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APPEALS FROM COUNTY COURTS. (ONTARIO.)

Section 52 of The County Courts Act gives a right of appeal to a Divisional Court of the High Court of Justice in three classes of cases :—

1. " From every decision made by a Judge of a County Court under any of the powers conferred upon him by any rules of Court or any statute, unless provision is therein made to the contrary ; and "

2. " From every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees ; and "

3. " From every decision or order made in any cause or matter disposing of any right or claim."

The section is limited in its operation by this concluding proviso — " provided always that the decision or order is in its nature final and not merely interlocutory." The proviso applies to all of the three classes of cases : *Baby* v. *Ross*, 14 P.R. 440.

In some instances there is difficulty in determining whether or not an appeal will lie from a particular order or decision, from which an appeal is desired, inasmuch as there has not in any of the decided cases been formulated any test which will apply to determine whether an order or decision within the section is " in its nature final " or " merely interlocutory."

The test applied under the English Rules governing the time for appealing from final and interlocutory orders will not apply under the proviso ; the language of the proviso precludes the application to it of that test : *Bank of Minnesota* v. *Page*, 14 A.R. 347.

The language of the proviso indicates that the test to be applied under it must bear upon the character of the subject matter adjudicated upon, whereas the test under the English Rules relates not to the nature of the order, but to the position it occupies in its relation to the action as a whole : *Salaman* v. *Warner*, L.R. (1891) 1 Q.B. 734.

The word "final" as ordinarily employed has a dual meaning; it means "decisive" and "the last." Usually the word denotes both character and position; but in the proviso the context confines it to the one meaning "decisive" in which sense, being applied to a decision or order, it must have reference to the character of the subject matter adjudicated upon.

The word "interlocutory," on the other hand, as ordinarily employed has a single meaning, i.e., "intermediate." Usually it denotes position or relation only, and therefore an interlocutory order may be "in its nature final." This use of the word is common; a striking instance is found in the judgment of Mr. Justice Osler in *Fately* v. *Merchants' Despatch Co'y*, 12 A.R. 640, in which case, when discussing the question whether an order directing the delivery out of Court of a bond for cancellation, which had been given as security for costs, was an interlocutory order under sec. 53 of the then Judicature Act, he said at p. 653, "It is admittedly, though final in its nature, an interlocutory order."

Every order which occurs in practice embodies a decision on some point or other and is decisive as regards that particular point, and in this strict sense no order can be said to be interlocutory and nothing more, or "merely interlocutory," and if, in the construction of the proviso, this strict sense of the words was to be adhered to, every decision or order within the section would be appealable, and the proviso would be nugatory.

Manifestly such could not have been the intention of the Legislature, and a consideration of the object of the section will aid in determining what the real intention was, and what meaning is to be attached to the controlling proviso.

Apart from statutory provision there could be no appeal, and the plan of the section is, first to confer a right of appeal from every decision or order within any of the three classes, then by the proviso to limit that right to those decisions and orders which answer the description in the proviso contained. The effect is that those orders and decisions which do not answer the description are without the statute and are consequently not appealable. It was thought by the Legislature that the matters included in the section were of sufficient general importance to warrant a right of appeal being given to a Superior Court from decisions in the County Court affecting such matters, and it is conceived that the Legislature had in mind, in enacting the proviso, the relative importance

and unimportance of the subject matters covered by the decisions, from which it was intended to confer or exclude the right of appeal, and that it was intended to give the right of appeal respecting the relatively important matters and to exclude it respecting the relatively unimportant matters.

Having regard then to the ordinary significations of the phrases "final in nature" and "merely interlocutory" and to the intention of the Legislature, it is submitted that an order within the section which embodies a decision on a matter of substantial right in controversy between the parties and which concludes those parties respecting such matter in the tribunal pronouncing the decision, though it be interlocutory in relation, is an order "final in its nature and not merely interlocutory," and is, therefore, appealable.

An order within the section which is final in the dual sense of that word is, no doubt, appealable, and, it is submitted, the only orders within the section which are not appealable are those which, being made intermediate between the initial and final process, do not embody decisions on matters of substantial right.

The following references may be profitably consulted:—*Whiting* v. *Hovey*, 12 A.R. 119, per Patterson, J.A. at p. 125; *Hately* v. *Merchants' Despatch Co'y*, 12 A.R. 640, per Patterson, J.A., at p. 649; *McPherson* v. *Wilson*, 13 A.R. 339; *Weaver* v. *Sawyer*, 16 A.R. 422-428; *Island* v. *Tp. Amaranth*, 16 P.R. 3; *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Company*, 19 S.C.R. 434, per Patterson J. at p. 439, et seq.

Toronto. J. E. IRVING.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COVENANT — TIED PUBLIC HOUSE — MORTGAGOR — MORTGAGEE— ASSIGNS — UNDERLESSEE WHEN BOUND BY RESTRICTIVE COVENANT—NOTICE - FIRM, COVENANT FOR BENEFIT OF.

In *John Brothers* v. *Holmes* (1900) 1 Ch. 188, the plaintiffs sued to restrain the defendant from selling beer, etc. on certain premises other than such as should have been supplied by the plaintiffs The premises in question were leasehold, and were subject to two mortgages. The plaintiffs claimed as assignees of the second mortgage which contained a covenant binding the mortgagor to sell only beer, etc. supplied by the mortgagee's firm of "John Brothers." The covenant was made with the members of the firm, their executors, administrators and assgns, and purported to bind the public hou se on the premises to John Brothers for the entire supply of beer so long as the mortgagor, his executors, administrators or assigns should be in possession of the premises. The plaintiffs besides being assigns of the second mortgage and the covenant, were also assigns of the business of "John Brothers." The defendant claimed under an underlease made by the mortgagor when in possession to which first mortgagee was also a party, and though he had taken with no. of the restrictive covenant on which the plaintiffs relied he claimed that he was not bound by it, as he derived title from the first mortgagee, and further that as an underlessee, he was not an "assign" of the covenantor within the meaning of the covenant. Kekewich, J. was of opinion that the plaintiffs were entitled to succeed, holding that the covenant though made with the individual partners was intended for the benefit of the business of the firm, and that the plaintiffs as assignees of the mortgage and business were entitled to enforce it. He also considered that as the Conveyancing Act, 1881, s. 18, expressly empowers a mortgagor in possession to make a valid lease as against every incumbrancer, the defendant must be considered to be in under the title conferred by the mortgagor, and could not escape liability under the covenant as lessee of the first mortgagee, and that the covenant was wide enough to bind all persons claiming under the mortgagor. Sec. 18 of the Convey-

ancing Act, 1881 does not seem to have been adopted in Ontario, and it is therefore possible that under the same circumstances a different conclusion might be reached in Ontario as to the right to set up the title derived from the first mortgagee.

