C. c. 38) providing that "Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister," the words "notice, condition or declaration" do not include a contract or agreement by which an employee has renounced his right to claim damages from the Crown for injury from negligence of his fellow servants. *Vogel* v. *Grand Trunk Railway Co.* 11 S.C.R. 612 disapproved.

An employee on the Intercolonial Railway became a member of The Intercolonial Railway Relief & Assur. Ass. to the funds of which the

Government contributed annually $6,000. In consequence of such contribution a rule of the Ass. provided that the members renounced all claims against the Crown arising from injury or death in the course of their employment. The employee having been killed in discharge of his duty by negligence of a fellow servant.

Held, reversing the judgment of the Exchequer Court (6 Can. Ex. C. 276) that the rule of the Association was an answer to an action by his widow under Art. 1056 C.C. to recover compensation for his death.

The doctrine of common employment does not prevail in the Province of Quebec. *Fillon* v. *The Queen* 24 S.C.R. 482 followed. Appeal allowed with costs.

Fitzpatrick, Q.C., Solicitor General, and *Lafontaine*, Q.C., for appellant. *Hogg*, Q.C., for respondent.

Ont.] PURDOM *v.* ROBINSON. [Oct. 24.

Right of way—Easement—User.

A right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect to any other property.

Judgment of the Court of Appeal (26 Ont. A.R. 95, ante p. 191) affirmed. Appeal dismissed with costs.

Purdom for the appellant. *Glenn* for the respondent.

Ont.] LUMBERS *v.* GOLD MEDAL FURNITURE CO. [Oct. 24.

Lease—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Quiet enjoyment.

A lease of premises used for a factory contained this provision—"Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice. . . ."

Held, reversing the judgment of the Court of Appeal (26 Ont. A.R. 78) and that of ROSE J. at the trial, (29 O.R. 75, ante p. 165) that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate.

Held further, that the lessor having, in good faith, represented that he had sold the property with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages, even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment. Appeal allowed with costs.

Que.] THE QUEEN *v.* POIRIER. [Oct. 24.

Landlord and tenant—Conditions of lease—Construction of deed—Practice — objections taken on appeal for the first time.

Where the issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court of Canada comes too late and cannot be entertained.

Where a written lease of lands provides for the payment of indemnity to the lessees in case they should be dispossessed by the lessor before the expiration of the term of the lease, the lessees are entitled to claim the indemnity upon being so dispossessed although the eviction may be for cause, inasmuch as the lessor could not, under the lease, dispossess the lessee except for breach of the conditions therein mentioned. Appeal dismissed with costs.

Duffy, Q.C., and *Cannon*, Q.C., for appellant. *Fitzpatrick*, Q.C., and *Marechal* for respondent.

Ont.] FARQUHARSON *v.* IMPERIAL OIL. [Oct. 29.

Rivers and streams—Driving logs—Obstruction—Dam—R. S. O. (1887) c. 120, ss. 1 and 5.

R.S.O. (1887) c. 120, s. 1, all persons are prohibited from preventing the passage of saw-logs and other timber down a river, creek or stream by felling trees or placing any other obstruction in or across the same.

Held, reversing the judgment of the Queen's Bench Division (34 C.L.J. 271; 26 O.R. 206) that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs was an obstruction under this Act.

In a previous term an appeal had been taken to the Court from an order made by Gwynne, J., in Chambers, granting leave to appeal per saltum from the Judgment of the Chancery Division. The Court held that no appeal could be taken from the order in Chambers, and dismissed it without pronouncing on the question of jurisdiction.

Held, per Taschereau, J., that the appeal should have been quashed on such motion; that an appeal does not lie from judgment of a Divisional Court; that as the case could not have been taken to the Court of Appeal leave to appeal per saltum could not be granted and the order therefore could not confer jurisdiction. Appeal allowed with costs.

Aylesworth, Q.C., and *Shaunessy* for appellant. *Osler*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] [Oct. 2.

HUFFMAN *v.* TOWNSHIP OF BAYHAM.

Municipal corporation—Highway—Obstruction—Negligence—Damages.

A milk-stand built on a highway by an adjoining proprietor and projecting slightly over the travelled way is such an obstruction as to constitute want of repair within the meaning of the Municipal Act, and when such an obstruction exists for three years and the municipal corporation having jurisdiction over the road in question take no steps to have it removed they are liable in damages for an accident caused by it. *Castor* v. *Uxbridge* (1876) 39 U.C.R. 113, considered and approved.

