Canada Law Journal.

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Requests have come from many of our subscribers for the publication of a directory of reliable practitioners in the principal business centres in Canada and the United States. To meet this need we have prepared a list, which will, we think, be found satisfactory. Every care has been taken to make it as complete and reliable as possible, and we think we can safely recommend the names given in the directory to those who may need their services. We shall be glad to hear from our subscribers in reference to any changes and additions which may seem desirable from time to time.

The Canada Law Library in London, England, is now an accomplished fact. Statutes, reports and gazettes have been received by the librarian, Mr. S. V. Blake, from the Dominion and most of the provinces, and a valuable collection of French law works has been lent to the library. There are still important gaps noticeable, particularly with regard to the Maritime Provinces, but this, it is hoped, will be rectified in course of time. The library occupies a modest apartment at 17 Victoria street, Westminster, in the same building with the office of the High Commissioner for Canada, and will doubtless be found a great convenience by the various members of the Canadian profession who will visit London this summer. It is hoped to raise by subscription a sum sufficient to procure certain text books and digests, as well as some Privy Council and other English reports, which would greatly increase the usefulness of the library.

A note on the method of certifying judgments in Ontario for use in foreign Courts, may perhaps be of interest to members of the profession from the absence in the rules of any provision regulating the practice. In the case of judgments entered in Toronto, the exemplification certified as correct by the Clerk of Records and Writs, and the seal of the Court, is presented to the Chancellor as President of the High Court, who verifies the seal and the signature of the Clerk of Records and Writs by his own certificate, according to a printed form provided by the central office. The whole is then authenticated by a certificate of the Provincial Secretary. which can be obtained on payment of two dollars. Where the judgment is entered in a local office neither the Clerk of Records and Writs, nor the Chancellor, can certify to the signature of the local officer. To overcome this difficulty it has been the practice in some cases to obtain from the Inspector of Legal Offices a certificate verifying the signature of the local officer, upon which the Chancellor has issued his certificate in the same form as that used with judgments entered in Toronto. The Provincial Secretary's certificate then follows as a matter of course.

A correspondent draws our attention to a point which we had overlooked, viz., that in the case *Johnston* v. *Catholic Mutual*, referred to in our last issue, it is stated in the report at p. 93 that after the argument of the appeal and before judgment the legatees and next of kin of Patrick O'Dea were, by order of the court, added as parties, but whether as plaintiffs or defendants is not stated; as their rights were clearly antagonistic to those of the original plaintiff, we presume they must have been added as defendants. It does not appear by the report, however, that they appeared, or set up any counter claim. The case, even in this view of the matter, is quite unique, and is an instance of the possibilities of procedure under the Judicature Act. The action wholly failed as regarded the plaintiff and original defendant (the executor), and yet a judgment was pronounced in favor of defendants, brought in at the eleventh hour, and who, so far as appears,

did not set up any counter claim. While we are opposed to unnecessary circumlocution, we nevertheless think some regard ought to be had to proper procedure. It is possible that a counter claim was actually filed, although not stated in the report; at all events we do not see how the judgment we referred to could purposely be pronounced except upon a counter claim. It would be interesting to know how the costs of the litigation were ordered to be borne—but the judgment of the majority of the court does not throw any light on that point.

The introduction of the type-writer into the field of law is one of those modern improvements which has greatly tended to facilitate business. At the same time there is a danger which ought to be guarded against arising from the ephemeral character of some of the work done on type-writing machines. One of the important requisites of most legal documents is permanency, and yet documents are frequently struck off on such machines whose legibility will not endure beyond a very few months. The copies produced by means of carbon paper, we believe, are especially open to this objection, and deeds type-written in this way will in a comparatively short time become quite illegible. Solicitors owe it to their clients to exercise some care in this respect and to see that their interests are not jeopardized by reason of documents affecting their rights being thus defectively printed. We have been induced to make these remarks by a communication we have received from a member of the profession, who informs us that he has in his office some carbon copies of documents which were printed off a few years ago and which have not since been handled, but have nevertheless become almost illegible. He very properly adds that the reckless use of carbon copies for settlements, deeds and agreements of any importance, is very much to be deprecated. We are inclined to think that the use of carbon prints for pleadings and other documents required to be filed in Court should be probibited. This is a matter which obviously requires a little attention.

FIXTURES.

During the last session of the Ontario Legislature an important addition was made to the Act of 51 Vict., c. 19, regulating conditional sales of chattels in that province. A recent case in the English Court of Appeal, *Hodson* v. *Gorringe*, L.R. (1897), 1 Ch. 182 (ante p. 311), decided that where fixtures had been attached to land under a similar hire and sale agreement, a mortgagee of the land without notice of the agreement could hold the fixtures in priority to the vendor. The fact of actual physical attachment is made the test of fixture, and the intention of the parties is treated as entirely immaterial.

By c. 14 of the Act of last session, s. 80, the following addition is made to 51 Vict., c. 19:—"10. (1) Should any goods or chattels, subject to the provisions of this Act, be affixed to any realty, such goods and chattels shall notwithstanding remain so subject, but the owner of such realty, or any purchaser, or any mortgagee or other encumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor thereof, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon."

"(2) The provisions of this section are to be deemed retrospective and shall apply to past as well as to future transactions."

This enactment has not as yet been under consideration in any decided case, but its effect is no doubt to override *Hodson* v. *Gorringe*. The mortgagee, even without notice, would seem to be able to retain the chattels against the bailor only upon payment of the amount still due under the hire and sale agreement. The manufacturer will obtain by his agreement a right in the nature of an easement or a covenant running with the land, the burden of which will attach to the land even in the hands of a subsequent purchaser or mortgagee, and notice to him is not necessary to create the right. See the remarks of Mr. Justice A. L. Smith in *Hodson* v. *Gorringe*, at p. 192.

But this section will perhaps be construed to effect other changes in the law. The words "owner of the realty" may be held to include, for instance, a lessor who could then, apparently at any time, require from the manufacturer a transfer of all his rights against the tenant on a contract of this kind for fixtures supplied to the latter. Other difficult questions may also arise under this provision, and its wisdom may be doubted.

THE HON. MR. JUSTICE MOSS.

In our last issue we referred very briefly to the recent appointment of Mr. Charles Moss, Q.C., as a Judge of the Court of Appeal, to fill the place upon that bench made vacant by the retirement of the Hon. Chief Justice Hagarty. We are now able to furnish our readers with a short sketch of the career which has led up to such an honorable distinction, a career which not only explains Mr. Moss' selection to fill the position of responsibility and dignity to which he has been summoned, but justifies us in predicting the best results both for the country and for litigants, from his acceptance of the office.

Mr. Moss was born at Cobourg on the 8th of March, 1840. In 1864 he turned his attention to the legal profession, being admitted to the Law Society in November of that year, and signing articles to his brother, the late Chief Justice Moss, then of the firm of Cameron & Moss.

During the five years of his student life Mr. Moss applied himself with diligence both to the mastery of the details of office work and to the absorption of the principles which underlie the science of the law. His Law Society examinations were a series of victories, a scholarship being captured on each occasion.

It is interesting to refer to our issue of December, 1867, (ante vol. 3, p. 312) published after Mr. Moss' third year examination, when we ventured to make the following prophecy:—"It will be seen from the above that Mr. Moss has only to obtain the scholarship for the fourth year, to have the

satisfaction of knowing that he has been successful in obtaining every scholarship for which he has tried. If we belonged to a betting instead of a legal fraternity, we should back him to take the scholarship for the fourth year as he has the first, second and third, though it is said that a University man intends to make him win it well a year hence,"—a prophecy which was duly fulfilled in the following year.

Upon being called to the Bar in Michaelmas Term, 1869, Mr. Moss at once became a member of his brother's firm of Osler & Moss, the present Mr. Justice Osler being the senior partner. The firm was later joined by the late Chief Justice Harrison, and carried on business under the name of Harrison, Osler & Moss, until October, 1875, when upon the elevation of Mr. Harrison and Mr. Thomas Moss to the Bench, the firm was joined by the late James Bethune, Q.C., and became Bethune, Osler & Moss. Mr. Osler being called to the Bench in 1879, the firm continued as Bethune, Moss, Falconbridge & Hoyles until 1883, when Mr. Bethune withdrew and Mr. Moss became the senior partner. In 1887 the firm contributed yet another member to the Bench in the person of Mr. Justice Falconbridge.

Mr. Moss has always been closely connected with the Law Society. He filled the positions of Lecturer and Examiner from 1872 till 1879, and he was elected in Nov., 1880, by the Benchers, to fill a vacancy in their number. He was re-elected by the profession at the general election in May, 1881, and has been returned high up on the list at every subsequent election.

He was appointed by the Benchers in 1884 as Chairman of the Legal Education Committee, and also as the representative of the Law Society on the Senate of the University of Toronto, both of which positions he has since continuously occupied.

It was very largely due to his energetic efforts that the Law School was established on a permanent and efficient basis in 1889, and obtained a home of its own by the erection of the Law School wing of Osgoode Hall in 1891. Mr. Moss also filled the position of fifth President of the County of

York Law Association in 1891. Mr. Moss has worn silk since July, 1881, having been appointed Queen's Counsel at that time by the Dominion Government.

Before the Judicature Act, Mr. Moss' practice was on the Chancery side; and since the union of the two systems of jurisprudence he has inclined towards the class of cases in which he had grown to be so much at home, and has especially avoided jury cases, so that his name has not figured in many cases of sensational interest. He has, however, been connected with many of the great constitutional cases of the last quarter of a century, amongst others the famous dispute between the Dominion and Provincial Governments over the Mercer Estate, *Attorney-General* v. *Mercer*, 8 App. Ca. 767; the Streams Bill case, *McLaren* v. *Caldwell*, 9 App. Ca. 392, and the stated case as to the constitutionality of s. 9 of the Assignments and Preferences Act, *Re Assignments and Preferences Act, s. 9*, 20 A.R. 489, A.C. (1894) 189.

