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WE regret to chronicle the death of Hon. James Patton, Q.C., who was one of the founders of this journal more than thirty years ago. His death was as sudden as it was deplored. We shall refer to his career hereafter.

WE make space to note the following changes in the judiciary, which have just been announced: Hon. Mr. Justice Patterson takes the place of the late Mr. Justice Henry in the Supreme Court, at Ottawa; and James Maclennan, Q.C., is to fill the seat vacated in the Court of Appeal.

A SOMEWHAT important change has been made by the revisers of the statutes in regard to jury notices. Under the Revised Statutes of 1877, c. 50, s. 253, the jury notice was required to be delivered with the last pleading; but now, by the Revised Statutes of 1888, c. 44, s. 78, the notice may be delivered at least eight days before the sittings at which the action is to be tried, or within such other time as may be ordered by the court or a judge. The jury notice, therefore, need not now be served until after notice of trial has been given. This change, we fear, has been made, like some others, without sufficient consideration of the consequences, and of the fact that it places in the hands of a litigant desirous of delay a means of effecting his wishes through the forms of legal procedure, which he is very likely to abuse. It certainly seems in the highest degree inconvenient that after notice of trial before a judge alone has been given, and preparation made for the trial, it should be open to the opposite party merely by filing a jury notice to render the notice of trial nugatory, and postpone the trial perhaps for three or four months. When a jury notice is given under such circumstances, it is obvious that the costs of the notice of trial, and of issuing, and serving, and countermanding subpœnas may, in many cases, be rendered useless, and questions will arise as to which of the litigants is ultimately to bear these useless costs. If the opposite party is within his rights in giving the jury notice, it is difficult to see how he can be made liable for the costs of the abortive proceedings, even though he should ultimately fail in the action; and at the same time it is hard that the opposite party, if successful, should be put to these useless costs. We doubt very much whether the amendment made by the revisers is likely to turn out any improvement on the former procedure.

BAILABLE PROCEEDINGS AGAINST A DEFENDANT BEFORE JUDGMENT.

WHEN recently commenting on the Consolidated Rules, we took occasion to, remark, that those relating to bailable proceedings appeared to be sadly defective and that this branch of practice was particularly in need of simplification and codification. It may be useful now to point out in a little more detail, how this should be done; but, before doing so, it may be well briefly to glance at the present condition of the law on this subject in Ontario.

In Ontario, the right to arrest a defendant before judgment depends upon three things: (1) The defendant must be a person liable to arrest; (2) The plaintiff, or his agent, must be able to swear that the plaintiff has a cause of action against the defendant to the amount of $100 or upwards; and (3) Such facts and circumstances must be shown by affidavit as satisfy a judge that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally, or the plaintiff in particular.

The new Rules have varied the procedure to be observed in procuring the arrest of a defendant from that laid down by the statute, R. S. O. c. 67, s. 1. The statute provides that the judge shall make an order to hold the defendant to bail for such sum as he thinks fit, and, therefore, the plaintiff is to sue out a writ of *capias*. The writ of *capias ad respondendum* is abolished by the Consolidated Rule 1045, and the defendant is now to be arrested simply upon the judge's order.

In England a defendant is liable also to arrest before judgment, but then it depends on four things: (1) He must be a person liable to arrest; (2) The plaintiff must show a good cause of action against him for £50 or more; (3) It must be shown that the defendant is likely to quit England, unless he be apprehended; and (4) That the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.

This fourth condition, it will be observed, does not prevail in this Province. In England, as in Ontario, the arrest is made on the judge's order, and the issue of a writ of *capias* is dispensed with.

After the arrest has been made, the procedure in England and Ontario materially differs. In Ontario the old procedure is continued; the defendant first goes through the form of giving bail to the sheriff, or "bail below," as it is called. This bail is given by bond to the sheriff by two sureties, and for double the amount for which the defendant is ordered to be held to bail. The condition of this bond is, that the defendant will, within ten days, put in special bail, or "bail to the action," or "bail above," as it is called. This bond must be taken by the sheriff before the time for putting in special bail has expired, or it will be void.

The defendant having given a bond to the sheriff that he will in due course put in special bail, has then, within the time limited for that purpose, to put

in. Now, the putting in and perfecting of this "special bail," is a somewhat complicated proceeding. According to the Rules, it is to be put in and perfected according to the established practice (Rule 1067).

It is a very easy matter to provide that special bail is to be put in according to the "established practice"; but, judging from past experience, we should say it is a very difficult thing, indeed, to say what is the established practice. The student cannot be referred to any statute or code of rules which will enlighten him; he cannot be even referred to any Canadian cases, which will enable him to learn intelligently what the established practice on this subject is.

In order to make this out, he must go to some of the older works on the English practice at law, and he must, in reading them, carefully note wherein express statutes and rules of court, either in England or Ontario, create a difference in the practice there laid down; and having carefully weighed and considered all these questions, he may, perhaps, have arrived at a faint glimmering of what is the established practice; but he will be a bold man, indeed, if he have any very great confidence in the knowledge thus acquired. His greatest security lies in the fact that his opponent, probably, knows as little about the "established practice" on this point, as he does himself. That there should be this difficulty is not, after all, very surprising, when we consider that the arrest of a defendant on *mesne* process has become a comparatively rare proceeding; not much opportunity, therefore, arises in the ordinary course of practice for getting any very accurate knowledge on the subject; and what is learned, is learnt for the occasion as it arises, and only so far as the exigencies of the occasion make it necessary. We do not pretend to greater wisdom than our fellows, and in venturing to state what we think is this established practice to which Rule 1067 refers, we feel that we are on treacherous ground.

Special bail may be given either by bond or recognizance, conditioned that if the defendant be condemned in the action at the suit of the plaintiff, he will satisfy the costs and condemnation money, or render himself to the custody of the sheriff of the county in which the action is brought, or that the sureties will do so for him (Rule 1062). The sureties are not to exceed two in number, except by leave of the court or a judge (Rule 1070), and they cannot justify if they have been indemnified for so doing by the solicitor or solicitors of the defendant (Rule 1072). The recognizance of bail cannot be taken by any one employed as solicitor or agent for either party (Rule 1073). And if any person put in as bail, except for "the purpose of rendering only," be a practising solicitor, or a clerk to a practising solicitor, or sheriff's officer, bailiff, or person concerned in the execution of the process, the plaintiff may treat the bail as a nullity, and sue upon the bail bond given to the sheriff as abovementioned as soon as the time for putting in special bail has expired, unless good bail be duly put in in the meantime (Rule 1074). The recognizance of bail may be acknowledged before a judge, or the Master in Chambers, or the Judge of the County Court, or Local Master having jurisdiction in the action, or before a commissioner for taking affidavits, and recognizances of bail.

The recognizance of bail being duly acknowledged, or the bond duly

executed, the next thing to be done is to get it allowed; and the procedure for doing this is left by the Rules in the greatest obscurity. Formerly, in every case, the bail had to be allowed by a judge in Chambers, at Toronto, and Rules which were appropriate enough when this was the practice have been retained, in apparent forgetfulness of the fact that the extension to the County Court Judges and Local Masters of jurisdiction in Chambers has materially altered the practice in this respect.

According to the English practice, the bail-piece was not filed until it had been allowed by the judge as sufficient. The bail-piece appears to have been deposited in the Judge's Chambers, and entered in the judge's book kept for the purpose, and notice given to the plaintiff of justification; and the bail attended in person at the time named, and were examined orally as to their sufficiency. The personal attendance of bail, however, is no longer necessary unless expressly ordered, but they may now justify by affidavit (Rule 1063). Under our Rules it is not clear whether the bail-piece, with affidavits of due taking thereof, and of justification, are intended to be filed with the officer in whose office the proceedings are to be carried on before allowance, or not (see Rule 1075); in that Rule it is provided that when bail is put in in the county, and is to be justified in court, the deputy clerk, with whom the bail-piece is *filed*, is to transmit it, with the affidavits of due taking and justification, to the proper officer in Toronto. But is not the Local Master, or County Court Judge, as the case may be, "the court" for the justification of bail in such cases? Rule 1077, on the other hand, seems inconsistent with the filing of the bail-piece before the allowance of the bail, for it provides that if the plaintiff does not give one day's notice of exception, "the bail may be taken out of court without other justification than the affidavit," which is inconsistent with the bail being already filed, though consistent with it having been merely deposited for the purpose of justification. Assuming that the bail-piece and affidavits are to be filed before the bail is justified and allowed, notice in writing, at all events, must be given to the plaintiff of the filing, or putting in of the bail. And here comes another little difficulty: Rule 1075 contemplates that the affidavits of justification shall be filed with the bail-piece; but Rule 1076 contemplates, apparently, that the affidavits may be served with the notice of bail. How they can be served on the plaintiff and at the same time filed we do not know, unless they are sworn in duplicate, one of which is filed and the other served. At any rate, the notice of bail may, or may not, be accompanied by an affidavit of justification of each of the bail according to the form No. 46, in the appendix to the Rules. If the affidavits are delivered with the notice, and the plaintiff afterwards takes objection to the sufficiency of the bail, or "excepts to the bail," as it is technically called, and such bail are allowed, the plaintiff must pay the costs of justification (Rule 1076), which is hard on the plaintiff, to say the least, especially as after service of notice of the bail it seems that he may have only one day to give notice of exception, otherwise the bail may, as we have said already, "be taken out of court without other justification than the affidavit" (Rule 1077), which is another way of saying that the bail is to be allowed as sufficient. This we

take to be the meaning of Rule 1077, though it must be confessed if that is its meaning it is not very clearly expressed.

If the defendant, with his notice of bail, does not serve affidavits of justification of the bail on the plaintiff, the latter has twenty days after the receipt of the notice within which "to except" to the bail (Rule 1078). Where notice of "exception" is given, the bail may justify by affidavit or affirmation, but need not attend personally to be examined as to their sufficiency, unless so ordered by the court or judge (Rule 1063). The affidavits of justification must show that the bail are worth "double the amount sworn to" (*i.e.*, the amount the defendant is to be held to bail for; *Baker* v. *Jackson*, 9 O. R. 661, which, by the way, is not always the same as the amount sworn to), over and above what will pay all their just debts, and over and above every other sum for which they are bail, but when the amount "sworn to" exceeds $4,000, it is sufficient if the bail justify in $4,000 beyond the "sum sworn to." (Rule 1079.) According to the old English practice, from which our "established practice" is derived, the names of the bail are required to be entered in "the judges' book," as we have already said, and the plaintiff is to enter in this book his exception, "I except against these bail," and serve a notice thereof on the defendant's solicitor; but as we believe it has never been the custom of the judges to keep any book for entering the names of bail, this mode of excepting to bail cannot be considered a part of our "established practice." The notice of exception must be in writing, and delivered within the twenty days; possibly also it should be filed as a substitute for the entry in the judges' book, but concerning this the established practice is obscure. If the notice be verbal, or not delivered within the twenty days, the objection may be waived by the defendant afterwards giving notice of justification; but his waiver will not affect the sheriff, as against whom no proceedings can be taken if the exception to the bail be not duly given within the prescribed time (Sellon Pr., Vol. I, p. 152). Within four days after notice of exception, the bail are to justify before a Judge in Chambers (Rule 1081), or, it is presumed, the judicial officer authorized to exercise jurisdiction in Chambers. The affidavit of justification by the bail is apparently *prima facie* sufficient; and if the plaintiff disputes the sufficiency of the bail, it would be necessary for him to cross-examine the bail on their affidavits of justification, and produce such affidavits in opposition as he may think necessary (Rule 1063). The question of the sufficiency of the bail being determined if the bail is allowed, an order must be taken out allowing the bail; the bail-piece, with the order of allowance, is then to be filed in the office where the pleadings are required to be filed, and the bail is then put in and perfected.