Quantum of damages for death of a child discussed.

Judgment of ROBERTSON, J., varied.

Osler, Q.C., and *T. G. Meredith* for appellants. *D. J. Donahue* and *W. E. Stevens* for respondents.

From Drainage Referee.] [Nov. 11.

CRAWFORD *v.* TOWNSHIP OF ELLICE.

Drainage—Mandamus—Notice—Damages—Drain insufficient.

To entitle a person who or whose property is injuriously affected by the condition of a drain to a mandamus for the performance of such work as may be necessary to put the drain in proper condition the notice required by s. 73 of the Drainage Act, R.S.O., c. 226, while not necessarily in technical form, must be so clear and precise that the municipality can decide whether the complaint is well founded or frivolous, and must be one which the municipality would be justified in acting upon under sub-s (a) of that section.

A letter referring to defects in the drain, and suggesting steps to be taken, but not calling upon the municipality to do specific work, is not sufficient. The notice by which proceedings are initiated in Court cannot be regarded as a notice under s. 73. Judgment of the Drainage Referee affirmed.

A person who or whose property is injuriously affected by the condition of a drain is entitled to recover from the municipality charged with the duty of maintaining it such damages as he sustains by reason of its non-repair, whether caused by the flooding of his land by the waters of the drain, or by its failure to carry off the water which came upon the land in the course of nature. Judgment of the Drainage Referee reversed.

J. P. Mabee, Q.C., for appellants. *M. Wilson*, Q.C., for respondents.

From Divisional Court.] [Nov. 11.

IN RE ROBERTSON AND CITY OF CHATHAM.

Municipal corporation—Local improvements—Mode of assessment—Appeal—County Court Judge—Prohibition.

When a sewer is being constructed by a municipal corporation under the local improvement system, and land not fronting on the street in question is benefited as well as land fronting thereon, the proper method of assessment is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and to assess the proportion payable by each class according to the total frontage of that class, and not according to the benefit received by the lots in that class inter se.

Judgment of a Divisional Court (30 O.R. 158, ante p. 74) affirmed, Burton, C.J.O., and Lister, J.A., dissenting.

But *held* also, reversing that judgment, Osler and Moss, JJ.A., dissenting, that after the County Court Judge had, on appeal by an owner, taken a contrary view and altered the assessment, it was too late to obtain an order for prohibition.

J. T. Small for appellant. *Douglas*, Q.C., and *Aylesworth*, Q.C., for respondents.

From Street, J.] NICOL SCHOOL TRUSTEES *v.* MAITLAND. [Nov. 11.

Schools—Public schools—Union school section—Existence de facto—Alteration of boundaries—"Municipality concerned"—R. S. O., c. 292, ss. 42, 43.

There was no proof of the formation of the union school section in question, but it was shown that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of sub-s. 4 of s. 11 of the Public School Act, R.S.O., c. 292, the lot was marked as in the school section of the adjacent township:

Held, that the evidence was sufficient to show that the union school section existed in fact, and that s. 42 of the Act applied to it, so that it must be deemed to have been legally formed.

History and object of that legislation discussed.

Proper corporate description of the trustees of a union school section pointed out.

A municipality in which there is any territory forming part of the union school section in question is concerned within the meaning of s. 43 of the

Act, in any proceedings for the alteration of the section, these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself.

Judgment of STREET, J., affirmed.

Johnston, Q.C., and *A. H. Macdonald*, Q.C., for appellants. *W. R. Riddell*, Q.C., and *Hugh Guthrie* for respondents.

From Ferguson, J.] [Nov. 11.

SUTHERLAND INNES COMPANY *v.* TOWNSHIP OF ROMNEY.

Drainage—Debentures—Maintenance—Embanking work—Registration of By-laws.

Sec. 83 of the Drainage Act, R.S.O., c. 226, directing that the time for payment of debentures issued for the cost of extending, improving, or altering a drainage work, and the municipality has the same power to issue debentures as in the case of an original drainage work.

Because in the course of the construction of a drainage work banks are formed with the spoil cast from the dredge, the work is not one within sub-s. 2 of s. 3 of the Drainage Act, R.S.O., c. 226; that sub-s. relates to the reclamation of wet or submerged lands.

Semble: The provisions of the Municipal Act as to the registration of by-laws for contracting debts apply to by-laws for the issue of debentures for drainage works, and when such by laws have been registered in accordance with the provisions of the Act they cannot be set aside even if originally ultra vires.