Other important cases which might be mentioned are *Langtry* v. *Dumoulin*, 7 O.R. 644; *Purcell* v. *Bergin*, 23 S.C.R. 101; *Commissioners of Niagara Park* v. *Howard*, 23 A.R. 355, and the arbitration between the Dominion and the Provinces of Quebec and Ontario over their accounts since Confederation.

In addition to his reputation as a skillful, astute and energetic advocate, Mr. Moss has long been known to the profession as one of the soundest, most careful and most pains taking advisers in the province, and it is especially to these qualities, which have made his opinions of so much weight, that we look for the fulfilment of the great expectations which have been raised by his appointment to the Bench. Courteous and affable, he will doubtless be as popular on the Bench as he has been at the Bar.

CAUSERIE.

Better have a bad epitaph
Than their ill report while you lived!

—HAMLET, Act II., sc. 2.

THE ODDITIES OF REPORTING.—Lawyers familiar with the old English reporters will recall many curious comments by them upon the Judges and judgments wherewith they had to do, which would be considered highly unconventional, to say the least, if indulged in by the reporters of our own times. For instance, we are amazed to hear Sir Harbottle Grimston, the son-in-law and first editor of Croke, announce that he has taken upon himself "the resolution and task of extracting and extricating these Reports out of their dark originals" [his father-in-law's hand-writing!], and to hurl at the "dark originals" aforesaid the vituperative, if classical, epithet of "folia sibyllina." Then, perchance, if one's researches take him into 4 Leonard, 198, and 2 Rolle, 87, he will be astonished to find that a certain point of law was "agreed by the Court, and *affirmed by the Clerks*," and his wonderment over this anomalous court of appeal will not subside until he resorts to Lord Bacon's essay on "Judicature," wherein it is set down that "an ancient clerk, skillful in precedents, wary in proceeding and understanding in the business of the Court, is an excellent finger of a Court, and doth many times point the way to the Judge himself." Again, the old reporters did not confine their divagations to strictures upon the Judges, or glosses upon the precedents reported by them, for sometimes we find them using the reports for the purpose of winging a cruel shaft against a brother scribe. Whoever has occasion to refer to Chief Justice Anderson's report of *Shelley's Case*, will find the following (1 And. 71):—"Nota—Le Atturney Master Cooke, ad ore fait report en print de cest case ove Argumentes et les Agreements del Chanceler et auters Juges mes rien de c. fuit parle en le Court ne la monstre,"—which put into simple English means that Coke—the fetish of the old common lawyers—was an unmitigated liar in the opinion of one, at least, of

his contemporaries, forasmuch as "*nothing of this* [the arguments and rulings as stated by 'Le Atturney Master Cooke'] *was said in the Court, nor there declared.*" But of all the amusing deliverances we have met with on the part of reporters in ancient or modern times, we unhesitatingly pronounce the gaucherie of the reporters of the Supreme Court of Georgia, at p. 631 of 65 Ga., to be paramount. In reporting the case of *The Western & Atlantic Railway Company* v. *Jones*, at the place where English and Canadian reporters are wont to put their caption-lines, we find the following legend: "JACKSON, CHIEF JUSTICE, *was providentially prevented from presiding in this case (!)*" We venture to say that no plea based upon the idiosyncrasies of the English tongue would avail to save a Canadian reporter from the wrath of a Judge whom he had subjected to so libellous an innuendo.

* * *

LEGAL ETIQUETTE IN PARLIAMENT.—The question as to whether considerations of etiquette ought to preclude a member of the Bar from taking part in a debate or voting in Parliament on a question in which he is professionally concerned, made a further attempt to have itself settled in the British House of Commons last month. An honourable and learned member was notified by an honourable fellow-member that he ought not to participate in the discussion or vote on a certain matter before the House, by reason of his holding a brief in legal proceedings connected with the matter in question. The honourable and learned member challenged his censor to bring the matter to the attention of the House, but the latter declined to intervene, and the Speaker, being asked for his opinion, referred to the following statement made by Mr. Speaker Peel in 1893, in relation to a similar case; "The House will see that on the point of order I cannot stand in the way of the honourable gentleman, to whom reference has been made, bringing on this matter, but at the same time I shall leave it to the legal profession to decide whether it is contrary to legal etiquette for honourable and learned members to take part in a debate under the circumstances." The matter

was prevented from reaching an acute stage by the impugned member declaring that he had declined a brief in the matter because he thought its acceptance might interfere with his freedom of action in Parliament. We almost regret the honourable and learned member's innocence, because had the charge been founded in fact its exploitation might have resulted in some specific rule being formulated in reference to such cases, which would conserve at once the etiquette of the profession and the independence of Parliament.

* * *

BOOTS IN ELECTRIC COACHES.—When John Davis recovered a verdict for $200 damages against the Ottawa Electric Railway Company for being forcibly ejected from a street car because he insisted upon keeping his feet, proudly encased in "new and rare-glistering boots," upon an empty seat opposite to the one on which he was sitting, the defendants, evidently agreeing with Milton where he remarks:

"What boots it at *one* gate to make defence?"

carried the case to the Divisional Court, the learned Judges of which decided, on the 5th instant, that Mr. Davis had put "his foot into it," so to speak, and set aside the verdict, with costs—

"And all appliances to boot."

Tempora mutantur, et nos mutamur in illis! In old days it was quite the proper thing to have boots piled high in coaches; nowadays to have them too much *en evidence* is a justification for summary eviction. Mr. Davis' varnished boots may not have been so altogether lovely as Trilby's bare feet, but nevertheless they have won quite as enduring a fame.

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

COMPANY—WINDING-UP—TRANSFER OF SHARES PENDING WINDING-UP—CONTRIBUTORY—COMPANIES' ACT, 1862 (25 & 26 VICT., C. 89) SS. 38, 131, 133, 153—(R.S.C. C 129, SS. 15, 44.)

In re National Bank of Wales, (1897) 1 Ch. 298, it was held by the Court of Appeal that the power of a liquidator under s. 131 of the Companies' Act, 1862, to sanction a transfer of shares pending the winding-up (see R.S.C. c. 129, s. 15), also involves the power to alter the register of members, and that the transferor is therefore released from the liability to contribute as a present member, and the transferee alone is the person to be placed on the list of contributories primarily liable, and where successive transfers are sanctioned by the liquidator pending the winding-up, the ultimate transferee alone is liable to contribute as a present member, the transferor and prior transferees being liable as past members. It may be noted that under the English Act past members are liable to contribute if they have not ceased to be members for a year or upwards before the winding-up commences, but past members are only liable in the event of present members being unable to satisfy the contributions required to be made under the Act. But these provisions do not appear to have been embodied in the Dominion Act, which simply renders the shareholder at the time of the winding-up liable to contribute in respect of the amount then unpaid on his shares: see s. 44. Any transfer of shares after the winding-up would probably fail to be sanctioned by the Court except on the terms of reserving the liability of the transferor in default of the transferee failing to pay.

SETTLED LAND—LEASE BY TENANT FOR LIFE—BRIBE FROM LESSEE—LEASE, INVALIDITY OF.

Chandler v. *Bradley*, (1897) 1 Ch. 315, although a case arising under the Settled Land Act, may be usefully noted here, as bearing upon leases made under the Settled Estates Act (58 Vict., c. 20, O.). Under the provisions of the Act a tenant for life had executed a lease for a term of years of the settled estate, and over and above the rents reserved thereby, had received from the lessee £21, in the nature of a bribe which he applied to his own use. There was no evidence that a higher rent than that reserved by the lease could have been obtained. The tenant having died the action was brought by those entitled in remainder to set aside the lease, and it was held by Stirling, J., that the acceptance of the £21 by the lessor invalidated the lease, the Court declining to consider whether the plaintiffs had been damnified or not.

BILL OF SALE—"PLANT"—HORSE—SUBSTITUTION—EJUSDEM GENERIS.

In *London and Eastern Counties Loan Co.* v. *Creasey*, (1897) 1 Q.B. 442, the question arose whether a horse could be considered as coming under the word "plant," as used in the Bills of Sale Act, 1878, which provides inter alia that the Act is not to apply to "any plant or trade machinery, where such plant or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse or other place, in substitution for any of the like fixtures, plant, or trade machinery, specifically described in the schedule to such bill of sale." The plaintiff relied upon *Yarmouth* v. *France*, 19 Q.B.D. 647, where it was held that a horse was "plant" within the meaning of the Employers' Liability Act,—but the Court (Wright and Bruce, JJ.) held that that case did not apply to the construction of the Bills of Sale Act, and that the word "plant" in the latter Act must be construed ejusdem generis with fixtures or trade machinery, and that therefore a horse was not "plant" within its meaning.

JUDGMENT IN REM—PROCEEDINGS IN REM IN FOREIGN COURT—COMPANY—WINDING UP.

In *Minna Craig S.S. Co.* v. *Chartered Mercantile Bank*, (1897) 1 Q.B. 460, the decision of Collins, J., noted ante p 189, has been affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) upon the same grounds as were taken by the Court below.

TRUST—PRECATORY TRUST—HEIRLOOMS.