But if, as sometimes happens, "special bail," or "bail to the action," or "bail above," as it is called, is not put in and perfected within the time limited, it will be necessary for the plaintiff to obtain a return from the sheriff of *cepi corpus* to the order of arrest, and upon this return he is entitled to issue an order, of course, to the sheriff "to bring in the body,"—not that he wants the body of his debtor in the least, but this is merely the technical mode for compelling the putting in of special bail. It would seem only reasonable that if the defendant

does not put in special bail within the time required by the order for his arrest, that his bail to the sheriff, or "bail below," should be at liberty to render their principal into the sheriff's custody again. But there are technical difficulties in the way of such a simple proceeding, and it is the "established practice" that before they can do this they must go through the solemn farce of putting in "special bail," even though immediately it is put in, and before it is justified, it is the intention of the bail to surrender their principal. This is called "bail for the purpose of rendering only," referred to in Rule 1074.

Then if the "special bail" be not put in, pursuant to the rule "to bring in the body," the plaintiff is entitled to call upon the sheriff to assign the bail bond, which he has taken, and forthwith to commence an action thereon in his own name against the sureties. This action, however, the sureties are entitled to have stayed on the terms of putting the plaintiff in the same position as if no default had been made, *e.g.*, by putting in and perfecting special bail, and paying the costs of the action; but no such order is to be made, staying the action, except where the application is made by the original defendant, upon an affidavit of merits; or where it is made by the sheriff, bail, or any officer of the sheriff, upon an affidavit showing that the application is really and truly made on the part of the sheriff or bail, or sheriff's officer, as the case may be, at his own expense, and for his own indemnity, and without collusion with the original defendant (Rule 1060). Or, instead of taking an assignment of the bail bond from the sheriff, the plaintiff, in the event of special bail not being duly put in and perfected, may, on the return of the order "to bring in the body," issue an attachment against the sheriff, which, however, may be set aside on the like terms as an action on the bail bond may be stayed.

Then, assuming the special bail is duly put in and perfected, the defendant is entitled to a writ of *supersedeas*, if he is in custody, which commands the sheriff to release him, if detained for no other cause.

The action must be duly proceeded with, and if the defendant, instead of giving bail, remains in the custody of the sheriff, the plaintiff must deliver his statement of claim within one calendar month after the arrest, otherwise the defendant will be entitled to be discharged, unless further time to deliver a statement of claim is given to the plaintiff by the court or a judge (Rule 1052). Judgment having been obtained, the plaintiff must then "charge the defendant in execution," in order to "fix the bail"; this is done by issuing a *ca. sa.*, and delivering it to the sheriff within fourteen days after the plaintiff is entitled to enter judgment (Rule 1053); whereupon the bail must either pay the plaintiff's claim to the extent of the amount for which they are bail (Rule 1085), or must surrender their principal to the close custody of the sheriff. In default of their so doing, the plaintiff must get a return of *non est inventus* to the *ca. sa.*, and he may then commence an action against the bail. But in order to "fix the bail," the plaintiff must take care that his *ca. sa.* is returnable on a day certain, and not immediately after execution: *Proctor* v. *McKenzie*, 11 O. R. 486.

Rules 1045-1088, which are supposed to embody the practice on this subject, are taken from the Common Law Procedure Act and the Common Law Rules passed pursuant thereto. The wording of these Rules is in several instances

ambiguous and obscure, and technical terms are used which are quite unnecessary, and, instead of elucidating, tend rather to obscure their meaning. It is to be greatly regretted that the revisers of the Rules did not see fit to consult the English Rules on this point, as they are a model of simplicity and perspicuity. They are only seven in number (Rules 1030-1036)—instead of forty-four—and provide for form of order for arrest, and for applying to discharge the order,—the indorsements to be made on the order before its delivery to the sheriff,—and on the arrest being made for the issue of concurrent orders, and the fees payable to sheriff. That security may be given by deposit of the sum mentioned in the order in court, to abide the order of the court, or by giving a bond to the plaintiff executed by the defendant and two sureties. The plaintiff, within four days after service of notice of the names and addresses of the sureties, may object to them, giving the particulars of his objection, which may then be adjudicated upon by the Master, who has power to award costs. The plaintiff is, within four days after giving his notice of objection, to obtain an appointment from the Master for the purpose of disposing of the objection, and in default, the security is to be deemed sufficient. The costs of the arrest, unless otherwise ordered, are to be costs in the cause. If money is deposited, a receipt is to be given, and if a bond is given, a certificate is to be given by the plaintiff or his solicitor, upon production of which receipt or certificate to the sheriff the defendant is to be released.

It may be that the adoption of the English Rules on this subject *verbatim* would not answer, because they appear to require the defendant arrested to give security for the payment of the claim if the plaintiff succeed in the action, whereas our statutes only require the defendant to give special bail conditioned to pay the condemnation money or render himself to the sheriff; and even when the plaintiff has recovered judgment and arrested the defendant under a *ca. sa.*, the latter is entitled to be released on giving a bond to abide by and observe the orders of the court. So that the arrest of a defendant in Ontario is by no means any security that the debt for which he is arrested will ultimately be paid. But some suitable modification of the English Rules would certainly have been far better than keeping alive the senseless rigmarole of "bail below" and "bail above," with all the other incidental technicalities. When the defendant is arrested he should be required to give security in the first place to the plaintiff and not to the sheriff; this might be done, either by depositing the sum in respect of which he is arrested in court, subject to the further order of the court, or by giving a bond with two sureties for the amount for which the arrest is made, conditioned that the defendant will abide by and observe the orders of the court, etc., as provided by R. S. O. c. 67, s. 14, for that is all the plaintiff can ultimately get, and he might as well be allowed to get it at first as being put to the useless expense of issuing orders on the sheriff to return the order of arrest, and "to bring in the body," and winding up with the writ of *ca. sa.* R. S. O. c. 67, s. 14, does in fact authorize a bond of this kind to be given by a defendant arrested on *mesne* process, but its beneficial effect appears to have been rendered nugatory by the Rules which require "special bail" to be given, which bail are to be subject to an entirely different condition (see Rule 1062).

COMMENTS ON CURRENT ENGLISH DECISIONS.

The *Law Reports* for October comprise 21 Q. B. D. pp. 349-413; and 39 Chy. D. pp. 1-83.

PRISON—GOVERNOR OF PRISON—WARRANT OF COMMITMENT—FALSE IMPRISONMENT.

Henderson v. *Preston*, 21 Q. B. D. 362, is an action in which the plaintiff sues the governor of a prison for false imprisonment under the following circumstances: The plaintiff was, on the 24th August, summarily convicted of an offence and sentenced to pay a fine, or in default to be imprisoned for seven days. He was arrested the same day, but was not lodged in prison until 25th August. The defendant kept the plaintiff in custody during 31st August. The plaintiff contended that the term of imprisonment began on 24th August and expired on 30th August. But the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.), without determining whether the imprisonment began on the 24th or 25th August, held that the defendant had acted within the terms of the warrant, and was therefore protected and not liable to the action.

NEGLIGENCE—MASTER AND SERVANT—PERSON INTRUSTED WITH SUPERINTENDENCE—EMPLOYERS' LIABILITY ACT, 1880—(R. S. O. C. 141, S. 2, S.S. 1; S. 3, S.S. 2).

In *Kellord* v. *Rooke*, 21 Q. B. D. 367, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) affirmed the decision of the Divisional Court (19 Q. B. D. 585), noted *ante* p. 10. The point in the case was whether a workman who was the foreman of a gang, and as such took part in the manual labour performed by the gang, could be said to be a "person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour" (see R. S. O. c. 141, s. 2, s.s. 1), and the court was clear that he did not come within that definition.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT, 1880—(R. S. O. C. 141, S. 3, S.S. 1)—DEFECT IN MACHINERY—DANGEROUS MACHINE.

Walsh v. *Whiteley*, 21 Q. B. D. 371, is another case under the Employers' Liability Act, which, by the way, bids fair to be as fruitful a source of litigation as the Statute of Frauds. In this case, the Court of Appeal lays down the rule that the mere fact that a machine is dangerous to a workman employed to work with it, does not show that there is a defect in the condition of the machine within the meaning of the Act (R. S. O. c. 141, s. 3, s.s. 1). Because the Act expressly provides (see R. S. O. c. 141, s. 5, s.s. 1) that unless the defect arose from, or had not been discovered or remedied, owing to the negligence of the employer or some person in the service of the employer, and intrusted by him with the duty of seeing that the machinery was in proper condition, the workman is not to be entitled under the Act to any right of compensation against the employer, and these two sections must, therefore, be read together. In this case the plaintiff was employed by the defendants to work a carding machine. Part of the machine consisted of a wheel and pulley, upon which, while in motion,

the plaintiff had to place a band. The disc of the wheel had holes in it, and while the plaintiff was putting on the band his thumb slipped through one of these holes, the result being that he lost his thumb. It was proved that though these wheels were sometimes made without holes, they were commonly made with them, the object being to reduce the weight of the wheel and consequent friction. In the defendants' mill there were machines of both sorts, and it did not appear that any complaint had previously been made with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine, which he had used for thirteen years, because it had never entered his head that it was dangerous. On these facts the Divisional Court (Wills and Grantham, JJ.) had differed. Wills, J., holding that there was evidence to go to the jury that the machine was defective, and Grantham, J., being of the contrary opinion. The Court of Appeal also presented the somewhat unusual spectacle of differing in opinion. This difference of opinion is accounted for by Lord Esher, M.R., who dissented from Lindley and Lopes, L.JJ., by the fact of there being, as he thinks, two schools of thought in relation to cases of this kind, the one striving to prevent injustice to masters by construing Acts of this kind as strictly as possible; while the other school regards masters and servants as not on an equal footing, the danger of the employment always falling on the workman, who was, therefore, to be protected by a liberal construction of Acts intended for his benefit. He confesses that he has always been of the latter school, and, therefore, in the present case agreed with Wills, J. He goes so far as to say that although the machine be of the best construction invented, yet if a master permit the machine to be used by his workmen, knowing it to be dangerous, the master is liable. He considers, too, that the defect contemplated by the Act, is not a defect with reference to the purpose for which the machine is employed, but a defect with reference to the safety of the workman using it. Lindley and Lopes, L.JJ., however, take the opposite view, and lay it down that the defect contemplated by the Act, as one making the employer liable, is one due to the negligence of the employer, and that the negligence of the employer is a necessary element in order to make the employer liable; and the defect in the machine must be one having regard to the use to which it is to be applied, or the mode in which it is to be used. The defect may be one in the original construction of the machine, or arising from its not being kept up to the mark, which renders it unfit for the purposes to which it is applied, when used with reasonable care; or a defect arising, or existing, from the negligence of the employer. They say the Act is not directed against dangerous machines, but against the negligence of employers. And this is the view which must now be considered the proper exposition of the statute.