ADMINISTRATION—TRUSTEE CARRYING ON TRUST BUSINESS—TORT OF TRUSTEE —DAMAGES—TRUSTEE, RIGHT OF, TO INDEMNITY—SUBROGATION

In re Raybould, Raybould v. *Turner* (1900) 1 Ch. 199, discusses the right of a person who has recovered damages against a trustee for a tort involuntarily committed in carrying on a trust business, to have such damages paid out of the trust estate. The facts were that the trustee was carrying on his testator's colliery business for the benefit of the estate, and, in so doing, let down the surface of the land, and thereby injured the buildings on the adjoining land of a third party, for which the latter recovered a judgment for damages against the trustee. The plaintiff in that action now applied to be paid the amount of his judgment out of the testator's estate which was in course of administration. Byrne, J., held that he was entitled to be so paid, on the ground that the trustee himself had a right to indemnity out of the trust estate, the damages in question having arisen without any reckless or improper working of the mine on the trustee's part, and that the claimant should therefore be subrogated to the trustee's rights against the testator's estate.

HUSBAND AND WIFE—TORT OF MARRIED WOMAN—HUSBAND, LIABILITY OF, FOR TORT OF WIFE.

Earle v. *Kingscote* (1900) 1 Ch. 203, is probably not an authority in Ontario to its fullest extent, having regard to the provisions of R.S.O. c. 163, s. 17, but is nevertheless useful, as showing what is the common law liability of a husband for his wife's torts. In this case, the plaintiff sued both husband and wife for damages for fraud committed by the wife under the following circumstances: In July, 1898, the female defendant requested the plaintiff to join her in the purchase of some shares, and requested the plaintiff to raise £2,000 towards the purchase money. This the plaintiff did, and paid it to the female defendant on her representing to the plaintiff that the shares had been purchased. The plaintiff then applied for particulars of the shares, which the female defendant refused to give, and the action was then commenced against the female

defendant alone, and claiming a declaration that the shares were held in trust as to one moiety for the plaintiff, and for an injunction to restrain her dealing with them. In answer to the motion for an injunction, the female defendant filed an affidavit stating that the shares had never in fact been purchased, and the plaintiff thereupon joined the husband and claimed, in the alternative, damages against him for his wife's fraud. It was agreed that the question was to be settled by common law, and was not affected by the English Married Woman's Property Act, and the principal question discussed was whether or not the case was within the exception which at law exonerates both a wife and her husband from liability, where the tort complained of is one directly connected with a contract with the wife, and is the means of effecting it, and parcel of the same transaction. This exception arises from the fact that a married woman is not, nor is her husband, liable upon her contracts, and in order effectually to prevent her being made indirectly so liable, under colour of a wrong: Byrne, J., who tried the action, came to the conclusion that the case was not within the exception, on the ground that the contract was complete before the fraud was committed, and the fraud was therefore not the means of effecting, or bringing about the contract, and he gave judgment against the husband for the amount claimed. In Ontario a husband's liability for his wife's tort is in any case (where the marriage has taken place on or after 1st July, 1884) limited to the property of the wife received by him, less any payments in respect of contracts or torts of the wife: see R.S.O. c. 163, s. 17; but as to marriages before that date the husband's liability continues as at common law, and it would be only in that class of cases that the present decision would be applicable.

STOCKBROKER — DEATH OF PRINCIPAL — CONTINUING ACCOUNT BY BROKER, AFTER PRINCIPAL'S DEATH.

In re Overweg, Haas v. *Durant* (1900) 1 Ch. 209, the facts were simple: The plaintiff was a stockbroker who had been employed by one Overweg, and had on 9th March, 1898, on Overweg's instructions, carried over for him, according to the rules of the Stock Exchange, a large number of shares, to be paid for on the 30th of that month. On 24th March, 1898, Overweg died, and the plaintiff was informed of the fact on the following day, and he then endeavoured to obtain instructions from Overweg's

representatives as to what was to be done with the stocks; and not receiving any instructions, he, on 28th March, 1898, entered into fresh carrying over contracts for the stocks for the next settling day. On 29th April, in consequence of learning that Overweg's estate was insolvent, he at once sold the stocks at a loss, the result of the transactions being that he brought in Overweg in debt to him for £383 12s. 3d., for which he claimed to recover as a creditor against his estate. It was not denied that the plaintiff had acted as he thought best for the estate; but it was held by Byrne, J., that by the death of Overweg the plaintiff's authority was revoked, and that the subsequent continuation of the account was unauthorized, and that, though Overweg's estate would have been liable for any loss sustained by a sale of the stocks in open market on the plaintiff becoming aware of his death, his estate was not liable for any loss arising on the new contracts subsequently entered into by the plaintiff, as such continuation is in law a sale and repurchase; and as the personal representative elected to stand by the contract made on the 28th March, and repudiated the subsequent repurchase, the plaintiff could not recover, and his action was accordingly dismissed with costs.

MORTGAGE—"CLOG ON REDEMPTION"—TIED PUBLIC-HOUSE.

Rice v. *Noakes* (1900) 1 Ch. 213, is another case touching the effect of a contract by a mortgagee for a collateral advantage, in which the recent cases of *Biggs* v. *Hoddinott* (1898) 2 Ch. 307, and *Santley* v. *Wilde* (1899) 2 Ch. 474 (noted respectively ante, vol. 34, p. 773, and vol. 35, p. 486), are distinguished. In this case the mortgage was of a leasehold public-house, and contained a covenant binding the mortgagor to purchase all beer, &c., sold on the premises from the mortgagees. The mortgagor claimed to redeem the premises, and insisted on a reconveyance, together with a release of the covenant. The defendants objected to release the covenant; but Cozens-Hardy, J., was clearly of opinion that the covenant, though valid during the continuance of the security, could not be maintained after all moneys secured by the mortgage had been paid, on the principle that, on redemption, the mortgagor is entitled to have all securities held by the mortgagee delivered up.

CONTRACT—ACCEPTANCE OF OFFER BY POST—WITHDRAWAL OF OFFER BEFORE ACCEPTANCE.

In re London & Northern Bank (1900) 1 Ch. 220, is upon the point, whether an offer to accept an allotment of shares had been validly withdrawn, before the posting of an acceptance of the offer. The question turned on the fact when the acceptance was posted. By the rules of the Post Office, postmen are not authorized to accept letters to be posted, and it appeared by the evidence that the letter of acceptance had been delivered to a postman to be posted about 7 a.m.; but the envelope containing it was impressed with a stamp indicating that it had been posted at a district post office, and from thence taken to the general post office, from which it was sent at 11 30 a.m. The letter of withdrawal was received at about 9.30 a.m. On the evidence Cozens-Hardy, J., came to the conclusion that as the letter of acceptance had been improperly delivered to a postman, who was not the agent of the Post Office for that purpose, the plaintiff had failed to show that it had properly reached the Post Office before the receipt of the letter of withdrawal, and, therefore, that the latter was valid.

ADMINISTRATION—TRUST DEED—TRUSTEE, MISCONDUCT OF—ACCOUNT AGAINST TRUSTEE, WHEN REFUSED—RULE 772—(ONT. RULE 954).

