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THE RECENT CHANGES IN THE RULES.

The Rules of Practice are better now denominated the Disintegrated than the Consolidated Rules, for, if one seeks to be informed as to the regulations governing the procedure on any point, it is necessary to consult, in addition to the Consolidated Rules, those passed on the 9th of June, 1888, the 15th of December, 1888, the 13th of June, 1890, the 13th of September, 1890, the 18th of February, 1892, the 21st of October, 1893, the 4th of November, 1893, the 29th of December, 1893, the 4th of January, 1894, the 17th of February, 1894, the 24th of March, 1894, the 23rd of June, 1894, the 29th of September, 1894, the 29th of December, 1894, and the 1st of January, 1896. If these be perused with care, it will be possible to discover whether there is or is not an enactment dealing with the specific subject under consideration—that is to say, unless it has crept into some obscure corner of a statute. However, it will be but a slight additional labor to peruse the statutes since the revision of 1887.

It has been written, "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law:" *Montrio* v. *Jeffreys*, 2 C. & P. 116; and well it is, for surely no human being can acquire and retain an accurate working knowledge of this confused medley of amendments, nor can he even, without the tedious search outlined above, ascertain where to put his finger upon the desired information.

Many of the changes made are undoubtedly valuable and important. Many have been made after years of effort on the part of the profession to bring them about. This protest is

against the manner in which it seems good to those who control the passing of new rules to make alterations piecemeal and at frequent intervals, and, as in the case of the recent and most extensive contribution to the rules, to bring these into force on altogether too short notice. Surely it is true that an extremely poor system of practice, intelligently and consistently applied, is better than the most perfect, if the latter be ill-understood, subject to constant variation, and therefore uncertain and unsatisfactory. At any rate the English judges think so. "It is more important that the practice should be uniform and certain, than that it should be right:"—1891, 3 Chy. 492. "The first thing to consider is that the practice should be uniform. It is much better, unless gross injustice would thereby be done, that one judge should follow another, even if he thinks that he is wrong, rather than that the practice should be in an unsettled state:" *Re Dunning*, 8 R., December, 235. "It will never do for one Division of the Court to decide one thing one day and the other Division to decide another thing another day; nobody would know how to advise their clients, and nobody would know how to act:" *Pillers* v. *Edwards*, 14 R., April, 268. Contrast with these *dicta* the decision in *Sears* v. *Meyers*, 15 P.R., 381, where it is said that one Court is not bound by the decision of another Court of co-ordinate jurisdiction where the matter is one of jurisdiction, and involves the settling of a new practice. There is certainly a radical difference in the way these things are viewed. Both cannot be right.

In the space of an article it is impossible to do more than very hastily touch upon some of the principal changes which came into force on the first of this year.

The Consolidated Rules of 1888 provided for a Central Office at Osgoode Hall, where the various branches of business heretofore conducted in the offices of the three Divisions should be carried on. More than seven years have elapsed since this reform was provided for by the Consolidated Rules, and now for the first time, and notwithstanding continual agitation to that end, these provisions are brought into effect. To show the value of mere momentum in a great legal mill

like Osgoode Hall, it is only necessary to refer to the fact that during this entire period the whole of the fees collected by the Common Pleas and Queen's Bench offices for services similar to those which the Clerk of Records and Writs was authorized by the Consolidated Rules to perform, have been collected without the authority of statute or rule. It was the Clerk of Records and Writs alone who was empowered to receive and file papers, make amendments, etc., etc. The many thousands of dollars which must have been received in stamps by the other Divisions were not demandable as of right. If momentum is so powerful, the resistance of inertia is not to be wondered at. The judges seemed indifferent; at least no one of them appeared to actively exert himself in the matter, and the officers preferred to leave well-enough alone. The profession certainly was clamant enough in its desire for reform, but met, as usual, with indifference.