BENEFIT SOCIETY—INSURANCE—PAYMENT OF DEATH ALLOWANCE ACCORDING TO AGREEMENT WITH DECEASED—RIGHT OF ADMINISTRATOR.

Ashby v. *Costin*, 21 Q. B. D. 401, was an action by the personal representative to recover a sum of money claimed to be due from a friendly society of which the deceased was a member. The deceased had, upon making applica-

tion for membership, signed a declaration agreeing to be bound by the rules of the society, and authorizing the deduction from his wages of the sum specified in the rules for securing to himself, or to his representatives, in case of his death, the benefits of the society. The rule relating to the payment of death allowances empowered the committee to pay the allowance to such person or persons as, in their discretion, they might think fit; and further provided that the allowance should be paid to certain specified relatives in such proportions as the committee should determine, unless otherwise bequeathed by will, when it was to be paid to the person to whom it was bequeathed. In the event of the deceased dying intestate and without any relatives within the specified degrees, the fund, after payment of the deceased's funeral expenses, was to belong to the society. Upon the death of the deceased intestate, the committee paid the allowance to the deceased's sister, the person specified in the rules. The plaintiff claimed the fund as administrator, but it was held by Cave and Grantham, JJ., that the rule constituted the contract between the deceased and the society as to the payment of the money, and that the death allowance was not the property of the deceased in his lifetime, nor, in the absence of his making a will regarding it, was it assets for the payment of his debts, and that, therefore, the plaintiff could not recover. Cave, J., who delivered the judgment of the court, says, "The death allowance is not the property of the member in the sense of its belonging to him absolutely in his lifetime, he has no right to it but such as the rules give him. If he chooses to bequeath it by his will, it will, as we have already said, be assets, but if he does not choose to exercise this power, the committee, and not the member, will determine which of his relatives will get the allowance, and in what proportions; and, unless he leaves surviving relatives within certain degrees, the balance, after payment of his funeral expenses, will remain the property of the society.

ARBITRATION—INCORPORATION IN SUBMISSION OF C. L. P. ACT, 1854—POWER TO REVOKE SUBMISSION—(R. S. O. c. 53, ss. 13-16.)

In re Mitchell v. *Governor of Ceylon*, 21 Q. B. D. 408, a question arose as to whether one of the parties to a submission to arbitration was in a position to revoke the submission under the following circumstances: By a contract, in writing, it was agreed that disputes between the contracting parties should be referred to arbitration. The contract did not contain an express stipulation that the submission should be made a rule of court, but by one of its clauses it was agreed that the provisions of the C. L. P. Act, with regard to arbitration, so far as applicable, should apply to the arbitration therein agreed to. A dispute arising out of the contract having been referred, one of the parties revoked the submission. The arbitrator proceeded *ex parte*, and made his award. On a motion to set aside the award, on the ground that the submission had been revoked before the making of the award, Cave and A. L. Smith, JJ., held that the submission by incorporating the provisions of the C. L. P. Act was equivalent to an agreement that the submission should be made a rule of court, and that, therefore, under the provisions of 3 & 4 Wm. IV. c. 42, s. 39, the sub-

mission was not revocable without the leave of the court. Under R. S. O. c. 53, s. 13, every submission to arbitration may be made a rule of court, unless the agreement contains words purporting that the parties intended that it should not be made a rule or order of court; and, by s. 16, no submission not containing words purporting that the parties intend that it shall not be made a rule of court is revocable without the leave of the court. The effect of s. 13 (Eng. C. L. P. Act, s. 17), however, Cave, J., points out, was discussed in *Mills* v. *Bayley*, 2 H. & C. 36, where it was held that this section has not the effect of inserting in the agreement a clause empowering it to be made a rule of court, or, in other words, that this statutory power was not the same thing in effect as an agreement that the submission should be made a rule of court. This decision was followed in *In re Rouse and Meier*, L. R. 6 C. P. 212, and by the Court of Appeal in *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310. But the learned judge distinguishes those cases from the present, because here the parties had expressly incorporated the provisions of the C. L. P. Act; and, therefore, section 17 was included in the submission; and, therefore, in this case, there was an express agreement that the submission should be made a rule of court; and, therefore, under 3 & 4 Wm. IV. c. 42, s. 39, the submission was not revocable, and in this conclusion the Court of Appeal (Lindley and Bowen, L.JJ.) concurred. We may observe, however, that 3 & 4 Wm. IV. c. 42, s. 39, is not as wide in its terms as R. S. O. c. 53, s. 16, and under the latter section it would seem clear that, even without the incorporation of the provisions of the C. L. P. Act, no submission which does not contain words purporting that the parties intend that it should not be made a rule of court can be revoked without the leave of the court, as provided in that section.

COMPANY—ARTICLES OF ASSOCIATION—POWER TO ISSUE PREFERENCE SHARES—WINDING-UP—SURPLUS ASSETS—NET PROFITS.

Turning now to the cases in the Chancery Division, we find *In re Bridgewater Navigation Co.*, 39 Chy. D. 1, calls for notice. In this case two points arose: first, as to the right of the company to issue preference shares; and, second, the rights of preference and ordinary shareholders in the surplus assets of the company. The original memorandum of association provided that the capital of the company should consist of 500 £1,000 shares. Article 4 gave power to create additional share capital, which might be issued as preference shares. By special resolution, under a power in the articles, it was resolved that the 500 £1,000 shares should be converted into 50,000 £10 shares, and that the capital should be increased by 80,000 new £10 shares. The company, by special resolution, repealed the original articles and substituted others, one of which was to the same effect as the original article 4. When 100,000 £10 ordinary shares had been issued, the company resolved to issue the remaining 30,000 £10 shares as preference shares. North, J., held that the 30,000 preference shares had been validly issued. That though the original 50,000 shares could not be issued with preferential rights, the 80,000 new shares were in a different position, and under article 4 were entitled to be issued with pre-

ferential rights. With regard to the contest as to the distribution of the surplus assets realized on winding up the company, the articles of association provided that the entire net profits of each year, subject to providing a reserve, should belong to the holders of shares. The preference shares were subsequently issued entitling the holders to a fixed dividend. Under a statute the company sold its undertakings to another company for a specified price, which left a large surplus after payment of liabilities and return of paid-up capital. This surplus, the ordinary shareholders claimed, must be regarded as net profit, and as such was divisible among them to the exclusion of the preference shareholders, but North, J., held that the surplus was divisible among ordinary and preference shareholders in proportion to the amounts paid up on their shares. The decision of North, J., was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.).

TRADE MARK—FANCY WORD.

In *Waterman* v. *Ayres*, 39 Chy. D. 29, the plaintiff had registered the word "*Reversi*" as a trade mark for a game somewhat similar to draughts. The word was the name of a game of cards popular in France in the sixteenth century. In the rules of the plaintiff's game the word "reverse" frequently occurred, and the game depended on the players reversing each other's counters. The defendant brought out a similar game under the name of "Annex," and on the labels of the boxes in which he sold it were the words "a game of reverses." This action was brought to restrain the infringement of the plaintiff's trade mark, and the defendant applied to remove the trade mark from the register. Kay, J., refused the application of the defendant, and granted the plaintiff an injunction to restrain the defendant from using the word "reverses" or any colourable imitation of the word "*Reversi*." But on appeal his decision on both points was reversed. The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) holding that as the word "*Reversi*" would suggest to an ordinary Englishman that the game had something to do with reversing, it was not a word which obviously could not have any reference to the character of the article, and was, therefore, not a "fancy word" which could properly be registered as a trade mark. And further, that as defendant's use of the words "a game of reverses" was a fair description of the nature of the game, and not indicative of any design on the part of the defendant to pass off his goods as those of the plaintiff, an injunction ought not to have been granted.

MORTGAGE—VALUATION—ACTION FOR FALSE VALUATION—NEGLIGENCE—MISREPRESENTATION.

Cann v. *Willson*, 39 Chy. D. 39, was an action brought by a mortgagee against valuers of the mortgaged property, who had made their valuation at the request of the mortgagor, and sent it direct to the plaintiff, knowing that the valuation was required for the purpose of enabling the mortgagor to obtain an advance, and on the faith of which the mortgagee had advanced his money. The defence was based on the ground that there was no privity between the

plaintiff and defendant; that as between them the valuation was given gratuitously, and, therefore, the defendant was not liable. But Chitty, J., held that the defendant was liable on two grounds: (1) That (independently of contract) the defendant owed a duty to the plaintiff, which he had failed to discharge; and (2) That he had made a fraudulent misrepresentation, on the faith of which the plaintiff had acted.

WILL—CONSTRUCTION—TENANT FOR LIFE, AND REMAINDERMAN—UNAUTHORIZED SECURITIES—TRUSTEES, POWER OF, TO RETAIN EXISTING SECURITIES.

In re Sheldon, Nixon v. *Sheldon*, 39 Chy. D. 50, a testator had empowered his trustees in their discretion to retain all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or else to convert the same and invest the proceeds in certain specified securities. At his death part of his personal estate consisted of securities not of a wasting nature, and not specifically authorized. An administration action having been brought, it was found by the Chief Clerk that some of the securities were proper to be continued, and that others should be called in. A question thereupon arose, whether the tenants for life of the unauthorized securities were entitled to the full income thereof, or whether such securities should be converted and the tenants for life be entitled only to interest on the proceeds of conversion as from a year after the testator's death, which is the rule when the unauthorized securities are of a wasting nature. But North, J., was of opinion that as the securities which the Chief Clerk reported should be continued were not of a wasting nature, they might be ordered to be retained, and that the tenants for life were entitled to the whole income produced from them.

COPYRIGHT—DRAMATIZATION OF NOVEL—INFRINGEMENT—INJUNCTION—5 & 6 VICT. C. 45, SS. 2, 3.