In *Hill* v. *Hill*, (1897) 1 Q.B. 483, an appeal was brought from the judgment of Collins, J., at the trial of the action. The object of the action was to recover possession of a diamond necklace and other jewels. The plaintiff claimed to be entitled thereto under the will of his grandmother, who had been married to the plaintiff's grandfather in 1831. Before her death she had written a letter to her solicitor, stating that on her marriage the jewels in question had been given to her by her mother-in-law "for my life, with a request that at my death they might be left as heirlooms." By her will she gave them to the plaintiff's father until he should die, and after his death to each and every of the persons who should in turn succeed to the title of Viscount Hill, her intention being that they should descend as heirlooms. The will was made in 1891, in which year the testatrix died. The plaintiff was born in 1860, and succeeded to the title of Viscount Hill in 1895, on the death of his father. The defendant was the plaintiff's stepmother, and claimed the jewels by virtue of a gift from her deceased husband. It was contended that the words of the memorandum above referred to, which showed the terms of the gift to the testatrix, imported a precatory trust, and that the trust was for the grandmother for life, with a special equitable power of appointment by will in favor of the plaintiff's father, and an implied trust that in default of appointment the jewels were to be his absolute property at her death, and that the testatrix, in exercise of the supposed power, could not carry the trust limitation further than the settlor herself could have done, without contravening the rule against perpetuities, and that therefore the plain-

tiff's father was absolutely entitled and able to give them, as he had assumed to do, to the defendant. Collins, J., gave judgment in favor of the defendant, but the Court of Appeal, Lord Esher, M.R., and Lopes and Chitty, L.JJ.) unanimously reversed his decision, holding that there was no trust attending the gift to the grandmother, but that she was absolutely entitled, and that her disposition of them by will did not offend against the rule of law against perpetuities, and therefore that the plaintiff was entitled to recover. Hitherto, it may be observed, it has only been to wills that the doctrine of precatory trust has been considered applicable, but in this case it will be noticed the attempt was made to extend it to a gift inter vivos.

MANDAMUS—LEGAL RIGHT TO APPLY FOR MANDAMUS.

The Queen v. *Lewisham Union*, (1897) 1 Q.B. 498, was an application for a prerogative writ of mandamus made by the Lewisham Board of Works to compel the guardians of the poor of Lewisham Union to enforce the provisions of the Vaccination Acts. The motion was refused by Wright and Bruce, JJ., on two grounds, first, because the applicants had no legal specific right to compel the performance by the guardians of their duties under the Vaccination Acts, and secondly, because the applicants had themselves statutory power to carry out the provisions of those Acts. As Bruce, J., tersely puts it, "The Court has never exercised a general power to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus."

EMPLOYERS' LIABILITY ACT (43 & 44 VICT. C. 42), S. 1, SUB-SEC. 1—WORKMEN'S COMPENSATION FOR INJURIES ACT (55 VICT. C. 30 (O.), S. 3, SUB-SEC. 1)—DEFECT IN CONDITION OF WAY—MACHINERY—GUARD TO CIRCULAR SAW, TEMPORARY REMOVAL OF.

Tate v. *Latham*, (1897) 1 Q.B. 502, is a case under the Employers' Liability Act, from which the Workmen's Compensation for Injuries Act, Ont., 55 Vict., c. 30, is adapted. The action was for injury occasioned by a circular saw. The defendant had provided a guard for the saw which was removable for the pur-

pose of cleaning out the saw dust which collected under the bench. The sawyer for his own purposes removed the guard, and while the guard was off the plaintiff fell against the saw, and his foot was cut off by the revolving saw. The County Court Judge, before whom the action was tried, ruled that the defendant having supplied a proper guard, was not liable, because the temporary absence of the guard was not a defect in the condition of the machine within the meaning of s. 1 of the Act (Ont. Act, s. 3). On appeal, however, the decision was reversed by Wright and Bruce, JJ., and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Chitty, L.J.), the defect being held to be due to the negligence of the sawyer, to whom the defendants had entrusted the duty of seeing that the machinery was in proper condition.

INSURANCE—CONTRACT TO INSURE PAYMENT OF DEBENTURE AT MATURITY—INSURER, LIABILITY OF.

In *Finlay* v. *The Mexican Investment Co.*, (1897) 1 Q.B. 517, the plaintiff sought to enforce a contract insuring the due payment at maturity of a certain debenture of a limited company, of which he was the holder, in case the company made default in payment for more than three months. The debenture was past due, but before it became due, by a special resolution passed at a meeting of the debenture-holders, but to which the plaintiff had neither agreed nor dissented, the date for the payment of the debentures had been postponed, and such postponed date had not yet arrived. The defendants contended that there had been no default and that the plaintiff was not entitled to recover, but Charles, J., was of opinion that the original date fixed for the payment of the debenture having elapsed, and the plaintiff not having been a party to any extension of the time for payment thereof, he was entitled to recover, subject to the defendants' rights to be subrogated to the plaintiff's rights as modified by the special resolution.

LANDLORD AND TENANT—LEASE—COVENANT TO PAY ALL "TAXES, RATES, DUTIES, ASSESSMENTS AND IMPOSITIONS"—NOTICE BY MUNICIPAL BODY TO ABATE NUISANCE BY MAKING A NEW DRAIN.

In *Brett* v. *Rogers*, (1897) 1 Q.B. 525, Wright and Bruce, JJ., have decided that under a covenant by a lessee to pay all "taxes, rates, duties, assessments and impositions, parliamentary, parochial or otherwise, now or hereafter during the said term, rated, charged or imposed on the said premises," he is bound to pay to his lessor the expenses incurred by the latter in making a new drain for the demised premises, pursuant to a notice served on him by the sanitary authority under statutory powers requiring him to abate a nuisance by making such new drain—the word "duties" being held to cover the particular outlay in question.

MANDAMUS, ACTION FOR, WHERE NOT MAINTAINABLE—PREROGATIVE WRIT OF MANDAMUS.

Smith v. *Chorley*, (1867) 1 Q.B. 532, was an action for a mandamus. The plaintiff was the owner of an estate on which he desired to build and the defendants were the sanitary authority of the district in which the lands were situate, and whose approval of the proposed buildings it was necessary for the plaintiff to obtain before he could proceed with his building. He had submitted his plans of the proposed buildings to the defendants in accordance with their by-laws, which the defendants refused to sanction on the ground that the erection of the proposed building amounted to the laying out of a new street, and that such new street was not of sufficient width according to their by-laws. Kennedy, J., who tried the action, dismissed it on the ground that an action for a mandamus would not lie in such a case, because if the plaintiff had any right to a mandamus at all, it was by application for a prerogative writ.

ALIMONY—INCOME OF HUSBAND—VOLUNTARY ALLOWANCE.

Bonsor v. *Bonsor*, (1897) P. 77, a divorce case, may be noticed for the fact that it was there held by the President that in the estimation of the income of a husband for the purpose of fixing an allowance for permanent alimony to his wife, it is proper to take into account an amount which he is in receipt of by way of voluntary allowance from a relative.

WILL—CONSTRUCTION—HOTCHPOT CLAUSE, EFFECT OF.

In re Cosier, Humphreys v. *Gadsden*, (1897) 1 Ch. 325, the proper construction to be placed upon a hotchpot clause in a will was under consideration. A father on the marriage of his son in 1885 covenanted with the trustees of the son's settlement that his executor should within six months of his decease pay the trustees £10,000, to be held by them on trust for the son for life, with remainder to his wife for life, and after the death of the survivor, for the issue of the marriage, and in default of issue, in trust, for the father (the covenantor), absolutely. The father died in 1886, having by his will given the residue of his estate upon trust for his son and daughter in equal shares. The will provided that any and all sums which the testator had already covenanted to give to or with any child of his, on his or her marriage, should be taken in and towards satisfaction of the respective share of such child, or the person claiming under or in substitution for her or him, under the testator's will, and should be brought into hotchpot and accounted for accordingly. On the father's death, after payment of the £10,000 to the son's trustees, his residuary estate amounted to £42,000, and of this sum £16,000 was paid to the son, and £26,000 to the daughter. The son having since died, leaving a widow, but without issue, it was now claimed that the £10,000 was divisible under the residuary clause between the daughter of the testator and the executors of the son, and Chitty, J., so held, but the effect of this decision was to give the daughter £10,000 more than the son, and the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) were of opinion that that construction could not be maintained, and that the effect of the hotchpot clause in this particular case was to give to the son absolutely the testator's contingent reversionary interest in the £10,000, and on the death of the son without issue, his executors became absolutely entitled to the £10,000, subject to the life interest of the widow of the son therein.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

New Brunswick.] [March 25.

JONES *v.* MCKEAN.

Trustee—Account of trust funds—Abandonment by cestui que trust—Evidence.

The holder of two insurance policies, one in the Providence Washington Insurance Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to McKean as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment Jones became entitled to the balance of said insurance money after McKean's claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of McKean, and for a defect in the other policy the plaintiff in the action thereon was non-suited.

In 1886 McKean wrote to Jones, informing him that a suit in equity had been instituted against the Delaware Mutual Insurance Co. and its agent for reformation of the policy and payment of the sum insured, and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. Jones replied that as he had not been consulted in the matter and considered the success of the suit problematical, he would not give security, and forbade McKean to employing the trust funds in its prosecution. McKean wrote again saying, "as I understand it, as far as you are concerned, you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which Jones made no reply. The solicitor of McKean provided the security and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy.

Before the above letters were written Jones had brought suit against McKean for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in said suit, referring it to a referee to take an account of trust funds received by McKean, or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to Jones, and the acceptance thereof, which decree was affirmed by the full court and the Supreme Court of Canada. On the taking of said account McKean contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged McKean with the amount received, but on exceptions by McKean to his report, the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick,

that the sum paid by the Delaware Co. was properly allowed by the referee; that the alleged abandonment took place before the making of the decree, which it would have affected, and should have been so urged; that McKean not having taken steps to have it dealt with by the decree, could not raise it on the taking of the account; and that, if open to him, the abandonment was not established, as the proceedings against the Delaware Co. were carried on after it exactly as before, and the money paid by the Co. must be held to have been received by the solicitor as solicitor of McKean, and not of the original holder.