Judgment of FERGUSON, J., (34 C.L.J. 695) affirmed.

Atkinson, Q.C., for appellants. *J. B. Rankin*, Q.C., for respondents.

From Ferguson, J.] ATKINSON *v.* CITY OF CHATHAM. [Nov. 11.

Municipal corporations — Highway — Obstruction — Telephone pole — Indemnity.

A telephone pole placed in the travelled portion of a highway is such an obstruction thereto as to constitute want of repair within the meaning of the Municipal Act, and when the municipal corporation having jurisdiction over the highway in question take no step for several years to compel the removal of the pole they are liable in damages for an accident caused by it.

Judgment of FERGUSON, J. (29 O.R. 517: 34 C.L.J. 565) affirmed.

But *held* that the municipal corporation has a right of indemnity against the telephone company erecting the pole notwithstanding their knowledge of and assent to the erection of the pole.

Judgment of FERGUSON, J., (29 O.R. 518) reversed.

Aylesworth, Q.C., and *Douglas*, Q.C., for City of Chatham. *M. Wilson*, Q.C., for Bell Telephone Company. *Atkinson*, Q.C., for plaintiffs.

Case stated by J.P.] [Nov. 11.

REGINA *v.* TORONTO RAILWAY COMPANY.

Constitutional law—Justice of the Peace—Stated case—Court of Appeal—R.S.O., c. 91, s. 5.

A case can be stated by a Justice of the Peace under R.S.O., c. 91, s. 5, for the judgment of the Court of Appeal only when the constitutional validity of the statute in question is involved and not when the decision depends merely upon whether the statute is or is not applicable to the defendants.

It was held, therefore, that an appeal would not lie from the decision of the Police Magistrate of the City of Toronto that the Toronto Railway Company were bound by a by-law of the Corporation, passed under the authority of the Municipal Act, directing them to put vestibles on their cars, the Company contending that the by-law and the Municipal Act did not apply because their line crossed the lines of Dominion railways, thus making their undertaking a work for the general advantage of Canada and subject only to Dominion regulations.

James Bicknell for defendants. *Irving*, Q.C., for Attorney-General for Ontario. *Fullerton*, Q.C., for relator.

From Boyd, C.] GREYSTOCK *v.* BARNHART. [Nov. 11.

Evidence—Mortgage—Alteration—Proof of execution—Registration Act—R.S.O., c. 136, s. 63.

The production of the registered duplicate original of an instrument with the registrar's certificate endorsed thereon is, by virtue of s. 63 of the Registry Act, R.S.O., c. 136, prima facie vidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.

Whenever it would be an offence to alter an instrument which has been completed, the legal presumption is that material alterations appearing on the face of the instrument were made at such a time and under such circumstances as not to constitute an offence.

Judgment of BOYD, C., reversed.

R. M. Dennistoun for appellant. *G. M. Roger* for respondents.

From Rose J.] EDMISON *v.* COUCH. [Nov. 11.

Trust—Grant on condition—Release.

The owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life estate in his own favour, and "subject to the payment thereout by the (defendants)" of certain sums to the plaintiffs, the deed being voluntary as to them.

The deed contained a covenant by the defendants with the grantor to make the payments and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all encumbrances:—

Held, that an irrevocable trust was created by the first deed in favour of the plaintiffs and was enforceable by them, and that *Gregory* v. *Williams* (1817), 3 Mer. 582, and *Mulholland* v. *Merrian* (1872), 19 Gr. 288, applied.

Judgment of ROSE, J., reversed.

E. C. S. Huycke for appellants. *F. M. Field* for respondents in the same interest. *W. R. Riddell*, Q.C., and *A. J. Armstrong* for other respondents.

HIGH COURT OF JUSTICE.

Boyd, C., and Ferguson, J.] [Oct. 13.

McSHANE *v.* TORONTO, HAMILTON & BRUCE R.W. Co.

Trespass—Dangerous article near highway—Child attracted thereby and injured.

Plaintiff's son, a boy of twelve years of age, entered upon railway property, and took a fog signal out of a box on a hand-car standing there, which he struck with a stone and exploded, injuring himself.

Held, that as the boy was a trespasser, the defendants were not liable. Judgment of ARMOUR, C.J., affirmed.

Staunton for the appeal. *Tate* contra.

Boyd C.] RE HYDE *v.* CAVEN. [Oct. 21.