Warne v. *Seebohm*, 39 Chy. D. 73, was an action to restrain the infringement of a copyright of a novel. The defendant had dramatized the novel, "Little Lord Fauntleroy," and caused his play to be performed on the stage. The infringement complained of was, that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, which were in MS., or made with a type-writer. Very considerable passages in the play were taken almost *verbatim* from the novel. The defendant claimed the right to make more copies, if it should be necessary, to enable him to give further representations of the play in London and elsewhere. Stirling, J., held that what had been done by the defendant constituted an infringement of the plaintiff's copyright, and he granted an injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages from the plaintiff's novel, and also for the cancellation of all passages taken from the plaintiff's book, which were contained in the four copies of the play. As to the rights of third persons to dramatize a copyright novel, Stirling, J., thus lays down the law at p. 81: "So long as he does

not print or otherwise multiply copies of the novel, any person may dramatize, and may cause his drama to be publicly represented. But if, for the purpose of dramatization, he prints, or otherwise multiplies copies of the book, he violates the rights of the author no less than if the copies were made for gratuitous distribution."

Notes on Exchanges and Legal Scrap Book.

RESTRAINT OF TRADE.—A somewhat interesting case in relation to restraint of trade was decided by the New York Supreme Court in *Thomas* v. *Musical Protective Union*, 49 Hun. 171. The defendant corporation was organized for the cultivation of music and the furtherance of the interests of the musicial profession, as well as for the pecuniary relief of its members. It enacted by-laws providing that no member should perform in any orchestra or band in which any performer was employed who was not a member of the union, and no person was eligible for membership unless he had been a resident of the United States for at least six months. The court below gave judgment restraining the union from enforcing its by-laws against the plaintiff to recover penalties for employing non-union musicians in his orchestra. The defendant company was incorporated for the cultivation of music, friendly intercourse and the relief of its members, and the plaintiff had been a member since 1876, but had been absent from New York several years, during which absence the by-law regarding six months' residence was passed. He employed a foreigner to perform in his orchestra, whereupon the union imposed fines upon him. The Supreme Court affirmed the judgment of the court below, and held that the by-laws were illegal and void, being in restraint of trade.

NEGLIGENCE.—In *Fitzpatrick* v. *Garrisons and West Point Ferry Co.*, 49 Hun. 288, it was held that where a ferry company carries on a business which naturally draws together numbers of people in a place which is open to the public, with instruments which are so defective as to be eminently dangerous to human life, it is guilty of a breach of duty to the public for injuries resulting therefrom, although the party injured may not have come upon the place on any business connected with the ferry company. The plaintiffs and other boys had gathered on the dock where the ferry-boat landed, and got upon a bridge and by their weight brought it down on the boat with some force, the result of which was that a bolt, which had fastened to it a chain running over a pulley with a weight at the other end, pulled out of one corner of the bridge, and the weight on that side fell, striking the plaintiff. The place at which the accident happened was Cranston's dock, at Highland Falls, which was private property, which did

not belong to the defendant, nor did the defendant have any lease of it, although it had been used by the defendant for some time for the landing of its boat. The court said: "The accident under consideration occurred at a place which was open to the general public, which they had been long accustomed to use, and into which they were impliedly invited to enter. They had, therefore, a right to assume that no traps existed that would make such entry dangerous. The appellant claims that as the plaintiff came upon the premises solely to gratify his curiosity, and was at most but a licensee, the defendant owed him no duty of active vigilance. But defendants must be held to have contemplated the natural consequence of their acts. They carried on an occupation which would naturally draw together numbers of people in a public place, with instruments that were so defective as to be eminently dangerous to human life. That was a breach of duty to the public for which they may be justly held responsible. The plaintiff might well suppose that defendant's business was conducted with ordinary care; there being no warning of danger, he may well have thought that none existed. In thus supposing, and in acting accordingly, the jury have found that he was not guilty of negligence. We think the question was properly submitted and by them properly decided. We also think this case is within the reason of the rule that holds the owner of the real estate liable when he allows a dangerous place to exist without warning, so near a highway that by-passers will be liable to suffer. If the owner of real estate will dig a pit nigh to the public road he must fence it or be liable for the injuries it occasions. Such owner is bound to anticipate that a traveller may deviate from the beaten path. And a technical trespasser does not thereby forfeit the protection of the law. As in the case of the druggist who sends abroad a dangerous medicine under a false label, no 'privity of contract' is necessary. The duty which one owes to the public to forbear from conduct which may endanger the safety of others is the foundation of the action."—*Albany Law Journal.*

ATTORNEY ACTING FOR EACH PARTY IN TURN.—In *Weidekind* v. *Tuolumne County Water Co.*, California Supreme Court, December 23, 1887, it was held error to allow an attorney and counsellor-at-law, who had formerly acted for the plaintiff in the trial of a cause, to appear and act on behalf of the defendant at a subsequent trial of the same cause; his avowed intention being to assist the defendant with all the knowledge and secrets he had gained from plaintiff. The court said: "This action of the court is contended to be such an irregularity on its part as prevented the plaintiff from having a fair trial. It was within the power of the court, if satisfied that the attorney in question had acted on the plaintiff's side of the case on the former trial, to prohibit his acting on the other side in another trial. Weeks' Attys. s. 120. There can be no doubt, from the statement of the attorney to the court, that he proposed to act, and it is also certain that he did act, as an attorney and counsellor for the defendant in the trial of a cause where he had formerly acted for the plaintiff. The trial court

had a right, and it was its duty to have forbidden the attorney from changing sides in the same suit, though at different trials; for to do otherwise was "to defeat the very purpose for which courts were organized, viz., the administration of justice." *Wilson* v. *State*, 16 Ind. 392. The evidence in this case and the statement of the attorney himself was sufficient to show the court that his intention was, for the benefit of the defendant, to use at that time all the knowledge and secrets he had gained from his former client in preparing for and conducting one trial, and observing and watching the developments of two others. This court, speaking to such a question, says: "We are of opinion that the court in that case would have restrained him, even had he been unjustly discharged, and he was allowed, as contended, to be employed by the adverse party. The law secures the client the privilege of objecting at all times and forever to an attorney, solicitor or counsellor from disclosing information in a cause confidentially given while the relation exists. The client alone can release the attorney, solicitor or counsel from this obligation. The latter cannot discharge himself from the duty imposed on him by law." *In re Cowdery*, 69 Cal. 50. The attorney himself boldly avowed his attention so to act. The court permitted him to do it, notwithstanding the plaintiff's objection. This we think was an error, and in the absence of any proof to the contrary, injury must be presumed to have resulted to the plaintiff, whereby he was prevented from having a fair trial of his case."—*Albany Law Journal.*

POWER OF SOLICITOR TO BIND CLIENT.—The counsel of record, representing married women in pending litigation, have an ample power to bind their clients in conducting and disposing of such litigation as have the counsel of other suitors, and decrees rendered with consent of counsel without fraud, are obligatory upon their clients, the consent of counsel being in law the consent of the parties they represent. There seems to be an opinion, which makes its appearance in records very frequently, that married women are privileged suitors; that when they come before the courts they come with a sort of shield against being bound in favour of their adversaries, and with the right to bind them in all matters whatsoever. Now this is a grave mistake. When a suitor comes into court, competent to select counsel, and does select counsel, no matter who the suitor may be, or how much married, the counsel is there for the purpose of representing the client, and whatever the counsel assents to the client assents to. There is full power on the part of the counsel to represent the client, and it is just the same as if the client were there in person; and it is no answer to a decree, a solemn judgment of the court, for the client to come in and say that the counsel misrepresented the client's interests, or did not represent the client's wishes. Let the client see that the counsel conforms to instructions, and if there is any injury by failure to do it, let the counsel answer for it, and not the other party. In this case, whatever gain was to this lady as against her adversary, was absolutely secured by the decree. The decree was carried into effect, and

she interposed nothing whatever in the way of an attack upon it, but merely presented a claim, after the advertisement had run, or was running; and because the sheriff disregarded her claim, she having had one claim, and it being disposed of by decree, she then files a bill against the sheriff after the sale was effected, and tries to prevent him from putting the purchaser in possession; and in that bill she makes no attack upon the decree, says nothing about it or against it in any way; and finally, when a bill is brought against her, she makes an answer to it, and says nothing about having the decree set aside, does not use her answer as a cross-bill, makes no prayer to vacate the decree, but afterward, when the case has been pending for years, from 1881, the time her first answer was filed, to 1887, she comes by amendment to her answer, with a cross-bill, attacks the decree in this feeble way, and prays that it be opened and set aside. Now thus much would not be done for any other suitor. There is no man who could avoid a decree for such cause as she sets up; then why should this lady be indulged in so doing? We dare not decide a question of right by a rule of courtesy, or substitute deference to sex for deference to law. The counsel of record, representing married women in pending litigation, have as ample power to bind their clients in conducting and disposing of such litigation as have the counsel of other suitors. And decrees rendered by consent of counsel, without fraud, are obligatory upon their clients, the consent of counsel being in law the consent of the parties they represent. A case very much in point is *Lewis* v. *Gunn*, 63 Ga. 542. Other relevant cases are *Mashburn* v. *Gouge*, 61 Ga. 512; *Glover* v. *Moore*, 60 id. 189; *Wingfield* v. *Rhea*, 73 id. 477. As to the powers of counsel, see *Wade* v. *Powell*, 31 Ga. 1; *Lyon* v. *Williams*, 42 id. 168; Ga. Sup. Ct., Jan. 16, 1888; *Williams* v. *Simmons*. Opinion by Bleckley, C.J.—*Albany Law Journal*.

DIARY FOR NOVEMBER.

1. Thur....Co. Ct. non-jury sittings in York. All Saints' Day. Sir Matthew Hale born, 1609.
3. Sat.....O'Connor, J., Q.B.D., died, 1887.
4. Sun.....*23rd Sunday after Trinity.*
6. Tues ...First intermediate examination.
8. Thur....Second intermediate examination.
9. Fri.....Prince of Wales born, 1841.
11. Sun.....*24th Sunday after Trinity.*
12. Mon....W. B. Richards, 10th C.J. of Q.B., 1868. J. H. Hagarty, 12th C.J. of Q.B., 1878.
13. Tues....Ct. of Appeal sits. Solicitors' examination.
14. Wed....Barristers' examination. Falconbridge, J., Q.B.D., appointed 1887.
15. Thur....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
17. Sat.....Lord Erskine died, 1823, æt. 73.
18. Sun.....*25th Sunday after Trinity.*
19. Mon....L. S. Michaelmas Term begins. H.C.J. sittings begin. Armour, J., gaz. C.J., Q.B.D., 1887. Galt, J., gaz. C.J., C.P.D., 1887.
21. Wed....J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
25. Sun.....*26th Sunday after Trinity.*
30. Moss, J. A., appointed C. J. of Appeal, 1877. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed 1887.

Reports.

DIVISION COURTS.

[Reported for the CANADA LAW JOURNAL.]

SEVENTH DIVISION COURT OF THE COUNTY OF ONTARIO.

SANDERSON (*Primary Creditor*) *v.* DUFFY (*Primary Debtor*) AND LONDON & LANCASHIRE INSURANCE CO. (*Garnishees' before judgment*); AND TIFFIN (*Primary Creditor*) *v.* DUFFY (*Primary Debtor*) AND SAME COMPANY (*Garnishees after judgment*).