In *Campbell* v. *Gillespie* (1900) 1 Ch. 225, the Court, in the exercise of its discretion under Rule 772, (see Ont. Rule 954), refused a general account against a trustee. The facts were as follows: In 1887 one Campbell, an insolvent trader, assigned his business to the defendant for the benefit of his creditors, with an ultimate trust for himself. In 1893 Campbell assigned his interest under the deed to his wife, the plaintiff, for her separate use. In 1896 the defendant re-assigned the business to the plaintiff. On this occasion some investigation of the trust account was made by the plaintiff, but no detailed account was required by, or rendered to her. In 1898 the defendant destroyed all the books of account connected with the trust under the honest belief that they were no longer required. In October, 1898, after the books had been destroyed, the present action was commenced against the defendant, who was charged therein with fraud and misconduct, and an account was claimed against him from 1887 to 1896 on the footing of wilful neglect and default. The defendant denied the charges of fraud and misconduct, but admitted three specific items

in respect of which he was chargeable. At the trial the charges of fraud and misconduct were not established; and under these circumstances Cozen-Hardy, J., considered that relief should be given only in respect of the three specific items admitted, and that the general account from the beginning of the trust should be refused.

VENDOR AND PURCHASER—CONDITIONS OF SALE—OUTGOINGS.

Barsht v. *Tagg* (1900) 1 Ch. 231, was an action by a purchaser for specific performance of a contract for the sale of lands, and the sole question was one as to the liability for certain outgoings which had arisen after the date fixed for completion. The contract was made in July, 1898, the time fixed for completion being 11th August, 1898. The conditions of sale provided that, in case of delay in completion from any cause, the vendor should have the option of receiving either interest on the purchase money, or the rents and profits up to the date of actual completion. Owing to the plaintiff's fault, he was not ready to complete until February, 1899. In November, 1898, the defendant had paid certain outgoings for the abatement of a nuisance on the premises, and he elected to retain the rents and profits. The plaintiff contended that, inasmuch as he elected to retain the rents and profits, he was also thereout bound to discharge the outgoings in question, whereas the defendant refused to complete, except on the terms of the plaintiff paying his purchase money, and the amount of the outgoings so paid by the defendant. Cozens-Hardy, J., held that under the conditions of sale the defendant's option to retain the rents and profits in lieu of interest did not involve any liability on his part to assume the payment of the outgoings which, prima facie, the plaintiff was bound to pay.

WILL—ABSOLUTE GIFT—JOINT TENANTS—SECRET TRUST COMMUNICATED TO ONE OF TWO JOINT TENANTS—NOTICE.

In re Stead, Witham v. *Andrew* (1900) 1 Ch. 237, is a case which turns on the effect of a secret trust in respect of property bequeathed to two persons as joint tenants, but which trust was communicated to one of them only, the other having no notice thereof. Farwell, J., held that under the circumstances of this case the trust was binding only on the legatee to whom it was communicated, and not on the other, who was entitled to take the

bequest beneficially for her own use. He points out that the cases have established a distinction between those cases where the will is made on the faith of an antecedent promise by one of the joint tenants that he will carry out the wishes of the testator, and those cases in which a will is left unrevoked on the faith of a subsequent promise by one of the joint tenants to execute a secret trust. In the former case the trust binds both joint tenants. In the latter case, only the legatee who is apprised of the trust is bound. He held the present case to come within the second class, because the plaintiff had failed to establish that the will had been made on the faith of the plaintiff executing the alleged trust.

SETTLEMENT — VOLUNTARY, BY LADY JUST OF AGE — FIDUCIARY RELATIONSHIP—INDEPENDENT ADVICE—SOLICITOR, DUTY OF—POWER OF REVOCATION—COSTS.

Powell v. *Powell* (1900) 1 Ch. 243, was an action brought to set aside a voluntary settlement made by the plaintiff, a young lady, who had just attained twenty-one, in favour of her half-brother and sister, and her former guardian. On her coming of age, the defendant, who had been the plaintiff's guardian, presented her with a memorandum, signed by her deceased father, in which he expressed the wish that she should make a statement of her property so as to give her half-brother and sister an equal share, and the plaintiff, in order to give effect to her late father's wishes, was persuaded to execute the settlement in question, which contained no power of revocation, under which she took one-third of the income of the settled fund during the joint lives of herself and the defendant (her former guardian), and the latter the other two-thirds, with alternate limitations of the capital on the death of the defendant (the former guardian) amongst the plaintiff and her half-brother and sister in equal shares. The same solicitor acted for both parties, and he was made a party to the action. Farwell, J., was of the opinion that the settlement could not be supported, as the plaintiff had been induced to make it without independent advice, and on the solicitation of her former guardian, between whom and herself a judiciary relationship had so recently existed. He was also of opinion that a solicitor called upon to advise in such a case cannot properly act for both parties, and that it is his duty to protect the donor as far as possible against himself, and not merely against the personal influence of the

donee, and he does not discharge his duty by simply ascertaining that the donor understands, and wishes to carry out, the transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make, under all the circumstances, and if he is not so satisfied, he should advise his client not to go on with the transaction, and ought not, if he disapproves of it, to assist in carrying it out merely because, if he did not act, some one else might be found who would; and that such gifts should not in any case be made by young persons just come of age without a power of revocation being inserted in the instrument. Because the solicitor had failed in his duty in this respect he was refused his costs.

PRACTICE—NON-SUIT—DISCONTINUANCE—RULES 290-293—(ONT. RULES 430, 431, 543, 1198 (D)).

In *Fox* v. *The Star* (1900) A.C. 19 the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, and Shand,) have affirmed the decision of the Court of Appeal (1898) 1 Q.B. 636 (noted ante, vol. 34, p. 404), to the effect, that a plaintiff cannot now elect to be non-suited; and if he offers no evidence at the trial the defendant is entitled to a verdict and judgment dismissing the action. It is thus settled pretty conclusively that the old common law practice which enabled a plaintiff to accept a non-suit at his election, and bring another action for the same cause is no longer in force.

BY-LAW—WORK EXECUTED IN CONTRAVENTION OF—CONTINUING OFFENCE—BUILDER, LIABILITY OF.

In *Welsh* v. *West Ham* (1900) 1 Q.B. 324, a builder, who had erected for another person a building in contravention of a municipal by-law, was convicted of an offence against the by-law and fined. He was subsequently prosecuted and convicted for a "continuing offence" against the by-law under a statute which provided that, where the execution of a work is an offence in respect whereof the offender is liable, under any by-law, to a penalty, the existence of the work in such form and state as to be in contravention of the by-law shall be deemed to be a continuing offence. It appeared that the builder had no power to go upon the premises, or to remedy the breach complained of. Under these circumstances the Divisional Court (Darling and Channell, JJ.), on appeal from the conviction, held that the builder was not guilty of a "continuing offence" within the meaning of the statute.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Those who read Mr. G. C. Speranza's article on the "Decline of Criminal Jurisprudence in America," in the Popular Science Monthly for February, no doubt found in it a good deal of food for reflection. What he says of the attitude of the profession in the United States towards criminal business is equally true of Canada. Beyond a doubt to-day, the young Canadian lawyer who stands upon the threshold of practice feels that he must eschew the criminal courts if he would attain the good reputation that must be his who ultimately holds the highest rewards of his profession. Consequently, the practice of the most important branch of the law from the view-point of ethics and sociology—a branch of the law wherein hitherto many of the giants of the English Bar have made their paramount fame—is nowadays, in this country, relegated to the shysters and "brilliant-failure" men, with a few notable exceptions which only serve to emphasize the general correctness of our statement. There exists, then, a crying need for reform. But where shall it begin? Mr. Speranza seems to be of the opinion that the initial step might be taken by the law-schools in the direction of a radical scientific reinforcement of their curricula touching the subject; but, while this would undoubtedly be helpful, we think a more thorough amelioration might be achieved if the Legislature would do a prompt something towards bringing the criminal law itself into touch with the scientific advancement of the times, and so make it a province in which only the thoroughly equipped specialist might find emolument and renown. It seems to us that then, and not till then, will the odium populi concerning the criminal lawyer become effaced, and the lawyer who is a 'criminologist' win the respect of an enlightened community.

