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THE pressure on our columns resulting from the number of cases contained in our summary of current English decisions and notes of Canadian cases compels us to hold over until a subsequent issue the discussion of several matters of interest and some valuable reports of judgments by county judges.

WE publish in this number an important decision on points of interest connected with maritime law in our inland seas. The judgment of Judge McDougall is valuable, not merely for its intrinsic merit and clear enunciation of some important principles, but also as a repertoire of cases which will be useful to those who, being interested in this branch of the law, have not ready access to the books referred to.

FEMALE BARRISTERS.

By an Act of the last session of the Legislature, "The Law Society of Ontario" is empowered, in its discretion, to make rules for the admission of women to practise as barristers-at-law.

"The Law Society of Ontario" which is referred to in the Act of 1892, which is amended by the recent Act, is, we believe, a non-existent body. The corporate name of the Law Society of this Province is "The Law Society of Upper Canada." (See R.S.O., c. 145, s. 2.) The Law Society of Upper Canada has, it it is true, passed rules which are probably wholly *ultra vires*, providing for the admission of women to practise as solicitors; but whether it will persist in passing similar rules to permit women to be called to the Bar remains to be seen.

We believe it is an open secret that a very considerable body of the Benchers were very strongly opposed to the admission of women to practise as solicitors, and they were practically dragooned into passing the rules for the admission of women as solicitors very much against the convictions as to the propriety of so doing.

The statute as amended ostensibly still leaves it to the discretion of the Law Society of Ontario to make rules for the admission of women to the Bar, but it is quite possible that the Benchers will be given to understand that their discretion is one which must be understood in a Pickwickian sense, and, if they do not choose to exercise it in conformity with the will of the Government of the day, the Legislature will incontinently ride rough shod over them at the next opportunity.

In view of the error which has been made in the Act of 1892 in the name of the Society, it is quite possible that the Act and the rules passed thereunder are null and void, and the legislative enactment to effectually admit women to practise either as solicitors or barristers still remains to be passed.

But assuming that, notwithstanding the error we have pointed out, the Law Society of Upper Canada is invited to make rules for the admission of women to the Bar, we may point out that if there were reasons against admitting them as solicitors, there are some still stronger ones against their being admitted to the Bar.

Admission to the Bar means a qualification for the Bench. To allow women to be called to the Bar, and to deny to them the legitimate aspiration of attaining a seat on the Bench, would seem unreasonable. The question, then, is, Is the public prepared to see, and is it in the public interest that it should see, female judges on the Bench?

We are firmly persuaded that neither the one nor the other is the case, and the only legitimate way of keeping women off the Bench is by excluding them from the Bar.

CURRENT ENGLISH CASES.

COMPANY—WINDING UP—ADJUSTMENT OF RIGHTS OF CONTRIBUTORIES—SHARES ISSUED AT A DISCOUNT.

In re Railway Time-Tables Publishing Co., (1895) 1 Ch. 255, we find a rather interesting point of company law is discussed, which was somewhat complicated by a dictum of Lord Herschell in the case of *Ooregum Gold Co.* v. *Roper*, (1892) A.C. 125 (noted *ante* vol. xxviii., pp. 397-8). The question was this: Under the authority of the articles of association, shares of the company had been issued at a discount. The company having been ordered to be wound up, the holders of these shares, as contributories, had paid up a call on the shares so issued to them, necessary for satisfying the creditors, and the liquidator proposed to make a further call on these shares for the purpose of adjusting the rights of the shareholders *inter se*, and the problem to be solved was whether the shares issued at a discount were liable to these further calls. The holders thereof claimed that the arrangement whereby they got them at a discount was good as against everybody but the creditors of the company, and, relying on Lord Herschell's dictum, they contended that, though they were liable to pay for the shares in full, so far as necessary to satisfy creditors, they were not liable to pay any further calls as between themselves and the other shareholders. But the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) agreed with Kekewich, J., that the cases *In re Almada & T. Co.*, 38 Ch.D. 415 (see *ante* vol. xxiv., p. 457), and *In re Weymouth & C.I.S.P. Co.*, (1891) 1 Ch. 66 (see *ante* vol. xxvii., p. 133), had settled that contracts to issue shares at a discount were *ultra vires* of a company, and, therefore, were not binding on the company, and could not be ratified though all the shareholders were to agree thereto; and, therefore, that the shareholders who had been allotted the shares at a discount were bound to pay them up in full, not only as between themselves and creditors, but also as between themselves and their co-shareholders, for the purpose of adjusting their rights *inter se*.

NUISANCE—STATUTORY POWERS—VIBRATION—NOISE—REVERSIONER, RIGHT OF, TO SUE—INJUNCTION—DAMAGES.

Shelfer v. *London Electric Lighting Co.*, (1895) 1 Ch. 287; 12 R. Mar. 96, was an action to restrain the defendants from con-

tinuing a nuisance. The defendants were an electric lighting company, which, under a statute in that behalf, was incorporated for the purpose of supplying electricity for the purpose of light, etc. The company erected powerful engines and other works near to a house, which was subject to a lease. Owing to excavations for foundations for the engines, and to vibration and noise from the working of them, structural injury was caused to the house, and annoyance and discomfort to the lessee. The lessee and the reversioners brought separate actions for an injunction and damages in respect of the nuisance and injury thus occasioned, which were tried together. The defendants claimed to be protected by the Act under which they were incorporated, and which authorized the erection of their works; but Kekewich, J., held that the statute, although it authorized the construction of the works, did not exonerate them from liability for nuisance in carrying them on; and he also held that the plaintiffs were not deprived by the Act of their right of action or compelled to seek for compensation under the compensation clauses. He, however, held that the case was not one for an injunction, because of the public inconvenience which would be caused by the stoppage of the defendants' works, but was one for damages. On appeal by both plaintiffs, the Court of Appeal (Lord Halsbury, and Lindley and Smith, L.JJ.) differed from Kekewich, J., as to the propriety of granting an injunction; their lordships holding that, although Lord Cairns' Act (see R.S.O., c. 44, s. 53, s-s. 9) gives the court jurisdiction to award damages in lieu of an injunction, yet it was not intended to revolutionize the principles of equity as to granting injunctions, and that in cases, such as this, of continuing actionable nuisance, the jurisdiction so conferred should only be exercised under very exceptional circumstances, and where damages would be an adequate remedy; and that in the present case there was nothing to justify the court in refusing to aid the legal rights established, by an injunction preventing the continuance of the nuisance; and an injunction was granted, accordingly, in favour of both plaintiffs. In the report of this case, as well as some others, we observe that the *dicta* of particular judges are incorporated in the headnote. It is, perhaps, presumptuous to find fault with this, which is probably due to the new editor, and yet we cannot help thinking that it is no improvement to the reports; of course, opinions on this point

vary, but for our part we think the headnote should be confined to the point authoritatively determined, and should never be incumbered with the *obiter dicta* of judges.

COMPANY—LIQUIDATOR—COSTS.

In *Re Bolton*, (1895) 1 Ch. 333, upon a question of costs, the Court of Appeal (Lindley and Smith, L.JJ.) overruled the case of *In re Staffordshire Gas Co.*, (1893) 3 Ch. 523 (noted *ante* vol. 30, p. 90). The question was whether a liquidator who had resisted an application of a person to be struck off the list of contributories was personally liable for the costs of the proceedings when, on appeal, the applicant succeeded in getting himself struck off. The Court of Appeal considered that where the liquidator is merely defendant in the litigation the costs are payable out of the assets, unless the liquidator has done something to make himself personally liable for the costs.

DISCOVERY — EXAMINATION OF DEFENDANT FOR DISCOVERY — RELEVANCY OF EVIDENCE.

In *Kennedy* v. *Dodson*, (1895) 1 Ch. 334; 12 R. Mar. 76, certain interrogatories exhibited for the purpose of discovery were objected to on the ground of irrelevancy. The action was brought for a declaration that a piece of land which had been purchased by the defendant and one Carswell, in 1873, was so purchased by them as partners, and for accounts of the partnership and consequential relief. The interrogatories were directed to showing that in previous transactions the defendants had purchased lands in partnership. The Court of Appeal (Lord Herschell, L.C., and Lindley and Smith, L.JJ.), although conceding that such questions might properly be put to the defendant upon a cross-examination, were, nevertheless, of opinion that such questions were irrelevant to the issue, and could not be properly put as evidence in chief; and they held that interrogatories, unless strictly relevant to the question at issue in the action, ought to be rigorously excluded. The interrogatories were therefore disallowed. If this rule were strictly observed in examinations for discovery under our practice, the outcry which has arisen about the length and cost of such examinations would probably not have arisen.

MARRIED WOMAN—INTEREST FOR LIFE OF MARRIED WOMAN FOR SEPARATE USE, FOLLOWED BY GENERAL POWER OF APPOINTMENT, AND, IN DEFAULT, LIMITATION TO HER EXECUTORS, ADMINISTRATORS, OR ASSIGNS—MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT., C. 75), SS. 1, 2—(R.S.O., C. 132, S. 3).

In re Davenport, Turner v. *King*, (1895) 1 Ch. 361; 13 R. Feb. 179, a bequest had been made to trustees in trust to pay the income to a woman married after 1882, for life for her separate use, and as to the capital in trust for such persons as she should appoint by will, and in default of appointment for her executors, administrators, or assigns. The married woman claimed to be absolutely entitled to the fund. Kekewich, J., held that before the Married Women's Property Act, 1882, the life estate and the reversion limited to the married woman would not have coalesced, but that since that Act they did, and that on releasing her power of appointment she was entitled to a declaration that she was absolutely entitled to the fund. He considered a release of the power was necessary, because, owing to the circumstances of the trust estate, he was not in a position to make an order for its immediate payment to the married woman.

WILL—CONSTRUCTION—PRECATORY TRUST—"I WISH THEM TO BEQUEATH THE SAME."

In re Hamilton, Trench v. *Hamilton*, (1895) 3 Ch. 373; 13 R. Feb. 196, exhibits the prevailing tendency of the courts to confine the doctrine of precatory trusts within narrower limits than formerly. In this case a testatrix bequeathed two legacies of £2,000, followed by the words, "and I wish them to bequeath the same equally between the families of my nephew, Silver Oliver, and my dear niece, Mrs. Pakenham, in such mode as they shall consider right." The question was whether these words had the effect of creating a precatory trust, and thereby cutting down the gift to the legatees to a life interest, and Kekewich, J., held that they had not that effect. As the learned judge remarks, the older authorities, though not expressly overruled, have been nevertheless ignored.