Foreign corporation—Service upon—Jurisdiction—Omission to dispute—D. C. Act, s. 182 *—Dominion Insurance Act—R. S. C.* 124.

Although under the Dominion Insurance Act, R. S. C. c. 128, a foreign insurance company must designate a chief place of business or agency in Canada for the service of proceedings upon them, such provision does not supersede, but is supplementary to, the enactments in the Division Court Act providing for service upon them in Ontario.

The omission of the garnishees to file a notice disputing the jurisdiction within the time prescribed conclusively confers jurisdiction, and such notice cannot be subsequently filed.

The garnishees, subsequent to the service upon them of the garnishee summons, paid to the primary debtor a sum much less than the sum insured, and as a compromise or settlement of a doubtful claim,

Held, that there was no garnishable debt at the time of service

[DARTNELL, J., Whitby, Oct. 23.

The primary creditor's claims were undisputed at the return day of the summons, on the 12th of May last, at which court the garnishees were not represented. The two summonses were served upon their nearest agent, one Bingham, at Orillia, who simply notified the clerk that he had no moneys in his hands, and omitted to notify the garnishees. The cases were adjourned as against them, and a direction made that they should retain any moneys payable by them until further orders. Thereupon they filed a notice disputing their liability and also the jurisdiction; and the cases came on again at the September court.

The primary debtor had taken out a fire policy in the garnishees' company for $400, $200 of which was on a house and $200 on his chattels. A fire occurred before these proceedings, and the company's inspector came out and stated his estimate of the loss at $270, and that probably the company's cheque for that sum would be forwarded in a few days. Between the May and September courts the company compromised the claim at $125, and paid over that sum to the primary debtor, inadvertently overlooking the previous order for the retention of the money. The claim was a doubtful one, it being alleged that the primary debtor was not the owner of nor had she any insurable interest in the house.

DARTNELL, JJ.—If the garnishees are a "body corporate not having their chief place of business within the Province," and if the service upon their agent, Bingham, binds them, then they are properly before the court; because, in Tiffin's case, the cause of action arose in this court, s. 185 (2); and because, in Sanderson's case, he recovered judgment therein (s. 182). An additional reason (still assuming that service upon Bingham was binding) is that the garnishees did not within the prescribed number of days after service upon him, serve a notice disputing the jurisdiction of the court. Sec. 176 provides that in default of such notice "the same (*i.e.*, jurisdiction) shall be considered established and determined."

Of course, if the garnishees are a "body corporate, not having their chief place of business within the Province," there is jurisdiction in this court, and the service is good; but if they cannot be so classed, their claim is

that they should have been served in one of the Toronto Division Courts, Toronto being the place where, under the meaning of secs. 181 and 185, they "live or carry on business."

They support this contention by a reference to R. S. C. c. 124, ss. 12, 13 and 16 (the Insurance Act), which provides that "every company shall, before the issue of a license to it, file in the Department of Finance . . . a power of attorney from the company to its agent in Canada, or (s. 13) such power of attorney shall declare at what place in Canada the head office or chief agency of such company is, or is to be, established, and shall expressly authorize such attorney to receive service of process in all suits and proceedings against such company, in any Province of Canada, in respect of any liabilities incurred by the company therein (s. 16). After filing such power in the manner and place directed, . . . any process in any suit or proceedings against any such company in respect of any liability incurred in any Province in Canada may be validly served on the company at its chief agency, and such services shall be deemed services on the company."

They further contend that this statute makes their chief office in Canada similar, to all intents and purposes, and the same, as the chief office of any Canadian company.

I do not agree to this. To do so, would be to concede that the license of the Finance Department confers upon, or attaches to, a foreign corporation the rights and liabilities of a domestic corporation. The Provincial Legislature has a right to regulate and prescribe the service of all legal process upon such corporations; and, so far from the Dominion Act superseding or controlling the Provincial Act, it appears to me to simply afford an additional manner of serving process upon them. The Dominion authorities in effect say, "We grant you a license to carry on business in Canada, on condition, among other things, that you accept service of process from *any* court of *any* of the *Provinces*, and some *locus designatus* within *Canada.*" Under this view, it further appears to me that, if service in these garnishee proceedings had been made upon the chief agent for Canada, it might be contended, with some show of force, that service upon an officer of the Company in Toronto, would dispense with service upon Bingham, the nearest agent. I distinctly am of opinion that under the Dominion Act, a "chief office or agency is not created or allowed for all purposes, but only for providing a place where service of process can, without delay or expense, be speedily and effectually made.

The primary creditors claim that the question of jurisdiction is concluded by the garnishees' omission to file a notice disputing the jurisdiction, within the proper time, as required by section 176. Through the ignorance, neglect, or stupidity of their agent, Bingham, their officials had no actual notice of these proceedings until the very day appointed for the hearing of the causes. The language of section 176 is very strong: "If this notice is not given within the prescribed time, the judge has no power to extend the time for giving it" (Sinclair, D. C. A. 1888, page 202). I do not dissent from this, but in garnishee cases (sec. 198), the powers of a judge are most extensive as to amending, adjournment, etc. It may be said, however, that the wording of the latter section cannot be extended to notices disputing the jurisdiction, but is confined to giving time for putting in omitted notices of defence.

Having generally inquired into the question of jurisdiction, and having found that I have jurisdiction, it is now necessary to ascertain and find whether there is any debt due to the primary debtor, which is the subject of garnishment.

I do not think that it was necessary to give strict proof that the defendants are a foreign corporation—that is a matter of common knowledge and notoriety. It so appears upon the face of their policies, in their published advertisements and circulars, and, if more was needed, the *Canada Gazette* periodically gives notice that they are licensed to do business in Canada as such.

The points of these cases were very imperfectly and carelessly adduced before me. Bingham, the agent, was not called by either party; the application and policy were not produced; nor were the claims papers or any resolution or authority from the garnishees, directing a settlement or final adjustment of the loss. From such documents as were produced, from such evidence as was offered, but chiefly from the statements and arguments of

the solicitors or agents who appeared, I find the following as facts: (1) The garnishees are a foreign corporation doing business in Ontario, and are properly before the court; (2) They issued a policy of $400, insuring the primary debtor against loss by fire—$200 on her house, and $200 upon its contents; (3) That the primary debtor had no insurable interest in the house; (4) That during the currency of the policy, and before these proceedings, a fire occurred, by which the subject matters of the insurance policy were destroyed; and that the company's inspector made an estimate of the loss at $270, and informed the primary debtor that she would receive a cheque for the amount within a few days; (5) That after knowledge and notice of these proceedings, and of a direction by the court not to pay without further order, the garnishees paid over to the primary debtor the sum of $125, in full satisfaction of their claim.

The garnishees allege, but did not prove, that they paid the latter sum *ex gratiâ*, and not *ex delictò*, to compromise and get rid of a doubtful claim, and not because there was any debt due and owing at the time of garnishment, which could be made the subject of garnishment.

I think this objection must prevail. The policy is a mere contract of indemnity. At the date of the service of the garnishee summons there was no "debt due and owing" by them to the primary debtor. She had a cause of action against them for unliquidated damages, and no more. Even if her damages had been assessed by a jury, the amount of the verdict would not become a "debt" until judgment be entered. The payment subsequently by the garnishees does not, to my mind, affect the case. The company had a right to resist the claim, or to compromise it for a small sum, rather than risk litigation with a person of no means, and incur costs to a greater amount than the sum she was willing to accept. I refer to *Boyd* v. *Haynes* (*British North American Insurance Company, Garnishees*), 5 P. R. 15, and the cases there cited, as being conclusive on this point.

I dismiss the action as against the garnishees. I make no order as to costs.

Evans (Orillia), for Macdonald.

McCarthy, Osler & Co. (Toronto), for the garnishees.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

SEELEY *v.* WELLES.

Contract.

Where a person agrees to take a machine and try it, and, if it works to suit him, to buy it, he may reject it, though his objections may seem unreasonable to others, if his objection is made in good faith, and is not merely capricious.

Error to Common Pleas of Bradford County.

Hall and *McPherson*, for plaintiff in error.

Califf and *Williams*, for defendant in error.

CLARK, J.—This suit was brought to recover the first instalment on an alleged contract for the sale of an Osborne reaper and binder. The principal controversy arises out of a disagreement as to the nature and terms of the contract. The plaintiff, on the one hand, alleges that the sale was absolute; that the machine was to be set up and tried, and was to work well, that it was put up on trial, and was accepted by Seeley; that the terms of the contract were fixed, and the time and manner of payment fully agreed upon. The defendant, on the other hand, maintains that he was to try the machine, and if it worked to suit him, and he could use it satisfactorily on his land, of which he was to be the judge, he was to take it upon the terms agreed upon; that upon trial it was not satisfactory, and he returned it to Welles. Both parties were to some extent corroborated by other witnesses, but the testimony was contradictory and conflicting; and it was for the jury to determine the true state of the facts.

In the general charge the learned judge of the court below instructed the jury as follows: "If you believe the evidence on the part of the plaintiff, particularly of Espy and Bradley, as to what occurred at the hammock, then there was a complete contract, and the plaintiff would be entitled to recover. If, on the other hand, you believe the evidence on the part of the defendant, that he was to take the machine and try it, and that he was not to keep it unless it worked to his satisfaction, then the plaintiff cannot recover, provided you find that the machine did not work well, and that he had reasonable cause to be dis-

satisfied with it. But if the machine did good work, he could not say, 'I have made a bad bargain; I am not satisfied,' and return the machine. In other words, there must have been a reasonable cause for his dissatisfaction, and the return of the machine must have been in good faith. . . . There is a great disagreement in the testimony of the witnesses for the plaintiff and the defendant, upon this subject, and you will have to determine, from all this evidence, whether the working of the machine was such as to give Mr. Seeley reasonable cause to be dissatisfied with it, or whether it worked well, according to the agreement and warranty, as testified to by the plaintiff and his witnesses. You will now take this case and give it your careful consideration, and render such a verdict as will do justice between the parties."

In this instruction of the court to the jury, we think there was error. If the defendant's theory of the case, on the facts, is accepted, it is plain that although the reaper may have worked well in the opinion of those who saw it, yet, if it did not work to the satisfaction of the defendant, he was not obliged to take it; he testified that he told Espy he would not take the reaper until he tried it, and if it worked to suit him, and his team could handle it on his farm, he would buy it, and that he was to be the judge of this himself. He complains that it was too heavy; that it weighed nearly 200 pounds more that it had been represented to weigh; that his horses could not haul it; and that, in his judgment, it did not do the work well, etc. His objections to the reaper may have been ill founded; indeed, they may have been in some sense unreasonable, in the opinion of others; yet if they were made in good faith, he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved?

