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It is time that we should have a new revision of the Dominion statutes. The profession would be glad to know what is being done in the matter.

Christian Scientists, so-called, have, as expressed by an American exchange, struck another snag. Notwithstanding one of the articles of their faith, that there is really no matter, disease, sin or death, they are in the habit of insuring their lives like ordinary people. The question has now arisen, can a company be compelled to pay a claim when a policy holder of this faith dies, after having refused all medical treatment, and the doctrine of contributory negligence comes prominently into view. One is not surprised to see various questions arise when people believe, or pretend to believe, such manifest absurdities as are promulgated by this sect.

MUNICIPAL FRANCHISES—A SUGGESTION.

An important question of the day, with reference to municipal government in large centres of population, relates to the manner of dealing with the public services which modern city life requires. Ought the municipalities themselves to undertake the supply of water and light, should they equip and manage the telephone and street railway service; or should public companies acquire franchises from the municipal authority and farm these necessary services at more or less profit to themselves?

Should not all the public services requiring the use of the highways be provided by the community owning the ways to the frontagers?

The answer is in the negative, because experience shows that city government is weak in executive force, and lacks that element of success which may be summed up in the words, 'good business management." I exclude any suggestion of purposeful evil.

The system of popular vote cannot be done away with, and at present it does not produce the best men. Now, and for many years to come, the "popular man" and the "lodge climber" are and will be the precipitate, and common gratitude requires that the value of the vote should be recognized when labour and contract questions have to be considered. And so it comes about that the control and use of the streets has largely passed into the hands of franchise companies, who supply the good business judgment required in return for the profits which are thus diverted from the city treasury.

The question has become one of much greater importance since the impetus given to street railway travel by the introduction of the trolley system. The service of water and light, moderate in their demands on the highway, and in most instances not unreasonable in the profits received, might well remain in the hands of companies controlled by well thought out by-laws or ordinances. But the enormous profits made by some of the surface roads has attracted attention to the subject, especially as capitalization has been largely based on the value of the franchise; in some instances franchise value being in the proportion of three to one of the actual capital expended.

How can the public get the sound business judgment necessary for the successful working of all the street service without the payment of undue profits to franchise corporations?

I suggest the following method as one well worth trying: Let it be possible under a general law to incorporate in every large centre of population by a local by-law, a franchise company, whose capital, fixed at the amount required for the acquisition of all or any of the existing works, or the establishment of new concerns, should be raised as to one-half by the sale of bonds guaranteed as to principal and interest by the municipality, and as to the other half by the issue and sale of shares of capital stock, and let it be possible under the laws relating to such companies to increase the bond and stock issue from time to time as extensions may demand.

The company should be governed by, say, nine directors, six to be elected by the shareholders, and three to be named or elected by the municipality. The auditor should be appointed by the municipality, and his decisions as to sinking fund and profits should be subject to appeal to a local judicial officer.

The profits should be disposed of as follows:

1. In payment of expenses; as to which all salaries and directors' fees might be fixed by the charter.

2. In maintaining capital account by proper sinking funds, etc.

3. In payment of the bond coupons.

4. In payment of a dividend, say, at the rate of five per cent. to shareholders.

5. In payment to the municipality of a sum equal to, say, three per cent. on the capital stock.

6. In payment to the shareholde of a further dividend, if earned, of one or two per cent.

7. In payment of the residue, if any, to the municipality.

There should be a right to the municipality to cancel the charter and take possession of the franchise properties and form a new company:

(*a*) On default in payment of interest on the bonds.

(*b*) Upon a resolution passed on a two-thirds vote by the municipal council that the franchises are not properly managed, and then only on repayment to the shareholders of their capital with a bonus of six months' dividend.

I need not further elaborate details. Many will occur to experts, and varying conditions will arise, making a hard and fast formula impossible.

The bond issue guaranteed by the municipality gives half the capital at the lowest possible rate. Say the total net earnings of the franchise company on the bond and share capital are at the rate of eight per cent., and the bonds are issued at par to pay three and one-half per cent. This would give twelve and one-half per cent. on the share capital, paying the shareholders the suggested five per cent. and the municipality three per cent., and there would remain for deferred dividend to shareholders two per cent., and a residue of profits for the municipality of two and one-half per cent.

The franchise company and the municipality are partners; conflicts cease; useless extensions are not required; the company can start with one franchise acquired, and can increase the capital as required for further acquisitions as they fall in or are capable of being dealt with.

The key, or special feature, is the suggested method of dividing the profits. The first dividend to the shareholders should be enough to enable the stock to be readily placed at par. The

incentive to high class business management and economy rest in the prospect of the second or deferred dividend, which cannot be paid until the municipality has received some return for the use of their streets.

The residuary profits go to the city treasury, as a further payment for the franchise.

The control of the audit by a city officer, subject to judicial review, is a necessary feature, for profits to be divided depend on a correct provision being made by sinking funds for keeping capital intact.

Growing cities would reap special advantage by adopting the proposed plan; surface railway receipts in a city of 50,000 will be in the neighborhood of $2.50 per capita; let the city grow to 200,000 and each inhabitant pays in about $5.00 to the street railway's profits; the city has grown four, the receipts of the railway eight times. The franchise of the surface road in the smaller city is worth very little, in the larger it will pay dividends on millions over capital expenditure.

Of course the great practical difficulty is the fact that nearly all the franchises are now outstanding in the hands of corporations holding some for long terms of years, some indefinitely; but if the deferred dividend plan now suggested is of value, it may be that the time will come for some cities when the legitimate profits from their franchises will be the source from which relief may be expected from the great burden of taxation now existing, in other words the large moneys now paid by the inhabitants in the shape of dividends to franchise companies, and which arise in great part from the use of the public property, will go in ease of the general city rate.

B. B. OSLER.

Toronto, March, 1899.

A PHASE OF CRIMINAL EVIDENCE.

We recently called attention (ante, p. 91) to sec. 687 of the Criminal Code, in view of a suggestion for an amendment in the direction there indicated. In answer to a request, we have received letters from Mr. E. F. B. Johnston, Q.C., and from the County Crown Attorney at Windsor. Both gentlemen, from a wide experience, are well qualified to give an opinion on the subject,

and their views will be read with interest. Mr. Johnston deals with the subject at some length, and his views are as follows:

Having been asked my opinion in reference to the proposed amendment to the Criminal Code, making the evidence of a witness taken at an abortive trial admissible at a subsequent trial of the accused person on the same charge, where the witness is dead, absent or unable to attend Court, and also with regard to the section as it now stands, I have pleasure in giving my views on the subject.

One has first to consider the effect of sections 687 and 688 on the admissibility of evidence taken at a preliminary enquiry. I think it is manifestly unfair to both the Crown and the accused that the evidence of a witness, as it is now taken at a preliminary investigation, should be used for any purpose at the trial. The person arrested is usually confined in gaol, and within a day or so the investigation takes place. The facts of the case are not fully developed, and certainly counsel for the prisoner cannot possibly be fully instructed. The examination-in-chief is, therefore, imperfect, and the cross-examination may be, in its result, most misleading, in the light of subsequent discovery of facts, or because counsel is not fairly seised of the real issue which is presented later on at the trial. The evidence is generally taken in long-hand, and taken very imperfectly. Sufficient time cannot in many cases, particularly in Toronto, be allowed for proper cross-examination. A few questions are asked, the magistrate decides to commit, and the cross-examination ceases. If the accused is not represented by counsel, the cross-examination of witnesses is a farce. Another feature has to be considered, namely, that the Crown case is presented by the Crown officer, the Crown Attorney, who has usually much experience and is specially skilled in conducting this class of cases, and who is possessed of all the facts known at the time of the enquiry before the magistrate. The counsel for the accused does not know the facts which he is called upon to meet until they are detailed in a hurried manner in the witness-box. It is an unequal and unfair combat. This evidence taken and written in a necessarily imperfect manner, the Clerk of the Court being the sole judge as to what is important and what is not, may be used at the trial under certain conditions. The

defence is helpless. Oral explanations cannot be given. The manner in which the evidence was taken is not open to comment or qualification.

The same objection applies to evidence for the defence. A witness may be put in on behalf of the accused at the investigation, and statements made by him, which the Crown officer cannot at the time probe by cross-examination, and the Crown is confronted at the trial by the like difficulty. I need only say, in order to emphasize the point, that the examination and cross-examination of a witness at the Police Court in Toronto occupying half an hour will appear on the depositions in one-third of a page of writing. This surely cannot be said to be a reasonable record of the evidence given. No one is to blame for this state of affairs. From the nature of the circumstances and the volume of business done at that Court, it is impossible to report the evidence correctly. Parliament must assume the responsibility.

If the provision of the law, as it now stands, is to be of value and to be fair to all parties, every case not tried summarily by the magistrate, particularly in all the large cities, should be reported by a shorthand writer. In making use of preliminary depositions at trials, we are constantly met with the assertion that the witness did not say what is written down, or, if he did, that it was qualified in a material manner, which does not appear on the record. This must, to a great extent, be true, and many judges appreciate the fact that a mere summary of evidence taken in the way in which it is now done may—and often does not—represent the meaning of the witnesses. Depositions, therefore, lose their value for the purpose of examination or cross-examination. One of the objects of the depositions was doubtless to furnish the Crown officer with the evidence upon which he could base the prosecution at the trial, and another to render the crime of perjury on the part of witnesses before justices of the peace more easily proved. These depositions are also of use before a Grand Jury, and indeed the Grand Jury may, upon the depositions alone, find a bill. But when it comes to the trial of a man for his life upon this class of evidence, taken, with all its necessary imperfections, the question becomes very serious, and I for one have no hesitation in saying that I am strongly opposed to such evidence being used. If taken in shorthand, and the accused appears by counsel, then my objections to a great extent disappear, and I think the policy of the

law would then be a reasonably wise one, in order that justice might not be defeated whether for the Crown or the prisoner.

Another grave objection to the use of this evidence is one that perhaps cannot be avoided. A witness skilled in the art of dissimulation may present his evidence, when written, in such a manner as to read very plausibly and forcibly. Such a witness, if examined in Court, may by his demeanour convince a jury that his testimony is unreliable. His evidence is believed because he is not present to convince the Court or jury that it is untrue. Should we, therefore, ask convictions or acquittals upon such methods? Frequently at preliminary investigations the accused is represented, if at all, by a junior or by some person unskilled in criminal defences. Leading counsel do not, unless in exceptional cases, appear at the preliminary investigation. It may be, therefore, a little unfair to the prisoner to read at the final trial evidence of clever and unscrupulous witnesses taken in this way, when so much depends upon the result.

The nature of the enquiry is only preliminary, and the magistrate has only to be satisfied that the accused should be put upon his trial. It is not necessary that even a prima facie case should be made out. It is a matter entirely in the discretion of the magistrate. There must, of course, be some evidence of crime having been committed; but how far it may implicate the accused is for the opinion of the justice without the restriction of precedent. Whether there is guilt really at the door of the prisoner or not is quite beyond the functions of the magistrate. A thorough investigation is, therefore, not necessary at this stage, and is consequently rarely made. To make the record of such proceedings applicable to the final and thorough trial of the prisoner binding upon him or upon the Crown seems to me to be quite beyond the object and purpose of such enquiry, and to be at variance with the spirit of a fair trial.