Now there is a Central Office, and all are agreed that it is a very good thing, and that it will be more easy to transact business in the future, and to find papers—always supposing that the business of that office is systematically and carefully conducted. It is going to be troublesome to find occupation for some of the clerks, but it is to be hoped that they can be comfortably established somewhere where they will not interfere with the work.

The duties of the Registrars have necessarily suffered considerable modification by reason of important changes in the matter of appeals and otherwise. The division of work between them seems to be one which will conduce to speed and uniformity in the transaction of business.

Under Rule 1418 the Marshal and Clerk of Assize shall be a clerk attached to the Registrar's office at Toronto. There does not appear to be much change in his duties; but it is hoped that the intention is to give him a local habitation at Osgoode Hall. This is something which the Registrars can control, and doubtless they will take steps to remedy the inconvenience which flows from the Clerk of Assize having no office at Osgoode Hall, where business in connection with the Assizes can be transacted.

Rule 1419, which comes from the statute, enables Local Judges under certain circumstances to hear motions to continue, vary or dissolve interlocutory injunctions which they have granted. With much submission to the powers that be, the writer ventures to consider that this is not a wise move. Injunctions may inflict, as well as avert, irreparable damage. It is highly important that they should be granted and continued upon principles which are certain and uniform. Even within the bounds of Osgoode Hall there is too much diversity in the manner in which this branch of the law is administered. If that is the case, consider the variety of practice in this regard which will be found in the different counties. Singular instances of the exercise of the lesser power formerly possessed by Local Judges have been made public from time to time. A man has been restrained for eight days from keeping up a dam to a certain height. Injunctions have been made perpetual at the first hearing. The undertaking as to damages has been frequently omitted, and all this where a review by a Judge at Osgoode Hall was in prospect. Where this no longer exists, is it probable the result will be satisfactory? In an ideal community, law might be delivered at a man's door like milk from a milk cart; but at present there is a good deal of risk in this mode of distribution.

By Rule 1419 Local Judges have pretty nearly as wide authority "in actions brought and proceedings taken" in their County as the Judge of the Weekly Court,—that is to say, where no infants are concerned. It may be that ultimately these provisions will save time and money to litigants. So far, it is the writer's firm belief it has cost them both. To hear and dispose of the class of business which this rule covers requires extended experience, and a continually refreshed knowledge of the practice. Is it likely that a Local Judge, however zealous and well intentioned, can acquire anything like the qualifications of a Judge at Osgoode Hall?

Local Judges, except in certain cases, can make orders for payment of money out of Court, as also can the Master in Chambers; but by Rule 1422 the Accountant is compelled to apply to a Judge of the High Court for his approval before

acting on any such order. Either the power of making these orders should be conferred or withheld. If conferred, it is absurd to hamper it in the manner indicated. If it cannot be exercised without control, it should not be exercised at all. An *ex parte* review of an order by the Accountant and a Judge is objectionable, and leads to delay and dissatisfaction. Give in the first instance to a tribunal which is competent to make an order, the power to make an order that is one in fact and not merely in name. The process of review by a Judge is likely to take considerably more time than would be occupied in hearing the application. It may be added further that the Master in Chambers has made these orders with perfect satisfaction and with all possible safeguards year after year, and no reason has been suggested for now for the first time appending this troublesome requirement.

Rule 1423 does away with the necessity of obtaining an order for a discharge of a mortgage. This is a useful rule and likely to save expense. The order was formerly obtained as a mere matter of course, the real safeguard being in the Accountant's certificate showing that the mortgage was paid off.

Rules 1424 and 1457 govern appeals to a Judge in Chambers. They are no longer to be set down and heard after motions, but are to come on as ordinary motions. The alteration is of little importance, however, as these appeals seem to be abolished with the exception of appeals from Taxing Officers, and possibly appeals under the Mechanics' Lien Acts.

Rule 1427 enables the Presidents of the Divisions to assign a particular duty to a Judge where the Judge who would ordinarily undertake it is unable to act. This is most useful, and will, it is hoped, prevent a contingency not unknown in the past,—the collapse of the Weekly Court.