What the learned court said to the jury on this point was equivalent to saying that although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought that he ought to have been satisfied, he was bound to take it; whereas, if the defendant's testimony is true, he was to judge of the merits of the machine himself, and not the bystanders nor the jury; and if he exercised his own judgment, in good faith, in the refusal to accept it, he was certainly not bound for the price.

The case is ruled by *Singerly* v. *Thayer*, 108 Pa. St. 291, where the authorities are collected, and the legal principles involved fully discussed. What has been said is of course applicable to the case only in the event that the jury in the re-trial of this case shall accept the defendant's theory as the correct one; for if the evidence on the part of the plaintiff is believed, the contract was complete. Upon this question, as we have said, the testimony is conflicting. We have purposely refrained from any discussion of the facts, out of which the principles of law governing the case arise, fearing that any reference to the testimony, in detail, might have a misleading effect. It is of the highest importance, in such a case as this, that the jury should be left entirely free to consider and determine the facts upon their own judgment.

The judgment is reversed, and a *venire facias de novo* awarded.—*American Law Register.*

NOTE ON ABOVE CASE BY THE EDITOR OF THE "AMERICAN LAW REGISTER."

Where a person undertakes to manufacture an article or deliver goods which he guarantees shall be satisfactory to the buyer, the purchaser is sole judge whether the article is satisfactory, and there is no remedy left for the seller, where the purchaser is not satisfied; *McClure* v. *Briggs*, 58 Vt. 82.

In the case of *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, the Circuit Court of the United States (Dist. Cal. Sept. 7, 1885) says: "The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser it must be satisfactory to him, or he is not required to take it. It is not enough to be satisfied with the article; he must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be judge; and if he deliberately enters into such an agreement, he must abide by it. To this effect, *Hallidie* v. *Sutter St. R. R. Co.*, 63 Cal. 575; *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v.

Foster, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Wood Reaping Machine Co.* v. *Smith*, 50 Id. 565; *Heron* v. *Davis*, 3 Bosw. (N.Y.), 336; *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42; *Gray* v. *Central R. R. Co.*, 11 Hun. (N.Y.), 70.

Thus, where one undertakes, "to satisfaction," to make a suit of clothes, *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; to fill a particular place as agent, *Tyler* v. *Ames*, 6 Lans. (N.Y.), 280; to mould a bust, *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; or paint a portrait, *Gibson* v. *Cranage*, 39 Mich. 49; *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42; *Moore* v. *Goodwin*, 43 Hun. (N.Y.), 534; he may not unreasonably expect to be bound by the opinion of his employer, honestly entertained; and neither the opposite party nor the jury can decide that he ought to be satisfied with the article made: *Moore* v. *Goodwin*, 43 Hun. (N.Y.), 534. See *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 565.

Thus, it has been held, that a contract to erect a patent hydraulic hoist, "warranted satisfactory in every respect," constitutes the purchaser sole judge of its fitness, and does not mean that it should be such as would satisfy other persons, or that the promisee reasonably ought to be satisfied with it: *Singerly* v. *Thayer*, 108 Pa. St. 291. And where the contract under which work is done provides for approval by a third party, no right to money earned or cause of action accrues until that party's certificate is procured: *Kirkland* v. *Moore*, 40 N. J. Eq. 106; *Tetz* v. *Butterfield*, 54 Wis. 242; *Oakwood Retreat Association* v. *Rathbone*, 65 Id. 177. But where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, the contract has been fully performed by the vendor, and the purchaser is bound to accept the article: *Silsby Manuf. Co.* v. *Chicago*, 24 Fed. Rep. 893, *supra*. Thus it was held in *Lynn* v. *Baltimore & O. R. R. Co.*, 60 Md. 404; s. c. 45 Am. Rep. 641, that on a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves of the goods.

In Connecticut, in the case of *Zaleski* v. *Clark*, 44 Conn. 418; s. c. 26 Am. Rep. 446, where a sculptor undertook to furnish a bust to the satisfaction of the defendant, who refused to accept the work, when done, though in fact a fine piece of workmanship, the Supreme Court held that there could be no recovery. The court says: "A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied, is quite another thing. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it he is bound by it." See also *Gibson* v. *Cranage*, 39 Mich. 49; *Gray* v. *Central R. R. Co. of N. J.*, 11 Hun. (N.Y.), 70.

The case of *Zaleski* v. *Clark*, *supra*, is founded upon *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139.

In Massachusetts, in a case where the plaintiff undertook to make a bookcase for a society, which was to be to "the satisfaction" of the president, the court says: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labour and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief:" *McCarren* v. *McNulty*, 73 Mass. (7 Gray) 139. And this case was subsequently followed in *Brown* v. *Foster*, 113 Mass. 139; s. c. 18 Am. Rep. 463, where the court says: "Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

In Michigan, in the case of *Wood Reaping and Mowing Machine Co.* v. *Smith*, 50 Mich. 555, which was a suit for the contract price of a machine warranted to be satisfactory to the defendant, it was held that "a stipulation in a contract of sale that it shall be of no effect unless the goods are satisfactory, is to be construed according to the circumstances, as re-

serving to the promisor the absolute right to reject them without giving any reason, or as binding him to decide on fair and reasonable grounds. In one case, his conclusion cannot be reviewed, but it can be in the other." The court says that "the cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class, the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course; and all right to inquire into the grounds of his action and overhaul its determination is absolutely excluded from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option and is not willing to leave his freedom of choice exposed to any contention, or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain upon the condition of reserving the power to do what others might regard as reasonable. The following cases sufficiently illustrate the instances of the first class: *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren* v. *McNulty*, 73 Mass. (7 Gray), 139; *Gibson* v. *Cranage*, 39 Mich. 49; *Hart* v. *Hart*, 22 Barb. (N.Y.), 606; *Tyler* v. *Ames*, 6 Lans. (N.Y.), 280; *Rossiter* v. *Cooper*, 23 Vt. 522; *Taylor* v. *Brewer*, 1 Maule & Sel. 290. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness, and the adequacy of the grounds of it, are open considerations, and subject to the judgment of judicial triers."

Among the cases applying to this class are, *Daggett* v. *Johnson*, 49 Vt. 345, and *Hartford Manufacturing Co.* v. *Brush*, 43 Vt. 528.

In New York, where the plaintiff repaired and set up the boilers for the defendant, under the contract that he was not to be paid, until the defendants were satisfied that the "boiler as changed was a success," defendants claimed that they alone were to determine the question whether they were satisfied that the boiler as changed was a success. The court held that this was error, where the work was completed according to contract, and the defendants used it without objection or complaint. The time for payment had come and the plaintiff had a right of action for the contract price in case payment was refused. The reason upon which this was founded seems to be, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with": *Duplex Safety Boiler Co.* v. *Garden*, 101 N. Y. 387; s. c. 54 Am. Rep. 709. In *Folliard* v. *Wallace*, 2 Johns. (N.Y.), 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150 three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded."

This decision was followed in *Miesell* v. *Globe M. L. Ins. Co.*, 76 N. Y. 115, and *Brooklyn* v. *Brooklyn R. R. Co.*, 47 Id. 475.

In Pennsylvania, it was held, in the recent case of *Singerly* v. *Thayer*, 108 Pa. St. 291, that a contract to furnish an article which shall be satisfactory to the purchaser, is not complied with by proof that the article furnished is made in a workmanlike manner, and per-

forms its intended purpose in a manner which ought to be satisfactory to the purchaser. The contract in this case was to erect an elevator "satisfactory in every respect," and the court held the meaning of the language used to be that the elevator, when erected, should prove satisfactory to the person for whom it was erected. As a matter of fact, the elevator did not prove satisfactory, and suit was brought on the contract for the price. The court says: "When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove that he ought to have been satisfied. It was so where the contract was for the purchase of a steamboat:" *Gray* v. *Central R. R. Co. of N.J.*, 11 Hun. (N.Y.), 70; where the agreement was to make a suit of clothes: *Brown* v. *Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; on a contract for a plaster-bust of the deceased husband of the defendant: *Zaleski* v. *Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; where a portrait was to be satisfactory to the defendant: *Gibson* v. *Cranage*, 39 Mich. 42; and where a portrait of defendant was to be satisfactory to his friends: *Hoffman* v. *Gallaher*, 6 Daly (N.Y.), 42.

In Vermont, in the case of *McClure* v. *Briggs*, 58 Vt. 82, where A set up an organ in B's house, upon an agreement that B should keep it and pay for it, if it proved satisfactory to him, B thought without cause, that he was dissatisfied, and notified A. The court held that, provided he acted in good faith, he was the sole judge as to his satisfaction with the organ. The court says: "He was bound to act honestly, and to give the instrument a fair trial, and such as the seller had a right, under the circumstances, to expect he would give it, and herein to exercise such judgment and capacity as he had, for, by the contract, he was the one to be satisfied, and not another for him. If he did this, and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and the plaintiffs have not fulfilled their contract, and all these elements are gatherable from the report. This is the doctrine of *Daggett* v. *Johnson*, 49 Vt. 345, and of *Hartford Manufacturing Co.* v. *Brush*, 43 Id. 528. In the former case, the defendant was required to bring to the trial of the evaporator only honesty of purpose and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. The case turned on an error in the admission of testimony, but Judge REDFIELD goes on to discuss the merits of the case, somewhat following substantially in the line of Brush's case, and citing it as authority. But *Daggett* v. *Johnson* is distinguishable in its facts from Brush's case, and from this case, in that the defendant omitted to test the pans in the very respect in which he knew it was claimed their excellence consisted."

In Wisconsin, in the case of *Tetz* v. *Butterfield*, 54 Wis. 242, it is said, that where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith. And in *Glasius* v. *Black*, 50 N. Y. 145, where by the terms of a contract for repairing a building it was provided that the materials to be furnished should be of the best quality and the workmanship performed in the best manner, subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the work to be paid for "when completely done and accepted," it was held that the acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work, or inferior materials, from those contracted for, bind the owner to pay for them; that the provision for acceptance was merely an additional safeguard against defects not discernible by an unskilled person. And in the recent case of *Oakwood Retreat Association* v. *Rathbone*, 65 Wis. 177, it was held that when a contract provides for the performance of work at at a stipulated price, to the satisfaction of an architect named therein, who is employed to adjust all claims of the parties to the agreement, and a bond is given to secure a faithful performance of the contract, where the party agreeing to do the work does not fully perform such contract, the other party may sue the principal and sureties on the bond for a breach of the contract, before the architect has adjusted any claim arising out of the breach.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Armour, C. J.] [Oct. 5.

In re BOBIER AND ONTARIO INVESTMENT ASSOCIATION.

Vendor and purchaser—Requisitions—Certified copies of deeds—Removing clouds on titles—Lis pendens—Power of attorney—Compensation for deficiency in land sold.

Upon a petition under the Vendor and Purchasers Act,

Held, 1. Following *McIntosh* v. *Rogers*, 12 P. R. 389, that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title, which the vendors were unable to produce. The statute 10 Anne, c. 18, does not bear such analogy to our registry laws as to make *Cooper* v. *Emery*, 1 Phil. 390, an authority to the contrary.