I see no parallel between civil and criminal cases. The Crown is not pressing as a litigant. The wrong, if any, done by a criminal prosecution is without remedy. No compensation can be made to a man who has been unjustly convicted and imprisoned. No relief can be granted where a man has been unjustly hanged. In civil cases, time largely rectifies the error, and a few years will place a man in the position he was in before he suffered the injustice, if injustice was done. The consequences are not so serious in civil as

in criminal matters, yet greater care appears to be taken with regard to evidence in a promissory note case than at a trial for murder. Examinations can only be held in civil matters after due notice and deliberation. Generally, pleadings are closed and the parties are in full possession of the facts, except perhaps as to matters of detail. Ample time is given to all parties, an examiner presides, the words of the counsel and of the witness are taken down verbatim, and every incident photographed on the record. Only this class of evidence is used at a trial, except in rare cases where no stenographer is available. Compare this method with the mode of hearing one out of fifty cases disposed of in two hours at the Toronto Police Court, where perhaps less than one-twentieth of the evidence can be taken down, and where the facts and real issue are not thoroughly known by the examining counsel, and certainly most imperfectly known by the defence, the only pleading being a formal charge of crime and a plea of not guilty.

The evidence taken at a trial as proposed by the amendment to be used at a subsequent trial against the same person for the same offence is not so objectionable. Every safeguard is afforded; ample time is given; counsel is properly instructed; the facts have been partially developed on the enquiry, and therefore known to the parties. The presiding judge has watched carefully the form of question to see that no misleading statements are made, and the transcript of the notes of the evidence is the faithful reproduction of what took place. To this, I see no serious objection, and therefore the amendment proposed is reasonably fair and proper. I do see grave objections to the present sections of the Code being allowed to continue as law, viz.: admitting depositions of witnesses at the preliminary enquiry to be used at the trial, and I have endeavoured briefly to indicate some of my reasons in support of the objection.

I think the proposed amendment, as a distinct section, should become law, and the present section be repealed; in other words, that the evidence as now taken at preliminary investigations should not be used at the trial in the cases provided for, but that evidence taken at one trial should be available at a subsequent trial where the former proved abortive. There must always be grave injustice where the evidence is not taken in shorthand, and although there is a provision for so taking it before the magistrate, it is a luxury that can be indulged in only by the prisoner who has

means, the rule apparently being that if the accused asks for the services of a stenographer, he has to pay for such services, and furnish the Crown with a certified copy of the evidence.

E. F. B. JOHNSTON.

Toronto, March, 1899.

An amendment to section 687 of the Criminal Code, such as is suggested in the issue of the LAW JOURNAL of February 15th, would, in my opinion, be of great advantage in the administration of the criminal law from two points of view: firstly, in making it clear that evidence taken at a trial may be used at a subsequent trial of the same offence; and secondly, in dispensing with the absolute proof of the facts now required to be shown before depositions previously taken can be used. Many times in my practice it has been necessary to invoke the aid of section 687 where the witnesses examined at the preliminary hearing reside ordinarily in the United States, and I have experienced considerable difficulty in proving at the trial that as an actual fact the witness was absent from Canada, although from all the circumstances the inference was overwhelming.

Within a year the very point arose upon the trial of an indictment for theft at the Sandwich assizes. The main witness, a resident of the United States, who was the owner of race horses, had been in Windsor during the racing period, and had been examined on the preliminary investigation, but shortly before the trial had gone with his horses to some track in the United States. Evidence was given of his departure by the ferry to Detroit, and of his statement that he was going to some place in the United States, and that no reply had been received to a letter to his reputed address. It was suggested for the defence that he was at the Fort Erie, Ontario, track, but a telegram failed to discover him there. Mr. Justice MacMahon, the presiding judge, intimated that if necessary he would reserve a case for the full court to determine whether or not sufficient was shown to enable the deposition to be read, but as the case failed on the merits the matter dropped.

Under the suggested amendment, the difficulty we had would be removed, no injustice done to any one, as its terms leave a wide discretion with the presiding judge to determine whether or not the facts in the given case raise a reasonable inference of absence,

etc. Many times I have found it necessary to procure witnesses from the United States, at considerable expense, solely to prove the absence from Canada of the person whose previous evidence is intended to be used.

The suggested amendment meets with my entire approval, and I would be pleased to see it enacted.

A. H. CLARKE.

Windsor, March, 1899.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

RECEIVER — MARRIED WOMAN'S SEPARATE ESTATE — JUDGMENT FOR COSTS AGAINST MARRIED WOMAN.

In *Cummins* v. *Perkins* (1899) 1 Ch. 16, the plaintiff was a married woman, and her action was dismissed with costs to be paid out of her separate estate. The only separate property which she had consisted of a share coming to her under a will. Before the costs were taxed, the trustees of the will were about to distribute the estate and pay the plaintiff her share, and the defendant applied for the appointment of a receiver to receive the plaintiff's share and hold it as security for the costs when taxed. The motion was resisted on the ground that it was in effect a motion for equitable execution, to which the plaintiff was not entitled until he was in a position to get legal execution, and the defendant could not be in that position until the costs were taxed. Kekewich, J., however, granted the application, and his order was sustained by the Court of Appeal (Lindley, M.R., and Chitty, L.J.) on the ground that where a party has a right to payment out of a particular fund the Court has power to protect the fund by injunction or the appointment of a receiver. *Kearns* v. *Leaf*, 1 H. & M. 681, though a case arising out of a contract, was held also to warrant the order in question.

PAYMENT INTO COURT—INTERLOCUTORY MOTION—ADMISSION BY DEFENDANT.

In re Benson, Elletson v. *Pillers* (1899) 1 Ch. 39, the defendant had sold certain shares and received the proceeds; the shares were claimed by the plaintiff to have been his property, and he claimed to be entitled to the proceeds, which the present action was brought to recover. Before the trial the plaintiff applied on motion to compel the defendant to pay the proceeds of the sale into Court. The defendant admitted the sale and receipt of the proceeds, but he deposed: "Before any question was raised as to the transfers, I in good faith paid away and disposed of the purchase money, in the belief that I was entitled thereto, and no part thereof is now in my hands, and I have no power over the shares or any of them"; North, J., was of opinion that, as the defendant had failed to swear that the purchase money was not under his control, as he had done in regard to the shares, his affidavit was insufficient, and he ordered him to pay in the money within a month.

DISCOVERY—PRODUCTION OF DOCUMENTS—PRIVILEGE—PRACTICE.

Goldstone v. *Williams* (1899) 1 Ch. 47, is a decision of Stirling, J., on a question of practice. The point arose on an application by defendants to compel the plaintiff to produce certain documents for the purpose of discovery. The documents in question were (1) certain accounts prepared under the plaintiff's solicitor's direction for the purpose of a previous suit brought by the plaintiff against another party, and (2) the depositions of such other party taken in the former action, and in which the accounts above referred to had been exhibited to the deponent and marked as an exhibit. Stirling, J., held that the accounts in question were originally privileged as being documents prepared for the plaintiff's solicitor for the purpose of litigation; that, although this privilege had been waived by the production of the accounts to the defendant in the former suit, yet it had not been waived as against all persons, and, notwithstanding the waiver of privilege in the former suit, the plaintiff was still entitled to claim that they were privileged from production in the present action: but as regards the depositions, he was of opinion that they had been filed in court and had become publici juris, and no privilege could be claimed for them, and the defendants were therefore entitled to production thereof.

PARTIES—JOINDER OF PLAINTIFFS—JOINT AND SEPARATE CAUSES OF ACTION—PRACTICE—RULE 123—(ONT. RULE 185).

Oxford and Cambridge v. *Gill* (1899) 1 Ch. 55, was an action in which the Universities of Oxford and Cambridge were joint plaintiffs. The object of the action was to restrain the defendants, who were publishers of educational works, from publishing and selling books bearing the titles, "The Oxford and Cambridge Publications," or "The Oxford and Cambridge Edition," so as to lead to the belief that the publications of the defendants were publications of the plaintiffs, or either of them, or issued from their presses. The defendants moved to strike out the statement of claim on the ground that the plaintiffs could not join as plaintiffs, but that each of the plaintiff's cause of action was separate and distinct, and could not be joined within Rule 123 as amended in 1896; but Stirling, J., held that each plaintiff's cause of action arose out of the same transaction or series of transactions, and that they could properly join as plaintiffs in the same action, and he therefore dismissed the defendants' application. He was also of opinion that both causes of action could be properly tried together, and that there was no ground for acting under Rule 195 (Ont. Rule 237) by ordering the action to be confined to one of the causes of action.

RESTRAINT OF MARRIAGE—WILL—CONDITION—MARRIAGE WITH CONSENT.

In re Nourse, Hampton v. *Nourse* (1899) 1 Ch. 631, discusses the validity of a condition attached to a bequest contained in a will. The testator bequeathed to his son during his life an annuity of £2,000, "and if he shall have married in my lifetime with my previous consent in writing, or, after my death, with the previous consent in writing of the trustees for the time being of my said will," he gave to his son a further annuity of £1,000. The son, being unmarried, made a summary application for a declaration that the above condition as to consent was inoperative, he claiming that it was a mere condition in terrorem, and in restraint of marriage, and therefore void; but Stirling, J., although conceding the general rule to be, that a gift of personalty on marriage with consent would take effect though the marriage took place without consent, was yet of opinion that an exception to that rule had been established by the cases where the condition was annexed, as in the present case, to an additional gift in the event of marriage, and that the condition in question was therefore a good condition precedent, and the gift would not take effect unless the condition was complied with.

LUNATIC—MAINTENANCE OF LUNATIC—STATUTE OF LIMITATIONS—(21 JAC. 1, C. 16).

In re Watson, Stamford v. *Bartlett* (1899) 1 Ch. 72, was an application made by guardians of the poor to recover out of a lunatic's estate the expense of maintaining the lunatic for sixteen years. It appeared that the lunatic had been maintained by the plaintiffs as a pauper for sixteen years prior to her decease in 1898. In 1895 she became entitled to a fund, and a receiver was appointed thereof. The fund was not actually recovered in the lunacy proceedings until after the lunatic's death. The present proceedings were instituted by the guardians in 1898 against the defendant, the administratrix of the lunatic, and she set up the Statute of Limitations (21 Jac. 1, c. 16) as a bar to the recovery of more than six years' arrears of maintenance against the intestate's estate; and Stirling, J., held that this defence was entitled to prevail, and that only six years' arrears from the date of the commencement of the proceedings by the guardians could be recovered.

LEASE—OPTION TO PURCHASE—EQUITABLE ASSIGNEE—POSSESSION.

In *Friary, H. & H. Breweries* v. *Singleton* (1899) 1 Ch. 86, the only question discussed is, whether an equitable assignee of a lease, who has neglected or omitted to perfect his title by a legal assignment, can exercise an option to purchase the demised premises given to the "assigns" of the lessee. Romer, J., decided that he could not, and that the option could only be exercised by an assignee who was, as to the lessor an assignee of the time, and as such liable to the lessor on the lessee's covenants, and that, though the equitable assignee was in actual possession, that did not make him so liable, and therefore he could not exercise the option. Though for many purposes the title of an equitable assignee is as beneficial as that of a legal assignee, this case shows there is an exception to that rule.

VENDOR AND PURCHASER — RESTRICTIVE COVENANT — NOISE — NUISANCE — BOYS' SCHOOL—MISREPRESENTATION BY VENDOR—RESCISSION.