The Judicature Act of 1895, sec. 64, calls for sittings of a Divisional Court every month. Rule 1429 says that the sittings of the Divisional Court "shall commence on Monday of each week." This is somewhat ambiguous and might mean Monday of each week upon which such sittings are to be held. However, it is said the intention is to have weekly sittings for

the present at any rate. From the state of the list it looks as if the sittings would have to be continuous.

Rule 1439 restores, with a modification, the old law permitting service out of the jurisdiction where the defendant has assets in Ontario of the value of $200 at least. Why it should be deemed necessary to impose safeguards does not appear. It will be necessary to come to the Master for directions, and possibly to go down to trial to prove the claim or assess damages. If there are any reasons for thus complicating the matter, do not they exist in the case of any other service out of the jurisdiction where the defendant does not appear?

Rule 1450 introduces a trifling but useful amendment. Under the old rule, where the time for doing any act or taking any proceeding expired on a day when the offices were closed, it was held to be duly done or taken on the next day when the offices were open. For the last words are now substituted the words "juridical day on which the proceedings in question can be taken." It is obvious that it was not always the mere fact of the offices being open or closed which governed the possibility of "doing any act or taking any proceeding." This and a number of the other alterations which have been made were among the recommendations contained in the report of the Committee of the County of York Law Association, prepared and submitted to the Judges some years ago.

Rule 1452 embodies the statutory provisions as to service of an appointment upon the Solicitor in lieu of serving a subpœna on the party for his examination. Under this rule seven days' notice is required, and the time appears to be unreasonably long. Moreover it is not clear what consequences are to follow on default. Where a motion under Rule 499 is made, what happens if the defendant is shown to be out of the country, or if his Solicitor has been unable to communicate with him?

Rule 1458 introduces into old Rule 562 certain provisions which are in accordance with common sense, and have already been held on more than one occasion to govern its operation. Where one side wishes to call the other as a witness at the

trial, he can give the Solicitor eight days' notice, *provided the party to be called is within the jurisdiction, and provided that the proper conduct money is paid.*

Rule 1459 forbids the taxing of professional witness fees, except upon a Judge's certificate. This gives the Judges additional labor, and takes from the Taxing Officers a duty which they are perfectly competent to perform. The obtaining of this certificate is nearly always overlooked at the trial. A Judge has to be seen at Osgoode Hall; weeks may elapse before he can be found; the taxation is delayed, and another item of wholly unremunerated work is added to the duties of Toronto Agents. Are Taxing Officers not competent to say whether a doctor, lawyer or surveyor, in making certain statements, was or was not giving professional evidence? If they are not competent to do that, to what branch of their duties are they equal? These remarks apply with equal force to the rule requiring a Judge's *fiat* before examinations can be taxed. If the Judges and Taxing Officers are not doing their duty under Rules 1195 and 1215, is this any reason for punishing the profession at large?

Rule 1463 imports into the rules the statutory provision as to venue. Save in the precise case governed by the rule, viz., where all the parties to the action reside in the county and the cause of action arose there, the much-vexed question of venue is in the same position as before the rule, and, as heretofore, decisions will be based upon that one of the particular theories applicable to the subject which the Court considering the matter favours.

Rule 1470 safely and satisfactorily anchors exhibits from trial till judgment, and during any stay of proceedings thereafter, and during any appeal to the Divisional Court or Court of Appeal.

Rule 1471 abolishes the absurdity of handing out the record after judgment, with all the inconvenience which so frequently resulted. The record now is the property of the Court from the time the case is set down, and thereafter it automatically goes to the spot "where it will do most good."