Held, further, that the referee, in charging McKean with interest on money received, from the date of the receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to the same fixed date, had not proceeded upon a wrong principle.

Earle, Q.C., and *McLean*, for appellant.

Palmer, Q.C., for respondent.

EXCHEQUER COURT.

THE QUEEN *v.* FINLAYSON ET AL.

Third party order—Jurisdiction—Costs.

In an action by the Crown upon two Customs export bonds it appeared that such bonds were given by the defendants personally and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof.

Held, that the Court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event.

J. M. Ferguson, for the plaintiff.

W. D. Hogg, Q.C., for the defendants.

MAGEE *v.* THE QUEEN AND THE CITY OF ST. JOHN.

Public works—Damages from obstruction—Deprivation of access—Compensation.

An interference with the public right of navigation in a harbour, which the owner of a wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situated, resulting from the construction of a public work.

But where the interference affects a private right of access which the owner has to and from the waters of the harbour, or affects the use of such water for the lading and unlading of vessels at his wharf, the claimant is entitled to compensation.

Allen, for the plaintiffs.

C. N. Skinner, Q.C., and *McKeown*, for defendants.

Province of Ontario.

COURT OF APPEAL.

From STREET, J.] [Jan. 12.

BEATON *v.* SPRINGER.

Fire—Negligence—Clearing land.

In the month of August the defendant set out fire on his own land for the purpose of clearing it. This fire continued to burn till October, when in consequence of a very high wind sparks were carried to the plaintiff's land, and set fire to some ties and posts stored thereon.

Held, that the question of the defendant's liability and negligence should be determined, having regard to the circumstances existing in October, and not to those existing in August.

Judgment of STREET, J., reversed.

George Lynch-Staunton, for the appellant.

J. W. Nesbitt, Q.C., and *W. T. Evans*, for the respondent.

From FERGUSON, J.] [May 5.

WALKER *v.* ALLEN.

Devolution of Estates Act—Children of deceased brother or sister—R.S.O., c. 108, s. 6.

Under s. 6 of the Devolution of Estates Act, R.S.O., c. 108, the children of a deceased brother or sister of the intestate, are entitled to share per stirpes.

Judgment of FERGUSON, J., reversed.

R. A. Grant and *J. N. Fish*, for the appellants.

W. L. Walsh, for the administrators.

W. A. Bell, for the respondents.

From Drainage Referee.] [May 11.

SEYMOUR *v.* MAIDSTONE.

Ditches and Watercourses Act—Municipal corporations—Damages—R.S.O. c. 220.

A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in fact defective.

Judgment of Mr. Britton, Drainage Referee, affirmed.

F. E. Hodgins, for the appellant.

J. B. Rankin, for the respondents.

From MEREDITH, C.J.] [May 11.

BAIN *v.* ANDERSON.

Master and servant—General hiring.

This was an appeal by the defendants from the judgment of Meredith, C.J., reported 27 O.R. 369, and was argued before Burton, Osler and Maclennan, JJ.A., on the 21st of January, 1897.

Appeal allowed with costs, Osler, J.A., dissenting, the majority of the Court holding that, upon the evidence, there was no definite engagement of the plaintiff, but merely a temporary arrangement pending the reorganization of the business.

McCarthy, Q.C., and *S. H. Blake*, Q.C., for the appellants.

Gibbons, Q.C., for the respondent.

From BOYD, C.] [May 11.

ROBINSON *v.* DUN.

Defamation—Libel—Mercantile agency—Privilege.

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained by the mercantile agency from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness.

Judgment of BOYD, C., 28 O.R. 21, reversed.

W. Nesbitt, and *R. McKay*, for the appellants.

Gibbons, Q.C., for the respondent.

From ROBERTSON, J.] [May 11.

IN RE TILSONBURG, LAKE ERIE AND PACIFIC RAILWAY COMPANY.

Trustee—Compensation—Debentures—R.S.O., c. 110, s. 38.

A person to whom municipal debentures in aid of a railway company are delivered in trust, to be handed over to the company upon the completion of the railway, is a trustee within s. 38 of R.S.O., c. 110, and entitled to compensation.

Judgment of ROBERTSON, J., 28 O.R. 106 (sub nom. *In re Ermatinger*) affirmed, but the amount of compensation reduced.

Laidlaw, Q.C., and *J. Bicknell*, for the appellants.

Moss, Q.C., and *D. W. Saunders*, for the respondent.

From FALCONBRIDGE, J.] [May 11.

ATKIN *v.* CITY OF HAMILTON.

Municipal corporations—Railways—Highway—Damages.

This was an appeal by the defendants from the judgment of FALCONBRIDGE, J., reported 28 O.R. 229, and was argued before Burton, Osler and Maclennan, JJ.A., on the 17th and 18th of March, 1897.

D'Arcy Tate, for the appellants.

J. Greer, for the respondent.

Appeal allowed with costs, the Court holding that the work in question was being lawfully and necessarily done, and that there was no evidence of want of care.

From FALCONBRIDGE, J.] [May 11.

BEATY *v.* GREGORY.

Church trustees—Covenant—Personal liability—R.S.O. c. 237.

The duly appointed trustees of a congregation, to whom by that description the site for the church has been conveyed, and who by that description give to the vendor to secure the purchase money a mortgage with the ordinary covenant for payment, are not personally liable upon the mortgage, although it is signed and sealed by them individually.

Judgment of FALCONBRIDGE, J., 28 O.R. 60, affirmed.

J. B. Clarke, Q.C., and *Swabey*, for the appellant.

Moss, Q.C., and *D. Urquhart*, for the respondents.

From MEREDITH, J.] [May 11.

O'NEIL *v.* WINDHAM.

Municipal corporations—Highways—Nuisance.

A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the knowledge or authority of the corporation, on the untravelled portion of a highway, but a person piling the ties on the highway without authority is responsible.

Judgment of MEREDITH, J., reversed in part.

G. Lynch-Staunton, for the appellant Taylor.

T. R. Slaght, for the appellants, the townships.

T. Macbeth, for the respondent.

From STREET, J.] [May 11.

IN RE STONEHOUSE AND PLYMPTON.

Drainage—Improvement of old drain—Drain extending into adjoining municipality—57 Vict, c. 56, s. 75 (O.)

Under s. 75 of 57 Vict, c. 56 (O.), a township municipality which has constructed a drain within its own boundaries, connecting, however, with a drain constructed as an independent work by an adjoining municipality, has power, without the petition of the ratepayers, to provide for the necessary repairs to both drains, and to assess the adjoining municipality with its proportion of the cost.

Judgment of STREET, J., reversed.

Shepley, Q.C., and *Cowan*, for the appellants.

Aylesworth, Q.C., and *Shaunessy*, for the respondent.

From Divisional Court.] [May 17.

IN RÈ BRANTFORD ELECTRIC COMPANY AND DRAPER.

Landlord and tenant—"Buildings and erections."

This was an appeal by the lessors from the judgment of a Divisional Court (Meredith, C.J., and Rose, J.) reported 28 O.R. 40, and was argued before Burton, C.J.O., Osler, Maclennan, and Moss, JJ.A.

Wilkes, Q.C., for the appellants.

Armour, Q.C., and *E. Sweet*, for the respondents.

At the conclusion of the argument the appeal was dismissed with costs.

From BOYD, C.] [May 18.

CARRIQUE *v.* BEATY.

Bills of exchange and promissory notes—Alteration after maturity.

A promissory note made by two persons, one signing for the accommodation of the other, was, after maturity, signed by a third person.

Held, on the evidence, that this third person signed as an additional maker, and that there was, therefore, a material alteration of the note discharging the accommodation maker.

Judgment of BOYD, C., 28 O.R. 175, reversed.

E. W. Boyd, and *Snow*, for the appellants.

J. W. Elliott, for the respondent.

HIGH COURT OF JUSTICE.

Divisional Court.] [March 1.

WILSON *v.* MANES.

Municipal elections—Returning officer—Duties, ministerial—Refusal to deliver ballot paper to voter—Wilful act—Absence of malice or negligence—Liability—Con. Mun. Act, 1892, ss. 80, 168.

The plaintiff's name was properly entered on the last revised assessment roll of a municipality as a tenant of real property, of the value entitling him to vote at a municipal election under s. 80, and was entered on the voters' list, but after the first revision thereof he ceased to be the tenant and to occupy the property, though he continued to reside in the municipality and was the owner of real property as a freeholder of the value entitling him to vote, and was such freeholder at the time of an election. At such election he demanded a ballot paper, and was willing to take the oath for freeholders, but the defendant, the returning officer, refused to furnish him with a ballot or to permit him to vote unless he took the oath required for tenants.

Held, that the defendant's duties were merely ministerial, and that an action for a breach thereof was maintainable without any proof of malice or negligence; that the plaintiff was entitled to vote at such election, and that the defendant's refusal to allow him to vote constituted a breach of his duty, and rendered him liable to the penalty of $400 given by s. 168, and also to damages at common law.

Aylesworth, Q.C., for the plaintiff.

E. R. Cameron, for the defendant.

BOYD, C., Trial of Cases. [March 18.

BAKER *v.* STUART.

Will—Rule against perpetuity—Thelluson Act—52 Vict., c. 10, s. 2, O.

A testator made his will as follows: "I order my executors to lease and rent and invest from one to five years from time to time all lands, money and

mortgages that I may be possessed of at the time of my death, for the term of sixty years, and to appoint their successors, and at the expiration of sixty years the property and funds shall be divided to those of my heirs who are members of the Presbyterian Church only, and that have been members of the said Church for at least ten years."