Wauton v. *Coppard* (1899) 1 Ch. 92, was an action brought by a purchaser to recover his deposit and rescind the contract of sale on the ground of misrepresentation by the vendor's agent. The property in question was required by the plaintiff for the purpose of carrying on a boys' school, and was offered for sale subject to the

covenants contained in a certain deed; and upon entering into the contract the deed was not produced, though called for, but the plaintiff was informed by the defendant's agent that there was nothing in the deed to prevent the plaintiff carrying on a school on the property, whereas the deed contained a covenant, binding on the defendant and his assigns, not to carry on any business or occupation on the premises whereby "any disagreeable noise or nuisance shall be collected, occasioned, caused or made." On discovering the purport of this covenant, the plaintiff refused to complete, and the question was whether the covenant would prevent the carrying on of a school. Romer, J., was of opinion that the carrying on of a school on the premises would be a breach of the covenant, and that the representation of the agent as to the deed, though innocently made, was not a representation as to the legal effect of the deed, but a misrepresentation of a material fact affecting the title, and that the plaintiff was therefore entitled to the relief he claimed.

LOTTERY—PRIZE COMPETITION—PREDICTION OF EVENT.

Hall v. *Cox* (1899) 1 Q.B. 198. This was an action to recover £1,000 offered by the defendant as a prize in a guessing competition, the question proposed being the number of births and deaths in London during a specified future week. The competitors, who were not limited to one prediction, were required to fill in the predicted numbers on coupons which were published in the issue of the defendant's paper which contained the offer. The plaintiff complied with the conditions, and one of a number of coupons sent in by him contained the correct figures according to the subsequently published return of the Registrar-General. The facts being found in favour of the plaintiff, the defendant contended the competition was void as being a lottery, and Lawrance, J., who tried the action, gave judgment on this ground for the defendant. The Court of Appeal (Smith, Rigby and Collins, L.JJ.), however, thought that, as the competition did not depend entirely on chance, but involved the exercise of skill and judgment, it was therefore not a lottery, and judgment was accordingly given for the plaintiff.

PRINCIPAL AND AGENT — LIABILITY OF EMPLOYER OF CONTRACTOR FOR NEGLIGENCE OF CONTRACTOR'S SERVANT—NEGLIGENCE.

In *Holliday* v. *National Telephone Co.* (1899) 1 Q.B. 221, the plaintiff sued for damages for injuries sustained under the following

circumstances: The defendants were lawfully engaged in laying underground telephone wires. The wires were passed through tubes, each of which was fitted into the socket of the one next to it. The defendants made a contract with one Higman to make the joints secure between the tubes with lead and solder. In Higman's employment was a workman who was using a benzoline lamp for the purpose of making the joints, which he ought to have known was defective owing to the safety valve being out of order. Wishing to heat the lamp quickly in order to obtain the necessary flare, he negligently dipped it into a pot of molten solder, whereupon, in consequence of the defective safety valve, it exploded and injured the plaintiff. The County Court judge who tried the action held that Higman was the defendants' servant, and therefore that they were liable for the injury; but the Divisional Court (Wills and Lawrance, JJ.) reversed this decision, holding that the relationship of master and servant did not exist between the defendants and Higman, and that the latter was merely in the position of a contractor, and, further, that the case did not come within the class of cases in which an employer has been held liable for injuries occasioned by the negligent or imperfect performance by the contractor of the work he is employed to do, because the act which occasioned the injury was not necessarily connected with the work Higman was employed to perform, but was a mere collateral act of negligence not necessarily connected with his employment, for which the defendants could not be made liable.

CRIMINAL LAW—JURISDICTION—FALSE PRETENCES - LOCUS OF CRIME.

The Queen v. *Ellis* (1899) 1 Q.B. 230; this was a prosecution for obtaining goods on false pretences. The goods were obtained in England by means of false pretences made in Scotland, and the question reserved by Day, J., was, whether the case was triable in England. The Court for Crown Cases Reserved (Lord Russell, C.J., and Hawkins, Wills, Wright and Bruce, JJ.), though not all agreeing in the reasons for the decision, held that the offence was triable in England; Hawkins, Wills and Bruce, JJ., on the ground that the offence consisted in obtaining the goods; whereas Wright, J., based his decision on the ground that the possession of the goods by the defendant might be treated as a possession in England under a representation made in Scotland and continued in England; Lord Russell, C.J., agreed in the affirmation of the conviction, without

expressing any opinion as to the ground on which the judgment of the court should be based.

RAILWAY—"ORDINARY LUGGAGE"—BICYCLE.

In *Britten* v. *Great Northern Ry.* (1899) 1 Q.B. 243, the question discussed is whether the bicycle of a railway passenger is "ordinary luggage," and Channel, J., who tried the action, was clearly of opinion that it was not, and that the defendants were therefore entitled to demand pay for its carriage, which they would not have been had it come within the description of "ordinary luggage."

Correspondence.

TENANT DISPUTING LANDLORD'S TITLE.

To the Editor of the Canada Law Journal.

DEAR SIR,—In your issue of February 1st, I notice a letter signed D. A. H. in reference to the appeal in *Ross* v. *McDonald*, lately decided by the Supreme Court of Nova Scotia. The writer makes the somewhat startling assertion that the Supreme Court in that decision have "somewhat shattered the old time-honoured doctrine that a tenant cannot dispute his landlord's title." If this is the case, then I agree with the writer that it is important that the practising profession in Nova Scotia should know it. I cannot, however, agree with him when he states that the doctrine referred to above has been affected in the slightest degree by that decision.

The facts of the case are not sufficiently set out in the letter. The purchaser at the sheriff's sale did more than notify the tenant to pay rent to him. He served the tenant with a written notice to quit, and threatened him with immediate eviction unless the tenant would agree to pay rent thereafter to the purchaser who had a paramount title. The tenant accordingly did agree to pay the purchaser the rent from that time forward, and to hold the premises as his tenant. I quote from the uncontradicted evidence of Ross (the tenant), as it appears in the printed case; the portions in brackets are mine: "I went to Morrison (the purchaser) after getting 'L.M.D.' (the notice to quit) and he told me he owned the premises, and that unless I paid rent to him to get out. I then made arrangement with him to pay rent from August (the month

in which he received notice to quit) and I agreed to hold property as his tenant."

The case relied on by the writer is that of *Delaney* v. *Fox*, 26 L.J.C.P. 248. A perusal of the judgment in that case will at once show that it is not an authority that conflicts with the decision in *Ross* v. *McDougall*. In the former case the tenant endeavoured to show that the lessor had no title at the time he leased; in the latter the tenant did not attempt to deny the landlord's title at the date of the lease, nor his right to receive the rent up to the time of the purchaser's intervention, but he merely set up the intervention of a paramount title, a constructive eviction by the party having that paramount title, and an attornment thereto. There is abundant authority to support the judgment of the Supreme Court of Nova Scotia upon these facts.

In the notes to *Moss* v. *Gallimore*, 1 Sm. L.C., 9th ed., 614, we find the following: "A tenant of the mortgagor, whose tenancy has commenced since the mortgage, may, at common law, in case of an eviction by the mortgagee, either actual or constructive, for instance an attornment to him under threat of eviction, dispute the mortgagor's title to either the land or the rent, which is no more than any tenant may do upon an eviction by title paramount." The above is quoted with approval in *Kinnear* v. *Aspden*, 19 A.R. 472.

In *Mayor of Poole* v. *Whitt*, 15 M. & W. 571, the question is also discussed. Pollock, C.B., in that case says: If a party having a good right to eject the occupier of demised premises goes there and demands to exercise that right, and the tenant says: "I will change the title under which I now hold and will consent to hold under you,' that according to good sense is capable of being well pleaded as an expulsion." In Clarke on landlord and tenant, page 148, we find the following: "Indeed, it is clear that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may, in case of eviction by the mortgagee either actual or constructive (for instance an attornment to him under threat of eviction), dispute the mortgagor's title to either land or rent.' Again, in *Hill* v. *Saunders*, 2 Bing. 115, 4 B. & C. 536: "Attornment by a tenant to the heir on threat of eviction is tantamount to entry by the heir and prevents the tenant from afterwards disputing his title." In *Hopcroft* v. *Keys*, 9 Bing. 613, we find the following: "If a tenant is evicted by title paramount but remains in posses-

sion under a new agreement with the person who had evicted him, his original landlord cannot distrain on him for rent."

I will merely cite the following authorities in which the doctrine with its limitations is fully discussed: Bigelow on estoppel, pp. 517-20, 522, 527 and 534-36-37; *London and North-Western R.W. Co.* v. *West*, L.R. 2 C.P. 553; *Achorne* v. *Gomme*, 2 Bing. 54; *Clardige* v. *McKenzie*, 4 M. & G.; *Pope* v. *Biggs*, 9 B. & C. 252; *Doe d. Higginbothom* v. *Barton*, 11 A. & E. 314-5-6. Bigelow on estoppel, at p. 522, says: "Some doubt has been raised in a recent English case (*Delaney* v. *Fox*, cited above) whether constructive eviction is enough in England, but it has been distinctly declared enough in one case, and evidently so considered in others. And it has been said that the law must be regarded as settled in England in this way." The most that can be said of *Delaney* v. *Fox* is that it threw out a doubt as to the sufficiency of constructive eviction. The question of its sufficiency did not even arise in that case, because the Court expressly decided that no constructive eviction was proved. The facts in that case do not disclose a threat of eviction by a person having a paramount title. In conclusion, the decision of the Supreme Court in *Ross* v. *McDougall* in no way affected the doctrine referred to, and the law in Nova Scotia as to the estoppel of a tenant from disputing his landlord's title remains the same to-day as it was before that case was argued.

HUGH ROSS.

Sydney, N.S.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

B.C.] MAJOR *v.* MCCRANEY. [Nov. 21, 1898.

Construction of statute—20 & 21 Vict., c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.

The Imperial Act, 20 & 21 Vict., c. 54, s. 12, provides that "Nothing in this Act contained, nor any proceeding conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen or

impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; . . . . . and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated."

Held, affirming the judgment of the Supreme Court of British Columbia, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.

Semble, that the section only covered agreements or securities given by the defaulting trustee himself.

Quære, is this Imperial Act in force in British Columbia? If in force it would not apply to a prosecution for an offence under R.S.C., c. 264 (the Larceny Act), s. 58.

An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R.S.C., c. 264, s. 58, which was not re-enacted by the Criminal Code, 1892.

Held, that the alleged criminal act having been committed before the Code came into force, was not affected by its provisions and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act. Appeal dismissed with costs.

Robinson, Q.C., for appellant. *Chrysler*, Q.C., for respondent.

Ont.] MAKINS *v.* PIGGOTT. [Nov. 21, 1898.

Negligence—Use of dangerous material—Evidence—Trespass.

Work on the construction of a railway was going on near the unused part of a public cemetery, in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool-box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial, on an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place that the workmen would hurredly place any explosives they might have in their possession under their tool-box, and then run away. It also was proved that caps of the same kind were kept in the tool-box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

Held, reversing the judgment of the Court of Appeal, that in the absence of evidence of circumstances leading to a different conclusion, the act of

placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M., in exploding the cap as he did, did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser was also a question for the jury who did not pass upon it. Appeal allowed with costs.

Nesbitt and *Gauld* for appellant. *Osler*, Q.C., for respondents.

Ont.] [Dec. 14, 1898.

HARDY LUMBER CO. *v.* PICKEREL RIVER IMPROVEMENT CO.

Company—Action against—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata.

In an action against a River Improvement Co. for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Co.'s Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands, whose report was to be accepted in place of that provided for by the Timber Slide Co.'s Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal that the above grounds of impeachment were covered by the consent judgment and were res judicata.

Held, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

By R.S.O. (1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation, it should forfeit all its corporate and other powers, "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works."

Semble, the non-completion of the works within two years, would not ipso facto, forfeit the charter, but only afford grounds for proceedings by the Attorney General to have a forfeiture declared.

Another ground of objection to the imposition of tolls was that the Commissioner, in acting on the report of the valuator appointed under the consent judgment, erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a new scale of tolls fixed.