* * * We know it is the fashion for politicians to minimize the ability of Parliament to make men good citizens; they say its part is only to make it disadvantageous for us to be bad citizens. That is their philosophy of the criminal law; and the pity of it is not so much that it is stupid and ignorant, but that so many wise and

enlightened men hold to it. It is an illustration of the truth demonstrated by experience, that—

"Full often bends.
Current opinion in the false direction,
And then the feelings bind the intellect."

Beccaria long ago taught that the criminal law ought to look to the prevention of crime rather than to its punishment; and prevention means more than making the severity of the law's sanctions a deterrent from crime. It means that an incipient bias to wrongdoing should not, by committal of juveniles to places of promiscuous imprisonment, be hopelessly solidified into the criminaloid mental state. It also means that every accused person shall have the benefit of intelligent discernment between his liability to punishment for a conscious infraction of the law, and his need of proper treatment for mental disease demonstrated by his method of committing the crime, and his abnormal motive, or lack of motive, therefor. It means, in short, a considerable departure from the methods which Herbert Spencer stigmatizes as not only failing to reclaim the malefactor, but which, in many instances, have increased criminality. We seem to have forgotten that education plays a large part in the reformation of the criminal.

* * * But the superficial reformer points to the excellences of our criminal code as compared with the state of the law at the beginning of the century, and airily bids us to fret not at the Law's unavoidable delay, but be thankful for our present great advancement in dealing with the repression of crime. Undoubtedly we have progressed, but that is no reason why we should rest on our oars when so much remains to be done.

* * * Besides this general arraignment of the philosophy of our criminal law, we might present some specific instances wherein we conceive the system to be defective, did space permit. We must content ourselves with the mention of one only at this time. The test of criminal responsibility which our courts are bound to apply is that formulated by the judges in *McNaghten's Case*, 10 Cl. & F. 200, which may be stated thus: the ability of the accused to distinguish right from wrong at the time of the offence. The judges practically say that it being once established that the prisoner's mental disease did not prevent him from knowing that what he was doing was wrong, then all evidence of insanity tending

to destroy his freedom of will does not displace his criminal responsibility. Now, alienists to-day wholly repudiate such a criterion, and say the proper enquiry is, "whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible. As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness, through cerebral defect or disease, to do right, is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows" (Bucknill & Tuke's Psychological Medicine, 4th ed., p. 269). A writer in 12 Criminal Law Magazine, at p. 4, says: "The rule in ***McNaghten's Case*** is attacked because it holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion operating on a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence." We venture to think that a purely artificial test established over fifty years ago should be revised in the light of modern scientific research.

* * * Of course we are aware that this medico-legal dogma, while having been adopted as law in some States of the American Union, has elsewhere been violently oppugned as tending to facilitate pseudo-defences to indictments for crime, and, consequently, to promote escape from legal punishment. But we think that with the exactness of diagnosis now possible to the phsycopathist, the chances of successful deception on the part of the accused are extremely small; and again, no advocate of the scientific test of criminal responsibility suggests that any involuntary malefactor should be allowed to roam the community at large while there are insane asylums humanely open for his reception. Many 'mental irresponsibles' have been murdered by stare decisis in the past; let us assure ourselves, then, that we might properly take some risk on the side of greater humanity for the future.

* * * The initial volume of Dr. T. A. Walker's new "History of the Law of Nations" is not an unqualified success, if it is fairly treated by some of the critics. The most notable thing that one of the 'criticizing elves' finds in the book is a *mot* attributed to

Lord Salisbury, namely: "International Law has not any existence "in the sense in which the term law is usually understood. *It* "*depends generally upon the prejudices of writers of text-books.*" We have not yet been favoured with an opportunity to peruse the volume, and so cannot speak of its real merits.

* * * Another celebrated man of letters who had been bred to the Bar in his youth passed away in February last. Henry Duff Trail, D.C.L., was undoubtedly one of the foremost litterateurs of his time. Besides his volumes on Sterne and Coleridge in the "English Men of Letters" series, he contributed "Shaftesbury" to the "English Worthies" series; "William III." to the "Twelve English Statesmen;" "Strafford" to "English Men of Action," and an estimate of Lord Salisbury to the "Queen's Prime Ministers" series. Other works from his industrious pen are "The New Lucian" and a "Life of Sir John Franklyn." He also edited the valuable collection of sociological essays published under the name of "Social England." Besides this, he did a great deal of journalistic work, and was the editor of "Literature" up to the time of his death. What a splendid content for a span of life of fifty-seven years!

* * * It is the abounding nescience of such literary personages as Mr. Robert Buchanan that disgusts hard-headed lawyers with contemporary belles-lettres. In his "Ethics of Criticism" (which, by the way, is mainly a jealous fling at Rudyard Kipling) in the February number of the Contemporary Review, Mr. Buchanan is not content to successfully wear the bonnet d'âne in remote and innocuous fields, but he must needs, in an acute stage of his excitement, commit a contempt against the dignity of the law. Listen to his screed: "Literature, although itself only a small part of Life, is a much broader and larger part of Life than either Medicine, the Bar or Art. * * * The pursuit of Medicine is very indirectly concerned with the question of Ethics, while the profession of the Law is to a large extent absolutely opposed to the highest Ethical sanctions." Now, while we are pleased with the assurance that Life has more of Literature than Medicine in it, we would respectfully inform the perfervid Mr. Buchanan that when he affirms, with a bravery of capital letters, that "Law is to a large extent absolutely opposed to the highest Ethical sanctions," he is simply talking capital Rot. If our critic knew howsoever

little of Jurisprudence, he would know that positive law is avowedly based on the law of nature. But we will not send him to the law-books. We will refer him to 'pure Literature,' and bid him read in Cicero: "Lex nihil aliud nisi recta et a numine deorum tracta ratio, jubens honesta, prohibens contraria;" or, in the modern pages of Froude: "Our human laws are but copies, more or less imperfect, of the eternal laws, so far as we can read them,"—and thus learn the folly of his declaration so presumptuously made. Mr. Buchanan should not think so ill of the Law; it affords him present protection in the exploitation of his vagaries, and an ultimate harbour of refuge when his strenuous battling with 'chimeras dire' proves too much for even his Homeric nerves.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.] DAVIES *v.* THE QUEEN. [March 2.

Highway—Agreement between Crown and city to maintain same—Negligence—Accident from ice—Liability—Public work—50 & 51 Vict., c. 16, s. 16 (c).

Under an agreement between the City of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an approach to the Sappers' Bridge, such approach having been built by the city and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the said approach was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50 & 51 Vict., c. 16, s. 16 (*c*).