COMPANY—WINDING UP—LANDLORD AND TENANT—RENT ACCRUED AFTER WINDING UP—RENT PAYABLE IN ADVANCE.

In the case of *Shackell* v. *Chorlton*, (1895) 1 Ch. 378, a contest arose between the landlords of a company being wound up and the liquidator as to the landlords' right to cover rent falling

due after the liquidation. By the terms of the lease, two quarters' rent were to be always due and payable in advance, if required. On the 20th December, 1894, the company went into liquidation, but the liquidator continued to occupy the demised premises. The quarter's rent due on the 25th December not being paid, the landlords demanded payment of that, and also of the next two quarters' rent in advance, and, on payment being refused, proceeded to distrain. The liquidator moved for an injunction to restrain the landlords from proceeding with the distress, and Kekewich, J., held that the rent for the December quarter must be apportioned, and that the landlords had only the right to prove, in the winding-up proceedings, for the rent accruing up to 20th December, but were entitled to be paid in full for the rest of the December quarter and for so much of the next two quarters as the liquidator should continue in beneficial occupation of the premises, such rent being part of the expenses of winding up, but that for the balance of the rent, if any, for those two quarters the landlords could only prove in the winding up.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—POWER TO RESCIND IF REQUISITIONS NOT WITHDRAWN—ELECTION.

In *Smith* v. *Wallace*, (1895) 1 Ch. 385; 13 R. Feb. 215, a vendor had entered into a contract for the sale of land, subject to a condition that he should be at liberty to rescind the contract in case the purchaser should make any requisition which he, the vendor, should be unable or unwilling to answer, and should not withdraw the same after being required so to do. The vendor, without actually electing to rescind the contract under this condition, entered into negotiations with a third person, with a view to effecting a sale to him. The purchaser then brought the present action for the return of the deposit. The vendor resisted the action, claiming that he had not rescinded the contract, and counterclaimed for specific performance; but Romer, J., held that the defendant, by entering into negotiations with a third person, entitled the plaintiff to treat the contract as rescinded, and he granted the plaintiff the relief prayed, and dismissed the counterclaim.

NUISANCE—OVERHANGING TREES—RIGHT TO ABATE NUISANCE.

Lemmon v. *Webb*, (1895) A.C. 1; 11 R. Feb. 64, is a case which has been already discussed in the earlier stages of its career (*ante*

vol. 30, p. 353, and *ante* p. 41). Through the persistence of the litigants we have now a deliverance of the House of Lords on the point in controversy, namely, the right of the owner of land to lop the boughs of his neighbour's trees which overhang his land, notwithstanding they have been growing for over twenty years. Their lordships (Lords Herschell, L.C., and Macnaghten and Davey) have affirmed the decision of the Court of Appeal, (1894) 3 Ch. 1, that the owner of the land overhung by the trees has the right to abate the nuisance by cutting the offending branches, and that this right is not lost by reason of the trees having been overhanging for over twenty years; and, moreover, that he has the right so to cut the branches without notice to the owner of the trees, provided he can do so without going on his neighbour's land.

MORTGAGE—PURCHASE OF EQUITY OF REDEMPTION—MERGER—TRANSFER OF MORTGAGE TO OWNER OF EQUITY OF REDEMPTION—INTENTION TO KEEP SECURITY ALIVE.

In *Thorne* v. *Cann*, (1895) A.C. 11; 11 R. Feb. 15, the House of Lords (Lords Herschell, L.C., and Watson and Macnaghten) have practically arrived at the same conclusion as was reached on a similar point by the Ontario Court of Appeal in *Hart* v. *McQuesten*, 23 Gr. 133. The question was whether an owner of the equity of redemption, who had paid off a mortgage and taken an assignment thereof, was entitled to keep it alive as against a subsequent mortgagee, where the documents and circumstances showed that such was his intention in taking the assignment. The House of Lords held that he was. In *Hart* v. *McQuesten* the question was whether a mortgagee of the legal estate who had taken a release of the equity of redemption expressed to be made in consideration of the amount due under the mortgage had thereby merged his security as against a subsequent mortgagee; the Court of Appeal held that he had not, although Blake, V.C., the judge of first instance, and Strong, J.A., in the Court of Appeal, were of the contrary opinion.

COPYRIGHT—PICTURES—INFRINGEMENT—SKETCHES FROM LIVING PICTURES.

Hanfstaengl v. *Baines*, (1895) A.C. 20; 11 R. Feb. 36, is a decision of the House of Lords (Lords Herschell, L.C., Watson, Ashbourne, Macnaghten, and Shand), affirming the decision of

the Court of Appeal, (1894) 2 Ch. 1 (noted *ante* vol. 30, p. 585). It may be remembered that the point in controversy was whether certain sketches of *tableaux vivants* arranged to represent pictures which were the subject of copyright were infringements of the copyright. Their lordships affirmed the decision of the Court of Appeal that they were not, on the ground that, looking at the sketches and comparing them with the copyright pictures, they were not, in fact, copies, reproductions, or colourable imitations thereof; but their lordships are careful to say that living pictures might be so arranged to represent copyright pictures that sketches or photographs of them might be an infringement of the copyright. The question seems really to turn on how nearly the living pictures actually resemble the copyright pictures.

PLEDGOR AND PLEDGEE—REDELIVERY OF PLEDGE TO PLEDGOR IN TRUST FOR SALE.

North-Western Bank (Limited) v. *Poynter*, (1895) A.C. 56; 11 R. Feb. 73, although a Scotch case, is deserving of notice, inasmuch as it turns on a point in which the law of Scotland agrees with the law of England, namely, that a pledgee of goods may deliver the pledge to the pledgor for a limited purpose, *e.g.*, in trust for sale, without impairing his rights under the contract of pledge.

EJECTMENT BY CROWN—EQUITABLE DEFENCE—SPECIFIC PERFORMANCE.

Attorney-General of Trinidad v. *Bourne*, (1895) A.C. 83, was an action of ejectment brought by the Crown against a subject, in which the defendant set up by way of equitable defence a contract for the purchase of the land from the Crown, of which he claimed specific performance, and on proof of the defence judgment had been given by the colonial court in favour of the defendant. The question submitted to the Judicial Committee of the Privy Council was whether there was any jurisdiction to decree specific performance against the Crown, and order it to convey the legal estate. Their lordships (Lords Watson, Hobhouse, and Shand, and Sir R. Couch) dismissed the appeal.

The Law Reports for April comprise (1895) 1 Q.B., pp. 533-672; (1895) P., pp. 121-162; (1895) 1 Ch., pp. 421-577.

BILL OF EXCHANGE—ALTERATION OF BILL—DUTY OF ACCEPTOR—NEGLIGENCE—ACCEPTANCE OF BILL SO DRAWN AS TO FACILITATE ALTERATION—ESTOPPEL—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), S. 64, S-S. 1—(53 VICT., C. 33, S. 63 (D.)).

Schofield v. *Londesborough*, (1895) 1 Q.B. 536; 14 R. Mar. 233, is an appeal from the decision in (1894) 2 Q.B. 660 (noted *ante* vol. 30, p. 681). It may be remembered that the defendant unfortunately fell into a trap artfully contrived by a swindler of the name of Sanders (now serving his time as a convict). This man, to whom the defendant was indebted in £500, presented to the defendant for his acceptance a bill of exchange so drawn up as to admit of its being raised by the filling in of blank spaces, so as to make it appear to be a bill for £3,500. It also bore stamps for a bill of that amount. The bill was signed for £500, and subsequently fraudulently raised to £3,500 by Sanders, and then negotiated by him, and came into the hands of the plaintiff for value and without notice of the fraud. It was claimed that the defendant had contributed to the fraud by his negligence in signing the bill with the blank spaces left, and bearing stamps for an amount in excess of what was payable for £500. But Charles, J., had decided that the plaintiff was not liable for more than £500, and this decision the Court of Appeal (Lord Esher, M.R., and Rigby, L.J.) have affirmed (Lopes, L.J., dissenting), the majority of the court holding that the plaintiff was not estopped by his conduct from setting up the true facts, that he had not been guilty of negligence, and, even if he had, the forgery of Sanders, and not defendant's negligence, was the proximate cause of the plaintiff's loss. Lopes, L.J., on the other hand, was of the opinion that the acceptor of a bill owes a duty to subsequent holders to take reasonable precautions against fraudulent alterations, that the defendant had failed in this duty, that his negligence was the proximate cause of the plaintiff's believing that the bill was valid for the larger amount, and that the defendant was consequently liable for the latter amount. The majority of the court considered the Bills of Exchange Act is a complete codification of the law on the subject, and that the case came within the express provision of s. 64 (53 Vict., c. 33, s. 63 (D.)). *Young* v. *Grote*, 4 Bing. 253, is characterized by Lord Esher,

M.R., as "the fount of bad argument," and Rigby, L.J., says "there must be some vice in the reasoning of the learned judges in that case." Lopes, L.J., on the other hand, affirms that it is "a binding authority," and recognized as such by the House of Lords recently in the memorable case of *Bank of England* v. *Vagliano*, (1891) A.C. 107. When such eminent doctors differ, who is to decide?

MASTER AND SERVANT—SERVANT'S AUTHORITY—EMERGENCY.

In *Gwilliam* v. *Twist*, (1895) 1 Q.B. 557, we find the defendants were doubly unfortunate. They were the owners of an omnibus, of which the driver got so drunk that he was ordered by a policeman to discontinue driving. The driver and the conductor thereupon authorized a man named Viares, who happened to be passing by, to drive the omnibus home, and Viares, while so driving the omnibus, negligently drove over the plaintiff and injured him. The question was whether Viares was the servant of the defendants, so as to render them liable for his negligent driving. The case was tried in the County Court, and the judge found, as a fact, that it was necessary that some one should drive the omnibus home, and upon this finding the Divisional Court (Lawrance and Wright, JJ.) held that there was an implied authority to the driver and conductor to employ Viares, and that the defendants were, therefore, liable. Wright, J., is careful to point out that this implied authority would not have justified the doing of any act which the masters themselves could not have legally done. For instance, had there been any statute prohibiting the employment of any person to drive who was not duly licensed, it would not have authorized the employment of an unlicensed driver. This learned judge, though admitting that there was some evidence to justify the finding of fact of the emergency existing, yet intimates a doubt whether he would have arrived at the same conclusion.