Held, that under the statute the schedule could only be altered or varied by the Commissioner, and the Court could not interfere especially as no application for relief had been made to the Commissioner. Appeal dismissed with costs.

Kappele and *Bicknell* for appellants. *W. Cassels*, Q.C., for respondents.

Quebec.] COMMON *v.* MCARTHUR. [Dec. 14, 1898.

Joint Stock Company—Irregular organization—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—Ultra vires—The Companies Act—Contributories—Pleading—Construction of statute.

After the issue of an order for the winding-up of a joint stock company incorporated under The Companies Act, a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; under the Act such grounds can be taken only upon direct proceedings at the instance of the Attorney-General.

The powers given the directors of a joint stock company under the provisions of The Companies Act as to forfeiture of shares for nonpayment of calls is intended to be exercised only when the circumstances of the shareholder render it expedient in the interests of the company, and cannot be employed for the benefit of the shareholder. Appeal allowed with costs.

Buchan and *R. C. Smith* for appellant. *J. L. Morris*, Q.C., and *Beique*, Q.C., for respondent.

N.W.T.] EASTMAN *v.* RICHARDS. [March 14.

Landlord and tenant—Duration of tenancy—Overholding tenant—Rent

R. rented a store from E. for a term of eleven months, agreeing to pay rent at the rate of $400 a year. After the term expired he remained in possession without any new agreement for ten months, paying the rent reserved monthly during the whole period, and then gave a month's notice and abandoned possession. E., claiming that the tenancy after the term expired was from year to year, brought an action for rent for the two months subsequent to the abandonment.

Held, affirming the judgment of the Supreme Court of the North-West Territories, that the tenancy after the eleven months expired was only from month to month and the action was properly dismissed by the Court below. Appeal dismissed with costs.

Latchford for appellant. *Lougheed*, Q.C., for respondent.

Manitoba.] LAWLOR *v.* DAY. [March 15.

Mortgagor and mortgagee—Foreclosure—Tax sale—Purchase for value—Notice—Pleading.

In 1888 R. gave a mortgage on his land to D., his wife joining to bar her dower. In May, 1893, the mortgaged lands were sold for municipal taxes and purchased by Mrs. R. who received the tax sale certificate. Later in 1893 a new mortgage on the lands was executed by R. and his wife in substitution of the former, the fact of the sale for taxes not being disclosed to the mortgagee. Subsequently the tax sale certificate was assigned to L. who, in 1895, received a tax sale deed of the land. An action to foreclose the mortgage was brought against R., his wife and L., the mortgagee alleging that the purchase at the tax sale was in pursuance of a scheme by defendants to cut out the mortgage, and plaintiff in his action asked for a declaration that L. held the land in trust for the other defendants. The Court of Queen's Bench exonerated L. from the charge of fraud but held that he should have pleaded purchase for value without notice.

Held, affirming such judgment, that L. should have pleaded such defence; that there were circumstances amounting to constructive notice that should have put him on inquiry; and that the purchase at the tax sale was really for the benefit of the mortgagor.

Held per GWYNNE, J., concurring in the opinion of DUBUC, J., at the trial that the whole scheme was a contrivance to commit a fraud on the mortgagee.

Ewart, Q.C., for appellant. *S. H. Blake*, Q.C., and *Smythe*, Q.C., for respondent.

Ont.] FARQUHARSON *v.* IMPERIAL OIL CO. [March 17.

Appeal—Leave to appeal per saltem—Appeal from order in chambers—Highest court of final resort—Judgment of Divisional Court—Appeal direct from.

There is no appeal to the court from an order of a judge in chambers granting leave to appeal. *Ex parte Stephenson* (1892) 1 Q.B. 394, followed.

Per GWYNNE, J., in chambers. In cases in which the Ontario Legislature has enacted that a litigant who takes his case to a Divisional Court for review of the judgment at the trial, he has no further appeal to the Court of Appeal, the judgment of the Divisional Court is the judgment of

the highest court of final resort in the Province within the meaning of R.S.C., c. 135, s. 24 (a), and there is a right of appeal from such judgment direct to the Supreme Court.

His Lordship also held that the judgment of the Divisional Court deprived the appellant for all time in a very essential degree of the use of a stream for floating down timber, such being the effect of the construction of a dam across the stream which the judgment pronounced lawful, and it was, therefore, a proper case for leave to appeal per saltem if such leave was necessary, and he made order granting such leave. On appeal from his whole judgment the Court did not pronounce on the first question, and held that it had no jurisdiction to review the order granting leave. Appeal disinissed with costs.

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

Province of Ontario.

COURT OF APPEAL.

Maclennan, J. A.] [March 8.

GREAT NORTH-WEST CENTRAL RAILWAY CO. *v.* STEVENS.

Appeal — Leave — Refusal by Court below — Stay of proceedings — Special circumstances—Judicature Act, s. 77.

Leave to appeal to the Court of Appeal from an order of a Divisional Court affirming an order of a judge in chambers, which set aside an order of a referee in chambers, whereby the proceedings in the action were stayed, pending the determination of an action in England brought by some of the present defendants, and to which the present plaintiffs were defendants, was refused by a judge of the Court of Appeal, where such leave had previously been refused by the court whose decision had been complained of, where there were no good grounds on which that decision could be supported, where none of the special circumstances existed which s. 77 of the Judicature Act makes essential, and there were no special reasons for treating the case as exceptional.

W. M. Douglas, for the applicants. *E. D. Armour*, Q.C., for the plaintiffs.

Practice.] FRASER *v.* LONDON STREET R.W. CO. [March 14.

Evidence—Appeal—Motion for leave to adduce further evidence—Action for bodily injuries—Excessive damages—Examination by surgeon—Rules 462, 498.

In an action for damages for bodily injuries received by the plaintiff owing to the alleged negligence of the defendants, the plaintiff recovered a

verdict for $3,300, which a Divisional Court reduced to $2,000, if the plaintiff would consent, and in the alternative directed a new trial. The plaintiff accepted the reduction, but the defendants declined to do so, insisting that the damages even as reduced were excessive, and appealed to the Court of Appeal. Their appeal being set down, they moved for leave to give further evidence to show that the damages were excessive, and, in order to show that the plaintiff had recovered his health and that the injury he sustained had not been so serious or of so permanent a character as was anticipated at the trial, they asked that he might be ordered to submit to a bodily examination by a surgeon, under Rule 462.

Semble, that the examination under Rule 462 is for discovery only, and is not evidence of the character contemplated by Rule 498 (1).

Held, that the only object in getting in the proposed evidence was to reduce the damages still further, or to obtain a new trial, and it was not reasonable that the defendants, having refused the relief the Court below offered, should be allowed to introduce this evidence on the appeal. They did not make out a sufficiently clear case for the admission of the evidence. It opened nothing but a prospect of conflicting statements and opinions as to the present state of the plaintiff's health and the prospects of his ultimate recovery. From the very nature of the case, it must be always a most difficult task to interfere, by reason of matters arising ex post facto with an assessment of damages in respect of personal injuries. It might be done in rare cases, but it was necessary to show some clear definite fact pointing to an over-assessment such as existed in *Sibbald* v. *Grand Trunk R. W. Co.*, 19 O.R. 164, or in *Cramer* v. *Waymark*, O.R. 1 Ex. 241. The motion was therefore refused.

H. D. Gamble, for the motion. *Aylesworth*, Q.C., contra.

HIGH COURT OF JUSTICE.

Robertson, J.] RE CALDWELL AND THE TOWN OF GALT. [Feb. 2.

By-law—Contracting debt—Publication of—Blank dates in—Debentures—Interest—Description of property—Power to apply money—Quashing—Discretion of Court.

Where a by-law for contracting a debt as published and submitted to the ratepayers, provided that it would come into operation on the day of A.D.

Held, that the reference to the date of its taking effect being in blank could be treated as surplusage as sec. 384, sub-sec. 2, of the Municipal Act, provides that, "if no day is named it shall take effect on the day of the passing thereof" and that it is not necessary to its validity to name the day.

The by-law as published left blank the days of payment of the deben-

tures, and the dates on which the interest should be payable in each year, but as passed declared that the "said debenture shall be payable on the 8th day of August, A.D. 1918 (being twenty years at furthest from the date on which this by-law takes effect)" and that the "interest thereon shall be payable half-yearly on the 8th days of February and August in each year."

Held, that the by-law on the face of it was legal, and that unless it be illegal on its face, it is discretionary with the Court to say whether there is such manifest illegality, that it would be unjust that it should stand or that it had been fraudulently or improperly obtained.

The preamble of the by-law as published recited the necessity for raising two certain named sums for interest and payment of the debt and separately provided for the raising of one sum, including both mentioned in the recital.

Held, 1. That the recitial and the enacting clause together make it quite clear what was to be done, and the including both sums in one in the enacting clause was no objection to the by-law.

2. That the by-law which recited "whereas it is necessary and expedient to raise the said sum of $10,000.00 to pay expenses for opening up a street between M. street and H. street, through the property known as the A. property and other properties so as to continue and extend A. street in a southerly direction between M. street and H. street"; and there was nothing to show that any by-law had been passed expropriating any particular parcel of land giving the dimensions thereof for the purpose of extending A. street, the simple fact being that the by-law in question provided for the issue of debentures for $10,000.00 without any authority to apply or expend the same, the by-law was invalid.

Du Vernet and *W. D. Card*, for the motion. *Armour*, Q.C. *and J. B. Irwin*, contra.

Meredith, C. J., MacMahon, J.] [Feb. 21

WRIGHT *v.* MCCABE.

Parent and child—Evidence to vary written agreement—For support and maintenance of children—Previous conversations.

Plaintiff on the death of a daughter executed an agreement with the daughter's husband promising to rear, maintain and educate his two children, and to make no demand on him to aid in their support in consideration of his renouncing all his rights as a father and returning her some chattels belonging to the daughter. In an action for six years' support of the children, in which she sought to show that she was induced to sign the agreement by his promise to pay for the support of the children.

Held, that evidence of conversations previous to the execution of the agreement to show that promise and understanding was inadmissable. Judgment of BOYD, C. affirmed.

Clute, Q.C., for the appeal. *E. G. Porter*, contra.

Meredith, C. J.] BURTON *v.* DOUGALL. [March 4.

Deed of land—Mistake in name of grantee—Void conveyance—Title.

A mortgage on lands was executed by the owner of the lands in which the mortgagee was named as "Clara Benton". The real name of the intended mortgagee was Mary Jane Burton. "Clara Benton" was neither a name which the intended mortgagee had assumed, nor was it one by which she was known, but it was inserted by mistake.

Held, that the mortgage was inoperative except so far as it operated in equity; and it did not pass the legal estate to Mary Jane Burton, who therefore could not make a good legal title to a purchaser under the power of sale contained in it.

Riddell, for the plaintiff. *Douglas*, for the defendant.

Ferguson, J., Rose, J., Robertson, J.] [March 4.

REGINA *v.* FOX.

Discovery—Examination of parties—Penalty—Alien Labour Act—Canada Evidence Act, ss. 2, 5.

An action brought in the High Court of Justice for Ontario, in the name of Her Majesty, to recover a penalty for a violation of the statute of Canada 60 & 61 Vict., c. 11, restricting the importation and employment of aliens, is an action to which the provisions of the Canada Evidence Act, 56 Vict., c. 31, apply, within the meaning of s. 2, which provides that the Act shall apply "to all criminal proceedings, and to all civil proceedings and other matters whatsoever, respecting which the Parliament of Canada has jurisdiction in this behalf;" ROSE, J., expressing no opinion as to this. In such an action, having regard to the provisions of s. 5 of that Act, as now found in 61 Vict., c. 53, the defendant can be examined for discovery before the trial; ROSE, J., dissenting as to this.