Held, 2. That the purchasers were entitled to have removed from the registry as clouds upon the title: (*a*) A certain certificate of *lis pendens* in an action upon a mortgage which appeared by the registry to be discharged, because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage: (*b*) A second certificate of *lis pendeus*, in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it, because the vendors, and, if the title passed, the purchasers, might be added as parties; (*c*) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling, because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all, before the vendors obtained title.

Held, 3. Upon the evidence, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title.

Hoyles, for the petitioners, the purchasers.
W. R. Meredith, Q.C., for the vendors.

Armour, C. J.] [Oct. 12.

LE MAY *v.* MCKAE.

Award—Motion to set aside—Conduct and jurisdiction of arbitrator—Draft award—Admissions of arbitrator—Revoking submission—Discovery of new evidence.

Action upon a sub-contract for railway construction. Motion by the defendants to set aside the award of an arbitrator, made upon a reference to him without provision for appeal, upon the ground that the arbitrator illegally and in excess of his jurisdiction received evidence of a verbal contract or understanding between the plaintiffs and defendants varying the written contract, and awarded payment to the plaintiffs for the timber supplied to the defendants not by board measure, as required by the written contract, but upon a different system of measurement; and upon the ground of the discovery of new evidence, that of one B., and the absence of a material witness, one M.; and upon grounds disclosed in the papers filed, and especially in the memorandum or draft award showing the grounds upon which the award was arrived at.

Held, that the award being good on its face, and the draft award not being delivered with or accompanying the award, the case did not come within the exception stated in *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189.

Admissions made by the arbitrator, upon which his award was founded, in conversation with the defendants' solicitors, were not available for the purpose of setting aside the award (see *Dinn* v. *Blake*, L. R. 10, C. P. 388); nor could the draft award or memorandum be any more available for such purpose than the oral admissions of the arbitrator.

Re Don Valley Railway Co., L. R. 6, Eq. 429, distinguished.

East and West India Docks Co. v. *Kirk*, 12 App. Cas. 738, in which it was held that the court had jurisdiction to revoke the submis-

sion if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction, does not affect the law as to setting aside awards laid down in *Dinn* v. *Blake*, and other cases, because the chief reason urged was that after the award was made there could be no relief against it.

Held, also, that no case was made out for remitting to the arbitrator on the ground of the discovery of fresh evidence, because the defendants were aware of the evidence of M. while the reference was proceeding, and did not ask for a commission or a postponement; and it was not shown that the evidence of B. could not have been obtained by reasonable diligence, and it was at any rate not such evidence as a new trial would be granted to obtain.

Robinson, Q.C., and *A. Ferguson*, for the defendants.

W. R. Meredith, Q.C., and *Delamere*, for the plaintiffs.

Chancery Division.

Robertson, J.] [Oct. 5, 1887.

MOORE *v.* ONTARIO INVESTMENT CO.

Corporation—Action for deceit—Demurrer.

Demurrer to a statement of claim in an action for deceit whereby the plaintiff was induced to purchase shares of stock in the defendants' company, and practically from the company, which were valueless, by reason of false and fraudulent statements in the annual report of the company, and in letters written to him by the president of the company, overruled with costs.

A corporation may be held liable in an action for deceit.

Shepley, for the demurrer.

Moss, Q.C., contra.

Boyd, C.] [Sept. 21, 1888.

MCLENNAN *v.* GRAY.

Mortgage—Bar of dower—Prior registration—Surety—Merger.

G., the owner of certain land, devised the land to his two sons, R. and J., charged with an annuity of $150 to his widow, and also with certain legacies to two other sons. After G.'s death, in March, 1879, R. and J. mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it. R. and J. then raised money from the plaintiff in November, 1879, by a mortgage, which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage, and, therefore, gaining priority. In this mortgage to the plaintiff the widow joined, barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage, and there was a surplus of $1,612, and the question was whether the widow as doweress and annuitant had priority over C.

Held, that she had, for the priority gained by the plaintiff over C. by means of his prior registration, enured to her benefit as surety. The fund, so to speak, out of which C.'s mortgage was to be primarily paid was increased by the act of the law based upon the default of the mortgagee first in point of time.

Held, further, that the fact that the widow had accepted a conveyance of a moiety of the land from R. did not cause her annuity to merge in whole or in part, the mortgage to C. intervening, and it, therefore, not being to her interest to hold that a merger had taken place. The question of interest governs merger in the absence of express intention.

Scott, Q.C., for mortgagee, C.

Boulton, for the widow.

Boyd, C.] [Sept. 22

Re CENTRAL BANK OF CANADA.

BAINES' CASES.

NASMITH'S CASE.

Banking Act—Payment of ten per cent. on subscription—Transfer of shares—Marginal transfer—Shareholders within month from suspension—Bank dealing in its own shares—R. S. C. c. 120, *ss.* 20, 29, 45, 77.

When ten per cent. was not paid at the time of original subscription of bank shares, nor within thirty days thereafter, as required by the Banking Act, R. S. C. c. 120, s. 20, yet the ten per cent. was paid before the first transfer took place, and was accepted by the bank.

Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings.

The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment.

When the evidence showed that the bank had adopted the practice of dealing with their shares by way of marginal transfer, the first transfer being made in blank, subject, as by marginal note, to the order of a broker, and the ultimate purchaser signing an acceptance in the book immediately under the transfer so signed in blank by the seller, the intermediate dealing of the broker being omitted from extended record in the bank books; and the transferees were duly entered as shareholders in the stock ledger of the bank,

Held, that this amounted substantially to an acceptance of shares transferred in blank, which is lawful where transfer by deed is not prescribed, and the entry in the stock ledger amounted to registration within the meaning of the Act, and though in one case the transferee did not sign the acceptance, yet he subsequently dealt with the shares by selling and transferring them to another; and the transferees were properly placed on the list of contributories, notwithstanding anything in the Banking Act, R. S. C. c. 120. s. 29.

When one of those placed upon the list of contributories acquired his shares within one month from the suspension of the bank,

Held, that he was liable as a contributory. R. S. C. c. 120, s. 77, is cumulative so as to make also liable those who have been holders during the month preceding the suspension, leaving them to discuss among themselves their respective liabilities.

When the shares which had been transferred to one placed on the list of contributories had been previously held by the cashier of the bank in trust, as alleged, for the bank, which it was objected was thus trafficking in its own shares,

Held, that even if the cashier did hold the shares in trust for the directors of the bank, this would not be necessarily illegal, as he might have such shares, under s. 45 of the Banking Act, as security for overdue debts; and, besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institution, became of no moment after the rights of creditors represented by the liquidators arise. The matter was not an absolute nullity, but, at most, one which the shareholders could waive as voidable, and it became, by the suspension, of unimpeachable validity as between the appellant and the liquidators.

A. Galt, for the appellants.

Foster, Q.C., contra.

Ferguson, J.] [Sept. 26.

Re Booth's Trusts.

Devolution of Estates Act—R. S. O. c. 108, s. 8—"Devolve."

When a will gave the lands of the deceased to the executors, and gave them the power to sell it,

Held, that the case was not within s. 8 of the Devolution of Estates Act, and the written consent or approval of the official guardian of infants was not necessary to a sale of the land.

The word "devolve" in this section is not used in its strict and accepted meaning of falling upon one by way of succession, but in the sense merely of "passing,"—and what is meant is that where infants are concerned no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian.

J. Hoskin, Q.C., as official guardian.

Carson, for the executors.

J. R. Miller, for intending purchaser.

Practice.

Boyd, C.] [Sept. 10.

Hay *v.* Johnston.

Judgments—Summary order for, upon money demand—Leave to proceed upon another claim—Rule 739.

There may be two judgments in the same action; and where a writ of summons was indorsed to recover the amount of a bill of

exchange, and also to set aside a conveyance as fraudulent, an order was made under Rule 739 for judgment on the money demand, with leave to proceed upon the other claim.

Huffman v. *Doner*, 12 P. R. 492, followed in preference to *Standard Bank* v. *Wills*, 10 P. R. 159.

Hoyles, for the plaintiff.

No one for the defendant.

MacMahon, J.] [Oct. 1.

REGINA *v.* LAVIN.

Warrant of commitment—Conviction—Variance—Motion to discharge prisoner—Enlargement—R. S. C. c. 176, s. 24.

In determining upon a motion to discharge a prisone whether a warrant of commitment is defective, the court cannot, in view of the Summary Trials Act, R. S. C. c. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction.

Cases cited by WILSON C.J., in *Arscott* v. *Lilley*, 11 O. R., at p. 167, referred to.

And where the conviction alleged that the offence was committed in January, 1887, and the commitment January, 1888, the motion was enlarged accordingly.

Badgerow, for the Crown.

Bigelow, for the prisoner.

Boyd, C.] [Oct. 1.

WOLF *v.* OGILVY—*In re* HAGAR.

Lunacy—Intervention of official guardian—Consolidated Rules 335 to 338—R. S. O. (1887), c. 44, s. 32.

Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant, and obtaining an order of the court by procedure analogous to that provided by Consolidated Rules 335 to 338.

But where a person has been found by the court to be of unsound mind, the official guardian may be served without order or notice to the lunatic.

Sec. 32 of R. S. O. (1887), c. 44, must be limited to causes mentioned in the marginal note thereto, which correctly defines the scope of the enactment.

Langton, for the plaintiff.

J. Hoskin, Q.C., for the lunatics.

W. Barwick, for the curator of the lunatic, Hagar.

Boyd, C.] [Oct. 3.

In re HORNIBROOK.

Sale of land—Order of court in infancy matter—Default of purchaser—Re-sale.

In a matter pending before the court concerning the sale of infants' lands, an order was made directing the acceptance of an offer to purchase the lands. The purchaser having made default, the Master in Chambers made an order for payment of the purchase-money, and in default for a re-sale, and payment by the purchaser of any deficiency.

An appeal from this order on the grounds that the contract provided a penalty for default, viz., forfeture of the deposit, and that the practice followed was not the proper one, as the sale was not under the standing conditions of the court, was dismissed.

Masten, for the purchaser.

Beck, for the vendors.

Armour, C.J.] [Oct. 4.

CUTLER *v.* MORSE.

Costs—Unnecessary counter-claim.

To an action on a building contract the defendant set up the defence that the work was incompletely and unskilfully done, and counter-claimed for damages by reason thereof. The Master to whom the action was referred found that $177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the plaintiff had suffered damage to the extent of $177.

Held, that the questions raised by the defendant might have been raised before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he set up was properly a counter-claim.

W. M. Douglas, for the plaintiff.

Middleton, for the defendant.

Robertson, J.] [Oct. 8.

WHITE *v.* RAMSAY.

Action for recovery of land—Joinder of other causes of action—Consolidated Rule 341.

The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Consolidated Rule 341.

Upon a motion by the defendant to set aside the writ of summons, the Master in Chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs.