Held, that the above clause was invalid as infringing the rules against perpetuity, and in contravention of the provisions of the Thelluson Act, 52 Vict., c. 10, s. 2, O., the whole being held in suspense till the sixty years has expired.

Maclennan, Liddell & Cline, for the executors.

Leitch & Pringle, for the widow, Margaret Stuart

Smith & Petit, and *Maclean*, for the other defendants.

MEREDITH, C.J.] [March 19.

CAMERON *v.* ELLIOTT.

Change of venue—County Court action—Appeal.

Motion to change place of trial in a County Court action from Goderich to Toronto, and in the alternative by way of appeal from the order of Mr. Cartwright, sitting for the Master-in-Chambers, dismissing an application for the same purpose made to him.

Held, following *McAllister* v. *Cole*, 16 P.R. 105, that no appeal lay from the order of the Official Referee, and that a second application for the same purpose not based upon any new state of facts arising since the first application was made, cannot succeed, though the order was made in the case of *Milligan* v. *Sills*, 13 P.R. 350. In this latter case the point was not fully argued, and Armour, C.J., who delivered the judgment of the Court, does not think the decision one which according to the provisions of the Law Courts Act. 1895, prevents Meredith, C.J., from coming to what he takes to be the proper conclusion according to the practice of the Court.

Motion dismissed. Costs in cause.

Beatty, (W. J. Elliott) for defendant.

W. E. Middleton, for plaintiff.

FALCONBRIDGE, J.] [March 22.

HARKLEY *v.* TORONTO GENERAL TRUSTS CO.

Security for costs—Temporary absence.

Motion by way of appeal from the order of Mr. Cartwright, acting for the Master-in-Chambers, requiring plaintiff to give security for costs, upon the ground that he resides out of the jurisdiction. It appeared that plaintiff went to British Columbia about nine months prior to the date of the writ of summons, and has ever since remained there, moving about from place to place prospecting for gold mines, but he swears that he intends to return to Ontario.

Plaintiff contends on these facts that he is only temporarily absent, and should not be required to give security.

Appeal dismissed, but time for giving security extended to six months. Costs in cause.

Jas. Ross, for plaintiff.

H. Cassels, for defendants.

ARMOUR, C.J., STREET, J., FALCONBRIDGE, J. [April 7.

CANTELON *v.* THOMPSON ET AL.

County Court—Appeal to High Court from order for new trial—Law Courts Act, 1895—58 Vict., c. 13, s. 44, O.

Under s. 44, sub-sec. 4, of the Law Courts Act of 1895, 58 Vict., c. 13, O., where a party in a County Court action has moved for a new trial, the opposite party may appeal from the order directing the new trial to a Divisional Court of the High Court of Justice.

Armour, Q.C., for the plaintiff.

Shepley, Q.C., for the defendants.

STREET, J.] [April 10.

QUINN *v.* CORPORATION OF ORILLIA.

Municipal corporations—Fire limits—Erection of buildings within—By-law therefor—Validity—Con. Mun. Act, 1892, s. 496, sub-sec. 10.

Sub-sec. 10 of s. 496, Con. Mun. Act, 1892, which empowers the corporation of a city, town or village to pass by-laws "for regulating the repair or alteration of roofs or external walls of existing buildings" within the fire limits, "so that the said buildings may be more nearly fire proof," does not empower the council to pass a by-law requiring "all buildings damaged by fire, if rebuilt or partially rebuilt," to be made fire proof, at the peril of such building being removed at the expense of the owner.

Pepler, Q.C., for the plaintiff.

McCosh, for the defendant.

Mr. Cartwright, Official Referee. [April 21.

JOHNSON *v.* STAFFORD.

Statement of claim—Particulars—Amendment—Suing as trustee.

Where by his statement of claim, the plaintiff sues as trustee for A. B. "and others," upon motion by defendant he was ordered to amend his statement of claim by striking out the words "and others," or else to give particulars to defendant of such "others" within one week.

W. M. Douglas, for defendant.

Biggs, Q.C., for plaintiff.

STREET, J.] [May 3.

THE QUEEN EX REL. JOANISSE *v.* MASON.

Municipal election — Property qualification — "Actual occupation" — Occupancy of partnership—Con. Mun. Act, 1892, s. 73.

Appeal from order of Mr. Cartwright dismissing a motion by way of quo warranto to unseat the respondent elected to the County Council of the County of Carleton.

Held, that "actual occupation" in s. 73 of the Municipal Act of 1892, 55 Vict., c. 42, O., which provides with regard to the property qualification of

candidates, that where there is actual occupation of a freehold of the value of $2,000, the value for the purpose of the statute is not to be affected by incumbrances, does not necessarily mean exclusive occupation; and that the occupation of the respondent as one of four partners was sufficient.

Clement, for the relator.

L. McCarthy, for the respondent.

MEREDITH, J.] [May 3.

IN RE DUNN.

Money in Court—Payment out of share of absentee—Presumption of death—Peculiar circumstances.

Application by the children of Patrick Dunn for payment out of Court of his share, amounting to about $270, of the estate of John Dunn, deceased, Patrick having escaped in 1889 from a prison at Auburn, in the State of New York, where he was serving a life sentence, and not having since been heard of.

When the application was first made, on the 8th of February, 1897, an order was made directing the publication of an advertisement asking for information as to whether Patrick was still alive, etc.

Publication having been made as directed and no answers received, the application was renewed on the 29th of March, 1897.

It was then pointed out that the circumstances were not such as to clearly raise a presumption of death, but the learned Chief Justice took the motion into consideration, and now made an order for payment out to the children of Patrick as asked. One-half the fund to be paid out at once to Margaret Dunn, who was of age, and the other half to be paid out to Edward Dunn at his majority. Administration of the estate of Patrick Dunn not required, as the fund in Court was small.

D. L. McCarthy, for the applicants.

BOYD, C., ROBERTSON, J.] [May 3.

IN RE SOLICITOR.

Solicitor — Costs — Taxation—Discretion of local officer—Increased counsel fees.

Solicitor and client taxations are distinct from party and party taxations both as to the scope of the inquiry and as to the powers of the officer to whom the reference is made, in regard to the allowance of items. In solicitor and client taxations there is no power of intervention on the part of the taxing officer at Toronto, in order to obtain an increase in amount under such items in the Tariff as 104, 145, 150, 153; but the officer charged with the reference has power to exercise the discretion recognized by the Tariff in increasing the amount chargeable for certain services ordinarily exercisable by the officer at Toronto in party and party taxations.

W. J. Clark, for the client.

C. R. W. Biggar, Q.C., for the solicitor.

BOYD, C., ROBERTSON, J.] [May 4.

SMITH *v.* BOYD.

Particulars—Application for—Close of pleadings—Discretion.

Particulars are ordered with reference to pleading, while examination for discovery is used to get at the knowledge of the adverse litigant; it is only in exceptional cases that particulars are ordered after the close of the pleadings.

And where, in an action by the plaintiff against his former partner and another, for conspiracy to ruin the business of the firm, the defendant partner set up the defence that the business was ruined by the wrongful withdrawals and overdrafts of the plaintiff, and by his mismanagement, negligence, fraud and embezzlement, and certain particulars were given thereunder, as to which the defendant swore that they were given with as much detail as he could command, showing how the business had been conducted, and the shortages which had arisen, for which he alleged the plaintiff was responsible as the acting partner.

Held, that the discretion exercised in Chambers in refusing to order further particulars, after issue joined, and notice of trial given by the plaintiff, should not be interfered with.

H. D. Gamble, for the plaintiff.

H. S. Osler, for the defendant Cooper.

STREET, J.] [May 5.

BOYD *v.* DOMINION COLD STORAGE CO.

Costs—Defendant company in liquidation—Liquidator intervening—Personal order for costs.

After the action was at issue an order was made for the winding-up of the defendant company and a liquidator was appointed by a Court in the Province of Quebec. The plaintiff then obtained leave from that Court to proceed with this action. Afterwards the liquidator obtained an order from that Court authorizing him to intervene and defend this action in his own name as liquidator; he then applied to this Court in this action, and obtained an order that the action proceed in the name of the plaintiff against the company and the liquidator.

Held, that the liquidator, having thus intervened and made himself a party to the action, and having appeared by his counsel at the trial and contested the claim of the plaintiff, the latter, having succeeded upon his claim, was entitled to a judgment for his costs both against the company and the liquidator personally.

This Court had no authority to direct that the liquidator might reimburse himself out of the assets; that was a question for the Court in the Province of Quebec having control of the assets.

Osler, Q.C., and *Moss*, Q.C., for the plaintiff.

George Bell, for the defendants.

MEREDITH, C.J.] [May 5.

PATERSON *v.* CENTRAL CANADA LOAN CO.

Amendment—Pleading—New defence—Statute of Limitations.

An appeal by the plaintiffs from an order of an official referee allowing the defendants to amend their statement of defence by setting up the Statute of Limitations as an additional defence in an action for waste brought by the plaintiffs as owners of the remainder in fee in certain lands of which the defendants were tenants for the lives of others.

Held, following *Williams* v. *Leonard*, 16 P.R. 544, 17 P.R. 73, that the Statute of Limitations being a defence permitted by law, and the real question between the parties being as to the right of the plaintiffs to recover by action the damages claimed by them, "the very right and justice of the case" demanded that the plaintiffs should not recover in this action if the statute afforded a bar to their right to do so.

Brigham v. *Smith*, 3 Ch. Chamb. R. 313, referred to, however, as laying down a more reasonable and just practice.

Appeal dismissed, with costs to the defendant in any event.

N. F. Davidson, for the plaintiffs.

Masten, for the defendants.

BOYD, C., ROBERTSON, J.] [May 5.