F. E. Hodgins, for plaintiff. *J. J. Warren*, for defendants.

Ferguson, J., Rose, J., Robertson, J.] [March 4.

HEWGILL *v.* CHADWICK.

Writ of summons—Issue from non-existent Court—Judge—Clerk—Nullity—Amendment—Waiver—Complete defect.

A document purporting to be a writ of summons stated on its face that it was "issued from the office of the deputy clerk of the District Court of the provisional district of Thunder Bay and Rainy River at Rat Portage, in and for said district," and was tested in the name of F.F., "Judge of our said Court at Port Arthur," the 14th April, 1898. It is provided by s. 90 of R.S.O., c. 109 that when a provisional judicial district is composed of

two territorial districts (as was the case here) the Lieutenant-Governor in council may by proclamation declare that the junior district shall be detached from the provisional district and erected into a separate provisional district. By proclamation dated the 21st February, 1898, it was declared that on and after the 4th April then next the district of Rainy River should be detached from Thunder Bay and erected into a separate district. The writ was, in fact, issued by the person who was, before the 4th April, the deputy clerk of the District Court at Rat Portage, but at the time of the issue no Judge or officers had been appointed for the District Court of the new district. The defendants entered a conditional appearance, pleadings were delivered entitled in the District Court of Rainy River; the defendants in theirs objecting to the jurisdiction, and the case came on for trial before the Judge of the District Court of Thunder Bay, at Rat Portage, who, the defendants again objecting, directed all amendments to be made to get rid of the objections, and, after a trial with a jury, gave judgment for the plaintiff.

Held, on appeal, that the writ was a nullity and incapable of amendment so as to make it good; that the defect was such as could not be waived by the defendants; it was a complete defect; and the proceedings should be stayed in toto, and the plaintiff ordered to pay the defendant's costs from the beginning.

D. L. McCarthy, for defendants. *E. Taylour English*, for plaintiff.

Boyd, C., Ferguson, J., Robertson, J.] [March 6.

ROGERS *v.* CARROLL.

Chattel mortgage—Affidavit of bona fides—Variation from statutory form—Liability of indorser—Payment of notes by mortgagee—Change in form of security—Execution creditors—Priorities—Assignment f. b. o. c. —Preference—Presumption—Rebuttal.

The affidavit of bona fides made by the mortgagee in respect of a chattel mortgage given to secure the mortgagee against liability in respect of his indorsement of certain promissory notes for the mortgagor employed the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words, "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause, "and for the express purpose of securing me, the said mortgagee therein named, against the payment of the amount of such notes indorsing liability for the said mortgagor," instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor."

Held, that the mortgage was not void as against creditors by reason of these variations from the statutory form. *Boldrick* v. *Ryan*, 17 A.R. 253, distinguished.

The mortgagee, having paid the notes during the currency of the mortgage, before the expiration of a year took and filed a new mortgage upon the same goods for the amount paid by him and interest, changing the form of the instrument so as to make it appropriate to an actual advance of money, but not reciting the prior mortgage or the payment. Within sixty days of this, the mortgagor made an assignment for the benefit of creditors.

Held, that executions in the sheriff's hands before the second mortgage was filed, but subsequently to the prior mortgage, did not gain priority over the second; and the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances.

George Kerr, for plaintiff. *Armour*, Q.C., and *W. B. Carroll*, for defendants.

Meredith, C. J.] IN RE KING. [March 8.

Dower—Conveyance of land free from—Application to dispense with concurrence of wife—R. S. O. c. 164, s. 12—Construction of—Ex parte application—Notice—Advertisement.

An order under s. 12 of the Dower Act, R. S. O. c. 164, dispensing with the concurrence of the land owner's wife for the purpose of barring her dower, where he is desirous of selling free from dower, is made by the Judge as persona designata, and is not subject to appeal. Great care should, therefore, be taken to ascertain that the case made by an applicant comes clearly within its provisions, and an order should not be made ex parte unless under very exceptional, if under any, circumstances.

The words "where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony," do not require more to be shown than that the wife has been living apart from her husband for two years, and that the circumstances under which she has been living apart from him are such that she is not entitled to claim alimony.

Leave given to serve notice on a missing wife by advertisement in a newspaper if further search for her should not prove successful.

J. W. Elliott, for the applicant.

Meredith, C. J.] PALMER *v.* SCOTT. [March 8.

Arrest—Intent to defraud creditors—Temporary absence.

Where the defendants place of residence was in Ontario, and he was quitting the Province for a temporary purpose, leaving his wife and children behind, and intending to return before the end of the year, and it appeared that he had no property, he was discharged from custody under

an order in the nature of a ca. re., made pursuant to s. 1 of R.S.O. c. 80, on the ground that it could not be said that he was going with intent to defraud creditors.

S. B. Woods, for plaintiffs. *F. C. Cooke*, for defendant.

Armour, C.J., Falconbridge, J., Street, J.] [March 9.

THOMSON *v.* CUSHING.

Equitable execution—Interest in land—Writ of fi. fa.—Necessity for amendment.

On the appeal from the judgment of MEREDITH, C.J., ante p. 71,

Held, that the action could not be maintained as the plaintiff had no execution in the sheriff's hands when it was commenced, and an amendment was refused, allowing the plaintiff to sue "on behalf of himself and all other creditors" on the ground that this was not a class action. Decision of MEREDITH, C.J., affirmed.

Armour, Q. C., and *H. J. Martin*, for appeal. *Shepley*, Q.C., contra.

Boyd, C., Ferguson, J., Robertson, J.] [March 13.

IN RE MASSACHUSETTS BENEFIT LIFE ASSOCIATION—JUNKIN'S CASE, BABCOCK'S CASE.

Life insurance—Benefit society—Total disability—Non-payment of assessments after claim made—Forfeiture—Vested right—55 Vict., c. 39, s. 42, application of, to contract—Novation.

Certificates of life insurance issued by a benefit society provided that in case of total disability, one half the amount of the insurance should be payable to the insured. This was subject to the following conditions among others:

"3. If the assured shall, at any time within thirty days after receiving due notice, fail to pay . . . the assessments . . . then . . . the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine."

"7. In every case when this certificate shall cease and determine . . . all payments thereon shall be forfeited to the association . . . ."

A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to T., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim.

Held, that he was not entitled.

B. made a claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the Association. He paid the call due on the 1st April, and no further call was made till the 1st June.

Held, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after default arose on the part of the Association to pay his claim; and, therefore, there was no bar to his establishing his claim upon the reference.

Default of the Association arose after sixty days from the furnishing by B. of proofs of total disability; for s. 42 of 55 Vict., c. , applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885.

J. H. Moss for Junkin. *Tremeear* for Babcock. *Watson*, Q.C., for liquidator.

Boyd, C., Ferguson, J.] [March 13.

IN RE MASSACHUSETTS BENEFIT LIFE ASSOCIATION—PALFRAMAN'S CASE.

Life insurance—Benefit society—Total disability—Conditions of policy—Effect of winding-up order.

A certificate of life insurance issued by a benefit society provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the society, there should be paid to the member, at the option of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the society and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance. Under this a claim for total disability was made after an order for the winding-up of the society.

Held, that the effect of the order was to destroy the functions of the directors and officers, and practically to determine the contract; and, as the conditions, upon which the total disability benefit was to become payable, were impossible of fulfillment, the claimant was not entitled to prove in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy.

R. J. Maclennan for William Palframan. *J. D. Montgomery* for Maria Gamble and Alexander Turpel. *Starr* for John R. Murray. *Watson*, Q.C., for liquidator.

Street, J.] IN RE BELL. [March 16.

Will—Restraint on alienation—Validity—Attempt to alien—Forfeiture—Heirs-at-law.

A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them or any of them to charge or alien the same or any part thereof, except by . . will."

Held, following *Re Winstanley*, 6 O.R. 315, a valid restraint on alienation

The three sons were the sole heirs-at-law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two.

Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir-at-law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers.

Idington, Q.C., for the vendor. *A. W. Ballantyne* for the purchasers.

Street, J.] MOLSONS BANK *v.* COOPER. [March 18.

Costs—Set-off—Solicitor's lien, prejudice of—Probable source of payment.

The plaintiffs, having recovered judgments for large sums against the defendants, sought to set off such sums, pro tanto, against certain costs adjudged to be paid by the plaintiffs to the defendants, but the solicitor for the defendants asserted a lien for his costs upon the judgment for these costs recovered by his clients against the plaintiffs. The defendants, themselves, were worthless, but there was another source from which it was probable that the defendants' solicitors would obtain payment of their costs.

Held, that this was not enough; if the solicitors had a certainty of being able to recover their costs from another source, the set-off could be ordered, because the lien would then be unnecessary; but it being merely a probability, the set-off could not be ordered without its operating to the prejudice of the solicitors' lien, because, should that source fail, the lien could not be replaced; and therefore, under Rule 1165, the set-off should not be ordered.

Shepley, Q.C., for plaintiffs. *Aylesworth*, Q.C., for defendants.

Street, J.] DELAP *v.* CHARLEBOIS. [March 20.

Costs—Taxation—Counsel Fees—Change in tariff.

An appeal to the Court of Appeal was heard in 1894, but the costs thereof awarded to one party against the other were not taxed until 1899.

Held, that the counsel fees on the argument must be taxed in accordance with the tariff in force in 1894, nothwithstanding the provisions of Rules 2 and 1178, and the alteration made in the tariff as to such counsel fees: *cf.* item 155 of tariff A appended to the Consolidated Rules of 1888 with item 149 of tariff A. appended to the Rules of 1897.

Arnoldi, Q.C., for plaintiffs. *L. G. McCarthy* for defendants.

Boyd, C., Ferguson, J.] [March 20.

DANGER *v.* LONDON STREET R.W. Co.

Street railways—Negligence—Operation of car—Contributory negligence—Proximate cause—Nonsuit.

Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the judge may withdraw the question from the jury and direct a nonsuit. *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. at p. 52, referred to.

In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car although he knew it was coming.

Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune. Nonsuit affirmed.

J. B. Clarke, Q.C., for plaintiff. *Hellmuth* for the defendants.

Meredith, C. J., Rose, J.] [March 21.

IN RE SIMPSON AND CLAFFERTY.

Appeal—County Judge—Order of—R. S. O. c. 147, s. 30—R. S. O. c. 78, s. 38—R. S. O. c. 55, s. 52—Persona designata.

By s. 30 of the Assignment Act, R. S. O. c. 147, an assignee for the benefit of creditors is enabled to take the proceedings authorized by s. 32 of the Creditors' Relief Act, R. S. O. c. 78, and if he does so, the provisions of ss. 32 and 33 of that Act are to apply, mutatis mutandis, to proceedings for the distribution of moneys and determination of claims arising under an assignment.

Held, that an order of a County Court Judge dismissing an application by a claimant, under s. 30, to vary the scheme of distribution made by the assignee of a debtor, was made by him as persona designata, and there was no appeal therefrom, either by virtue of s. 38 of the Creditors' Relief Act, or of s. 52 of the County Courts Act, R. S. O. c. 55 or otherwise. *In re Paquette*, 11 P. R. 463, and *In re Young*, 14 P. R. 303, approved and followed. *In re Waldie and Village of Burlington*, 13 A. R. 104, distinguished.

Watson, Q. C., for appellant. *Wilkes*, Q. C., for respondent.

Barron, Co. J., Loc. Judge.] [March.

POWELL *v.* RUSKIN.