ROBERTSON, J., on appeal, upheld the Master's order.

Hoyles, for the defendant.

C. J. Holman, for the plaintiff.

Armour, J.] [Oct. 9.

MCLEOD *v.* SEXSMITH.

Judgment under Con. Rule 756—*Stage of action when ordered—Admissions in letters.*

An application for judgment under Rule 756 cannot be made until the right of the party applying to the relief claimed has appealed from the pleadings.

And an order made under that rule before the delivery of any pleading in the action based on admissions in letters, was set aside.

T. Langton, for the plaintiff.

C. J. Holman, for the defendant.

Mr. Dalton.] [Oct. 12.

ELLIOTT *v.* CANADIAN PACIFIC RAILWAY CO.

Evidence—Sole witness of accident giving rise to action—Examination before trial.

In an action under Lord Campbell's Act an order was made for the examination before the trial *de bene esse* on behalf of the plaintiff of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness.

J. H. Ferguson, for the plaintiff.

D. Armour, and *W. H. Wallbridge*, for the defendants.

Boyd, C.] [Oct. 16.

FOSTER *v.* VANWORMER.

Judgment debtor—Examination—Duty of debtor—Unsatisfactory answers—Notice of motion to commit.

It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out as best they may what it is the business of the debtor to make clear.

Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he has the means at hand to qualify himself to explain.

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of.

Precision should be used on the examination in ascertaining the exact state of facts, as shown in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the judge can only look at what is proved or admitted.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense, and to pay the costs of the motion.

Ex p. Bradbury, 14 C B. 15, and *Ex p. Moir*, 21 Ch. D. 61, followed.

Crooks v. *Stroud*, 10 P. R. 131; and *Lemon* v. *Lemon*, 6 P. R. 184; and *Hobbs* v. *Scott*, 23 U. C. R. 619, discussed.

A. R. Creelman and *Macrae*, for the motion.

Walter Barwick, contra.

Boyd, C.] [Oct. 16.

MCLEAN *v.* BRUCE.

Examination—Proof of service of appointment and payment of conduct money—Examiner's certificate—Waiver.

Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination, upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not show that due service of subpœna and appointment and payment of conduct money had been made.

Semble, the certificate of the examiner as to these points would not have been sufficient; and

Held, that in the absence of evidence it was not to be inferred, from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not, by such attendance, waive his right to have the service and payment proved.

H. Cassels, for the plaintiff.

F. C. Moffatt, for the defendant.

Boyd, C.] [Oct. 16.

HALL *v.* GOWANLOCK.

Discovery—Libel—Privilege—Answers tending to criminate—Costs.

No man can be compelled to answer a question incriminating himself. And where the defendant, upon his examination for discovery in an action of libel, refused to answer questions as to the authorship of the alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him;

Held, that he was entitled to the privilege, and that he was not too late to claim it. The costs of the motion to commit were made costs to the plaintiff in the cause.

Law Students' Department.

THE following papers were set at the Examination of the Law Society before Trinity Term, 1888.

SECOND INTERMEDIATE.

REAL PROPERTY.

1. What is the difference between the covenants for title in a statutory form of deed, and those in a statutory form of mortgage?

2. How is an estate tail barred? Explain fully.

3. What is meant by merger of estates? Explain fully the requisites of merger.

4. How long has a mortgagee within which to sue on the covenant in his mortgage, and how long within which to recover the land, after default?

5. What is a contingent remainder? Give examples of the different contingencies upon which it may depend?

6. What are the rules as to creation of remainders?

7. What are the requisites of a deed?

BROOM'S COMMON LAW AND O'SULLIVAN'S GOVERNMENT IN CANADA.

1. Explain the writ of *prohibition*, and state in what cases it will be granted.

2. What is the meaning of the phrase *transit in rem judicatam*?

3. Into what three great heads are bailments usually divided? and what is the essential difference between them as to the liability of the bailee?

4. Explain the difference between *natural* and *local allegiance*.

5. Under what circumstances does the appropriation of *lost goods* by the finder amount to larceny?

6. Explain the difference between *larceny* and obtaining goods by *false pretences*.

7. What legislative powers, if any, has the Legislature of Ontario in criminal matters?

EQUITY.

1. What is meant by the term advancement? State generally in whose favour it will, and in whose favour it will not be raised.

2. State the requisites in a will to create a valid trust.

3. Explain and illustrate by an example the maxim that Equity acts *in personam*.

4. Is there any difference between the right of a trustee purchasing from his *cestui que trust* and a solicitor buying from his client? If so, distinguish between them.

5. A person imagining he is about to die, hands to A his cheque for $1,000. Explain the effect of his gift.

6. Define the classes into which legacies are divided, giving an example of each.

7. Into what various heads has constructive fraud been divided?

PERSONAL PROPERTY—JUDICATURE ACT.

1. A and B are jointly liable to C on a bond. A dies, leaving D executor of his estate.

subsequently dies, leaving E executor of his estate. Who is liable to C for the debt? Why?

2. Explain the term *liquidated damages.* Distinguish from penalty.

3. Stock is settled in trust for A for life, and after his decease in trust for his executors and administrators. What is the effect? Why?

4. A appointed B his executor. When A dies, B is a minor. What is the result on the executorship?

5. What is the difference between *set-off* and *counter-claim* in an action?

6. What is the procedure to obtain a new trial in jury cases?

7. On a change of interest in an action, how can the necessary change be made in the parties to the action? State how the parties affected by the procedure may attack such procedure.

REAL PROPERTY.—HONOURS.

1. What objections are there to the power of sale contained in the statutory form of mortgage?

2. What is an estate upon condition? Give examples of the different kinds of such estates.

3. What is the difference between primary and secondary conveyances? Exemplify.

4. Define *dominant tenement, servient tenemen', easement.*

5. What was the effect of using the words "die without issue" in a devise of realty, and how has it been effected by statute?

6. An infant purchases land and dies, are his representatives bound to accept the land, and pay the purchase-money if unpaid? Why?

7. What is the effect of a statutory discharge of mortgage before and after registration?

BROOM'S COMMON LAW — O'SULLIVAN'S GOVERNMENT IN CANADA.—HONOURS.

1. What is the rule as to the suspension of the civil remedy against a wrong-doer when the act done is a felony? and what statutory exception is there to the rule?

2. In what cases does the law deny a remedy for an injury from motives of *public policy?*

3. Explain the law as to the criminal responsibility of a married woman.

4. Explain the meaning and effect of *privileged occasion*, in an action of slander or libel.

5. State the true doctrine of *contributory negligence*, as a defence to an action at law.

6. Discuss briefly the question of the necessity for *privity* in an action *ex delicto.*

7. State the necessary qualifications for a Dominion Senator.

EQUITY.—HONOURS.

1. In what cases of contract is silence tantamount to direct affirmation?

2. State the law governing satisfaction of legacies by subsequent legacies: (1) where the legacies are by the same instrument; (2) where the legacies are by different instruments.

3. Distinguish between the rules of Equity in dealing with executory trusts in marriage settlements and those in wills, respectively.

4. A testator bequeaths $10,000 by will to such charitable uses as he shall direct by codicil annexed to the will—there is no codicil. What is the effect of such bequest? Reasons for answer.

5. Under what circumstances may a plaintiff be entitled to specific performance of a written contract with a parol variation?

6. What various remedies are open to a *cestui que trust*, where a trustee has wrongfully converted the trust property?

7. A and B are partners, the period of whose partnership has not expired. A comes to court seeking a dissolution; on what grounds can he succeed?

PERSONAL PROPERTY—JUDICATURE ACT.—HONOURS.

1. A grants to B all goods which he now has or may hereafter have in his dwelling-house. How far is this grant valid?

2. A is indebted to B, and wishes to put B in the position of being a judgment creditor. How can he do so without an action being commenced by B?

3. How far can a party to a submission to arbitration revoke such submission?

4. A bequest of personal property is made to A, but to be forfeited if A marry without C's consent—then to go to B. What is the effect?

5. What is the rule as to the recovery of

stolen goods by the owner as against a purchaser of such stolen goods?

6. A desires to sue the firm of B and Co. What provision is there by virtue of which he can ascertain who are the members of the firm?

7. A writ of summons cannot be served until after one year from its date. How could it have been kept alive?

Miscellaneous.

CAUSE AND EFFECT.—"I hear," said somebody to his friend, "that Smith the lawyer is dead, and leaves very few effects." "He could scarcely do otherwise," was the response; "he had so very few causes."

THE LAWYER'S BEST FRIEND.—At a certain law society's dinner not long ago the president called upon the oldest member of the bar to give as a toast the person whom he considered the best friend of the profession. "Certainly," he replied; "the man who makes his own will."

SENTIMENT AND BUSINESS.—Young man: "I cannot see, sir, why you permit your daughter to sue me for breach of promise; you remember that you were bitterly opposed to our engagement because I was not good enough for her, and would disgrace the family." Old man: "Young man, that was sentiment; this is business."

DISSENTING OPINIONS.—We notice from the current reports that they have taken to filing dissenting opinions in Massachusetts. We have understood that it had been for many years the practice of the Supreme Judicial Court of that State to suppress any knowledge of dissenting opinions; so that every opinion, although that of a bare majority of the judges, carried with it the force of the united opinion of the full bench. A good many lawyers think that the dissenting opinions ought not to be filed; but the argument against dissenting opinions proves too much, for it is equally an argument against all opinions.—*American Law Review.*

HE WOULD REFORM GRADUALLY.—A ward statesman, whose testimony was needed in a case of election frauds, was about to be sworn. "Do you solemnly swear," said the court, "to tell the truth, the whole truth, and nothing but the truth, so ——" "Hold up, Judge," interrupted the witness, "can't you mitigate that sentence just a little. You know I have been in politics a good long time."

A SUGGESTION TO REPORTERS AND AUTHORS.—It is strange that reporters and legal authors have never had the practical sense to put at the top of each left-hand page the name of the reports, together with the volume, so that the practitioner can accurately cite the case without turning the book over to look at the back. But two or three instances are known where reporters and authors have had the sense to do this.—*American Law Review.*

NOT QUITE READY.—A good story is told of a lawyer at Boston, who was noted for his desire to put himself on a friendly footing with the jury. An old and severely virtuous lawyer was opposed to him in a case, and there was apparently some unnecessary delay on the part of the latter in beginning his case. "Well, gentlemen, why don't you begin?" said the court; to whom the old lawyer replied, "I perceive, your honour, that there is one member of the jury with whom my learned friend has not yet shaken hands. If he will shake hands with him, we will be ready to go on."

Appointments to Office.

COUNTY JUDGES.

Elgin.

John McLean, of St. Thomas, Deputy Judge of the County Court.

Hastings.

S. S. Lazier, of Belleville, Deputy Judge of the County Court.

THE *Illustrated London News* (American Edition) comes with regularity. It is a faithful reproduction, in New York, of the well-known English illustrated periodical.