Rule 1477 remedies an injustice. Under the old practice a defendant, if he wished to prevent an application for interim alimony, had to give notice that he was willing to pay the amount claimed by the plaintiff. He may now submit to pay such less sum as he considers proper. If the plaintiff accepts this amount as sufficient, no order is to be made till there has been a default in payment; and if the plaintiff is dissatisfied and moves for interim alimony, and it is found upon the motion that the sum offered by the defendant was reasonable, in that case also no order for interim alimony is to be made till a default.

Rule 1483 is something of a mystery. It repeals the main clause of old Rule 798, and then re-enacts it *verbatim et literatim.*

Rule 1484 governs the manner of appeal to a Divisional Court. The procedure seems to be simple and should work smoothly.

Rule 1485 requires a party served with a notice of motion which his opponent does not set down, to apply for the costs of the abandoned motion. Surely these will be his as a matter of course; but why add to them the expense of counsel's attendance in Court?

Rule 1487 gives the procedure on appeals to the Court of Appeal. The most radical change is in doing away with security for costs or damages. In discussing this question, one side of the argument seems to have been given undue prominence. It is no doubt a desirable thing, where a right of appeal is given, to withhold it from no man because of his poverty; but cannot this principle be carried a little too far? It must surely be presumed that the judgment appealed from is right. This presumption is supported by the fact that the majority of appeals are dismissed. If the respondent has the benefit of this presumption, he should, so far as possible, be saved harmless where the appellant chooses to take the opinion of a higher Court. As the law now stands the appellant can as a matter of course not only stay execution in the hands of the Sheriff, which is not so injurious, but can stay all further proceedings in the action. If the Courts had to deal exclusively with honest men, this would be unobjectionable,

but an unscrupulous appellant is able to prevent the respondent from even taxing his costs or entering judgment, and can in ordinary course tie up matters for months; at the end of which period, if solicitor and client are commonly adroit, the successful respondent will win a barren victory. It is hoped that this view of the question will have weight with the Judges, and that the power of ordering security which still exists will be exercised where there is a reasonable apprehension of injury to the respondent.

Rule 1487 (804) calls for a notice of appeal, "setting forth the grounds of the appeal," and Rule 1488 (814) directs the appellant to serve his reasons of appeal along with his notice of appeal. Two documents then, similar in substance, must be prepared, but for what conceivable object it is impossible to guess. Of the reasons of appeal he is to file one copy and deliver four to the Registrar of the Court. He will also need one or two copies for himself and one to deliver to the other side—in all eight—and this is more than can be struck off at one time on a typewriter. Probably, therefore, it will be found cheaper to print the reasons for and against appeal.

Rule 1487 (804) contains a contradiction within its borders. The notice of appeal is to be served "within one month after the judgment complained of." But by the same rule the appeal is to be set down "for the first day of the sitting of the Court of Appeal, commencing after the expiration of one month from the day on which judgment has been signed"; and further, by the same rule, the notice is to be given "not less than seven clear days before the first day of the sittings." It will probably cause some unfortunate litigant quite a respectable bill of costs to resolve this little discrepancy, unless indeed the Judges meet and decide what interpretation is to be placed upon the rule, or unless—which seems more likely, as things go,—a further batch of rules is out before this article is printed.

Rule 1489 appears to contemplate an inexpensive appeal from the County Courts to the Divisional Court. The original papers, including the evidence, judgment, etc., are to be transmitted with the Judge's certificate to the Central Office. But 1489 (837) calls for appeal books. This is decidedly anoma-

lous in view of the fact that they are not ordinarily required on appeal to the Court of Appeal, or in the case of any other appeal to the Divisional Court. It is submitted that this very considerable expense might be saved to litigants and that the Divisional Court, without very great inconvenience, could make use of the certified original papers and dispense wholly with appeal books.

Rule 1489 (837) is peculiar in its terms. It states that the appeal "shall be set down to be heard at the first sittings of a Divisional Court which commences after the expiration of thirty days after the decision complained of." If this is to be accepted literally, it is irregular to bring on such an appeal before the expiration of the thirty days. The rule is taken, without substantial alteration, from the old rules governing appeals to the Court of Appeal. The altered conditions called for a modification of it.