Libel—Security for costs—R. S. O. c. 68, s. 10 (1)—Notice of action—R. S. O. c. 68, s. 6 (2)—"Libel contained in a newspaper."

Motion by defendants for security of costs, and by plaintiff to strike out defendant's statement of defence so far as it sets up want of notice of action. These motions came before the Local Judge (Barron, Co. J., of Perth) who gave the following judgment:—"The libel complained of was contained in a newspaper. The defendants inserted it as an advertisement; but they are not the publishers or proprietors of the paper, nor have they any connection with it in any way; nevertheless it is said, because the libel is contained in a newspaper, the defendants are entitled to an order for security for costs, and to notice of action. This may be the technical reading of the statute, but the intention of the statute, in my opinion, 'is to protect newspapers reasonably well conducted, with a view to the information of the public.' (Boyd, C., *Bennett* v. *Empire*, 26 P. R. at p. 69.) This intention is not aided by passing on the benefits of the statute to those who have nothing whatever to do with newspapers. The construction I am asked to place upon the statute would produce this anomaly: that a defendant libelled (e. g.) by postal letter is refused benefit of security while if the same 'is contained in a newspaper' he must get it. For the same reason the want of notice is no defence to the action."

Plaintiff's motion for security, dismissed with costs. Defendants' motion to strike out plaintiff's defence as to want of notice granted with costs.

G. G. McPherson, for plaintiff. *Panton*, for defendant.

COUNTY COURTS.

COUNTY OF YORK.

REG. *v.* MCLEAN.

Liquor License Act—Intoxicating liquors—Percentage of alcohol—Police magistrate—Territorial jurisdiction.

Held, following the analogy of *Reg.* v. *Wotten*, 34 C. L. J. 746, that diluted lager beer, shewing on analysis 2.05% of alcohol, is an intoxicating liquor within the prohibition of the Liquor License Act.

Held, that the Police Magistrate for Toronto Junction had jurisdiction to take the information and adjudicate upon the case while sitting in the City of Toronto, the offence having been committed in the Village of Woodbridge within the County of York.

[TORONTO, Feb 15, 1899.—MCDOUGALL, CO. J.

This was an appeal by the Crown from an order made by P. Ellis, Esq., Police Magistrate for the Town of Toronto Junction, dismissing an information laid against the defendant charging him with selling liquor without a license at the Village of Woodbridge, in the County of York, on

the 19th October, 1898. The order of dismissal bears date January 6th, 1899. The County Crown Attorney filed the fiat of the Attorney-General to prosecute this appeal.

Du Vernet, for the defendant, took a preliminary objection to the validity of the proceedings, on the ground that they were coram non judice, because Mr. Ellis, as he contended, had no jurisdiction to institute or adjudicate upon the case sitting in the City of Toronto, for the following reasons:

1. Mr. Ellis is Police Magistrate for the Town of Toronto Junction only. The offence, if any, was committed at Woodbridge, a place outside of the territorial limits fixed by his commission as police magistrate.

2. The information was sworn before Mr. Ellis in the City of Toronto, the city having a police magistrate of its own, and the summons issued thereon directed the defendant to attend for trial before him at the Court House in the City of Toronto. The defendant was a resident of the City of Toronto, the sale of liquor complained of being made by him at the Woodbridge Fair at some booth or stall temporarily conducted by him. The information is the complaint of J. M. Pearen, of the Township of York license inspector, and is taken before "The undersigned Police Magistrate in and for the Town of Toronto Junction, and one of Her Majesty's justices of the peace in and for the said County of York," and the jurat reads: "Taken before me the day and year first above mentioned at the City of Toronto. (Sgd.) P. ELLIS, Police Magistrate."

Raney, for the Crown, contra.

MCDOUGALL, Co. J.: I cannot do better than refer to the decisions dealing with the nature and extent of the powers and jurisdiction of police magistrates. In 1884 *Reg.* v. *Riley*, 12 P.R. 98, decided that a justice of the peace whose commission appointed him a justice of the peace for the County of Brant, and not excluding the City of Brantford, had power as a magistrate, while sitting in the County, to adjudicate upon any case arising in the County while sitting in the City of Brantford, notwithstanding such city had a police magistrate. Further, the opinion was expressed that if an offence was committed in the County, and the offender was found in the City, although this was a case in which the City Police Magistrate could properly act, but was not bound to do so, yet that the Justice of the Peace for the County might act in such a case and sit in the City, if he desired to do so.

In March, 1887, the Queen's Bench Divisional Court, in *Reg.* v. *Young*, 13 O.R. 198, decided, Armour dissenting, that a police magistrate appointed for the County of Lanark had no jurisdiction to act as such in a town included within the limits of the County, even if such town had no police magistrate of its own. This was the construction placed upon section 103 of the Temperance Act of 1878, which directed the prosecution, if an offence was committed in any County, City or Town having a police magistrate, to be before such police magistrate, or in his absence before

the n r or any two justices of the peace; but if the offence was committed in any city or town not having a police magistrate, then before the mayor thereof or before any two justices of the peace. The majority of the Court held that the commission to a police magistrate, constituting him Police Magistrate for the County, did not, without including the towns by name, extend his authority to towns in the County, even if such towns had no police magistrates of their own at the time. This decision was followed in *Reg.* v. *Bradford*, 13 O.R. 135, by Mr. Justice O'Conner, who was one of the judges forming the majority of the Court which decided *Reg.* v. *Young*. The case of *Reg.* v. *Young*, however, was not followed in May, 1888, in the Queen's Bench Divisional Court, Armour, C.J., who dissented in *Reg.* v. *Young*, adhering to his earlier view and stating that the late Chief Justice Wilson had authorized him to say that he had become convinced that the opinion he (the Chief Justice) had formed in *Reg.* v. *Young* was wrong, and that the dissenting judgment was right. Falconbridge and Street, JJ., concurred with Armour, C.J., so that the Queen's Bench Division may be said to have reversed their earlier decision. In *Reg.* v. *Orr*, 16 O.R. 1, the Chief Justice went further, and held that if a police magistrate were appointed for a County, and another police magistrate for a town within the County, an offence committed in the town could be adjudicated upon by either police magistrate, but that the Town Police Magistrate, so long as there was a Police Magistrate for the County, could only act within the territorial limits of the town, while the County Police Magistrate could exercise his jurisdiction anywhere in the County, including the town.

In 1887 the Common Pleas Division in *Reg.* v. *Lee*, 15 O.R. 353, held that a police magistrate whose commission was for the County of Brant, excluding the City of Brantford, could institute and try an offence committed anywhere in the County outside of the City of Brantford sitting in the City of Brantford, although that city, like Toronto, had its own police magistrate. In 1891, in *Reg.* v. *Gulley*, 21 O.R. 219, it was held that a Police Magistrate for a City could try in the City an offence committed in the County, and that in so acting, in a case under the Liquor License Act, he was, by virtue of his office of police magistrate, expressly qualified by s. 21 of the Police Magistrates' Act (now s. 30), "To do alone whatever is authorized by any statute in force in this province relating to matters within the legislative authority of the Legislature of the Province to be done by two or more justices of the peace."

Now, in the present case, Mr. Ellis as a police magistrate could have tried this case at Toronto Junction, not by virtue of his territorial jurisdiction as police magistrate, but by virtue of his being a Justice of the Peace for the County of York ex officio, possessing the power of two justices of the peace. He has power to try a case arising in the County, sitting anywhere in the County, so far as the place of trial is concerned. In my opinion, his jurisdiction to try a County case sitting in the City of

Toronto is equally clear. The only restriction upon his acting in the City of Toronto is that he could not try a case originating in the city except in the illness, absence or at the request of the Police Magistrate for the City. Mr. DuVernet was forced to admit that his objection, to be good, must go to both the institution of the proceedings and the trial of the same. The case of *Reg.* v. *Riley* says that a justice of the peace can deal with a County case sitting in the City. Sec. 27 of the Police Magistrates' Act creates every Police Magistrate ex officio a Justice of the Peace for the County. The County includes the City when united judicially. There is, therefore, no limitation as to place within the County as applied to a Police Magistrate acting in his capacity as a Justice of the Peace with the power of two justices of the peace. There is only limitation as to case, and this is governed by s. 7 of the Police Magistrates' Act, which enacts that no justice of the peace shall admit to bail or discharge the prisoner . . . or otherwise act in any case for a town or city where there is a police magistrate . . . except in the case of the illness, absence or at the request of the police magistrate. I cannot, therefore, sustain the preliminary objection as to Mr. Ellis' lack of jurisdiction.

After the preliminary objection was disposed of, the learned judge went into the merits of the appeal in reference to the question whether the beer was or was not an intoxicating liquor, and he held in accordance with his judgment in *Reg.* v. *Wotten*, 34 C.L.J. 746, that it was so. In the present case the evidence shewed that the liquor in question was diluted lager beer, and that on analysis it yielded an average strength of 2.05 per cent. of absolute alcohol.

DIVISION COURTS.

8TH DIVISION COURT, NORTHUMBERLAND AND DURHAM.

Ketchum, Co. J.] IN RE BONTER *v.* CHAPMAN. [March 2.

Master and servant Act, R.S.O., c. 157—Appeal—Magistrate's power to allow witness fees as part of the costs—A Division Court no power to allow costs of the appeal.

KETCHUM, Co. J.—This is a summary proceeding to enforce payment of a debt in which the Legislature has seen fit to give jurisdiction to a justice of the peace, and he has, by s. 11, power to direct the payment of wages due, not exceeding the sum of $40, with costs. There is nothing that prohibits him from awarding witness fees as part of the costs; the Act R.S.O., c. 95, has not that effect, as it is confined, in its application, to criminal matters. He may allow witnesses fees as part of the costs by analogy to the powers of a judge under the Division Courts Act, in which Act witness

fees are treated and described as costs (see s. 215), and he should be governed by the Division Court tariff in fixing the amount. The Division Court has no power to give costs of the appeal. That Court derives its power, as to such appeals, wholly from the Act respecting master and servant. The appeal is not an action or proceeding within the meaning of ss. 213 or 312 of the Division Courts Act, as those sections relate only to actions and proceedings had or taken under the authority of that Act. There is no express power to deal with the costs of the appeal given to the Court by the Master and servant Act, and the expression "costs awarded" in ss. 18, 23, means costs awarded by the magistrate. Appeal dismissed on the merits, and order of magistrate directed to be enforced by the officers of this Court; no order as to the costs of the appeal.

J. W. Gordon for appellant. *Geo. Drewry* for respondent.

Nova Scotia.

SUPREME COURT.

Full Court.] RE ESTATE OF DANIEL CRONAN. [Jan. 14.

Trustee, appointment of—Discretion of judge on petition—Appointment of relatives—Costs.

The appointment of a fit and proper person to be a new trustee is a matter largely within the discretion of the judge who hears and decides upon the petition, and if, after a full consideration of the circumstances, it does not appear that the discretion has been wrongly exercised, or that the rules governing the making of such appointments have been infringed, the appointment made will not be disturbed.

Per MEAGHER, J., while under the circumstances shown the Court should not set aside the appointment, the appointment of relatives should be avoided wherever another competent party can be had.

D. McNeil for appellants. *H. McInnes* for respondents.

Full Court.] HORSFALL *v.* SUTHERLAND. [Jan. 14.

Coroner acting in place of Sheriff—Rights and liabilities—Held personally liable for taking bond with insufficient sureties—Replevin bond, requirements as to.

The provisions of the Judicature Act as to replevin call for a bond with two sureties.