Examination of judgment debtor—Order for payment by instalment—Commitment—Government official—Jurisdiction.

There is jurisdiction in a County Judge, under R.S.O., c. 60, s. 247, as amended by 61 Vict., c. 15, s. 4 (O.) after examination had and payments of instalments ordered, to make an order for the commitment of a judgment debtor on default being made in the payments of instalments, and prohibition was refused even where the debtor committed was a Dominion Government official with no other source of income than his salary as such.

Such an order is not so much by way of execution as it is of a punitive character.

Judgment of the County Court of the County of Perth affirmed.

W. H. Blake for the appeal *J. Moss* contra.

Street J.] SMYLIE *v.* THE QUEEN. [Nov. 24.

Crown—Timber licenses—Renewal—New regulations—"Manufacturing condition"—61 Vict., c. 9—Application to past sales—Powers of Provincial Legislature—Sale of public lands—B.N.A. Act, s. 92 (5).

By C.S.C. c. 23, s. 1 it was enacted that the Commissioner of Crown Lands might grant licenses to cut timber on the ungranted lands of the Crown, subject to such regulations as might from time to time be established by the Governor in Council; and, by sub-s. 2, no license shall be granted for a longer period than a year. Regulations established by order in council in 1869 provided, inter alia, that license holders who had complied with all existing regulations should be entitled to have their licenses renewed on application to the commissioner, and prescribed a form of license. The licenses issued to the suppliants in 1873 and 1888, and annually renewed up to 1898, contained a clause, (also found in the advertisement and conditions of sale) stating that the license was subject to the condition that the licensee should comply with all regulations "that are or may be established by order in council." By order in council of Dec. 17, 1897, .. was ordered that every license issued on or after the 30th April, 1898, should contain a condition that all pine cut under such license should be manufactured into sawn lumber in Canada. By 61 Vict., c. 9 it was enacted (s. 1) that all sales of pine timber which should be thereafter made, and all licenses thereafter granted, should be so made or granted subject to the condition set out in the regulations of Dec. 17, 1897, (s. 2) that such regulations were approved; (s. 3) that further regulations might be made; (s. 4) that s. 1 sh.. ld come into force on the passing of the Act, and the other parts on April 29, 1898.

The suppliants applied to the commissioner for a renewal for the year 1898-9 of their licenses, without the insertion of the "manufacturing condition" above referred to, but this was refused. It was admitted that the suppliants had complied with all former conditions in the licenses previously issued to them.

Held, 1. That the suppliants were not entitled to renewals of their licenses free from conditions coming into force after the licenses originally issued to them.

2. Notwithstanding that s. 1 of 61 Vict., c. 9 was apparently applicable to future sales only, that Act, having regard to ss. 2 and 4, applied to renewals of licenses issued upon sales made before it was passed.

3. That that Act was intra vires of the Ontario Legislature, being an enactment in relation to "the management and sale of the public lands belonging to the province and of timber and wood thereon," within the meaning of s. 92 (5) of the British North America Act, and not to "the regulation of trade and commerce," within the meaning of s. 91 (2).

C. Robinson, Q.C., and *H. J. Scott*, Q.C., for suppliants. *S. H. Blake*, Q.C., and *Walter Gow* for Crown.

Boyd, C.] STEVENSON *v.* STEVENSON. [Nov. 28.

Alimony—Costs—Interim order—Disbursements—Undertaking.

Notwithstanding the language of Rule 1144—"only the amount of the cash disbursements actually and properly made by the plaintiff's solicitors"—an order may be made in an action for alimony for payment by the defendant to the plaintiff's solicitors of a sum to cover prospective witness fees upon the undertaking of the solicitor to account for all sums not actually and properly disbursed.

J. H. Moss for plaintiff. *W. E. Middleton* for defendant.

Province of Nova Scotia.

SUPREME COURT.

Townshend, J., in Chambers.] [Sept. 30.

VICKERS *v.* BOYD.

Pleading—Embarrassment—Assault.

Action for assault. Plea by way of justification that defendant was "a duly appointed policemen for the Town of North Sydney, and in the course of his duty arrested the plaintiff, and did not use more force than was necessary to effect such arrest."

Held, that as it is not the duty of a policeman to arrest except for cause, the above plea was embarrassing and no answer to the action.

McNeil for plaintiff. *Fulton* for defendant.

Townshend, J., in Chambers.] [Oct. 20.