Rule 1489 (838) refers to a "notice of appeal" which is nowhere else spoken of. What its nature must be is matter of speculation. It would seem probable that the intention was to bring these appeals into line with appeals to the Court of Appeal, and that the notice should be of the kind referred to in Rule 1487. Certainly some notice must be given if the appellant is to get the advantage of the stay of execution for which the rule provides.

Rule 1490 practically abolishes appeals to a Judge in Chambers, and sends all these appeals to the Divisional Court; and with one exception, it may be said that the procedure which the rule contemplates, appears to be simple and workable. The exception is found in sub-section 3 (by the by, there is no sub-section 1), and says, "Every appeal is to be placed on the peremptory list for the first day after the day on which the appeal is set down." That is to say, it may be placed on the peremptory list a matter of a week before the motion is made returnable; yet a conscientious officer could hardly venture to disregard a rule drawn in such positive terms.

Rule 1498 is a modification of old Rule 1243. It will not cover all cases arising under counterclaims.

Rule 1501 prescribes what is often an impossibility, namely, that "all papers relating to proceedings in the Weekly Court are to be filed in the Registrar's office not later than the day preceding that upon which they are intended to be used." It happens in very many cases that affidavits and other papers are only received from the country on the day on which they are intended to be used, and this not by reason of any fault on the part of the Solicitor. If this and some of the other rules referred to are not interpreted with a certain degree of latitude, they will prove extremely inconvenient.

Rule 1504 is a move in the right direction. It enables a Taxing Officer at Toronto to allow on the argument of an appeal to the Court of Appeal such fees as in his discretion he may think proper. But there are many other items in the tariff which call for attention. The charge for "procuring evidence" is not taxable against an unsuccessful litigant, and yet it is as genuinely a part of the expenditure necessarily incurred in the action as anything else. Charges under this head are allowed by the English tariff, and if costs are to be considered an indemnity, such charges should certainly be allowed here. Every copy of a "common order," whether its length is one or twenty folios, is taxable at the uniform charge of 75c. Why not 10c. a folio like other documents? It must also be noted that there is a continual tendency to increase the uncontrollable expenditure in actions. For example, in the old times very few motions were set down in the Weekly Court—at any rate in the Chancery Division. Now, all but *ex parte* motions must be set down. This necessitates an expenditure of 60c. or 70c. in each case. Some two or three years ago the certificates given by the Accountant were charged for at the rate of 30c., now the uniform charge is 50c. Then there is the additional tax of $1.00 imposed by the Law Courts Act of 1895, which is required to be paid on every civil action entered for trial. Instances might be multiplied if necessary. It is the Government which is responsible in great part for the burdensome expense of litigation, and not the legal profession, which usually gets the credit for it.

There are wide branches of practice left untouched—the rules with regard to bailable proceedings are complicated and difficult of comprehension—pleadings have degenerated to such an extent that many Judges are accustomed to almost wholly disregard them—the law as to examination for discovery is unsatisfactory. Again and again the Courts have said that so long as the right to discovery exists it shall be made effective by permitting the examination of the individual who can give discovery. How often it happens that the officers of a corporation are ignorant, and persist in remaining ignorant? How often, in the case of an individual, is the whole of the knowledge to which the opposite party is entitled, locked in the breast of a clerk or employee who is unexaminable?

In minor matters, too, there are many changes which might profitably have been made. A few of those which were brought to the notice of the Judges in the report already mentioned, are referred to:

Where a defendant out of the jurisdiction, whether a person or partnership, has a recognized place of business or agents empowered to carry on his business within Ontario, with whom the dealing out of which the litigation arose took place, why should service not be made by leave upon such agent?

Where it is found impossible to enforce or execute a judgment without discovery, why, under proper restrictions, should discovery not be ordered in aid of it?