Held, affirming the judgment of TOWNSHEND, J., and dismissing the

appeal, that defendant, a coroner, acting in the place of the sheriff in a case in which the sheriff was disqualified, who accepted a bond with one surety was personally responsible, neither the plaintiff in replevin nor the surety being at the time possessed of sufficient property to respond the judgment against them on the bond.

Held, that there is no distinction between the liability of a coroner acting in the case where the sheriff is an interested party and that of the sheriff, the coroner being in such cases, at common law, ex officio sheriff, so that not only all the common law but all the statutory liabilities as well as the rights of the office of sheriff attach to him while acting in that capacity.

A. Drysdale, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] PALGRAVE *v.* MCMILLAN. [Jan. 14.

Solicitor and client—Lien for costs—Right of solicitor to be protected as against attaching creditors.

As the result of extensive litigation between M. and the P. Gold Mining Co., in which W. was solicitor for the company, costs became payable by M. to the company under a judgment of the Privy Council. For these costs a judgment was entered up against M., upon which the sum of $1.445.14 was admitted to be due. Subsequently, O. and others, having obtained judgment in this court against the company, obtained an ex parte garnishee order attaching all debts due from M. to the company. After service of the order upon the garnishee, W. served notice upon the garnishee claiming a solicitor's lien on the judgment for costs, and on application by the judgment creditors for an order for payment to them by the garnishee of the amount due by him to the judgment debtor, W. appeared and claimed to have a lien on the judgment for the costs which were thereby recovered by the judgment debtor against the garnishee. He also applied to have an issue stated for trial. The learned judge, who heard the application, having dismissed the claim made by W., and ordered payment by the garnishee to the judgment creditors of the balance due on the judgment, W. appealed.

Held, per MEAGHER, J., TOWNSHEND, J., concurring:

1. That W. had a lien upon the judgment for his costs which the court would protect.

2. The attaching creditor under the garnishee order took no more than the rights of the debtor, and that as, in a contest between solicitor and client, the court would assist the former, under the circumstances shown, equally so must it aid him where the contest was between the solicitor and the person who had succeeded to the rights of the client.

3. Under O. 63, R. 11 the existence of a solicitor's lien for costs was clearly recognized.

4. The burden was upon respondent to show clearly that the lien had been displaced.

5. There was no substantial difference between the solicitor's rights here, in cases where it was proper to protect him, and those of a solicitor in England who had taken no effective proceedings to obtain a charging order under the statute until after the attaching order had been served.

Per RITCHIE, J., dissenting, that in the absence of statute the claim of the solicitor must depend upon the common law, and that as the claim here was a general lien and was not confined to costs incurred in obtaining the judgment the balance due upon which was sought to be attached, there was no authority to support it.

T. J. Wallace for appellant. *C. H. Cahan* for respondent.

Full Court.] SUMNER *v.* THOMPSON. [Jan. 14.

Sale of goods—Option as to place of delivery—Completion of terms by action of one party adopted by other—Usage of trade.

After negotiations by telephone in reference to the sale of a quantity of oats plaintiff wrote defendant as follows: "I confirm sale to you by telephone of 10,000 bushels of Island black oats at 24½ cents per bushel f.o.b. cars at Pictou, or 28 cents delivered at Elmsdale, whichever way you prefer to order them forward, the oats to be bagged in your bags. If you intend to have them go to different stations kindly give me instructions as early as possible."

To this letter defendants replied as follows: "Yours of the 7th inst. to hand, and we now complete purchase and will forward the bags to you at once for the oats, when we hope to be able to instruct you as to where to ship the same." At the trial it was agreed that it was the usage of the trade if oats were to be delivered at a certain point on the railway at a certain price, with an option to the buyer to direct delivery at points either this side or beyond the place of delivery, the freight should be either added or deducted as the case might be. Defendants, through their agents ordered the cars containing oats to different stations on the railway from time to time. Plaintiff complied with their orders prepaying the freight on each car to the place of destination, and sending invoices with a notification that the freight had been prepaid. A large part of the oats was received in this way without objection by defendants or their agent.

Plaintiff having in all his dealings with defendants treated the delivery at Elmsdale as the one adopted by defendants,

Held, affirming the decision of the trial judge that the defendants were bound.

A definite agreement having been arrived at, with an option as to how it was to be performed,

Held, that as soon as one of the parties acted on one of the alternatives and the other, without objection, adopted it, the option was at an end and all the terms complete.

D. McNeil and *W. F. O'Connor* for appellants. *H. A. Lovett* for respondent.

Full Court.] SORETTE *v.* NOVA SCOTIA DEVELOPMENT CO. [Jan. 14.

Railway Company—Contract for construction of line—Conditions as to payment of laborers, certificates as to satisfactory completion of work, etc.—Termination of contract still effective in determining right of parties.

Plaintiffs and the defendant company entered into a contract in writing under which plaintiffs were to do certain work on the defendant's railway. One of the terms of the contract was that, before each payment was due, plaintiffs were to furnish evidence satisfactory to defendant that all laborers employed by plaintiffs on any work being done by them for the defendant had been paid.

Held, 1. Affirming the decision of the trial Judge, that the defendant company was precluded from setting up this condition by measuring the work and materials and paying plaintiffs or their laborers all that the defendant admitted to be due.

2. That plaintiffs, having since paid their men in full, were not precluded from recovering the amount found to be due them.

The agreement contained a provision under which the defendant company was enabled to terminate the contract after five days' notice, in case the plaintiffs, after notice, failed to push the work in a manner satisfactory to the company. The contract having been terminated and the work having been taken by the company into their own hands,

Held, that plaintiffs were entitled to payment for work completed at the time of the termination of the contract, but only where as provided, the work in question had been completed in strict accordance with the plans and specifications and was in every way acceptable and satisfactory to the company's engineer and the engineer of the province.

2. The burden was on plaintiffs of showing that the measurements and quantities allowed for by the company were erroneous.

3. The obtaining of the certificate of the company's engineer was a condition precedent which must be performed to entitle plaintiffs to payment.

4. Notwithstanding the fact that the contract was put an end to by defendant, plaintiffs were still bound by its terms in arriving at a decision as to what was due them.

F. B. Wade, Q.C., for appellant. *W. B. A. Ritchie*, Q.C., and *Corning* for respondent.

Full Court.] GRANGER *v.* O'NEILL. [Jan. 14.

Administratrix—Judgment against for costs not binding upon estate—Citation to close estate—Judgment of probate judge refusing application held a bar to subsequent action by assignee of judgment against administratrix—Words, "creditor of estate," Probate Act, R.S. (5th series) c. 100, s. 57.

An action was brought by the widow and administratrix of A. O'N., claiming damages for trespass to land committed after her husband's death. Judgment was given against the administratrix for costs, and, subsequently, she gave a chattel mortgage to her own solicitor to cover his costs and the fees of administration. Plaintiff, having obtained an assignment of the judgment and of the chattel mortgage, claiming to be a creditor of the estate, obtained a citation from the Judge of probate calling upon the administratrix to show cause why the estate should not be closed or the letters of administration cancelled. On the return of the citation the judge of probate disallowed plaintiff's claim as a charge against the estate and refused to cancel the letters of administration, etc. From this decree there was no appeal.

Plaintiff, subsequently, alleging himself to be a creditor of the estate, commenced an action against the widow and infant children claiming payment of the amount alleged to be due him under the two assignments.

Held, 1. The decree of the judge of probate on the citation to settle the estate, unappealed from, was a bar to the action,

2. Plaintiff was not a creditor of the estate, and the administratrix had no right to interfere with the real estate until the judge of probate had decided that the personal estate was insufficient to pay debts and directed that the real estate should be sold.

Semble, that if the administratrix had paid the costs she might have charged them against the estate in her account, to be allowed or refused by the judge of probate after investigating the circumstances, but that neither her solicitor nor his assignee had any claim against the estate in respect thereof. Also, that in every case commenced by an executor or administrator in which the defendant becomes entitled to costs, judgment ought to be entered against such executor or administrator personally.

T. J. Wallace for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

Full Court.] QUEEN *v.* BIGELOW. [Jan. 14.

Liquor License Act, 1895—Conviction—Want of jurisdiction in Magistrate—Certiorari dismissed for want of affidavit required by s. 117.

The Liquor License Act, 1895, s. 117, enacts that: "In no case instituted for breach of the Liquor License Act, 1886, or any amending Act, or this Act, shall a writ of certiorari issue unless the party applying therefor shall make an affidavit that he did not by himself or his agent, or clerk,

with his knowledge and consent, sell the liquor contrary to law as charged in the information, or commit the offence charged in the information as the case may be. Such affidavit shall negative the charge in the terms used in the information, and shall further negative the commission of the offence by the agent or clerk of the person accused or convicted with his knowledge or consent."

Defendant was convicted of having sold without license, contrary to the statute, a quantity of liquors which were adjudged to be intoxicating within the meaning of the Act. The facts were admitted but it was contended that it was a wholesale transaction and was not illegal because so much of the provisions of the statute as professed to deal with wholesale transactions was ultra vires.

Held, that s. 117 was enacted in relation to writs of certiorari which could be made available to secure the quashing of convictions or other proceedings because of want of jurisdiction in the officer or tribunal making them, and that, in the absence of the affidavit provided for, an order for a writ of certiorari made by a judge at chambers and the application for the writ must be dismissed.

F. T. Congdon for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

New Brunswick.

SUPREME COURT.

Full Court.] MASSEY-HARRIS CO. *v.* STAIRS. [Feb. 11.

Inferior Courts—49 Vict., c. 53—Security for costs—Demand necessary.

Held, that a non-resident plaintiff in an action in an inferior court, under 49 Vict., c. 53, is not required to give security for costs, without demand therefor being made by the defendant.

G. F. Gregory, Q.C., for plaintiff. *F. St. J. Bliss* for defendant.

Full Court.] EX PARTE FLANAGAN. [Feb. 11.

Canada Temperance Act—Jurisdiction of Parish Court Commissioner—Ultra vires of Dominion Parliament.

A Parish Court Commissioner has no jurisdiction to try a prosecution under the Canada Temperance Act, the provisions of that Act purporting to give such jurisdiction being ultra vires of the Dominion Parliament. Rule absolute for certiorari to remove conviction.

R. A. Lawlor in support of rule. *L. A. Currey*, Q.C., contra.

Full Court.] MACPHERSON *v.* MCLEAN. [Feb. 11.

Defendant's costs on demurrer set against plaintiff's judgment in the action.

Ordered that costs taxed to defendant on judgment on demurrer to an equitable plea be set against the damages and costs recovered by plaintiff in the action and deducted therefrom, plaintiff to issue execution for the balance.

C. E. Duffy for plaintiff. *F. St. J. Bliss* for defendant.

Full Court.] EX PARTE MCELROY. [Feb. 11.

Summary conviction—Excessive magistrate's costs—Conviction quashed therefor.

Rule absolute to quash a conviction under the Dominion Summary Convictions Act on the ground that the magistrate's costs were excessive.

F. B. Carvell in support of rule. *G. F. Gregory*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] MARSHALL *v.* MAY. [Feb. 9.

Evidence—Admission of judgment debtor not admissible as between his creditor and third party—Garnishment—County Courts Act, R.S.M., c. 33, s. 266.

Certain money found on the person of one Gaynor on his arrest on a criminal charge was handed by the constable to John Macdonald, the Deputy Clerk of the Crown, when H. E. May, who had a claim against Gaynor, obtained an assignment of part of the money for his claim. He then sued Gaynor in the County Court and issued a garnishee order attaching the money in Macdonald's hands. The latter then paid the money into court, and May, on obtaining judgment, applied for payment out to him. Marshall & Co. intervened, claiming that the money found on Gaynor was their property and also that it was not attachable in the hands of the officer of the Superior Court as it was not a debt due by him to Gaynor. On the trial of an interpleader issue directed by the County Court judge, in which Marshall & Co. were made plaintiffs and May defendant, the only evidence the plaintiffs gave to show that the money in question was theirs was an admission made by Gaynor to that effect after he had given the assignment to defendant.