FAWKES *v.* GRIFFIN.

Action—Stay of—Jurisdiction — Application of stranger — Judicature Act, 1895, s. 52 (9).

The jurisdiction to stay proceedings given by s. 52 (9) of the Judicature Act, 1895, at the instance of any person, whether a party to the action or not, is only to be exercised where the action is an improper one, or where under the former practice the Court of Chancery might have enjoined its prosecution, and only where the stranger is one who seeks to intervene as a party and can properly be added as a party.

Bradford, for the plaintiff.

W. R. Smyth, for intervener.

STREET, J. [May 5.

G. T. R. CO. *v.* HAMILTON R. E. R. CO.

Constitutional law—Railways—Restrictions under provincial charter against crossing at grade—Dominion Act, 1888, ss. 306 and 307—Jurisdiction of Railway Committee—Ultra vires.

The defendants were incorporated to construct an electric railway, crossing the plaintiff's line at Burlington, but forbidden by their charter to cross the line of any steam railway at grade. A dispute arising between the plaintiffs and defendants as to the manner in which the defendant should cross the plaintiffs' line, the matter was brought before the Railway Committee of the Privy Council, who determined that the restriction in the defendants' Act of incorporation forbidding them to cross at grade was ultra vires and not binding on the defendants, and made an order allowing the latter to cross the plaintiffs' line at grade.

Held, that subject to the right of appeal to the Governor-General or of reference to the Supreme Court, the decision of the Railway Committee was under s. 21 of the Railway Act of 1888, 51 Vict., c. 29, D., final, for ss. 306 and 307 of that Act brought the defendants' line under the legislative authority of Parliament so soon as they proposed to cross the plaintiff's line.

Osler, Q.C., and *W. M. Douglas*, for the plaintiffs.

Shepley, Q.C., for the defendants.

MEREDITH, C.J.] [May 5.

THE QUEEN EX REL. FERRIS *v.* SPECK.

Municipal elections—Incorporated village—Qualification for councillor—Con. Mun. Act, 1892, s. 73.

Quo warranto proceedings to remove the respondent from the office of councillor for the village of Niagara Falls, on the ground of want of qualification.

The respondent was rated on the proper assessment roll as tenant of land assessed for $800, and the land with other land owned by the same landlord of the value of at least $1,100 was encumbered by a mortgage for $800, having priority to the respondent's lease.

The Consolidated Municipal Act, 1892, s. 73, requires a candidate for the office of councillor of incorporated villages, qualifying on leasehold property, to be proprietor or tenant of such property to at least the value, as assessed upon the last assessment roll, of $400, over and above all charges, liens and incumbrances.

Held, on appeal from the Judge of the County Court of the County of Welland, that on the proper construction of the above section the mortgage on the lands in question was not to be taken into account in diminution of the value, not being on the leasehold interest of the respondent.

Held, also, that even if the mortgage had to be taken into account the respondent would be entitled to have it marshalled so that recourse should be first had to the other lands included in it; and at any rate the mortgage should be apportioned according to the respective values of the properties included in it, so that in either case the respondent was qualified.

Douglas, for relator.

Du Vernet, for respondent.

BOYD, C.] [May 6.

TURNER *v.* DREW.

Costs—Damages—Set-off—Solicitor's lien—Rule 1205.

There can be no set-off of damages or costs between the same parties in different actions, to the prejudice of the solicitor's lien; that is the effect of Rule 1205.

The lien is simply a right to the equitable interference of the Court not to leave the solicitor unpaid for his services, and it exists if it is made to appear that the solicitor has not been paid his costs.

Hislop, for the plaintiff.

Delamere, Q.C., for the defendant.

STREET, J.] [May 10.

HAGGERT *v.* TOWN OF BRAMPTON.

Costs—Taxation—Items common to defence and counterclaim.

A claim and counterclaim are to be treated as separate actions, and the costs are to be taxed in accordance with that principle; but items common to both defence and counterclaim should not be taxed, either in whole or in part, to a defendant who has succeeded upon his counterclaim, but should be wholly disallowed him.

In re Brown, Ward v. *Morse*, 23 Ch. D. 377, followed.

Griffiths v. *Patterson*, 22 L.R. Ir. 656, not followed.

Summerfeldt v. *Johnston*, 17 P.R. 6, distinguished.

Justin, for the plaintiff.

T. J. Blain, for the defendants.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [May 10.

REGINA *v.* ROBINSON.

Criminal law—Evidence—Non-support of wife—Criminal Code, 1892, s. 210, sub-sec. 2—Lawful excuse—Agreement.

Upon an indictment of the prisoner under s. 210, sub-sec. 2 of the Criminal Code, 1892, for omitting without lawful excuse to provide necessaries for his wife, evidence is admissible on behalf of the prisoner of an agreement between him and the person who became his wife, at the time of the marriage, that they were to live at their respective homes and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance; STREET, J., dissenting.

J. R. Cartwright, Q.C., for the Crown.

F. C. Cooke, for the prisoner.

Divisional Court.] [May 10.

BELAIR *v.* BUCHANAN.

Security for costs—Plaintiff out of jurisdiction—Property in jurisdiction.

The decision of FERGUSON, J., ante p. 289, was affirmed on appeal by the defendant to a Divisional Court.

J. Bicknell, for the appellant.

W. Read, for the plaintiff.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [May 14.

REGINA *v.* MCRAE.

Justice of the peace—Jurisdiction—Associate justices—Request.

Where a justice of the Peace issues a warrant or a summons, and the accused is brought before him, he is seized of the case, and no other magistrate has jurisdiction therein unless requested by him to sit with him.

McCarthy, Q.C., and *D. O. Cameron*, for the defendant.

Aylesworth, Q.C., for the prosecutor.

COUNTY COURT.

INSURANCE LAW.

DARLING *v.* INSURANCE COMPANIES.

Fire insurance—Wholesale stock—Measure of value—"Goods sold but not delivered."

The owner of goods destroyed by fire is entitled to receive from the insurers only the actual cash value of the goods, which value is represented by a sum equivalent to the cost of replacement. The liability of the insurer is not increased by reason of the fact that the assured had before the fire contracted to sell the goods destroyed and that he could not replace them in time to enable him to carry out his contracts.

[TORONTO, July 14, 1896 – MORGAN, J.J.

This was an arbitration before His Honor Judge Morgan, Junior Judge of the County Court of the County of York.

The claimant, a wholesale merchant, was insured in the defendant companies to the extent of more than ninety thousand dollars against loss by fire to his stock of dry goods, etc. The policies expressly covered "goods sold but not delivered." Some of the goods having been destroyed and others damaged by fire, it was agreed that the companies should take over the whole stock and should pay therefor some ninety-six thousand dollars (being the cost price of the stock as laid down in the warehouse of the assured) and that the question whether or not the assured was entitled to any further sum by reason of his having before the fire contracted to sell certain of the goods at a price largely in excess of the cost price, should be submitted to arbitration.

The evidence was taken on April 22, 23, 1895, and the matter came on for argument on May 1, 1895.

Shepley, Q.C., for the assured. The assured is entitled to recover the actual cash value in the market in which he sells, or his actual loss without reference to cost price. In this case the claimant had contracted to sell certain of the goods, and as to them he is to recover (*a*) a sum equivalent to the price at which he had agreed to sell, or (*b*) at least his expenses, such as travellers' wages, etc., incurred in securing the contracts. These expenses represent labor expended upon the subject matter of the insurance, which has by reason of that labor acquired a new value. Moreover certain of the goods had actually been cut up and made ready for delivery, and even if all the goods contracted to be sold had not acquired a new value, these, at least, had, and that new value is to be estimated in one of the ways suggested with regard to all the goods contracted to be sold, *i.e.*, the sale price must be taken, or else there must be added to the cost price the amount expended in effecting the sales. See *Equitable* v. *Quinn*, 11 L.C. Rep. 170; *Hoffman* v. *Ætna*, 19 Abb. Pr. 325; affirmed 32 N.Y. 405; *Fowler* v. *Old N. State Ins. Co.*, 74 N.C. 89; *Mack* v. *Lancashire*, 4 Fed. R. 59; 2 McCrary 211, (U.S. Cir.); *Fisher* v. *Crescent*, 33 Fed. R. 544; *Western* v. *Studebaker*, 124 Ind. 176; *Grubbs* v. *N. Car. H. Ins. Co.*, 108 N.C. 472; *Mitchell* v. *St. Paul etc., Ins. Co.*, 52 N.W. Rep. 1017 (Mich.); *Birmingham Ins. Co.* v. *Pulver*, 126 Ill. 329; *Washington Mills Co.* v. *Weymouth Ins. Co.*, 135 Mass. 503; *Snell* v. *Delaware Ins.*

Co., 4 Dallas (Penn.) 399 (top paging); *Curson* v. *Marine Ins. Co.*, 2 Washington 468; *Wolfe* v. *Howard Ins. Co.*, 1 Sandf. N.Y. 124, affirmed, 7 N.Y. 583, 3 Seld. 583; *Ætna* v. *Jackson*, 16 B. Munroe, 242; *Steward* v. *Phœnix*, 8 Alb. L. Jour. 285; *Ionides* v. *Pender*, L.R. 9 Q.B. 531; May on Insurance, 3rd ed., ss. 423-4.