NEGLIGENCE—DAMAGE—REMOTENESS—AGISTMENT.

Halestrap v. *Gregory*, (1895) 1 Q.B. 561; 15 R. April 358, was an action to recover damages for injury sustained by the plaintiff's horse while in the defendant's care under a contract for agistment. The horse was in the field at pasture, and the defendant left open the gate whereby the horse strayed into an adjoining

cricket field. Some men in this field endeavoured carefully to drive it back through the gate, but the horse refused to go, and, having run against a wire fence, fell over it and was injured by one of the posts. The judge of the County Court nonsuited the plaintiff, holding that the damage was too remote; but the Divisional Court (Wills and Lawrance, JJ.) sent the case for a new trial, holding that the injury to the horse was the natural consequence of the defendant's negligence. See *Pearce* v. *Sheppard*, 24 Ont. R. 167.

JUSTICES—INTEREST—BIAS—DISQUALIFICATION OF JUSTICE.

In *The Queen* v. *Huggins*, (1895) 1 Q.B. 563; 15 R. Mar. 393, an application was made to quash a conviction on the ground that one of the six justices by whom the conviction had been made was disqualified by reason of interest. The conviction was had under a statute prohibiting an unqualified pilot from assuming or continuing in charge of any ship after a qualified pilot has offered to take charge of her. The magistrate who was objected to was a pilot, but was specially employed to pilot the ships of a certain company, and by the terms of his employment was restricted from offering his services as pilot to any other company, and was in no way brought into competition with the defendant. But the Divisional Court (Wills and Wright, JJ.) were of opinion that the fact of his belonging to the class whose interests were affected by the decision was sufficient to disqualify him. As Wills, J., puts it, suppose all six justices had been pilots, the tribunal would not have been a fair one, and, that being so, the objection must equally exist though only one of the six was a pilot.

DEFAMATION—SLANDER—ALDERMAN—WORDS IMPUTING MISCONDUCT IN A PUBLIC OFFICE—SPECIAL DAMAGE—AMOTION, POWER OF.

Booth v. *Arnold*, (1895) 1 Q.B. 571, was an action for slander in respect of words spoken by the defendant imputing dishonesty to the plaintiff as an alderman in which two points of considerable interest are discussed, one of which, however, the majority of the Court of Appeal deemed immaterial. The first question, and one on which the case turns, was whether the action was maintainable without proof of special damage. And the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) held

that it was, and they distinguish the case from *Alexander* v. *Jenkins*, (1892) 1 Q.B. 797, where the imputation was merely as to the sobriety of the plaintiff, which was held not to be actionable without proof of special damage, whereas the defamatory statement here amounted to a slander of a man in his office, which was actionable at common law without proof of special damage. The other question on which Lord Esher, M.R., and Rigby, L.J., declined to pronounce an opinion, but which is discussed at length by Lopes, L.J., was whether there is a power of amotion from office of an officer of a municipal corporation incorporated under the Municipal Corporation Act, 1882, on the ground of misconduct in office. This point was relied on by the plaintiff as furnishing a ground of damage; but taking the view they did, that it was unnecessary to prove any damage, the majority of the court declined to go into that question. Lopes, L.J., however, is clear that the right of a motion for reasonable cause is incident to every corporation, unless taken away by statute. He also considered the action maintainable on the ground that the words imputed to the plaintiff a criminal offence.

"BROTHEL," MEANING OF—CRIMINAL LAW—NUISANCE—(CR. CODE, SS. 195, 198).

In *Singleton* v. *Ellison*, (1895) 1 Q.B. 607; 15 R. Mar. 391, a Divisional Court (Wills and Wright, JJ.) determined that where a woman occupies a house which is frequented day and night by men for the purpose of committing fornication with her (there being no other woman living in the house or frequenting it for the purpose of prostitution), she cannot be convicted of "keeping a brothel," the court holding that in the legal acceptation of that term it means a place resorted to by persons of both sexes for the purpose of prostitution. We may observe that the Criminal Code, s. 195, defines a common bawdy house as "a house, room, or set of rooms, or place of any kind kept for the purposes of prostitution," and s. 198 makes it an indictable offence to keep any common bawdy house as thus defined, so that it would seem that on the facts in this case there would, in Canada, be an indictable offence.

DIARY FOR MAY.

2. Thursday.....J. A. Boyd, 4th Chancellor, 1881. Battle of Cut Knife Creek, 1885.
3. Friday.....Ascension Day.
4. Saturday.....Wm. A. Henry, J. of Sup. Court, died, 1888.
5. Sunday.....*3rd Sunday after Easter.*
6. Monday.....Law School closes. Lord Brougham died, 1868, aged 90.
7. Tuesday.....Supreme Court of Canada sits.
12. Sunday.....*4th Sunday after Easter.* Battle of Batoche, 1885.
14. Tuesday.....Court of Appeal sits. County Court Jury and non-Jury Sittings in York.
18. Saturday.....Montreal founded, 1642.
19. Sunday.....*Rogation Sunday.*
20. Monday.....EASTER TERM begins. Q. B. and C. P. Div. Courts sit. Convocation meets.
21. Tuesday.....Confederation proclaimed, 1867.
22. Wednesday....Earl of Dufferin, Gov.-Gen., 1872.
23. Thursday.....Ascension Day.
24. Friday.....Queen's Birthday, born 1819. Convocation meets.
25. Saturday.....Princess Helena born, 1846.
26. Sunday.....*Sunday after Ascension.*
27. Monday.....Chan. Div'l Court sits. Habeas Corpus Act passed, 1679
28. Tuesday.....Hon. G. A. Kirkpatrick, Lieut.-Gov. of Ontario, 1892.
29. Wednesday....Battle of Sackett's Harbour, 1813.
31. Friday.....Convocation meets.

Reports.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

SYMES *v.* "THE CITY OF WINDSOR."

Maritime Law—Master's lien for wages and ships necessaries—Master's authority to bind ship and owner—Priority of lien over mortgage.

A master has a maritime lien upon a vessel for proper disbursements for seamen's wages, necessaries, etc. (such as fuel, provisions, urgent minor repairs, etc.), and for his own wages, although such vessel be employed in domestic waters and home ports.

Definition of extent of master's implied authority to bind ship and owner, and definition of necessaries.

Held, that the power of a master to pledge the owner's credit in a home port exists where the power of communication is not correspondent with the existing necessity.

Held, also, that where a maritime lien, as above stated, is created, such lien takes priority to a mortgagee's claim, whose mortgage antedates the creation of the lien.

(TORONTO, March 15—MCDOUGALL, L.J.Ad.

This was an action *in rem* against the ship, The City of Windsor, brought by the master to recover wages due him upon an alleged hiring for the season of 1894; for damages for wrongful dismissal; and for disburse-

ments properly made by him and liabilities properly incurred by him on account of the ship during the months of April, May, June, July, and August, 1894. The ship was taken possession of by the Third National Bank, as mortgagees, on the 27th August, 1894, and they now intervene as defendants. The Peninsular Savings Bank also intervene as defendants, claiming same right or interest in the same mortgage.

The City of Windsor was a passenger steamer registered at the port of Windsor, and was placed on the route between Toronto and St. Catharines, in the season of 1894, by her owner. With consent of the mortgagee, Captain Symes was appointed master.

On the 11th day of May, The City of Windsor started for St. Catharines, arriving there on the 13th, and the boat was at once placed on the dry dock by the owner's orders to have her bottom scraped, and several other minor repairs made. The owner during the whole season supplied little or no money for the running expenses of the boat. One or two small drafts drawn upon him by the master were paid, while others were protested for non-acceptance or non-payment. The owner had no agent at either St. Catharines or Toronto. In his letters to the master, he was urging him not to draw on him for necessary outlays, but to try to meet his accounts and bills from the boat's earnings.

In the month of May the boat met with several accidents, necessitating her going into dry dock. A second accident occurred through the engineer disobeying a signal going through the canal, and, in consequence of an injury caused to the canal, the boat was tied up for some weeks by the Government, and was not released for about three weeks. The business done throughout the season was unsatisfactory. Money enough was not earned to pay running expenses and the charges for the repairs necessitated by the several casualties above alluded to. The master had to purchase coal, provisions, and other necessaries for the boat on credit. Money was borrowed to pay wages and various liabilities incurred, amounting in the aggregate to about $2,500, outside of the master's present claim for wages.

The master swears that he endeavoured to raise money on the credit of the owner, but was unable to do so. Reeves gave the master $100 on leaving Windsor in May, $20 at another time, and paid one draft drawn on him by the master amounting to $50. Beyond this, he paid nothing towards the expenditure incurred during the season.

On the 27th August, 1894, the defendants, the Third National Bank, mortgagees, took possession of the boat. The seamen and master were paid up to that date, and the boat was laid up for the balance of the season. On the 31st day of August, the master commenced the present action for his own claim and for the amount of the various debts he had incurred on account of the ship. Nearly all the creditors were examined, and detailed the circumstances under which they supplied the goods to the steamer. A large number swore that they supplied the goods they charged for solely on the credit of the master, with whom they were personally acquainted, and stated the fact that as they were totally unacquainted with the owner they did not credit him. Others declared that they supplied the goods on the joint credit of the ship and master, and a few admitted that they did not look to the master, but had supplied the goods in the usual course of their business to the ship, charging the account to The

City of Windsor on their books. The master gave notes or acceptances for some of the accounts, and in a few other cases acknowledgments or agreements to be personally responsible for the charges. The City of Windsor made, with one or two exceptions, all her trips to Canadian ports.

It was admitted that there is due and unpaid in respect of all the mortgages as against The City of Windsor about $9,700. Beyond this amount Mr. Hudson, the receiver of the Third National Bank, made an advance of about $600 to Reeves, the owner, to enable him to fit out. The receiver also advanced, further, about $1,700 on August 27th, 1894, to pay off the crew and certain claims then settled. They contend that these advances should be treated as covered by the mortgages.

Canniff for the plaintiff.

Fleming and *Howell* for the intervening defendant.