IN RE MARSHALL.

Infant—Custody Estoppel on parent.

Habeas corpus to the director of the Halifax Ladies' College to bring before a judge one Nelly Marshall an infant daughter of the applicant.

The facts were shortly as follows: The infant was the daughter of the applicant and his wife Laura, formerly Laura Logan. The father was a Roman Catholic, but apparently seldom attending church, and his wife a Presbyterian. The child was baptized and brought up in the Presbyterian church, the father not objecting during his wife's lifetime. She died in 1897, at which time the applicant, at his wife's request, gave the child to her sister Annie Logan to be brought up by her, the aunt being also a Presbyterian. The aunt and child then removed to Halifax from British Columbia, where the wife died, and was brought up by her, attending the Presbyterian services and becoming a member of that body. These facts

were known to the father, who made no objection to the faith in which she was being brought up. The applicant after his return from British Columbia married a second time in the year 1898. Shortly after this the father told his daughter that she was to come and live with him at Truro, which she did. She was then told that she must attend the Roman Catholic services, or in default go to a convent. Under pressure she consented to go to the Roman Catholic church, and signed a paper consenting to do. When she became 14 years of age, in August 1899, she left her father and entered the ladies' college at Halifax, a Protestant institution, being placed there and paid for by her uncle. She stated on affidavit that she desired to remain in the above institution, and was determined to continue in the faith in which she was brought up.

Held, that it would not be for the welfare of the girl to return to her father, and that it would apparently result in much unhappiness to her, and in both mental and physical injuries: that as the father had permitted her to be brought up in the Protestant faith, which was the same as that of her mother, he could not now be allowed to make her change that faith, or to remove her from the relatives who had provided for her and treated her with apparent kindness, and to whom she was much attached, and that his conduct acted as an estoppel against any rights which otherwise he might have had.

Russell, Q.C. and *Fenn* for applicant. *Ritchie*, Q.C., and *McKinnon* contra.

Townshend J. in Chambers.] [Sept. 25.

IN RE MUTUAL LIFE INSURANCE CO.

Service of interpleader summons out of jurisdiction.

Held, that the Court had no power to grant an interpleader summons for service out of the jurisdiction: See *Credits Gerundense* v. *Van Weede*, 12 Q.B.D. 171; *In re La Compagnie Generale D'Eaux Minerales*, (1891) 3 Ch. 451; *In re Busfield*, 32 Ch. D. 131; Piggott, page 144.

H. H. McKay for applicant. *J. A. Chisholm* contra

Province of New Brunswick.

SUPREME COURT.

Full Court.] EX PARTI WELMORE [Nov. 17.

Civic assessment—Provincial Government official—Exemption.

An official of the Provincial Government is not exempt from civic taxation. Rule for certiorari to remove assessment of Board of Assessors of city of Fredericton refused.

J. W. McCready and *G. W. Allen*, Q.C., for appellant.

In Equity. Barker, J.] TRITES *v.* HUMPHREY. [Sept. 19.

Injunction suit—Bill—Affidavit—53 Vict., c. 4, s. 23—Administration suit—Parties—Administrator—Assets limited to land.

It is not a ground of demurrer to a bill in an injunction suit that it is not sworn to or supported by affidavit. The Act 53 Vict., c. 4, s. 23, only requires that the bill shall be sworn to by affidavit where application for an injunction is made before the hearing.

In a suit by creditors of a deceased intestate to set aside conveyances of real estate as fraudulent, and to administer the debtor's estate, it is necessary that an administrator of the intestate's estate be made a party to the suit, though there is no personal estate of the deceased. The Probate Court has jurisdiction to grant letters of administration where the intestate dies indebted possessed of no personal estate, but having an interest in lands.

M. G. Teed for plaintiff. *White*, A.-G., and *Allison* for defendant.

In Equity. Barker, J.] [Oct. 17.

ATTORNEY-GENERAL *v.* MILLER.

Office—Irregular appointment—Injunction—Quo warranto.

In an injunction suit to restrain pilots appointed by the Pilot Commissioners of the District of Miramichi from acting, on the ground that their appointment was irregularly and illegally made, in that they were not appointed by bye-law confirmed by the Governor-General in Council, as required by the Pilotage Act, c. 80, R.S.C., and in that they were not examined as to their competency, as required by regulation of the Commissioners.

Held, that the remedy by injunction was misconceived, and that the application should be by information in the nature of a quo warranto.