Wallace Nesbitt and *H. E. Rose*, for insurance companies. What the assured is claiming is in reality profits, and profits are not here insured. All the authorities are agreed that the amount to be recovered is limited to the actual cash value of the goods, and this means the actual cost of replacement on the day of the fire. The fact that the companies have the right to replace the goods is to be considered, and goes to show that the cost of replacement is the measure of value. Sums expended by the assured in procuring contracts of sale of the goods do not add to the value of the goods, nor does cutting the goods into short lengths. Neither of these is at all the same, as, *e.g.*, making cloth up into clothing. These expenses are all included in "gross profits." See Flanders on Fire Ins. 2 ed. 302; *re Wright & The Sun Fire Office*, 1 A. & E. 621 (s. c. Nev. & Man. 819); *Grant* v. *Ætna*, 11 L.C. Rep. 128; 5 L.C.J. 285; Bunyon on Fire Ins. (1893) 19; Griswold Fire Underwriters' Text Book (1889), par. 723, 1693, 1696, etc.; *Mengies* v. *North British Ins. Co.*, 9 Ct. of S., 2nd ser., 694; *McCarville* v. *Commercial Union Ins. Co.*, tried before Patterson, J., at London, April 5th, 1877, not reported; *Niblo* v. *N. A. Fire Ins. Co.*, 1 Sandf. 551; *Eyre* v. *Glover*, 16 East 218.

MORGAN, J.J.:—It is fairly well established law that, in mercantile insurance, in estimating the loss, the test is "the value of the thing insured at the time and place of the fire." At first blush it would seem that the price at which the goods had been agreed to be sold and bought should be the true value thereof and the basis on which the insured, Robert Darling, should be paid for the same; and an American authority, to be found in 16 B. Monroe, Kentucky Reports, at p. 242, goes a very long way in that direction, but the facts and circumstances of that case are not similar to those involved on this reference, and on a full consideration of the matter I am of opinion that this cannot be the basis or test on the facts of this case

The stock of goods in question on the reference was insured as a wholesale stock; its value to the insured while it remained unsold was surely only what it had cost him to buy it and lay it down in his warehouse; if he was selling it out as a wholesale stock, or if he was taking stock for his own information, or if stock were being taken by an assignee, or if it were necessary to value the stock for any other business purpose, without doubt the basis of the sale, or of the stock taking or valuation, would be the cost price as hereinbefore defined and not the price he could sell it at to customers, which price would be either an arbitrary one fixed by himself to cover costs of handling that stock with a reasonable profit to himself in addttion, or would be such other price as his customers were willing to give. The expenses incurred in carrying on his business, such as wages, rent, insurance and interest, etc., in no way increase the actual value of the goods, but are really only items of gross profit added on to the prime cost to enable the merchant to carry on his business without loss and with profit to himself. Can it be said that the mere fact that an executory contract has been made to sell the goods

at the prime cost, with the gross profit added, increased the insured value thereof? These contracts might never be executed, and if executed the goods might not be paid for, and to say that the insured value of the sold goods was the contract price, would in effect be to insure the performance of the contract and also to make the policy cover both gross and net profit, which is not covered unless so expressly provided for in the policy.

If the goods agreed to be sold and delivered had been delivered, they would on delivery have ceased to be covered by the policies even though remaining in the premises where insured; while they remained undelivered the policy would only cover them in the character in which they were insured, namely, as a part of the general wholesale stock, to be valued as wholesale stock in the same manner and on the same basis as the residue of the stock which had not been agreed to be sold. That the actual prime cost or "cost price" is the basis on which the loss should be adjusted is practically admitted by the insured as to goods in respect to which there were no contracts for sale and delivery, for it is on that basis that the loss was adjusted as to the whole stock, the insured only contending for his sale price, being the value of the goods which he had contracted to sell, and in this reference claiming as to these goods the difference between the prime cost which he has been paid and the price at which he had made contracts to sell.

Looking at the agreement between the parties in which the submission to arbitration is contained, and reading his evidence, the contention of the insured may fairly be stated as follows: "I insured my wholesale stock; there was a fire; as to the great bulk of the stock the proper basis of my loss is the prime cost of the goods, but as to some of the stock I had made contracts for sale of it, had cut off and put aside for each customer the goods he had ordered, and the same were ready for delivery, but the fire happened and destroyed these goods. I could not fill the orders in time, and they were cancelled, so that I have lost, not only the prime cost of these goods (which I have been paid), but have also been unable to complete any contracts for sale, and have so suffered loss beyond the prime cost of such goods and the price which I would have realized from the sale of them if, but for the fire, I had filled my contracts." It seems to me that to give effect to this contention would be to enlarge the scope of the policies, and make them cover not only the actual value of the goods, but also insure the completion of all contracts for the sale of the goods, and the realization of the gross profit consequent on such sale.

The insurers had the right of replacement within a reasonable time, but instead of exercising such right they say to the insured, we will give you a sum sufficient to insure the replacement of the goods, such sum being the "cost price" of the goods as above defined. Are they required to do more; do the policies require them to replace within such time as would enable the insured to complete his contracts for sale of the goods? Do the policies cover any loss that might arise from the inability of the insured, or the companies to replace in time to execute the contracts? I think not.

On the whole case I am of the opinion that the insured, Robert Darling, is not entitled to be paid by the insuranee companies above named, or any of them, any sum whatever in respect of the matters to me referred, and I so award.

Province of Quebec.

QUEEN'S BENCH.

LACOSTE, C.J., BOSSÉ, BLANCHET, HALL and WURTELE, JJ.

CENTRAL VERMONT RY. CO. *v.* STANSTEAD ETC., FIRE INS. CO.

Negligence—Fire caused by sparks from locomotive—Communication of fire to other buildings—Subrogation—Proof of cause of fire.

Held, 1. It is negligence on the part of the employees of a railway company to use a locomotive in shunting cars on a heavy grade in exceptionally dry weather, with a strong wind blowing, and in the immediate vicinity of inflammable buildings.

2. Where it is established that sparks did escape in great volume from the locomotive, and that a fire was thereby caused, the railway company will not be relieved from responsibility for loss by proof that the locomotive was supplied with the most approved appliances for preventing the escape of sparks.

3. Where a fire is negligently caused by sparks from a locomotive, and it spreads beyond the building where it commenced, the railway company is obliged to indemnify the owners of the other buildings damaged or destroyed, unless some exemption from, or limitation to such liability be established. The fact that a high wind prevailed and aided in spreading the fire does not relieve the company from liability.

4. The insurance company which pays a loss caused by the negligence of a railway company is subrogated in the claim.

Greenshields, for appellant.

Hurd, for respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [March 8.

FANE ET AL. *v.* BANCROFT ET AL.

Surety held liable for goods supplied—Mercantile agreement to be liberally construed—Pleading—Approval of act of agent by principal, where alleged, should be controverted in statement of defence.

Plaintiffs, doing business under the name and style of "The Comet Cycle Co.," appointed the firm of Bancroft & Bailey agents for the sale of their bicycles within a described area, on terms expressed in a written agreement entered into between the parties, but which, in consequence of Bailey, one of the members of the firm, being an infant, and under disability, was not executed in the firm name, but was signed by Bancroft, the other member, in his own name, and by H. M. Bailey, the father of the infant partner, as follows :—"I accept the terms of the above agreement, and hereby acknowledge the receipt of a copy of the same. Ernest M. Bancroft, H. M. Bailey."

Held, McDONALD, C.J., dissenting, that the defendant H. M. Bailey was liable as surety for the goods supplied the firm under the terms of the agreement.

Held, also, that the document being a mercantile one, must be liberally construed for the purpose of giving effect to the intention of the parties.

The agreement on the part of the company was made and signed by their agent, and was expressed to be made subject to the approval of the company, and in the statement of claim such approval was alleged to have been given.

Held, that if defendant wished to controvert the allegation he should have done so in his statement of defence.

W. B. A. Ritchie, Q.C., and *E. J. Morse*, for plaintiff.

W. E. Roscoe, Q.C., for defendant.

Full Court.] [March 8.

WEATHERBE *v.* WHITNEY.

Company—Fraudulent representations to induce purchase of shares—Right of individual shareholder to sue on behalf of himself and others—Special circumstances to be shown—Damages—Pleading—Costs.

Plaintiff brought an action against the defendant W., alleging that he was induced to become a bondholder and shareholder to the Dominion Coal Co., Ltd., by the false and fraudulent representations of the defendant, giving particulars of the alleged false and fraudulent representations, and claiming certain relief. By amended paragraphs of his statement of claim plaintiff alleged that in respect of the matters stated he sued on behalf of himself and all the other shareholders and bondholders of the company who joined and contributed to the costs of the action.

Held, that the action being in reality one on behalf of all the stockholders of the company, it should, in the ordinary course, have been brought in the name of the Company, and that in order to enable plaintiff to sustain such an action in his own name on behalf of himself and other shareholders, special circumstances must be shown.

Held, also, that it was not sufficient for this purpose to show that the company was under the absolute control of the defendant, unless it was clearly and distinctly indicated that such control existed at the time the action was commenced.

Held, also, that the joinder of other shareholders of the company as plaintiffs in connection with one of the paragraphs of the statement of claim under which plaintiff alone could recover, would not prevent plaintiff from recovering all the damages to which he could show himself to be entitled.

Plaintiff, without asking to have the sale to him rescinded, or offering to return the stock or bonds, claimed to recover the damages he had sustained by reason of defendant's alleged fraud and misrepresentation, being the difference between the amount paid for the stock, and the real value of the stock at the time the purchase was made.

Held, that it was no answer to offer to take the stock and bonds and pay the purchase price with interest and expenses, less all sums paid for interest,

or dividends, for if there had been fraud and misrepresentation plaintiff must recover at least nominal damages.

Held, also, neither party having entirely succeeded, that there should be no costs.

R. L. Borden, Q.C., and *A. Drysdale*, Q.C., for plaintiff.

Ross, *Mellish* and *Mathers*, for defendant.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] [April 27.

DUNHAM *v.* ST. CROIX SOAP CO.

Guessing competition—No lottery—Good consideration.