MCDOUGALL, Local Judge in Admiralty: One question arises in this action which it is necessary to decide before entering upon any consideration of the various liabilities alleged to have been incurred by the master on account of the ship, and before I deal with his own personal claim for wages: Is the plaintiff entitled to a maritime lien on the said ship for the liabilities alleged to have been incurred by him as master? By 56 Vict. (Dom.), c. 54, entitled, An Act to amend the Inland Water Seaman's Act, assented to on April 1st, 1893, it is provided by s. 35 (*a*) as follows: "The master of any ship, subject to the provisions of this Act, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages, and, if in any proceeding in any court possessing admiralty jurisdiction in any of the said provinces touching the claim of a master for wages any right of set-off or counterclaim is set up, such court may enter into and adjudicate all questions, and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and may direct payment of any balance that is found to be due." The section above quoted is practically a transcript of the Imperial statute, 52 & 53 Vict., c. 46, s. 1, and the courts in Canada are aided in construing its provisions by several very recent English decisions upon the section defining its legal effect and meaning.

The first is *Morgan* v. *The Castlegate Steamship Co.*, L.R. 1893, A.C. 38, and *The Orienta*, L.R. Pro. 1894, 271, as qualified by the judgment of the Court of Appeal, L.R. Pro. 1895, p. 49. The Imperial statute of 1889 was passed immediately after the decision in the House of Lords in the case of *The Sara*, L.R. 14 A.C. 209, and in consequence of the decision of the House of Lords in that case. The effect of the decision in *The Sara* was to hold that the provisions of the Admiralty Court Act, 1861, did not give a master a maritime lien on the ship for disbursements or liabilities incurred by him. The contrary of this had been held in a long series of cases commencing with *The Mary Ann*, L.R. 1 A. & E., p. 8, decided in 1865, and ending with *The Sara* in the court below, until that case was reviewed in the House of Lords and all the previous decisions declared to be unsound, and the judgment of the court

below in the case of *The Sara* was reversed. In the previous case of *The Chieftain*, Browning & Lush, 104, and *The Edwin*, Browning & Lush, 281, it was thought that the maritime lien then thought to exist in favour of a master for disbursements extended only to moneys actually paid, but not to liabilities incurred and not actually paid. But in the case of *The Feronia*, L.R. 2 A. & E., p. 65, this doctrine was infringed upon, for Sir Robert Phillimore confirmed the ruling of the registrar as to certain items for liabilities for proper necessaries purchased by the master, but not actually paid for by him; and the items were allowed to the master conditionally upon his producing vouchers showing actual payment of them by him and depositing them in the registry. See also *The Red Rose*, 2 A. & E. 80, the added words in the Imperial statute of 1889: "And liabilities incurred on account of the ship," now clearly establish a maritime lien for such liabilities, even if such liabilities had not been actually paid by the master at the date of his action.

The Sara, 14 Appeal Cases, 209, as I have said, reversed all these cases, and Parliament, recognizing the confusion that would arise from disturbing the line of decisions which had been followed and acted upon for twenty or twenty-five years, immediately enacted 52 & 53 Vict., cap. 46. The effect of this statute is stated by Lord Halsbury in *The Castlegate*, L.R. Appeal Cases (1893), p. 46, "to be to create the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty." (See 10 Admiralty Court Act, 1861.) Again, he says at page 47, "When the legislature altered the law laid down in this House in the case of *The Sara*, and restored the law which was supposed to exist before, it cannot for a moment be imagined that the legislature was ignorant of the construction which had been consistently put upon the words in the former Admiralty Court Act which was supposed to create a lien. I cannot conceive that if it had been intended to create a wider lien than had been held to exist under the previous words which was supposed to create it, the legislature would not have used different words to those upon which the construction had been put, so as to make that intention clear and unambiguous." This being the result of the statutory amendment, and our Act of 1893 being to all intents and purposes identical in language, we are compelled to examine some of the earlier cases which, by force of the Act of 1889 in England, are re-established as authorities, to ascertain what are and what are not proper disbursements and liabilities incurred on account of the ship by the master in respect of which the maritime lien will arise. It is also necessary to consider under what circumstances such disbursements, even if creating a maritime lien upon the ship, if expended or incurred in a foreign port, would create a similar lien if the expenditure was made and the liability incurred in a home port.

First, what are necessaries for which disbursements may be made or liabilities incurred? Coals: *West Friesland*, Swab. 454, S.C., on appeal to P.C. 456; *The N. R. Gosfabrick*, Swab. 344. Cables, anchors, rigging, and matters of that description: *The Sophie*, 1 Wm. Robinson 368. Money advanced for procuring necessaries: *The Onni*, Lush 154. Primary indispensable repairs, anchors, cables, sails, and provisions: *The Comtesse De Fregeville*, Lush 329. Insurance for freight, money advanced to pay pilotage, light, tonnage, and

harbour dues, noting protest, travelling expenses of master: *The Riga*, L.R. 3 A. & E. 516. Tobacco and slops supplied seamen; bill of exchange drawn by master the dishonour of which he had received no notice: *The Feronia*, L.R. 2 A. & E. 65; *The Fairport*, 8 P.D. 48. Account for painting ship on master's order: *The Great Eastern*, 2 A. & E. 88. Money advanced to pay a shipwright's bill for repairs where he refused to allow the ship to leave his dock until paid: *The Albert Crosby*, L.R. 3 A. & E. 37.

The obligation of the owners upon the contract of the master for repairs and necessaries to the ship depends upon the principles of agency. The owners act through the master, as their agent, and, in the absence of any express directions, impliedly hold him out to the world as possessing authority to bind them by his contract for the employment or repairs of the ship and the supply of necessaries. He is appointed by the owners for the purpose of conducting the navigation of the ship to a favourable termination, and there is vested in him, as incident to that employment, an implied authority to bind the owners for all that is necessary to that end. The master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to the owners only. But when the contract is made by the owners themselves, or under circumstances that show the credit to have been given to them, there is no right of action against the master. Usually, however, the surrounding circumstances attending the making of the contract are such that there is an election for the creditor to proceed against the owners or against the master, but he may not sue both. McLachlan on Shipping (3rd edition), 139. Where the owner or his agent is at the port where the liability is incurred, or so near it as to be reasonably expected to interfere personally, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities. Under the foregoing limitation of the implied authority of a master, it has been stated that the rule cannot be described by any geographical radius, because it is said that cases arise daily where, as the necessity is pressing, the delay of communicating with the owner, though comparatively near, would be prejudicial to his (the owner's) interests. Mr. McLachlan formulates the rule, as the result of a number of decisions, in the following language: "There is authority to borrow money on the ship or pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity": McLachlan (3rd edition), 142. In *The Orienta*, L.R. P.D. 49 (1895), Lord Esher thus expresses himself as to the circumstances under which the master incurs a liability which entitles him to a maritime lien: "He (the master) is only authorized to pledge his owner's credit for what you may call the things necessary for the ship; that is to say, he can pledge his owner's credit if he is in a position where it is necessary for the purposes of his duty that these things should be supplied, and he cannot have recourse to his owners before ordering them. . . . . The real meaning of the word 'disbursements' in admiralty practice is disbursements by the master which he makes himself liable for in respect of necessary things for the ship for the purposes of navigation, which he, as master of the ship, is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there able to give the order, and

he is not so near to the master that the master can ask for his authority, and the master is therefore obliged necessarily to render himself liable in order to carry out his duty as master."

In *The Riga*, 3 A. & E. 516, Sir Robert Phillimore, in the Admiralty Court, adopted the common law rule laid down by Abbot, C.J. (not Lord Tenterden, as stated in the report), in *Webster* v. *Seekamp*, 4 B. & Ald. 352, where he thus expresses the rule to be applied by a jury in determining what were the circumstances that would justify the master in pledging his owner's credit for necessaries, and in determining what were necessaries: "If the jury were to enquire only what is necessary, there is no better rule to ascertain that than by ascertaining what a prudent man, if present, would do under the circumstances in which the agent in his absence is called upon to act. I am of opinion that whatever is fit and proper for the service on which the vessel is engaged, whatever the owner of that vessel as a prudent man would have ordered if present at the time, comes within his meaning of the term 'necessaries,' as applied to those repairs general, or things provided for the ship by order of the master for which the owner is liable." See also *Arthur* v. *Barton*, 6 M. & W. 138; *Webster* v. *Seekamp*, above cited. *The Riga*, L.R. 3 A. & E. 516, abolished the distinction between necessaries for the ship and necessaries for the voyage, and placed them on the same footing.

In *The Castlegate*, Appeal cases, 1893, at page 51, Lord Watson lays down the principle that "there can be no lien upon a ship in respect to disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien can attach to the *res* for any sum which is not a personal debt of the owner." And this definition must be taken as the latest udicial decision of the highest court in the empire, as determining the test which must be applied in each case where the master sets up a lien for the disbursements made for liabilities incurred on account of the ship.

Before examining the evidence in the present case, then, it becomes necessary to consider a few of the authorities wherein it has been held that the master had authority to pledge the owner's credit in a home port, and thereby render the owner liable in an action brought by the creditor to recover for an indebtedness contracted by the master. McLachlan (3rd edition), p. 133, states that even when the ship is at home, if she is to be employed as a general ship, it rarely happens in practice that the owners interfere with the receipt of the cargo. Without doubt, however, they are by law bound by every contract made by the master relative to the usual employment of such ship. At page 138, the same author says, "The obligation of the owners upon the contract of the master for repairs and necessaries to the ship is of the same nature, and depends upon the same principles as the obligations on his contracts with regard to its employment," and at page 139, speaking of the implied authority of the master, he says, "Consequently this authority, subject to certain limits hereafter to be considered, covers all such repairs and the supply of such provisions and other things as are necessary to the due prosecution of the voyage, and extends to the borrowing of money when ready money is required for the purposes of the same employment to which the authority is incident." In *Webster* v. *Seekamp*, 4 B. & Ald. 452 (1821), Abbot, C.J., and the

court, held it was a proper question to submit to the jury to determine whether the coppering of a vessel for an intended voyage to the Mediterranean, ordered by the master living at Liverpool, the owner living at Ipswich, was not necessary, and what a prudent owner, if present, would not have ordered, and, the jury having found both questions for the plaintiff, he refused to disturb the verdict, and held the owner bound by the master's contract. In *Arthur* v. *Barnett*, 6 M. & W. 138 (1840), Lord Abinger held that the question as to the owner's liability for money borrowed for necessaries by the master of a coasting vessel from the plaintiff, who resided at Swansea, the owner residing at Port Madoc, in Merionethshire, was a question for the jury, and he laid down the principles as follows: "Under the general authority that a master of a ship has, he may make contracts and do all things necessary for the due prosecution of the voyage in which the ship was engaged, but this does not usually extend to cases where the owner himself can personally interfere in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner or his personal agent be at the port, or so near it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or his agent to do what is necessary. But if the vessel be in a foreign port where the owner has no agent, or if in an English port, but a distance from the owner's residence, and provisions or things require to be provided immediately, then the occasion authorizes the master to pledge the credit of the owner." In *Stonehouse* v. *Gent*, 2 Q.B. 431 (1841), the owner escaped liability, but largely on the ground that the plaintiff in that case set up in evidence what amounted to a special authority from the owner to the master, but the court found that the conditions of the special authorization had not been followed, and that there was full opportunity for communicating with the owner. In *Wallace* v. *Fielden*, 7 Moore's P.C. Cases 398, the owner was held not liable because he was in actual communication with the master by telegraph, though the ship was in a foreign port, and the master signed a bottomry bond for repairs, and for discharging and reloading cargo, without his express authority, which could have been asked for. *Gunn* v. *Roberts*, L.R. 9 C.P. 331 (1874), cites *Arthur* v. *Barton*, and affirms and approves of the judgment in that case as a correct and proper exposition of the law.