Held, that, even assuming that the sidewalk upon which the suppliant fell was a public work, it not having been established that the duty to keep the sidewalk in repair, or in a safe condition for travel, had been imposed upon some officer or servant of the Crown, who had been negligent while acting within the scope of some duty or employment, the case did not fall within the said enactment, and the petition must be dismissed.

2. In this climate, it is not possible always in winter to have the sidewalks of the highways always in a safe condition to walk upon; and

negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition.

A. E. Fripp, for suppliant. *E. L. Newcombe*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, J.A.] [March 30.

WINDSOR FAIR GROUNDS, &c., ASSOCIATION *v.* HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance—Leave to appeal.

Leave to appeal from an order of a Divisional Court, ante 165, setting aside a third party notice, was refused by a judge of the Court of Appeal in Chambers.

Held, that the Divisional Court had not placed a construction of general application upon the words "or any other relief over" in Rule 209, but had merely decided their bearing upon the facts of this case, which were of a nature not likely to be of common occurrence; there was nothing special in the case beyond the fact that a Divisional Court of three judges had differed from the view of another judge of the High Court and of a local judge; and the amount involved was comparatively small.

Moreover, the decision of the Divisional Court did not deprive the defendants of the benefit of the alleged dealings with the proposed third parties as a defence to the plaintiffs' action, and if the defence should be successful there would be no occasion for seeking relief over.

Semble, that even if leave to appeal were granted, it would not be on technical grounds, but only on the construction of the rule.

F. A. Anglin, for defendants. *Aylesworth*, Q.C., for proposed third parties.

HIGH COURT OF JUSTICE.

Divisional Court.] REEKIE *v.* MCNEIL. [Dec. 18, 1899.

County Courts—Appeal—Inability of courts to extend time limited—Striking out appeal.

The provisions of ss. 55 and 56 of the County Courts Act, limiting the time in which an appeal from the County Court to the Divisional Court must be set down is peremptory and there is no power to dispense with such provisions, or to enlarge the time for setting down the appeal.

Where therefore a judge of a District Court refused to certify the pleadings so as to enable an application set down for the Divisional Court and an order was obtained from a judge to allow such an appeal to be set down, such order was held to be of no avail, and the appeal was struck out.

R. U. Macpherson, for the motion. *Hugh Rose*, contra.

Boyd, C.] BOARDMAN *v.* NORTH WATERLOO INS. CO. [Dec. 28, 1899.

Insurance—Condition—Change material to risk—Non-occupancy.

Whereby a condition in a fire policy on a dwelling house, any change material to risk, etc., should avoid the policy, the fact of the premises being unoccupied and vacant did not constitute a breach of such condition.

Maybee, for plaintiff. *E. F. B. Johnston*, Q.C., and *Reade*, for defendants.

Boyd, C.] SPAHR *v.* NORTH WATERLOO INS. CO. [Dec. 28, 1899.

Insurance—Statutory conditions—Condition requiring occupation of premises —Untenanted—Meaning of.

The conditions in a policy of fire insurance provided that "If the premises insured became untenanted or vacant and so remained for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied."

Where therefore the occupant of a house left it for several weeks, but left furniture and clothing therein, while a person went there to feed the pigs and chickens and water the flowers, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition.

Maybee, Q.C., for plaintiff. *E. F. B. Johnston*, Q.C., and *Reade*, for defendants.

Divisional Court.] NORTHEY MFG. CO. *v.* SANDERS. [Dec. 28, 1899.

Sale of goods—Specific article—Warranty—Parol evidence.

Under a written contract for the sale by description of a specific article, namely a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to show a warranty made prior to the entering into of the contract which is inconsistent with the written warranty as it would be allowing the admission of parol evidence to control, vary, add to or subtract from the written contract; and the statements alleged to have

been made by the vendors, and acted on by the purchaser, were not such as to constitute a separate and independent collateral agreement, and admissible as such.

J. R. Roaf, for plaintiffs. *Mills*, for defendant.

Divisional Court.] [Dec. 29, 1899.

REGINA EX REL. HORAN *v.* EVANS.

Public Schools—Trustee—Residence.

The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son and went to live with his wife and family on a farm owned by his wife, in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family and remaining there over night, while the wife occasionally visited him, staying a couple of weeks, when there was cooking or mending to be done.

Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion so as to qualify him as a trustee of a school section within that township, to which he had been elected; but as the granting of the order for a quo warranto, was in the discretion of the court and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed, but without costs.

Sub sec. 8 of s. 4 of the R.S.O. c. 292, would not of itself prevent the granting of such order.

T. J. Blain, for the relator. *Morphy*, contra.

Ferguson, J.] HAMILTON *v.* NORTHEY MFG. CO. [Dec. 30, 1899.

Sale of goods—Engine—Warranty for return of article.

Where, in a contract for the sale of a gasoline engine and tank, there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and, if such defect could not be remedied, the engine was to be returned to the defendant, and a new engine given in its place.

Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty.

A. S. Bull and *S. G. McKay*, for plaintiff. *J. R. Roaf*, for defendants.

Meredith, C.J.] McCORMICK *v.* COCKBURN. [Jan. 6.

Mortgage—Fraud of solicitor—Liability.

The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of land, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff asked to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, fraudulently procured from the mortgagee an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud.

Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for, the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and he could pass no higher or better title to his assignee.

Staunton, Q.C., for plaintiff. *W. H. Blake*, and *Crerar*, for defendants.

Divisional Court.] ROYAL VICTORIA *v.* RICHARDS. [Jan. 10.

Insurance—Premium payable on presentation of policy—Non-acceptance of policy—Damages.

By an application for a policy of insurance on the defendant's life, he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company, and a policy issued and tendered to the applicant, who refused to accept the same.

Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy.

W. R. Riddell, Q.C., for the Company. No one contra.

Rose, J.] POTTS *v.* POTTS. [Jan. 11.

Insurance—Benefit society—Beneficiary for value—Right in policy.

Under ss. 151 and 160 of the Ontario Insurance Act, R.S.O. c. 203, it is not necessary in the absence of a requirement therefor on the face of the policy to find as a fact whether or not the beneficiary is one for value; but apart from this the evidence showed that the plaintiff, who claimed to be a beneficiary under such a policy, had no claim whatever thereunder.

Waldrum and *Mulbery*, for plaintiff. *Teetzel*, Q.C., and *McClements*, for defendants.

Divisional Court.] REGINA *v.* MCGARRY. [Jan. 15.

Intoxicating liquors—Former conviction—Proof of, by parol.

Under sub-secs. 1 and 2 s. 101 of the Liquor License Act, R.S.O. c. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient. Where, therefore, on a trial before a magistrate, being the same magistrate by whom the defendant had been previously convicted of a like offence, the information alleging such prior conviction, and all that appeared with regard to it was the evidence of the license inspector who proved that the defendant was the person previously convicted. It must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant.

J. M. Godfrey, for defendant. *Langton*, Q.C., contra.

Divisional Court.] MEEK *v.* PARSONS. [Jan 22.

Free Grant and Homestead Act—Sale of land to take effect after patent—Validity of.

Sec. 19 of the Free Grant and Homestead Act, R.S.O. c. 29, which provides that "neither the locatee, nor anyone claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof and where such agreement was entered into it was enforced after the issue of the patent and where all the requisites of s. 8 of the Act had been complied with.