Pugsley, Q.C., and *Tweedie*, Q.C., for Attorney-General. *Currey*, Q.C., and *Landry*, Q.C., for defendants.

In Equity. Barker, J.] McGREGOR *v.* ALEXANDER. [Oct. 17.

Crown land license—Agreement—Writing—Statute of Frauds.

An agreement with respect to a Crown land lumber license is not an agreement relating to an interest in land within the meaning of the Statute of Frauds, and need not be in writing.

Stockton, Q.C., and *Watt* for plaintiff. *Currey*, Q.C., and *Montgomery* for defendant.

Full Court.] EX PARTE WALLACE. Nov. 17

Canada Temperance Act - Service of summons—Clerk of hotel—Adult inmate of household.

A constable's return of the service of a summons in a Scott Act case, alleging that the summons was left with A.B., a clerk in the defendant's employ at the latter's hotel, without shewing that he was an adult inmate of the household, is bad.

M. G. Teed in support of rule. *W. B. Chandler*, Q.C., contra.

Full Court.] ACKERMAN *v.* BOYD. [Nov. 17.

Agreement to purchase land—Default in payment—Tenant at will—Summary ejectment Act.

A. and B. entered into an agreement for the purchase by B. from A. of a lot of land at $450, to be paid in five equal consecutive annual instalments on or before the 10th July every year, with a proviso that in default of payment of any of the instalments, B. should pay interest thereon at 6 per cent. from the date when due, under which agreement B. went into possession.

Held (VANWART, J., dissenting), that B., having paid the first two instalments, by making default in the subsequent ones, became a tenant at will to A., and as such was liable to be proceeded against under the Summary ejectment Act. Appeal from Queen's County Court setting aside the proceedings before two justices of the peace under the Summary ejectment Act allowed, with costs.

John R. Dunn in support of appeal. *M. McDonald* contra.

Full Court.] EX PARTE DOHERTY. [Nov. 17.

C. T. Act—Second arrest on same warrant—Estoppel.

Applicant was convicted of a fourth offence under C. T. Act. A warrant was placed in the hands of a constable, who after keeping it for some time went to defendant to execute it, and told him he would have to come to jail with him. Defendant, complaining of the great inconvenience he would be put to if placed in custody at that time, induced the constable to hold off for a week or two longer by agreeing to deposit $100 with him. Later on the constable arrested the defendant on the same warrant and lodged him in jail.

Held, on application for his discharge by habeas corpus on the ground that he had been twice arrested on the same warrant, (VANWART, J., dissenting), that even if an arrest had been effected on the first occasion when the constable agreed to hold off, it was called off by defendant's own request and he was therefore estopped. Application refused.

Pugsley, Q.C., in support of application. *F. A. McCully* contra.

Full Court.] EX PARTE GRANT. [Nov. 17.

Stipendiary magistrate—Fees of office—Direction from City Council concerning same—Mandamus.

The City Council of Moncton passed a resolution directing the stipendiary magistrate of the city (who is appointed by the Provincial Government, but receives his salary from the city, and is required by the City incorporation Act to pay the fees of his office over to the city treasurer,) not to demand the payment of fees for the issue of processes in civil suits in advance. The magistrate, despite the council's direction, refused to issue summonses in several civil suits for the applicant without first being paid for them.

Held, on an application for a mandamus, that the resolution was not binding on the magistrate notwithstanding his obligation to account to the city for the fees, and that in any case the Court would not grant a mandamus where the only question was as to whether the fees, which the magistrate was entitled to receive for the act sought to be enjoined, should be paid before the performance of the act or on the signing of judgment a few days later.

G. F. Gregory, Q.C., in support of rule. *Jas. Kaye*, stipendiary magistrate, contra.

Full Court.] ANDERSON *v.* SHAW. [Nov. 17.

County Court appeal—Set-off of costs.

Court refused an application to set-off costs granted to defendant appellant on appeal from an interlocutory judgment of the York County Court against a judgment recovered in the Court below by plaintiff respondent for damages and costs.

G. W. Allen, Q.C., in support of application.

ST. JOHN COUNTY COURT.

Forbes, J.] BLACK *v.* SMITH. Nov. 1

Set-off—Costs—County Court Act, 1897, s. 68—Supreme Court Act, 1897, s. 113.