I have, therefore, come to the conclusion that, in the disbursements by the master for provisions, fuel, and certain other repairs, he only acted as an ordinary, prudent man would have acted had he been there dealing with the same difficulty. He procured his daily necessary supplies under various heads on credit, and, under all the circumstances of the case, and looking to the nature of the employment of the boat, I am of the opinion that the master must be held to have had implied authority from the owner to incur the liabilities in question.

I cannot find in favour of the plaintiff upon his alleged contract of hiring for the season, but, as it is admitted that he was hired by the month and discharged by the mortgagees in the middle, he cannot be discharged

summarily without reasonable notice: *Greene* v. *Wright*, L.R. 1 C.D. 591. I, therefore, allow him $100 for a month's wages, with an allowance for his board of $30.

Having disposed of the various claims for disbursements, liabilities, and the master's claim for wages and damages, there remains but one question further to be considered. Is the plaintiff to have the amount of such wages, damages, and disbursements or liabilities, or any of them, paid out of the proceeds of the vessel in priority to the claims of the mortgagees? The cases of *The Chieftain*, Brown & Lush, 212; *The Mary Ann*, L.R. 1 A. & E. 8; *The Feronia*, L.R. 2 A. & E. 65; and *The Hope*, 28 L.T. Rep. N.S. 287, seem to be conclusive upon this point. In *The Mary Ann*, at p. 12, Dr. Lushington says (speaking of the Admiralty Act of 1861): " . . . I think under this Act a seaman would have a maritime lien for his wages, although fixed by special contract, because before the Act he had such a lien for wages earned, not under any special contract. And for a similar reason there would be a maritime lien for damages done by the ship. If this be so, then under this Act the master, claiming for disbursements, is to be preferred to the mortgagee because, before the Act, his claim for disbursements was entitled to similar preference in the only case where the court could take cognizance of such disbursements, namely, in the case of a set-off." I refer also to the case of *The Marco Polo*, 24 L.T.R. N.S. 804, where the mortgagees' claim was postponed to the master's claim for disbursements and liabilities incurred by him on account of the ship.

From these decisions, it is clear that a master's lien for his wages and disbursements (including, under our statute of 1893, liabilities properly incurred by him on account of the ship) takes priority to the claim of the mortgagees under their mortgage. Of course, this means as to disbursements and liabilities incurred by the master before the mortgagees took possession of the ship under their mortgage.

There will, therefore, be judgment for the plaintiff in this action for $1,196 17, in respect of proper disbursements and liabilities properly incurred on account of the ship, and for $130 for wages and his claim for wrongful dismissal, in all, $1,326.17, subject to this direction: That, as to the liabilities allowed to the master herein, he must deposit with the registrar the vouchers showing payment by him of the several claims outstanding to the various creditors which are unpaid, and of the amounts which have been allowed to him by me as proper liabilities incurred by him on account of the ship. I also allow the master his costs of this action, and, in default of the payment into court of the amount above awarded and costs within thirty days from the date of this judgment by the intervening defendants (the mortgagees), who claim to have been in possession of The City of Windsor when arrested by the warrant in this action, I order that the said ship be sold pursuant to the usual practice of this court, and the proceeds brought into court. And that, after payment out to the plaintiff of the various sums herein awarded to him according to the terms of this judgment, together with his costs of the action and the costs (if any) of the sale, the balance be paid over to the defendants, the mortgagees.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [Jan. 15.

CRAIG *v.* SAMUEL.

Promissory note—Consideration—Transfer of patent right—Bills of Exchange Act, 53 Vict., c. 33, s. 30, s-s. 4 (D.).

C. and F. were partners in the manufacture of certain articles under a patent owned by F. A creditor of F. for a debt due prior to the partnership induced C. to purchase a half interest in the patent for $700, and join with F. in a promissory note for $1,000 in favour of said creditor, who also, as an inducement to F. to sell the half interest, gave the latter $200 for his personal use. In an action against C. on this note,

Held, reversing the decision of the Court of Appeal, TASCHEREAU, J., dissenting, that the note was given by C. in purchase of the interest in the patent, and, not having the words "given for a patent right" printed across its face, it was void under the Bills of Exchange Act, 53 Vict., c. 33, s. 30, s-s. 4 (D.)

Appeal allowed with costs.

Moss, Q.C., and *Thompson* for the appellant.

Watson, Q.C., and *Parkes* for the respondents.

Nova Scotia.] [Jan. 15.

DOYLE *v.* MCPHEE.

Deed—Description of land—Extent—Terminal point—Number of rods—Railway company.

A deed conveyed a lot of land and also "a strip of land twenty-five links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre more or less."

Held, reversing the decision of the Supreme Court of Nova Scotia, TASCHEREAU, J., dissenting, that the strip conveyed was not limited to twelve rods in length, but extended to the western end of the station, which was more than twelve rods from the starting point.

Appeal allowed with costs.

Ross, Q.C., for the appellant.

McInnes for the respondents.

Nova Scotia.]

REID *v.* CREIGHTON.

Chattel mortgage—Affidavit of bona fides—Compliance with statutory forms—Change of possession—Levy under execution—Abandonment.

N. executed a chattel mortgage of his effects, and shortly afterwards made an assignment to one of the mortgagees in trust for the benefit of his creditors. The assignee took possession under the assignment.

Held, affirming the decision of the Supreme Court of Nova Scotia, that there was no delivery to the mortgagees under the mortgage which transferred to them the possession of the goods.

The Bills of Sale Act, Nova Scotia, R.S.N.S., 5th ser., c. 92, by s. 4, requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by s. 5, if the mortgage is to secure a debt not matured, the affidavit must follow another form. By s. 11, either affidavit must be "as nearly as may be" in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms,

Held, affirming the decision of the court below, GWYNNE, J., dissenting, that this affidavit was not "as nearly as may be" in the forms prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same, the mortgage was void for want of such compliance.

Appeal dismissed with costs.

Russell, Q.C., for the appellant.

Borden, Q.C., and *Roscoe* for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

Q.B.D.] [April 5.

CAMPBELL *v.* HALLY.

Assignments and preferences—Compromise by assignee—Action by creditor—R.S.O., c. 124, s. 7.

Where a creditor obtains an order under subsection 2 of section 7 of the Assignments and Preferences Act, R.S.O., c. 124, authorizing him to bring an action in the assignee's name, the action so brought must be such as is justified by the scope of the order.

A creditor suing in the name of the assignee under this subsection cannot attack the *bona fides* of a compromise entered into before his action was brought between the assignee and the defendant, when the defendant cannot be restored to his original position.

Quære: Whether subsection 2 is not confined to cases in which an exclusive right of suing is given to the assignee by subsection 1.

Judgment of the Queen's Bench Division reversed, MACLENNAN, J.A., dissenting.

Shepley, Q.C., for the appellants.

Johnston, Q.C., for the respondents.

Q.B.D.] [April 5.

OLDRIGHT *v.* GRAND TRUNK R.W. CO.

Railways—Railway station—Negligence—Damages.

A railway company is bound to provide for passengers safe means of ingress to and egress from its stations, and where a passenger arriving at a

station at night walked along a platform that was not intended to be used as a means of exit, but was not in any way guarded, and after leaving the platform fell into an excavation in the company's grounds and was injured, the company was held liable in damages.

Judgment of the Queen's Bench Division affirmed.

Osler, Q.C., for the appellants.

W. Nesbitt and *J. H. Denton* for the respondent.

Q.B.D.] [April 5.

COFFEY *v.* SCANE.

Attachment—Absconding debtor—Reasonable and probable cause.

Where a man, having numerous creditors in Ontario, leaves the Province openly, to reside in the United States, after publicly announcing his intention so to do, without paying his creditors, and after his departure it is found that statements made by him as to property available to pay his debts are false, and that nothing is, in fact, available for that purpose, his arrest upon civil process upon his return to Ontario for a temporary purpose, intending to return to the United States, is justifiable.

Judgment of the Queen's Bench Division, 25 O.R. 22, affirmed.

M. Wilson, Q.C., and *E. Bell* for the appellant.

Osler, Q.C., and *M. Houston* for the respondent.

C.P.D.] [April 5.

TRUMAN *v.* RUDOLPH.

Master and servant—Workmen's Compensation for Injuries Act, 1892—Master's knowledge of defect—55 Vict., c. 30, s. 6, s-s. 3 (O.).

Where the workman is aware that the employer knows of the defect that ultimately causes the injury, he is not bound under s-s. 3 of s. 6 of the Workmen's Compensation for Injuries Act, 1892 (55 Vict., c. 30 (O.)), to give information thereof to the employer, and his failure to give information in other cases will not bar his right of action if a reasonable excuse is shown for the omission, this being a question of fact for the jury.

Where both the employer and the workman know of the defect, and it is the workman's own duty to see that the defect is remedied, but orders given by him with that object are not carried out, he cannot recover.

Judgment of the Common Pleas Division affirmed.

N. Macdonald for the appellant.

F. E. Hodgins and *J. S. Robertson* for the respondent.

Q.B.D.] [April 5.

HURDMAN *v.* CANADA ATLANTIC RAILWAY COMPANY.

Negligence—Railway—Volenti non fit injuria.

Where a railway company sent an engine and crew to the yard of a lumber company, and under the direction of servants of the lumber company cars of lumber were shunted from place to place by this engine and crew, the railway were held liable in damages for the death of a servant of the lumber company, who was in a car counting lumber, caused by negligence in the management of the engine.