Judgment of MACMAHON J., reversed. FALCONBRIDGE J., dissented.

Aylesworth, Q.C., for plaintiff. *D. E. Thomson*, Q.C., and *Slaght*, for defendant.

Divisional Court.] MORSON *v.* BURNSIDE. [Jan. 30.

Sale of land—Land agent—Commission.

The defendant, knowing that the plaintiff was a land agent, arranged with the plaintiff to procure for him a purchaser for a lot of land of his at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed, the result however was that a lease was entered into of the premises for three years with a collateral agreement giving him the option of purchasing within a year, which he exercises, and purchased the property.

Held, that the plaintiff was entitled to his commission.

Herbert Mowat, for the plaintiff. *R. J. Gibson*, contra.

Divisional Court.] MACGREGOR *v.* SULLY. [Jan. 30.

Apprentice — Articles of apprenticeship — Unreasonable provision — Non-liability.

Articles of apprenticeship which required the apprentice during the term of four years of 310 working days of ten hours each to give and devote to a firm, to who he was apprenticed, ten hours each working day, or such number of hours as might be the regulation of the workshop for the time being, or as special exigencies of the business might require is unreasonable and could not be enforced against the infant; and therefore an action was not maintainable against the defendant, who was security under the articles for the performance of the infant's duties, to recover damages for the breach thereof.

W. R. Riddell, Q.C., for defendant. *Shepley*, Q.C., for plaintiff.

Divisional Court.] [Jan. 31.

GARDNER *v.* CANADA MNFG. & PUBLISHING CO.

Directors—Invalid resolution—Payment of creditors.

By the by-laws of a publishing company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G. were present, one being the president and the other the secretary of the company, a resolution was passed that "The matter of the compensation of 'C.' the editor, and 'G.' the advertising solicitor of the company was considered, and the sum of $1,000 each, ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, in addition to their regular salary, and to be charged to their salary account." 'C.' as a matter of fact had not been appointed editor nor 'G.' advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stock holder, who owned the greater part of the stock, and had made a claim against the company, being paid.

Held, that the resolution could not be sustained, nor could any moneys received under it be retained.

Shepley, Q.C., for the appellants. *Barwick*, contra.

Divisional Court.] [Feb. 2.

REGINA *v.* TORONTO PUBLIC SCHOOL BOARD.

Public Schools—General Sessions of the Peace—Appeal from order of dismissal of—Divisional Court—Offence under by-law—Municipal Act, R.S.O. c. 223, s. 551.

There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint against a city by-law passed under the authority of above statute.

F. E. Hodgins, for the appellants. *J. E. Jones*, contra.

Divisional Court.] WHITELOCK *v.* COOK. [Feb. 8.

Landlord and tenant—Removal of goods before rent due—Illegal distress—Pretended sale by tenant—Right of tenant to set up title to goods—Counterclaim—New trial.

A landlord is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; and the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser.

To the action for the illegal distress in the County Court the defendant counterclaimed for rent due, but such counterclaim not having been tried, the action was remitted back to the County Court to be there dealt with, regard to be had to the finding of the Court as to the rights of the parties.

Bicknell, for plaintiff. *D. E. Thomson*, Q.C., for defendant.

Armour, C. J., Falconbridge, J., Street, J.] [March 8.

BROCKBANK *v.* HOLMES.

Mortgage—Authority of solicitor for mortgagee to receive mortgage money—Execution—Alteration—Evidence—Presumption.

One of the defendants, a widow, agreed to purchase land, and employed a solicitor to act for her in the matter of the purchase. The property was subject to a mortgage for $3,500, which the mortgagee required should be paid, and the solicitor arranged with P. to advance $2,500 of the amount, with the plaintiff to advance $500 upon the interest of the defendants in other lands, and he himself promised to advance the remainder of the sum required, the widow having also a little money of her own. A mortgage from the widow to P. for $2,500 was accordingly executed; also a mortgage from the defendants to the plaintiff for $500; and a mortgage from the widow to the solicitor for $300. All these mortgages and a conveyance from the vendor to the widow were registered by the solicitor, who had previously received from the plaintiff $400 of the amount the plaintiff had agreed to advance, giving a receipt for the amount "for investment Jemima and Christiana Holmes mortgage," and making the affidavit of execution of the mortgage. Shortly afterwards the plaintiff gave the solicitor $90 further of the amount he was advancing, and the solicitor gave him credit for $10 which he owed to the plaintiff. From the time of the completion of the documents the defendants never made any further inquiry as to the matter, and only went to the solicitor to pay him his account for his services and to ask him for the mortgage deed for the $3,500, which they assumed he had paid, and supposed he would have, but

which he told them was held by P. as one of the title deeds. As a matter of fact the solicitor appropriated the $490 to his own use and never paid it to the original mortgagee.

In an action upon the $500 mortgage the defendants denied the making of it, and denied that any money was ever advanced by the plaintiff to them upon it.

Held, affirming the findings of MEREDITH, C.J., the trial judge, that the solicitor had the authority of the defendants to receive from the plaintiff the mortgage money on their behalf for the purpose of applying it in part payment of the $3,500 mortgage.

Held, also, ARMOUR, C.J., dubitante, that the proper conclusion from the evidence was that the plaintiff's name was written in the mortgage at the time of its execution. The instrument on its face bore every indication that the name of the plaintiff was written at the same time as the names of the defendants and the other written portions of it. The positive evidence of the witness who drew it supported the appearance of the document itself, and there was also a presumption, rebuttable of course, in favour of its regularity. The recollection of the solicitor, who was the subscribing witness, was the other way, but he was not positive upon the point. The surrounding circumstances were as consistent with one conclusion as the other, and the benefit of any doubt should be given in favour of the validity rather than of the invalidity of an instrument such as this, regular upon its face, intended by the defendants to be acted upon, acted upon as they intended, and strongly supported.

Holman, Q.C., for the defendants. *S. C. Smoke*, for the plaintiff.

Boyd, C.] YOUNG *v.* DOMINION CONSTRUCTION CO. [March 28

Writ of summons—Substituted service—Foreign corporation—Rules 146, 167.

Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional action is to be followed only when prompt personal service appears by affidavit to be unavailable.

Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons.

And where the plaintiff showed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to show that they could not be easily served at the head office, an order for substituted service was vacated.

A. M. Lewis, for plaintiff. *D'Arcy Tate*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J., at Chambers.] [March 20.

OVERMAN WHEEL CO. *v.* FORBES MFG. CO.

Company—Judgment creditor's right to execution against shareholder of debtor company for unpaid calls—His right of set-off.

The plaintiff company recovered judgment against the defendant company on which execution was issued and returned unsatisfied. The plaintiff company then applied for leave to issue execution against one John Peters, a shareholder of the defendant company for the amount of the unpaid calls on his stock in the company. Peters resisted the application on the ground that he had a set-off against defendant company for a larger amount.