Plaintiff claimed by his particulars $81.45. Defendant pleaded a set-off of $42. At the trial plaintiff proved for $51, and defendant established a set-off of $41 50. A verdict was entered for the plaintiff for $9 50. Defendant applied to amend the verdict by entering a verdict for the plaintiff for $51, and for the defendant for $41.50, with a view of taxing costs of proving set off, under s. 113 of the Supreme Court Act, 60 Vict., c. 24. Reliance was placed upon this section; s. 68 of the County Court Act, 60 Vict., c. 28; and English authorities.

Held, that s. 113 was not applicable to the County Court Act, and application refused. (This case is being appealed.)

E. R. Chapman for plaintiff. *A. G. Blair, Jr.*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] CARTER *v.* RODGERS. [Nov. 20.

Practice—Evidence—Commission to examine witnesses abroad.

Appeal from the decision of the Referee refusing to order the issue of a commission to Montreal to take the evidence of a witness for the plaintiffs for use at the trial. The usual affidavit had been filed in support of the application.

Held, reversing the decision of the Referee, that the commission should be issued, and that the facts that the witness sold the plaintiffs' goods on commission and acted as their agent in the transaction out of which this action arose, were not sufficient special reasons for refusing the commission, as there was nothing in the nature of the evidence expected from him that would make it unjust or unfair to the defendants to allow it to be taken under a commission.

Mulock, Q.C., for plaintiffs. *Howell*, Q.C, for defendants.

RULES OF COURT—ONTARIO.

Regulation for preventing causes being entered for trial, or hearing, before the same are in a fit state to be tried, or heard.

WHEREAS it is necessary for the due administration of justice, and avoidance of delays and unnecessary expense, that records entered for trial should show the state of the action against all the defendants, including those who have not appeared, or as against whom the pleadings have been noted closed, or any interlocutory, or final, judgment has been signed:—

THEREFORE, from and after January 1st next (1900), all officers passing records are hereby directed, and required, to see that they contain, in addition to a certified copy of the pleadings, a note or memorandum stating the state of the action as against every defendant or defendants who has, or have, put in no defence, or as against whom the action has been discontinued. No extra charge is to be made for such note or memorandum. All officers and clerks when entering causes for trial, or for hearing on motion for judgment, are required to see that the same are in a proper state for trial, or hearing, and are not otherwise to enter the same; and for that purpose may require either the production of the Record, or a certificate of the state of the action, when the necessary information cannot be obtained from their own books of office.

(Signed) J. A. BOYD, C. and P.
" J. D. ARMOUR, C.J.Q.B.
October 28th, 1899. " W. R. MEREDITH, C.J.C.P.

Book Reviews.

The Law of Mortgages of Real Estate. By EDWIN BELL, LL.B., and H. L. DUNN, B.A., of Osgoode Hall, barristers-at-law. Toronto, 1899: The Canada Law Book Company, law publishers, 32 Toronto Street.

Messrs Bell and Dunn, the editors of "Practice Forms," a work which has now become almost a necessity to Ontario solicitors as regards the multifarious documents of court procedure, have, in their present work on "Mortgages of Real Estate," presented to the profession an excellent treatise on that subject, with citations of both the English and Canadian authorities. The subject matter is divided into five parts, viz.: The Contract of mortgage, the Rights and Liabilities of the mortgagee, the Rights and Liabilities of parties claiming under the mortgagee, the Rights and Liabilities of the mortgagor, and the Rights and Liabilities of parties claiming under the mortgagor. Each of these parts is appropriately subdivided into chapters, 36 in all, including separate chapters on Interest, Limitation of actions, Fixtures, Foreclosure, Sale under power of sale, Indemnity of mortgagor selling his equity, Rights of purchasers of an equity of redemption, Rights of executors, Rights of dowress in mortgaged lands. Although the text is devoted primarily to the law of Ontario, references are made to the statute and case law of the provinces of Nova Scotia, British Columbia, Manitoba and New Brunswick and of the N. W. Territories, which will make it of great value in all of the provinces excepting Quebec. An examination of the text with a number of the citations shows that the cases have been carefully and accurately abstracted, and the work cannot fail to be of great value to practitioners. Its typographical arrangement and execution is of the first quality.

The Living Age, Boston, U.S.—The selections in the number for December 9 are excellent, giving good promise of what may be expected in 1900. For our own taste, we care little for articles taken from continental sources in comparison with those available in the Anglo-Saxon literature of Greater Britain and America, and should not grieve if we have in the year to come more of the latter and less of the former.

ANALYTICAL INDEX

of the Contents of this Volume.