A finding by the jury that "the deceased voluntarily accepted the risks of shunting" was held to mean that he accepted the ordinary risks, and not risks arising from negligence.

Judgment of the Queen's Bench Division, 25 O.R. 209, affirmed.

W. Nesbitt and *H. E. Rose* for the appellants.

McCarthy, Q.C., and *G. E. Kidd* for the respondent.

Co. Ct. Lincoln.] [April 5.

ZUMSTEIN *v.* SHRUMM.

Action—Negligence—Damages—Highways—Turkey.

The owner of a turkey cock which, without negligence on his part, strays upon the highway is not liable for damages resulting from a horse taking fright at the sight of the bird and running away.

Judgment of the County Court of Lincoln affirmed.

Moss, Q.C., and *E. A. Lancaster* for the appellants.

H. H. Collier for the respondent.

Co. Ct. Wentworth.] [April 5.

KENNEDY *v.* AMERICAN EXPRESS COMPANY.

Carriers—Damages—Non-delivery of animals.

Where dogs were delivered to an express company to be carried to a city for the purpose, made known to the company, of being exhibited at a dog show and were not delivered at the address given until ten hours after their arrival in the city, and were thus too late to compete, their owner was held entitled to damages against the company.

Judgment of the County Court of Wentworth reversed.

G. Lynch-Staunton for the appellant.

Bruce, Q.C., for the respondents.

Co. Ct. Haldimand.] [April 5.

SHERK *v.* EVANS.

County Court—Jurisdiction—Removal of action—54 Vict., c. 14 (O.)—Court of Appeal—Practice—Certificate of judgment—Summary order for repayment of money.

An action cannot be removed under 54 Vict., c. 14 (O.), from a County Court to the High Court after a judgment in the County Court in favour of the plaintiff has been set aside for want of jurisdiction, so as to leave that judgment in force, with the right to either party to move against it in the High Court.

Re McKay v. *Martin*, 21 O.R. 104, considered.

Judgment of the County Court of Haldimand reversed.

Where the certificate of judgment of the Court of Appeal by inadvertence directed the dismissal of a County Court action with costs, instead of merely setting aside the judgment in the County Court for want of jurisdiction, the certificate was on summary application amended and repayment of costs taxed and paid under it directed.

W. E. Walker, Q.C., for the appellants.

C. W. Colter and *Geo. Kappele* for the respondent.

Co. Ct. Brant.] [April 5.

BLOOMFIELD *v.* HELLYER.

Mortgage—Default—Emblements—Bills of sale and chattel mortgages.

A mortgagor after default is, as far as crops growing upon the mortgaged land are concerned, in the position of a tenant at sufferance, and cannot, by giving a chattel mortgage upon the crops, confer a title thereto upon the chattel mortgagee, to the prejudice of the mortgagee of the land.

Judgment of the County Court of Brant reversed.

Moss, Q.C., for the appellants.

S. A. Jones for the respondent.

Co. Ct. Brant.] [April 5.

WELSH *v.* ELLIS.

Company—Director—Personal liability for wages—"Labourers, servants, and apprentices"—R.S.O., c. 157, s. 68.

A person employed as foreman of works, who hires and dismisses men, makes out pay-rolls, receives and pays out money for wages, and does no manual labour, and, in addition to receiving pay for his own services at the rate of $5 a day, payable fortnightly, is paid for the use of machinery belonging to him, and of horses hired by him, is not a labourer, servant, or apprentice within the meaning of s. 68 of the Joint Stock Companies Letters Patent Act, R.S.O., c. 157, and cannot recover against the directors personally.

Judgment of the County Court of Brant affirmed.

W. S. Brewster and *D. Plewes* for the appellant.

E. Sweet and *J. T. Hewitt* for the respondents.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [March 2.

MCVICAR *v.* TOWN OF PORT ARTHUR.

Public Parks Act—Purchase money for lands taken—Liability for—How obtained—Agency of board for corporation—R.S.O., c. 190

In an action by an owner of land, taken by a Board of Park Management under the powers given by R.S.O., c. 190, for the amount of an order given by the board on the town treasurer in payment for the land, it was

Held (reversing ROBERTSON, J.), that by the passing of a by-law adopting "The Public Parks Act" the corporation gave, in effect, antecedent authority for the doing of everything authorized to be done by the provisions of that Act, including the purchase by the board of "the lands, rights, and privileges needful for park purposes."

That the effect of "The Public Parks Act" is to make the board the statutory agents of the city or town for the purchase of such lands, rights, and privileges, and to take the title of all lands purchased, to the city or town, and the necessary inference from the Act is that the city or town is bound to pay for the lands so purchased for it by their agents, the board.

Held, also, that although the council of the city or town may raise, by a special issue of debentures under s. 17, s-s. 4, of the Act the sums required for the purchase of lands, they are not compelled to adopt that course or confined to it, but may pay such purchase money out of the general funds of the city or town

Held, also, that the plaintiff had no remedy against the board, as it had performed its whole duty in purchasing her land, taking the title to the corporation and giving an order for the purchase money, but had a remedy against the corporation whether it sold its park fund debentures or not, and was not concerned with the method to be adopted by the corporation in procuring the money.

Aylesworth, Q.C., for the motion.

A. S. Wink and *Dyce Saunders*, *contra*.

Div'l Court.] [March 2.

THIBAUDEAU ET AL. *v.* PAUL ET AL.

Sale of goods—Book debts—Agreement to sell—Property not to pass—Attacking creditors—Rights of assignee—R.S.O., c. 125—55 Vict., c. 26 (O.), not retrospective.

K. M. & Co., by agreement in writing, dated February 28th, 1891, sold a business stock to P., and agreed to keep him supplied with goods, but stipulated that no property in the same should pass until they were paid for. On December 20th, 1892, P., by another agreement in writing, assigned his book debts to K. M. & Co. K. M. & Co. took possession of the stock on the same day that P. made an assignment for the benefit of creditors, but before they were aware that he had done so. The assignee, when he subsequently got possession, notified the debtors to pay him. Neither instrument was filed under the Bills of Sales Act.

Held (affirming BOYD, C.), that book debts are not within the provisions of R.S.O., c. 125, and that the language of 55 Vict., c. 26 (O.), is not explicit enough to induce the conclusion that it was intended to widen the law as to the character of the property acquired being dealt with, and its scope appears to relate to future property akin to property to which the Revised Statute applied.

Held, also, that although the second agreement, subsequent to 55 Vict., c. 26 (O.), was not affected by it, and that the first agreement was not within the Revised Statute, and stood independently of the later Act as a prior transaction.

Held, also, that 55 Vict., s. 26 (O.), does not give a plaintiff the same status as an execution creditor for all purposes, but only as a basis of attack upon instruments which, from lack of form or substance, were not protected by registration under the Revised Statute.

Held, also, that 55 Vict., c. 26 (O.), had not a retrospective operation.

Held, also, that an assignee under R.S.O., c. 124, is in no better position than his assignor as to property assigned, and cannot be looked upon as a purchaser for value, and that he took the book debts subject to the equitable right of K. M. & Co. under the agreement of December 20th, 1892.

Clute, Q.C., and *J. A. Mills* for the appeal.

Moss, Q.C., and *W. F. Walker*, *contra*.

STREET, J.] [March 18.

BRABANT *v.* LALONDE.

Will—Construction—"Nearest of kin"—Period of ascertainment—Tenants in common—"Then"—Dower—Election.

In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale.

And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that, in the event of the latter dying without issue, "then in that case" it should be equally divided between his "nearest of kin," and the daughter died while still an infant and unmarried;

Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance she was, nevertheless, entitled as one of the "nearest of kin"; and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common.

Bullock v. *Downes*, 9 H.L.C. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; and *Re Ford*, *Patten* v. *Sparks*, 72 L.T.N.S. 5, followed.

The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will.

The widow remained in possession after the death of the testator with her infant daughter, whom she supported out of the rents until an order was made under R.S.O., c. 137, permitting her to lease the farm, to retain one-third of the rents for herself as doweress, and to apply the remaining two-thirds in support of the infant.

Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was, therefore, entitled to dower out of the farm in addition to the one-third in fee simple.

Colin G. O'Brian for the plaintiff.

N. A. Belcourt for the defendants J. B. and O. Lalonde.

John Maxwell for the infant defendants.

Chancery Division.

STREET, J.] [Feb. 6.

DUFTON *v.* HORNING.

Lien—Mechanics' lien—Prior mortgage—Jurisdiction of Master under 53 Vict., c. 37.

Under the Act to simplify proceedings for enforcing Mechanics' Liens, 53 Vict., c. 37 (O.), the remedy of a lienholder as against a mortgagee is confined to the increased value provided by s. 5 of s-s. 3, R.S.O., c. 126, and he cannot question the priority of the mortgage.

The name of the town and county in which a lienholder resides is a sufficient address under s. 11 of 56 Vict., c. 24 (O.).

W. H. Blake for the mortgagee.

Ambrose for the defendant Young.

Furlong for the plaintiff.

Common Pleas Division.

Div'l Court.] [Dec. 5, 1894.

RE MURPHY.

Extradition—False document—Cheque—Conspiracy to defraud—Fictitious bank account—Law of Canada—Amendment.

In extradition proceedings, it is sufficient if the evidence disclose that the offence under the Extradition Acts is one which according to the laws of Canada would justify the committal for trial of the offender had the offence been committed therein, it not being essential to show that the offence was of the character charged, according to the laws of the foreign country where it was alleged to have been committed; and, *quære*, whether evidence is admissible to show what the foreign law is.

In pursuance of a fraudulent conspiracy between the prisoner and his brother, a cheque was drawn by the brother under a fictitious name, on a bank in which an account had been opened up by the brother in such fictitious name, there being to the knowledge of the prisoner no funds to meet it, and which, on the faith of its being a genuine cheque, another bank was induced by the prisoner to cash.

Held, that the cheque was a false document both at common law and under section 421 of the Criminal Code, 1892, and that there was sufficient evidence to justify the committal of the prisoner for extradition for uttering a forged instrument. *Regina* v. *Martin*, 5 Q.B.D. 34, distinguished.

Where in such proceedings the warrant of commitment stated that the prisoner had been "committed" for the extradition offence instead merely of his being "accused" thereof, the fact of the evidence showing that an extraditable offence has been committed will not warrant the court in remanding the prisoner for extradition; but the court may permit the return to be amended, and for such purpose allow it to be taken off the files and re-filed.