MEAGHER, J.: The defendant's position and the rights of the plaintiffs are well stated by Cockburn, C.J., in *Wyatt* v. *Derwent Valley Railway Company*, 2 C.B.N.S. 110, where during the argument he said: "The judgment creditor has a right to have execution against the shareholder to the extent of his share not paid up. What answer is it for the shareholder to say: The company is indebted to me as well as to you? The one party has a judgment against the company, the other a mere right of set-off." See also Thompson on Stockholders, s. 381. The case of *Ingraw* v. *Bank of P.E.I.*, 13 Sup. C.R. 265, has no application. That was merely an action to recover a debt, and the right to set-off was clear in that case. There was no judgment as here. If Mr. Peters is sued by the company to-morrow for a debt, I take it he would be entitled to set-off the amount he claims to be due him. The plaintiff's application must prevail.

J. A. Chisholm, for plaintiff. *H. Mellish*, for Peters.

Province of New Brunswick.

SUPREME COURT.

Barker, J., in Equity.] CUSHING *v.* MCLEOD. [Jan. 12.

Charter party—Customary despatch—Lay days—Notice of vessel being at berth—Sufficiency—Delivery of cargo—Delay.

By charter party the defendant's ship was to proceed to the port of St. John for lumber for Buenos Ayres, to haul once to loading berth as

might be required by charterer, with privilege to charterer of moving vessel afterwards at own expense. It was provided that cargo was to be furnished at customary despatch; that lay days should commence from the time the vessel was ready to receive cargo and written notice thereof given to the charterer, and that for each day's detention by charterer's default he should forfeit $60 per day to the owner of ship. On arrival of the vessel on the 23rd of August the master was notified by the charterer to proceed to loading berth about 100 yards from where vessel was then lying. On the 28th of August the master mailed a notice to charterer that the vessel was then at loading berth and ready to receive cargo on the 29th. At time notice was sent, the vessel was not at loading berth.

Held, that the vessel should have been at her loading berth ready to receive cargo at the time notice was sent, that the notice was therefore insufficient, and lay days did not commence to run previous to commencement to deliver cargo.

The words "customary despatch" in the above charter have not a recognized meaning at the port of St. John with reference to the loading of lumber for shipment to South American ports. Their meaning must be taken to be that the vessel shall be loaded with the usual despatch of persons engaged in the trade having a cargo ready for loading. Upon the evidence, the Court found the rate to be 35 M. per weather-working day; substantial work, though not amounting to half a day, to count as half a day.

Cargo delivered under the above charter was brought to the loading berth over the Intercolonial Railway, and delivery was delayed by the railway. It was contended by the charterer that, as he had a right to name the load berth, any delay arising from delivery by railway was to be borne by the vessel.

Held, that as the charterer was bound to deliver cargo at the customary despatch of persons having a cargo at the place of loading ready for shipment, delay must be borne by charterer.

W. Pugsley, Q.C., and *A. P. Barnhill*, for plaintiff. *A. A. Stockton*, Q.C., and *C. J. Coster*, for defendant.

En Banc.] DIBBLEE *v.* FRY. [Feb. 9.

Action on limit bond—Striking out pleas—Supreme Court Act, s. 133.

In an action on a limit bond taken in a suit in the City Court of St. John defendants pleaded that said Court did not have jurisdiction, and in said plea set out at length the proceedings in said Court, showing the issue and service on Nov. 16 of a summons returnable on Nov. 17, and that on Nov. 25, without the service of any other process, plaintiff recovered a

judgment against the principal defendant. The magistrate's record, which was set out in said plea, contained this entry; "Thursday, the 24th Nov., having been appointed Thanksgiving Day, was a public holiday, in consequence of which the Court is held on Friday of this week;" and defendant's contention was that Thanksgiving Day, the day for which the cause stood for trial, not being a dies non or legal holiday within the meaning of 52 Vict., c. 27, s. 54, the Court lost jurisdiction over the cause by not taking it up on that day. JUDGE MCLEOD, on application of plaintiff, struck out the plea under s. 133 of the Supreme Court Act. The above section 54 provides that the City Court shall be held . . . . . on Thursday in every week, provided that when Christmas Day, or New Year's Day, or any other legal holiday shall fall upon Thursday, the said Court shall be held on the Friday in such week."

Held, on motion to rescind JUDGE MCLEOD'S order, that the plea was not embarrassing within the meaning of said section, plaintiff's remedy, if the plea were bad, being to demur to it. Order rescinded.

A. A. Wilson, Q.C., for plaintiff. *W. B. Wallace*, Q.C., for defendants.

Barker, J., in Equity.] IN RE THISTLE. [Mar. 27.

Infant's interest in land—Sale to pay for improvements—53 Vict., c. 4, s. 175.

Application under s. 175 of 53 Vict., c. 4, for an order to mortgage or sell lands belonging to infants to pay for improvements to buildings on land made by mother of infants refused, it not being shown that the expenditure was properly and necessarily incurred.

F. A. McCully, for petitioners.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] KNOX *v.* MUNRO. [March 1.

Contract of hiring—Leaving service before expiry of term—Quantum meruit.

Appeal from a County Court.

The plaintiff's claim was for four months' wages at $17 per month. He swore that the hiring was by the month, at $17 per month; but defen-

dant stated that the hiring was for a definite period of eight months for $130, no time having been fixed for payment, and his account was corroborated by a witness who was present when the bargain was made.

Plaintiff left the service of defendant after four months, without defendant's consent, and without any valid reason or excuse.

The County Court Judge held that the minds of the parties had not met as to the terms or duration of the intended contract, and that as the plaintiff had worked four full months, he should be allowed for his work on a quantum meruit.

Held, that even if the plaintiff had misunderstood the legal effect of the bargain he had made, he was still bound by it: *Smith* v. *Hughes*, L.R. 6 Q.B. 597; and that he could not recover anything for his services without fully completing his contract.

Cutter v. *Powell*, 2 Smith's L.C. 1, and *Britain* v. *Rossiter*, 11 Q B.D. 123, followed. Appeal allowed with costs.

J. D. Cameron, Q.C., for plaintiff. *West*, for defendant.

Full Court.] CLOUTIER *v.* GEORGESON. [March 10.

Exemptions — Assignment for creditors — Selection of exemptions by assignee when assignor neglects to make choice — Assignments Act, R.S.M. c. 7, s. 3 — Exemptions Act, R.S.M. c. 53, s. 43.

The plaintiff, a merchant, made an assignment in the usual statutory form of all his stock in trade, and personal property, etc., liable to seizure under execution to the defendant in trust for creditors.

Amongst the chattels in the store were the following: Shelving, drawers and counters valued at $700, a staircase valued at $100, and a number of small machines, a safe, tables, chairs, show cases and other shop furniture valued at $501.10; all of which were set forth in the inventory with the knowledge and consent of plaintiff. All these articles were included in the sale made by defendant by auction at 60 cents on the dollar of the valuations; but, before the sale was completed, the plaintiff's solicitors notified the defendant that the plaintiff claimed the "fixtures" in the shop as not being liable to execution, and the landlord claimed the shelving, drawers and counters. Defendant then abandoned the latter to the landlord and left the staircase on the premises, but received and distributed the purchase money of the other goods including those above mentioned as valued at $501.10.

A considerable time afterwards the plaintiff claimed that these articles were exempt under sub.-s. (*f*) of s. 53 of The Exemptions Act, R.S.M. c. 83, which specifies: "tools . . and necessaries used . . in the practice of his trade, profession or occupation to the value of five hundred dollars," and had not passed by the assignment. He then brought this action to recover their value.