Defendant company, as a means of advertising their soap at an exhibition held at St. John, offered a piano as a prize for the person guessing the correct weight or the nearest to the correct weight of a large cake or block of soap exhibited at the said exhibition. The guessing was free and all persons who desired to guess were provided with coupon tickets upon which to mark their guesses. The tickets were deposited, or were supposed to be deposited, in a box, and the corresponding coupons retained by the respective guessers. The plaintiff guessed within a shade of the correct weight, and after the soap had been weighed presented her coupon with her guess marked thereon, but the judges could not find her ticket in the box and awarded the prize to another person whose guess was not so near the correct weight as the plaintiff's. Plaintiff afterwards brought an action for breach of contract.

Held, on demurrer to plaintiff's declaration that the competition was not a lottery within the meaning of the Criminal Code, and that the exercise of judgment required in the guessing was a sufficient consideration to support the contract.

Currey, Q.C., supported demurrer.

E. P. Raymond, contra.

Full Bench.] [April 27.

FERRIS *v.* BUTT.

Action of slander—Evidence of Judge of Probates as to defendant's personal property.

In an action for breach of promise of marriage the plaintiff called the Judge of Probates of St. John to prove the interest of the defendant in the personal estate of his deceased father, who died intestate. Defendant's mother as administratrix filed a petition for the final passing of accounts and distribution of estate, on which witness as the Judge of Probates ordered the distribution, but the formal order had not been taken out. Witness spoke from his own record.

Held, that the evidence was admissible.

A. W. MacRae, for plaintiff.

C. J. Coster, for defendant.

Full Bench.] [April 27.

MOLLISON *v.* HOFFMAN.

County Court Judge has no power to strike out counts of declaration for insufficient particulars.

Held, on appeal from the St. John County Court that the Judge thereof had no power to strike out counts in a declaration, on the ground of insufficient particulars.

A. H. Hannington, for appellant.

Scott Morrell, contra.

Full Bench.] [April 27.

HARRINGTON *v.* C. E. MCBETH.

Slander—Notice of justification sufficient to justify part of words spoken.

In an action of slander plaintiff charged defendant with having published that plaintiff went there and tore her (Bertie McBeth's) clothes, set her nose bleeding, and tried to rape her. Defendant in addition to pleading the general issue, justified by notice of defence "that before the alleged words were spoken the plaintiff did go to the house where Bertie McBeth was, and did there assault her and tear her clothes." Plaintiff applied to a Judge at Chambers to strike out the notice of defence, on the ground that it did not justify all the words spoken, which application the Judge refused.

Held, on a motion to rescind the Judge's order, that the notice was sufficient, as it was competent for defendant to justify part of the words spoken.

A. W. MacRae, for plaintiff.

Mont. McDonald, for defendant.

Full Bench.] [April 27.

HARRINGTON *v.* ANN MCBETH.

Slander—Justifying the words spoken—Notice of defence sufficient.

In an action of slander plaintiff charged defendant with having published of the plaintiff: "That big stallion throwed Bertie McBeth on the floor, and God knows what he would have done to her if it had not been for Mary" (meaning Mary McBeth); inuendo, the defendant meaning thereby that the plaintiff had been guilty of unlawfully and indecently assaulting said Bertie McBeth, and had feloniously attempted to commit the crime of rape upon her, and would have committed such crime if it had not been for Mary. The notice of defence in this case was that the plaintiff before the alleged words were spoken did throw the said Bertie McBeth on the floor and did assault her in the presence of Mary McBeth, and Mary interfered to prevent the assault.

Held, on a motion to rescind the order of a Judge at Chambers refusing to strike out the notice as not being a plea in bar and not answering the whole matter to which it was pleaded, that the notice was good.

A. W. McRae, for plaintiff.

Mont. McDonald, for defendant.

Full Bench.] [April 27.

TEMPLE *v.* COMMERCIAL UNION ASSURANCE CO.

Additional insurance effected—No notice to company—Non-suit.

Plaintiff's building was insured in defendant company. On April 10th, 1896, plaintiff himself being ill, his son, without his knowledge, made application to the Quebec Insurance Co. for $1,000 additional insurance on the building. The letter from the Quebec Co. accepting the risk, was mailed from Quebec on April 17th, and would not reach plaintiff by course of mail until April 19th. Plaintiff did not learn of the additional insurance having been effected until April 21st. In the meantime, on April 18th, the building was burned. Plaintiff adopted the insurance, made up his proofs of loss, and received the $1,000 in due course. No notice was given to defendant company of the additional insurance having been effected, except by the proofs of loss, which were forwarded to them after the fire, and in which the fact was stated. There was no tender of their policy to the defendant company or their agent for their endorsement of their approval of the additional insurance.

Held, that the company was not liable, as the plaintiff had not complied with the conditions of the policy by giving notice of additional insurance, and tendering the policy for the endorsement of their approval thereof, and even if he had, the company still had the option to refuse their assent, and thereby render the policy void. Non-suit ordered.

Pugsley, Q.C., for plaintiff.

Miles B. Dixon, for defendant.

Province of Manitoba.

SUPREME COURT.

Full Court.] [May 6.

DOLL *v.* HOWARD.

Misrepresentation—Rescission—Waiver—Failure of consideration—Amendment—Parties—Right of action.

Judgment of TAYLOR, C.J. (noted vol. 32, p. 460), affirmed with costs.

On the argument before the full court defendant's counsel contended that defendant might have relief without rescinding the purchase of shares referred to, as the evidence showed that W. F. Doll had first agreed to sell all of the shares of the stock of the Company to the defendant's co-purchasers at $15,000, and had carried out the sale at that price, the par value being $25,000, that they represented to the defendant that the price of the shares was $25,000, and induced him to join with them in a purchase at that price apparently from Doll, but really from themselves, and that Doll knowingly assisted the co-purchasers in carrying out the fraud, and obtained a benefit from it in the substitution of the notes of a more reliable party for a portion of the purchase money, for which he should have taken the notes of those others ; and that in

such a case a Court of Equity would not only take the accounts and reapportion the purchase money among the purchasers, but would also compel the vendor to repay to the victim of the fraud any sum paid by the latter in excess of his proper proportion of the real price, and enjoin the vendor or any other holder of notes representing such excess, not being a holder in due course, from collecting such notes, there being to that extent a failure of consideration.

Held, that, although the evidence before the Court standing by itself might seem to warrant such a view of the rights of the parties, and suggested strongly a fraud such as was relieved against in *Beck* v. *Kautarowiez*, 3 K. & J. 242, yet no case for relief on that ground had been set up in the statement of defence, or at the trial, and it would not be proper to give effect to it now, or to allow any amendment of the pleadings at this stage, as the plaintiff might have made her case stronger at the trial if she had been called upon to do so.

Held, also, that the evidence showed that the sale impeached was one of the shares en bloc to three parties for a single consideration, and, following *Morrison* v. *Earles*, S.O.R. 434, that the purchase could not be avoided by the defendant alone as to some of the shares, but, if rescinded at all, it must be so as between all of the purchasers on the one side and Doll on the other, and as to the whole subject of the sale, and for this no case has been made.

Martin and *Mathers*, for plaintiff.

Howell, Q.C., and *Hough*, Q.C., for defendant

TAYLOR, C.J.] [May 6.

REID *v.* GIBSON.

Pleading — Practice — Injunction — Queen's Bench Act, s. 39, sub-sec. 11, Rule 300.

The plaintiff moved on notice for an interlocutory injunction. He had not asked for an injunction in his statement of claim, the cause of action in respect of which the injunction was sought having arisen since the filing of the statement. Plaintiff's counsel contended that, under sub-sec. 11 of s. 39 of the Queen's Bench Act, 1895, the Court might order an injunction if it appeared to be just and convenient to do so, although such relief had not been asked for in the statement of claim.

Held, that the Queen's Bench Act, 1895, has made no change in the practice as to the necessity of the prayer for an injunction, and that under Rule 300 no injunction can be granted where none has been prayed for in the statement of claim.

Motion refused with costs.

Clark, for plaintiff.

Mulock, Q.C., for defendant.

North-West Territories.

SUPREME COURT.

RICHARDSON, J.] [April 23.

IN RE F. H. MARTIN.

Criminal law—Extradition Act, s. 19—Fugitive not surrendered and conveyed out of Canada within two months.

The accused was committed by Mr. Justice Richardson for extradition to the United States on a charge of having committed grand larceny in the second degree, in the State of Minnesota.

The fugitive was not surrendered and conveyed out of Canada within two months after his committal for surrender, and application was made to the committing Justice on behalf of the prisoner under s. 19 of the Extradition Act, for an order discharging him out of custody. No cause being shown by the Minister of Justice, upon whom notice of the application had been served, order was granted.

Hamilton, Q.C., for accused.

Flotsam and Jetsam.

X RAYS AS EVIDENCE.—A district Court of Colorado seems to have had the honor of determining for the first time the rule of law governing the admission in evidence of shadowgraphs or photographs made by what is known as Cathode or X ray process. *Smith* v. *Grant*, Chicago Legal News, December 26, 1896: The Court held such photographs admissible as secondary evidence upon the same ground as maps or drawings.—*Central Law Journal.*

It is well known that a great many barristers in the Temple have been having a bad time during the last year or so. One evening last winter a certain young barrister—now a Welsh M.P.—went across to the Inner Temple library. He was surprised by the sudden appearance of his errand boy, who was looking very excited. "If you please, sir," the boy gasped, "a gentleman is waiting for you at the chambers with a brief! He can't get out, sir, I've locked him in!"—*Ex.*

Justice—You are charged with stealing Colonel Julep's chickens. Have you any witnesses?

Uncle Mose—I neb not. I don't steal chickens befo' witnesses.—*Ex.*