Aylesworth, Q.C., and *Fitzgerald* for the prisoner.

Bruce, Q.C., and *Crerar*, Q.C., *contra*.

BOYD, C.] [Dec. 15, 1894.

SMITH *v.* CORPORATION OF THE COUNTY OF WENTWORTH.

Way—Toll roads—Toll chargeable on intersected road—R.S.O., c. 159, ss. 2, 87, 157 (52 Vict., c. 27 O.).

Section 87 of R.S.O., c. 159, as extended by s. 157 of that Act, and by 52 Vict., c. 27 (O.), applies not only to toll roads owned or held by private companies, or municipal councils, but also to all toll roads purchased from the late Province of Canada, so that, where one of such roads is intersected by another of them, a person travelling on the intersecting road shall not be charged, for the distance travelled from such intersection to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll-gate on the intersecting road, as evidence of his having travelled only from such intersection.

Mandamus granted to compel the issue of such tickets.

G. Lynch-Staunton for the plaintiff.

Osler, Q.C., and *MacBrayne* for the defendant.

STREET J.] [Dec. 28, 1894.

CAPON *v.* CORPORATION OF TORONTO.

Assessment and taxes—Local improvement rate—Improper charge on land—Municipal Act, R.S.O., c. 184, ss. 612, 623—Assessment Act, R.S.O., c. 193, s. 119; 55 Vict., c. 48, s. 119 (O.).

Where, under a local improvement by-law, an assessment is made of the lands benefited and chargeable with the cost of the improvement, and lands having a specified street frontage are thereafter charged with a specific amount of the cost of the improvement, which is entered on the assessment and collector's rolls, and such lands are subsequently subdivided, the whole rate cannot legally be charged against a portion of the lands so subdivided.

The duty of the clerk of the municipality is to bracket on the roll the different subdivisions, with the name of the persons assessed for each parcel, and the annual sum charged against the original parcel, as that for which the subdivided lots and persons assessed for them are liable under the special rate.

Biggar, Q.C., for the plaintiff.

Meredith, Q.C., for the defendant.

BOYD, C.] [Jan. 25.

REGINA EX REL. MOORE *v.* NAGLE.

High schools—Vacancy in board—Appointment to fill vacancy.

Where in a High School Board of a High School district constituted under s. 11 of 54 Vict., c. 57 (O.), and consisting of six members, three appointed by the county and three by the town, a vacancy occurred by reason of the expiration

of the term of office of one of the trustees appointed by the town, whereupon the council of the town passed a by-law appointing the plaintiff to fill the vacancy, and the council, however, at a subsequent meeting, in the absence of any of the causes provided for by the Act, namely, death, resignation, or removal from the district, etc., passed a by-law amending their previous by-law by substituting the name of the defendant for that of the plaintiff;

Held, that the plaintiff was duly appointed to fill the vacancy, and that he was entitled to the seat, and that the subsequent appointment of the defendant was illegal and void.

McVitty for the plaintiff.

Gorman, contra.

Practice.

FERGUSON, J.] [Jan. 24.

ROBERTS *v.* DONOVAN.

Arrest—Order for—Writ of attachment—Contempt of court—Disobedience of judgment—Regularity of proceedings—Imprisonment—Discharge—Conditions—Discretion—Consent judgment—Vacating—Time.

The defendant was arrested and imprisoned by a sheriff in obedience to a writ of attachment, issued pursuant to an order of the court, made at the instance of the plaintiff, on notice to and in the presence of the defendant, which adjudged him guilty of contempt, and ordered that the sheriff should take him into custody and commit him to the common gaol for such contempt, there to be detained and imprisoned until he should have purged his contempt, and that for this purpose a writ of attachment should issue. The writ commanded the sheriff to attach the defendant so as to have him before the Chancery Division of the High Court of Justice, there to answer touching his contempt, etc., and further to perform and abide such order as the court should make.

The contempt consisted in disobedience of a judgment, made upon consent, ordering the defendant to cause a certain mortgage to be discharged.

Held, upon motion for the defendant's discharge upon the return of a *habeas corpus*, that the arrest and imprisonment of the defendant under the order and writ were regular and in accordance with the proper practice; it was not necessary that the conditions of the release of the defendant from custody should be expressed in the writ.

Owing to the character of the judgment, the plaintiff was entitled to the order and writ, and they could no more be denied to her than could a remedy by way of *fi. fa.* be denied to a judgment creditor; and the matter of the defendant's continuing in confinement was not a matter resting in the discretion of any court or judge.

Much time having elapsed since the consent judgment, and much having been done under it, it could not be vacated without consent, even if a petition to vacate it had not already been presented and dismissed.

The defendant, *J. A. Donovan*, in person.

Moss, Q.C., for the plaintiff.

BOYD, C.] [Feb. 28.

ROBERTS *v.* DONOVAN.

Judgment—Consent—Withdrawal—Mistake—Fraud—Delay—Previous applications.

A petition for leave to withdraw a consent to judgment, and to vacate the judgment entered thereon, can be dealt with on no other grounds than any other matter of practice, although the petitioner is in custody for disobedience of such judgment.

And where a consent judgment directed that the petitioner should cause a certain mortgage to be discharged, save as to the plaintiff's life estate, and the petitioner alleged that this was a mistake, and that it was intended that the mortgage should be ordered to be discharged as to any interest which the plaintiff might have over and above a life estate, contending that the plaintiff had no such interest;

Held, not sufficient to induce the court to vacate the judgment and allow the case to be tried out, after the withdrawal of charges of fraud against the petitioner, the death of the original plaintiff, the lapse of more than four years since the judgment, and the prior refusal of two similar applications.

Elsas v. *Williams*, 54 L.J.Ch. 336, and *Peed* v. *Gussen*, 4 Dr. & War. 199, followed.

The defendant, *J. A. Donovan*, in person.

Moss, Q.C., for the plaintiff.

BOYD, C.] [March 11.

TREVELYAN ET AL. *v.* MYERS.

Security for costs—Præcipe order—Increased security—Election—Delay.

Motion by defendant for increased security for costs.

The plaintiffs lived in England, and the defendant in Ontario. This action was brought upon a covenant for $5,500 contained in a mortgage made by the defendant over lands in England. The defendant obtained upon præcipe an order for security for costs, with which the plaintiffs complied by paying $200 into court.

More than six years before the commencement of this action the plaintiffs had brought an action in England, and obtained judgment against the defendant upon the covenant.

The defendant set up as an answer to this action that the cause of action was merged in the English judgment, and also that the plaintiffs had agreed to take the mortgaged lands in full satisfaction of the judgment.

On the 18th September, 1894, the defendant moved for a commission to England to take evidence, and also to increase the security for costs to $500.

The Master in Chambers made an order for the issue of a commission, but adjourned the application for increased security until after the return of the commission.

The defendant, however, did not proceed upon the order for a commission, and made no further application until after the action had been entered for

trial at the Toronto spring sittings, 1895, when he again applied to the Master in Chambers for an order for the increased security for costs.

The Master refused the application, and the defendant appealed.

O. M. Arnold for the defendant.

W. H. Lockhart Gordon for the plaintiffs.

BOYD, C.: I think the facts bring the case within the decision of *Bell* v. *Landon*, 9 P.R. 100. The defendant should have foreseen the necessity of a commission to England and of the costs being larger than usual, and, instead of taking the ordinary præcipe order for security, should have made a special application for security in a larger sum. Not having done so, he must now abide by his election. On this account, and also because it looks as if the application was made for delay, I dismiss the appeal with costs.

FERGUSON, J.] [March 22.

ROBERTS *v.* DONOVAN.

Attachment—Imprisonment—Contempt of court—Disobedience of judgment—Inability to obey—Discharge from custody.

The defendant, after he had been for more than three months in gaol under attachment for contempt of court in disobedience of a judgment requiring him to cause a certain mortgage to be discharged, applied for an order for his release, upon the ground that, being destitute of money and having no means of procuring or earning it, he was unable to do what was required, and had already been sufficiently punished for his offence.

Held, that the imprisonment suffered by the defendant was not a penalty, but the remedy to which the plaintiff was entitled for execution of her judgment, and no case had been made out entitling the defendant to be discharged.

MacGregor for the defendant, J. A. Donovan.

Moss, Q.C., for the plaintiff.

MACMAHON, J.] [April 2.

REGINA *v.* VERRAL.

Evidence—Foreign commission—Prosecution for indictable offence—Pendency of—Information—Preliminary inquiry—Criminal Code, s. 683—Witnesses—Materiality.

A prosecution for an indictable offence is pending within the meaning of s. 683 of the Criminal Code, 1892, when an information has been laid charging such an offence, and a commission to take evidence abroad for use before a magistrate upon a preliminary inquiry may then be ordered.

But the discretion of the judge in ordering the issue of a commission is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence.

And, under the circumstances of this case, a commission was granted to take the evidence of only one of three witnesses, whom the Crown proposed to

examine, it appearing that the other two had not been asked to come into the jurisdiction, and that their evidence would be in corroboration only of the statement of the third witness that he was with the defendant upon a certain occasion.

Dewart for the Crown.

Briggs, Q.C., for the defendant.

Court of Appeal.] [April 5.

MCVICAR *v.* MCLAUGHLIN.

Summary judgment—Default of appearance—Writ of summons—Special indorsement—Promissory note—Interest—Liquidated damages—Regularity of judgment—Nullity—Application to set aside judgment—Laches—Terms—Amendment—Costs.

By ss. 57 and 88 of the Bills of Exchange Act, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and is to be calculated at the rate of six per cent. per annum, in the absence of a special contract for a different rate.

And where, in an action upon two promissory notes, the plaintiff by the indorsement on the writ of summons claimed the principal and a definite sum for interest, without specifying the rate or the dates from which it was calculated, such sum being less than interest at six per cent. from the dates of maturity;

Held, a good special indorsement.

London, etc., Bank v. *Clancarty*, (1892) 1 Q.B. 689, and *Lawrence* v. *Willcocks*, *ib.*, 696, followed.

Ryley v. *Master*, *ib.*, 674, and *Wilks* v. *Wood*, *ib.*, 684, distinguished.

Held, also, that the indorsement being regular, the defendant's non-appearance was equivalent to an admission that the claim was correct, and that he was bound to pay the whole demand; and a judgment signed for default of appearance was, therefore, regular.