Held, that the assignee had a right to select the exemptions in the absence of a selection by the assignor, and having appropriated only a portion of the property coming under the head of necessaries exempted by the statute, and left over $500 worth, was not liable to an action for the value or proceeds of the portion sold.

Appeal from RICHARDS, J., dismissed with costs.

Howell, Q.C., and *Mathers*, for plaintiff. *Tupper*, Q.C., and *Phippen*, for defendant.

Bain, J.] IN RE ST. BONIFACE ELECTION. [March 10.

Election petition—Preliminary objections—Proof of deposit of security required—Evidence that notes deposited were current money of Canada—Notice of presentation of petition—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 22.

Hearing of preliminary objections to an election petition.

Counsel for respondent contended that it was necessary to prove that the Dominion notes deposited as security on the filing of the petition were genuine notes and signed by the proper officials with the same strictness as would be required in proving any other documents before the Court, and that the identical notes must be produced on the hearing. It was shown that all the notes in question had been handed out by one bank to the petitioner's solicitor as Dominion notes in payment of a cheque, that they had been deposited with the prothonotary as security, and that the latter had deposited them with another bank which received them as cash. One of the notes was for $500 and was produced and identified at the hearing, but the others had been paid out in the course of business, and could not be traced.

Held, that the evidence adduced was sufficient to prove that the petitioner had furnished the security required by section 22 of the Manitoba Controverted Elections Act, R.S.M. c. 29. Such notes being legal tender by statute are treated to all intents and purposes as money or cash and cannot be compared to ordinary promissory notes or evidences of debt: *Miller* v. *Race*, 1 Smith's L.C. 468.

The petition filed asked not only that the election be declared null and void, but also that the respondent should be personally disqualified, but the notice of presentation that was served contained no reference to the latter part of the petition.

Held, following *Randal* v. *Powell*, 34 C.L.J. 634, that this was not necessary.

Andrews and *Bernice*, for petitioner. *Wilson*, for respondent.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.] IN RE LEV. [Jan. 23.

Creditor's Trust Deeds Act—Exemption of personal property under Homestead Act—Remuneration of stee—Costs.

Debtors, a firm of builders, assigned under the Creditor's Trust Deeds Act, all their personal property, credits and effects that might be seized and sold under execution.

The assets were not sufficient to pay any part of the claims of ordinary creditors, and two members of the firm claimed, as exemption, chattels to the value of $500.00 each (under the Homestead Act) selected out of the lumber and materials around the factory of the firm.

Held, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption. Trustee's remuneration in this case fixed at five per centum.

Davis, Q.C., for the summons. *Williams*, for debtors. *Bowser* and *Bull*, for creditors.

Full Court.] BANK OF BRITISH COLUMBIA *v.* OPPENHEIMER. [Feb. 23.

Practice—Discovery—Affidavit of documents—Sufficiency of description in affidavit—Privilege.

Appeal by defendants from an order of MARTIN, J., dated 6th January, 1900, dismissing an application of the defendants for further and better particulars, and cross-appeal by plaintiffs from that part of the said order of MARTIN, J., which ordered that the paragraph claiming exemption in Mr. Murray's affidavit should be struck out. The action was on promissory notes indorsed by defendants. The defendants obtained the common order of discovery, and Mr. Murray, the plaintiff's manager, filed an affidavit setting out in a schedule all the documents in his possession; and at the end he gave this description: "Various dates. Plaintiffs' books of account showing their dealings with the defendant Horne in relation to the promissory notes sued on herein." On November 4th, the defendants took out a summons for a further affidavit of documents, and particularly of the documents above mentioned. On 7th November, Murray filed a further affidavit stating that the documents consisted of voluminous entries from 30th March, 1892, to 24th August, 1894, in the current ledgers and bill registers, which they objected to produce as they contained nothing to impeach the plaintiff's case or support the defendants as they related to defendant Horne's accounts.

MARTIN, J., dismissed the application for better particulars and ordered the paragraph in Mr. Murray's affidavit claiming exemption to be struck out.

Held, on appeal (IRVING, J., dissenting), that the description of the documents in the affidavit on production was sufficient. *Held*, also, that although privilege was claimed for the first time in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit, this affidavit defeated the summons and that the claim of privilege must be allowed.

Duff, for defendants. *Hunter*, for plaintiffs.

Full Court.] BELL *v.* MITCHELL. [Jan. 27.

County Court Judge—Sitting in county other than his own—Jurisdiction of when requested so to sit by Supreme Court Judge.

Appeal from an order made in an action in the County Court of Vancouver by his Honour JUDGE BOLE, directing an issue. The appeal was taken as a test case to determine the question as to whether or not the presiding judge of the County Court of New Westminster has jurisdiction to try cases in the County Court of Vancouver when requested so to act by one of the judges of the Supreme Court, in this case the request being made by the Chief Justice. There is no County Court Judge of Vancouver but the Chief Justice had been acting in that capacity.

Held, allowing the appeal, that the County Court Judge had no jurisdiction to sit by virtue of such request, and that section 8 of the County Court Act empowers only a County Court Judge to make such request.

Irving, J. TILLEY *v.* CONFEDERATION LIFE. [March 3.

Life Insurance—Premium Note — Non-payment — Forfeiture — Extended Insurance.

A life policy was issued 27th June, 1894, for $5,000.00, an annual premium of $84.50 being payable on the 20th of March in each year. The second premium was paid 20th March, 1895, but the third was not paid, the insured giving a note dated 20th March, 1896, at ninety days instead, the note providing that if it was not paid at maturity the policy should become null and void but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died.

Held, in an action by the beneficiary that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid.

Wilson, Q.C., and *Bloomfield*, for plaintiff. *McPhillips*, Q.C., for the defendants.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

Scott, J.] PARRSLOW *v.* COCHRANE. [Feb.

Dominion Elections Act—Executory contract referring to an election thereunder—Hiring teams and conveyances—Wife's authority to contract on behalf of her husband.

The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election of a Member of the House of Commons of Canada for the Electoral District of Alberta, held on the 23rd June, 1896. The horses and rigs furnished were used by the defendant in connection with the said election.

Held, following *Luke* v. *Perry*, 12 U.C.C.P. 424, that the contract of hiring was an executory one, and that it came therefore within the terms of s. 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act by 57 & 58 Vict., c. 15, s. 10 (D.) and that the contract was therefore void in law, and the plaintiff could not recover.

The plaintiff also sued the defendant on another account for horses and rigs furnished by one Pepper, some of them to the defendant, others to the defendant's wife, and some to both of them, which account had been assigned to the plaintiff. These horses and rigs were not shown to have been furnished in connection with the election. It appeared in evidence that the defendant had instructed Pepper to charge to his account any rigs furnished to his wife, and that the defendant on many previous occasions, paid for rigs so furnished.

Held, that the defendant had by his ratification of these prior transactions and by his conduct, authorized his wife to pledge his credit, and that the plaintiff was entitled to recover.

Held also, with reference to the rigs furnished to the defendant himself, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred to, or arisen out of an election, nothing should be intended in favour of such a defence, and it must clearly appear that such contract did refer to an election held under the Act.