The County Court judge found in favor of plaintiff and held that the money was not attachable in Macdonald's hands, set aside the garnishee order and directed payment of the money to Marshall & Co.

Held, following *Bertrand* v. *Heaman*, 11 M.R. 205, that the admission of Gaynor was not evidence against his attaching creditor, May; also that Marshall & Co. had no right under s. 266 of the County Courts Act, or otherwise, to apply to set aside the garnishee order as they had not proved any title to the money; and that, as Macdonald had paid the money into the County Court under the order, it must, for the purposes of the interpleader issue, be treated as properly attached.

Andrews for plaintiffs. *Metcalfe* and *Sharpe* for defendant.

Full Court.] BERNHART *v.* MCCUTCHEON. [Feb. 9.

Chattel mortgage—Change of possession—Bills of Sale Act, R.S.M., c. 10, s. 2—Sale of Goods Act, 1896, ss. 4, 18, 33—Sale of unascertained or future goods by description.

Appeal from the County Court of Winnipeg. The defendant in February, 1898, visited the camp of one Ryan, who was then engaged in cutting cordwood on a limit under permit from Government. The defendant and Ryan then made a bargain by which the latter was to deliver about 85 cords of wood on the station grounds at Molson on the C.P.R. at a point indicated by defendant, in payment of a debt due by Ryan to defendant, and if Ryan should deliver a few cords more at that point for defendant, the latter was to take and pay for them. During the following month Ryan hauled out and piled about 85 cords of the wood in the place indicated and notified the defendant thereof. He also hauled out and piled, in different parts of the same station grounds, about 1,500 cords besides. The plaintiff, to whom Ryan was heavily indebted for advances, obtained from him a chattel mortgage dated 7th April, 1898, covering the wood delivered for defendant and a large quantity of other wood piled at the same station. He registered the mortgage in the proper office on the 14th of the same month. A few days after, the defendant went to Molson, accepted the 85 cords in question, and took steps to have it shipped to St. Boniface, where the plaintiff replevied all he could find of it.

Held, 1. Acceptance of the wood by defendant sufficient to satisfy s. 33 of the Sale of Goods Act, 1896, was not a condition precedent to the passing of the property.

Per DUBUC, J., dissenting, that the facts brought the case within Rule 5 of s. 18 of the Sale of Goods Act, 1896, and that there had been a contract for the sale of unascertained or future goods by description, and a sufficient appropriation afterwards made by Ryan, of goods of that description and in a deliverable shape with the assent of the buyer to pass the property as soon as delivered at the station grounds: and that such was the result notwithstanding the value exceeded $50 and the bargain was a verbal one, as s. 4 of the Act only provides that such a contract shall not be enforceable by action and replaces s. 17 of the Statute of Frauds.

Per KILLAM, J., dissenting, that the facts, although showing an immediate delivery by Ryan to defendant within the meaning of s. 2 of the Bills of Sale Act, R.S.M., c. 10, did not warrant the conclusion that there had been the actual change of possession necessary to satisfy that statute, which must be such a change of posesssion as is open and reasonably sufficient to afford public notice thereof, as expressly provided in the corresponding Ontario Act, and therefore that the plaintiff's chattel mortgage was entitled to prevail over defendant's title.

Culver, Q.C., and *Dubuc* for plaintiff. *Howell*, Q.C., and *Mathers* for defendant.

Full Court.] FOSTER *v.* LANSDOWNE. [Feb. 9.

Municipality—Negligence in exercising statutory powers—Right of action—Arbitration—Municipal Act, s. 665.

Appeal from the decision of a County Court giving the plaintiff a verdict for $144 damages in an action against the defendant municipality for injury claimed to have been caused to the plaintiff's land and crops by the negligent and wrongful construction of a ditch by the corporation, in consequence of which water, diverted from its natural course and collected in the ditch, overflowed upon the plaintiff's land. The principal ground relied on for the defendants was that the plaintiff could not recover by action, but must avail himself of the provisions of the Municipal Act s. 665, to obtain relief.

Held, following *Geddis* v. *The Proprietors of the Bann Reservoir*, 3 A.C. 430; *Queen* v. *Selby Dam Drainage Commissioners* (1892) 1 Q.B. 348; *The Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93; and *Atcheson* v. *Portage la Prairie*, 9 M.R. 192, that an action will lie against a corporation for doing what the Legislature has authorized, if it be done negligently so as to cause damage to the plaintiff, the recovery by arbitration being confined to any damages necessarily resulting from the exercise of such powers; and it makes no difference that the corporation exercised proper care in the selection of its servants and agents, if they acted within the scope of their employment. *Raleigh* v. *Williams* (1893) A.C. 540, distinguished.

The ditch in question had been constructed under a by-law simply authorizing the expenditure of money upon it.

Held, that such a by-law could not make lawful an act causing damage by flooding private lands.

Metcalfe and *E. E. Sharpe* for plaintiff. *Perdue* and *James* for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.] CENTRE STAR *v.* IRON MASK. [Dec. 24, 1898.

Mineral Act, C.S.B.C., 1888, c. 82, ss. 77 and 82—Right to follow vein—Practice—Injunction—Order for inspection—Rule 514.

Appeals argued together from orders continuing injunctions until trial, and from orders refusing inspection of property in dispute. The Centre Star Company, under C.S.B.C. 1888, c. 82, s. 77, which gives the owner of a vein or lode, whose apex lies upon the surface of his location, the right to follow it within the lands of others, was mining in adjoining lands owned by the Iron Mask Company, which Company obtained two injunctions restraining the Centre Star Company from proceeding with its workings at two different points, pending the trial of the action. Subsequent to the injunction orders the Centre Star Company applied for inspection, and for leave to do experimental work, which was refused. On appeal the Centre Star Company asked that the injunction orders be modified so as to allow experimental, or development work to be done, in order to obtain a knowledge of the character and identity of the veins for use at the trial.

Held, MARTIN, J., dissenting, dismissing the appeal, that it should be left to the Judge at the trial to say whether or not actual work should be done for the purpose of elucidating any particular point with regard to the issues raised.

Davis, Q.C., and *Galt*, for appellant. *Bodwell* and *A. H. MacNeill*, for respondent.

Irving, J.] IN RE SPINKS TRUSTS. [Jan. 31

Trustees and Executors Act, R.S.B.C., 1897, c. 187, s. 59—One of trustees outside jurisdiction—Vesting order—Service of petition for.

Petition under s. 39 of the Trustees and Executors Act for a vesting order. The petition showed that the testatrix, who died in September, 1892, had by her will appointed her brother, resident in England, and the petitioner (her brother-in law) her executors, and after bequeathing certain specific and pecuniary legacies, had devised and bequeathed the residue of her real and personal estate to her executors upon trust, to sell and convert the same as therein mentioned. The will was duly proved in 1892, by the petitioner, power to prove being reserved for the other executor who has never proved, renounced probate, disclaimed, nor acted in any way in the execution of the trusts.

Held, that where one trustee is resident out of the jurisdiction the Court will not vest the estate in the trustees within the jurisdiction on the ground that it will not reduce their number. A petition to vest the trust estate in certain trustees within the jurisdiction ought to be served on the absent trustee.

Wilson, Q.C., for petitioner.

Full Court.] PENDER *v.* WAR EAGLE: EX PARTE JONES. [March 11.

Court stenographer—Person undertaking to act as such—Estoppel—Whether bound to furnish copy of notes—Fees payable to.

Appeal from an order of DRAKE, J., refusing to compel one C. F. Jones to deliver a transcript of his notes, taken at the trial of the action. The action, which was one for damages against the War Eagle Consolidated Mining and Development Company, Limited, was tried at Rossland in October, 1898, and judgment was entered against the plaintiff, who desired to appeal, but was unable to obtain the extension of the shorthand notes of the evidences taken at the trial by C. F. Jones, who acted as Court stenographer. On 13th September, 1898, Jones by letter from the Attorney-General's Department was instructed to go from Victoria to Nelson, and act as Court stenographer at the Assizes; and in the letter it was provided, "and your remuneration will be fixed after your return." He was never appointed as provided by sections 63-71 of the Supreme Court Act, R.S.B.C., 1897, c. 56. Jones proceeded to Nelson, and thence to Rossland, and acted as Court stenographer during the Assizes at both places, *Pender* v. *War Eagle* being one of the cases reported by him at the latter place. On his return to Victoria he presented to the Attorney-General's Department an account for his services as stenographer at $8.00 per day for the time he was absent from Victoria, and $10.00 for the first day, claiming that under an Order-in-Council of 13th May, 1891, those were the fees he was entitled to. The Attorney-General refused to vouch the account, and claimed that by his letter of 13th September he was to fix the fees. Jones thereupon refused to deliver up his notes of evidence, claiming a lien on them. The plaintiff was willing to pay the transcript fees for a copy of the evidence; and on being refused a copy applied to DRAKE, J., on 22nd February, for an order compelling Jones to deliver a transcript of his notes. The application was refused, and he then appealed to the Full Court before WALKEM, IRVING and MARTIN, JJ.

The Court allowed the appeal, holding that a person who undertakes to act as Court stenographer cannot refuse to furnish parties to a suit with a transcript of his notes merely because his fees have not been paid by the Crown.

Martin, *Attorney-General*, for appellant. *G. A. S. Potts*, for Jones.

Obituary.

Alexander Leith, Q.C.

To many members of the profession the notice of the death in England on the 17th of February last, of Mr. Alexander Leith, Q.C., at the age of 76, will leave little impression, while a considerable but decreasing number of both Bench and Bar will experience a feeling of genuine sorrow at the passing away of a very worthy man and good lawyer. Born in England, he was educated partly there and at the University of Heidelberg, one of his college companions at the University being the late Lord Hannen. Originally intended for the army, having actually received a commission, we believe in the 9th Regiment which he never joined, he changed his mind and came to Canada in the early forties. In 1848 he was admitted as an attorney and was called to the Bar in 1849. For nearly forty years he practised his profession in Toronto, at one time as a member of the firm of Read, Leith & Read, having one of the largest businesses in that place. In all ways a sound lawyer, his knowledge of the law of real property probably exceeded that of any of his contemporaries. While in practice, he published several works on his favorite subject, including the 2nd volume of Blackstone's Commentaries adapted to the law of this Province, a Canadian edition of Williams on Real Property, and a work on the Real Property Statutes. During the latter part of his professional career he largely devoted himself to counsel business in that branch of the law with which he was most familiar. For some years he acted as Law Clerk to the Legislative Assembly, where his knowledge of law and accuracy of expression strongly marked the legislation during his term of office. He was also at one time lecturer on the law of real property in the Law School, Osgoode Hall, and for some time filled the office of President of the School. Some ten years ago, after a residence of nearly fifty years in this country, he returned to England and made his home there, returning now and then to Canada, and once visiting India. Kindly and courteous in disposition and manner, and retaining, among many characteristics of an English gentleman, a fondness for a horse, a gun and a dog, he was a good representative of a type of professional man now fast passing away in this country.

Flotsam and Jetsam.

Horace Greeley—he used to tell the story himself—once sent a claim to a western attorney for collection, the attorney to keep half the amount for his fee. After a time Mr. Greeley received the following note from the lawyer:

"Dear sir: I have succeeded in collecting *my half* of the claim. The balance is hopeless."