Rodway v. *Lucas*, 10 Ex. 667, followed.

Semble, that had the indorsement lacked the essentials of a special indorsement, such a judgment would have been a nullity.

Rogers v. *Hunt*, 10 Ex. 474, and *Smurthwaite* v. *Hannay*, (1894) A.C. at p. 501, specially referred to.

Held, also, that an application to set aside the judgment (unless upon terms) was too late when made twelve days after a seizure by the sheriff under execution issued pursuant thereto, and after the defendant's wife had claimed the goods seized, and an interpleader order had been made on the application of the sheriff, to the knowledge of the defendant.

Bank of Upper Canada v. *Vanvochis*, 2 P.R. 382; *Dunn* v. *Dunn*, 1 C.L.J. 239; and *Mackenzie* v. *McNaughton*, 3 P.R. 35, specially referred to.

If the defendant desired to contest the whole action, it was not unreasonable that as a condition of his being allowed to do so he should bring into court the amount of principal claimed; but if his only objection was to the

interest, the judgment might, at the option of the plaintiff, have been amended by reducing it by the amount claimed for interest, or limiting the defence accordingly.

Costs withheld from the successful respondent where the objection as to laches was substantiated by affidavits filed for the first time in the Court of Appeal.

Alexander Stuart for the appellant.

W. E. Middleton and *A. B. Cox* for the respondent.

ARMOUR, C.J.] [April 5.

FEWSTER *v.* TOWNSHIP OF RALEIGH.

Costs—Scale of—Drainage—Action—Reference—54 Vict., c. 51, s. 24 (3).

Action brought in the High Court of Justice, in 1890, to recover damages for injuries caused to the plaintiff's land by reason of the negligent construction of certain drains by the defendants, and by reason of their omission to keep such drains in repair, and for a mandamus.

After a judgment referring the action to a special referee, set aside by the Court of Appeal, 14 P.R. 429, an order was made under s. 11 of the Drainage Trials Act, 1891, 54 Vict., c. 51, referring the action to the drainage referee, who made his report in favour of the plaintiff, assessing damages at over $500 and allowing the plaintiff costs. He referred the taxation of the plaintiff's costs to the clerk of the County Court of the county of Kent, who taxed them upon the scale of the County Courts.

The plaintiff appealed from the taxation to a judge of the High Court in Chambers.

W. H. Blake, for the plaintiff, contended that as the proceedings were begun by action in the High Court and the drainage referee acquired his jurisdiction by an order of reference under s. 11 of 54 Vict., c. 51, and not by proceedings under ss. 5, 6, and 7, and as the amount recovered by the plaintiff was beyond the jurisdiction of the County Court, the costs should be on the scale of the High Court, relying on 55 Vict., c. 57, s. 6 (2) and 57 Vict., c. 56, s. 114.

H. W. Mickle, for the defendants, contended that no appeal lay from the taxation by the clerk of the County Court to a judge of this court, and that, at all events, the costs were properly taxed on the scale of the County Court, in accordance with 54 Vict., c. 51, s. 24 (3), and 57 Vict., c. 56, s. 109, no other tariff having been framed.

ARMOUR, C.J., held that the costs were properly taxed upon the County Court scale, no provision to the contrary having been made in the order of reference.

Appeal dismissed with costs.

FALCONBRIDGE, J.] [April 18.

HAIST *v.* GRAND TRUNK R.W. CO.

Trial—Stay of—Appeal from order directing new trial.

A second trial of an action was stayed pending an appeal to the Court of Appeal from the order directing such trial, where the principal question upon

the appeal was as to the proper method of trial, and the appellants had been diligent in prosecuting the appeal and there was no suggestion of any possible loss of testimony.

Arnold v. *Toronto Railway Co.*, 16 P.R. 394, distinguished.

W. M. Douglas for the plaintiff.

D. Armour for the defendants.

MEREDITH, J.] [April 20

GENERAL ELECTRIC C . *v.* VICTORIA ELECTRIC LIGHT CO. OF LINDSAY.

Pleading—Cross-counterclaim—Striking out—Rules 371-383.

A person brought into an action as defendant to a counterclaim delivered by the original defendant cannot deliver a counterclaim against such defendant.

Such a pleading, not being authorized by the Rules or the practice, was struck out on summary application.

Construction of Rules 371-383.

Street v. *Gover*, 2 Q.B.D. 498, followed.

Green v. *Thornton*, 9 C.L.T. Occ. N. 139, distinguished.

C. Millar for the original defendants.

J. A. Paterson for the Canadian General Electric Co., defendants by counterclaim.

STREET, J.] [April 25.

IN RE SOLICITORS.

Solicitor—Client's moneys—Payment over—Summary order—Partnership—Misconduct—Disputed account—Striking name off roll.

Upon a summary application by a client for an order for payment over by three solicitors of moneys of hers alleged to be in their hands as a firm, and, in default, for an order striking them off the roll,

Held, that, no professional misconduct being suggested against two of them, one of whom had left the firm before, and the other of whom was ignorant of the receipt of a large sum of money by the third, the summary order asked for could not be made against the two, although they might be liable in an action.

Re Toms and Moore, 3 Ch. Chamb. R. 41, and *Re McCaughey and Walsh*, 3 O.R. 425, followed.

And, it appearing that the third solicitor had a sum of money in his hands against which he had a claim for costs, an order was made for delivery and taxation of bills of costs and for an accounting, and for payment by him of the balance, if any, found due.

But, as he denied that any balance was due,

Held, that it would be unfair to add to the order a provision that, in default of payment, his name should be struck off the roll. Such a term, while frequently proper, is an uncalled-for slur upon a solicitor who has merely a disputed account with his client, or has been lax in rendering his bills.

Re Bridgman, 16 P.R. 232, distinguished.

G. G. Mills for the applicant.

F. A. Anglin for two of the solicitors.

Shepley, Q.C., for the third.

MANITOBA.

COURT OF QUEEN'S BENCH.

KILLAM, J.] [April 8.

CROTHERS *v.* MUNICIPALITY OF LOUISE.

Prohibition of sale of liquor—Liquor License Act, R.S.M., c. 90—Ultra vires—Quashing by-law.

This was an application to quash a by-law of the defendant municipality, forbidding the receipt of any money for licenses for the sale of liquors within the municipality, passed in accordance with section 58 of the Liquor License Act, which provides as follows: "No license shall be granted by the commissioners for the sale of liquors within the limits of a municipality when it shall have been made to appear to the commissioners that a by-law has been passed by said municipality forbidding the receiving by the said municipality of any money for a license for such purpose." Section 94 of the Act provides that any municipality may, by by-law, require each licensee for premises within the municipality to pay towards its municipal revenue such sum as it may determine, not exceeding the amount of provincial duty payable on such licenses, and forbids commissioners to issue any license without evidence that such fees have been paid. Other sections of the Act prohibit the sale of liquors without such license having been obtained.

Held, that section 58 must be construed as an attempt to confer the power upon the municipality to prohibit the liquor traffic within its boundaries, as such would be the effect of the by-law referred to therein being passed, although the language is that the by-law only forbids the receiving of any money for a license.

Held, also, that if the legislation in Ontario, and the circumstances appearing in the case of *Huson* v. *South Norwich*, 19 A.R. 343, were the same as in the present case, the decision of the Supreme Court in that case should be followed rather than the decision of the same court given on the same day in the case submitted for its opinion by the Provincial Government of Ontario, the two decisions being apparently conflicting; but the cases are not the same, because in the former the reason of the decision was that the prohibited sales were small retail sales which could be forbidden under the police powers proper to be committed to municipal bodies without interfering with trade and commerce; whereas the effect of the by-law in question in this case is to prevent a license of any kind from being granted.

Held, also, following the decision of the Supreme Court upon the questions submitted to them, that the provincial legislatures have no power to prohibit the selling of intoxicating liquors to any greater extent than such selling was prohibited in the case of *Huson* v. *South Norwich*, 19 A.R. 343, 24 S. C. R., and that the by-law in question should be quashed.

Wade for applicant.

Hough, Q.C., for the municipality.

MacLean for the Attorney-General.

DUBUC, J.] [April 15.

GRUNDY *v.* GRUNDY.

This was an appeal from the order of the referee, striking out the plaintiffs' third replication as embarrassing. The defendant filed a counterclaim for damages, upon a covenant that the plaintiffs would pay the liabilities of the former firm, composed of the plaintiffs and the defendant, to the Commercial Bank of Manitoba. No time had been fixed within which these liabilities were to be paid, but the defendant set up that the plaintiffs had failed to pay the same, and that the bank held the defendant liable for them, and had threatened to sue the defendant for the same, and that his credit was unfavourably affected by the fact of the said liabilities standing against him, and he claimed damages in respect thereof.

The plaintiffs, in answer to this, set up that they had paid off about two-thirds of the original liability, and that the balance would be paid in the ordinary course of business in a short time, and that the plaintiffs had given ample security to the bank for such balance, and that the bank had not in any way called upon the defendant to pay or satisfy the said debt, and had not threatened or intended to sue or harass the defendant therefor.

Held, that this replication was good, and that the appeal should be allowed, and the order of the referee set aside with costs to be costs to the cause to the plaintiffs in any event.

Cullin v. *Rinn*, 5 M.R. ; *Leith* v. *Freeland*, 24 U.C.Q.B. 132 ; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, distinguished, on the ground that the covenants sued upon in these cases provided for payment within a fixed time, whereas in the present case no time was fixed within which the plaintiffs were to pay the liability in question, and, if defendant had not been called upon to pay it, or any part of it, he had suffered no damage.

Howell, Q.C., and *Metcalfe* for the plaintiffs.

Mathers for the defendant.

BAIN, J.] [April 16.

FROST *v.* DRIVER ET AL.

Exemptions—A registered judgment may be a lien on lands, although temporarily exempt from sale thereunder.

In this case it was held that the registration of a certificate of judgment constitutes a lien and charge upon the lands of the judgment debtor, even although he actually resides thereon and cultivates the same, either wholly or in part, and the effect of s. 12 of the Judgments Act, R.S.M., c. 80, is simply that, as long as the judgment debtor actually resides upon the land, no proceedings can be taken to realize on the land under the registered judgment, but the same is still a lien and charge thereon, and the district registrar would not be warranted in issuing a certificate of title for the land, free from such lien or charge.

Martin for the petitioners.

Clark for the respondents.