It sometimes happens when an examination is being held that papers and documents required in order to intelligently conduct it, are in the hands of a third person. There is no method of compelling the production of these, and the examination is rendered nugatory for the lack of them.

It is occasionally necessary to take samples, or make tests and investigations, in order to perpetuate evidence for the trial, and this where the property sought to be thus dealt with is not, in the language of the rule, "the subject of the action." Rule 1135 is too narrow in its terms. It should permit an order to be made with regard to any property, the inspection,

etc., of which *is necessary for the proper determination of the question in dispute.*

These criticisms are not fanciful, but relate to actual practical difficulties which have occurred from time to time, nor do the instances given begin to exhaust the list of amendments which the Committee reported after most careful consideration it was desirable to make.

Turning to the statutes which have recently been brought into force, there are a few points to be noted. It would need far more space than can be accorded to this article to deal adequately with the important and radical changes which have been made, and very likely it would be wholly unprofitable to endeavor to do so before these changes are better understood and some defined lines of practice have been channelled out. In this place it may be said that haste and its consequences are only too visible in statutes and rules alike.

Section 10 of the Law Courts Act goes a long way towards abolishing the Divisions of the High Court. Section 3 of the Judicature Act expressly continues them. Section 142 directs that all officers shall continue to be attached to the Divisions to which they are now attached. How will this work out? What is the position of the Registrar of a Court that cannot sit?

Throughout the Law Courts Act there are frequent references to the Judicature Act as it appears in the Revised Statutes, and many of its provisions are based upon that Act.

Section 43 of the Law Courts Act repeals certain sections of the Judicature Act; but section 192, of the Judicature Act of last session, repeals the whole of the earlier Act.

Section 70 of the Judicature Act will mislead many until its true effect is understood. It says that there shall be only one appeal, save in certain cases. It will be found that by the operation of subsequent clauses an appeal from a judgment at the trial can go as of old, *via* the Divisional Court and the Court of Appeal, to the Supreme Court, if the Divisional Court reverses the judgment of first instance.

Section 79 of the Judicature Act makes prior known decisions of a judge of co-ordinate authority binding. But were they not so already?

Section 81 of the Judicature Act deals, among other things, with the Sittings in the County of York. Whether the expression "such sittings" therein found refers to jury or non-jury sittings is a matter for speculation.

Sections 112 and 113 of the Judicature Act provide respectively for the verdict of ten jurors and for a verdict where one juror is incapacitated by illness, or consanguinity to a litigant. This looks like a step in the direction of a more important reform, as to the expediency of which there will be many opinions.

Section 130 of the Judicature Act withholds fees for references from Judges, Registrars, or other officers who are paid wholly or partly by salary. Are these officers entitled to refuse to undertake long and difficult references without remuneration?

Section 44 of the Law Courts Act makes a very radical alteration in the County Courts Act with regard to appeals. Under this section a motion for a new trial on the ground of discovery of new evidence or the like, shall be made before the County Court. Is there an appeal from the decision on such motion?

Nearly nine months have elapsed since these Acts were passed. There has been ample time to evolve an orderly and complete Code of Practice under them, but anyone who has cared to peruse the above can scarcely arrive at the conclusion that the new rules fulfil these requirements. There was no desperate necessity for bringing the changes into force on the 1st of January, 1896. It would have been much better to have gone on under the old state of affairs until such time as these matters could have received proper care and attention. Just now the very officers themselves who are called upon to interpret the rules confess their inability to do so, and practitioners are at sea without a rudder or compass.

W. H. Blake.

CRIMINAL JURISDICTION—ANOMALIES OF RECENT STATUTES.

In discussing the new Law Reform Acts (the Judicature Act and the Law Courts Act, 1895), and the somewhat radical changes brought about through their being grafted upon the procedure which has hitherto prevailed in the Courts, it seems pertinent to inquire:—in what tribunal, by the operation of the Statutes and the rules promulgated thereunder, is the jurisdiction in criminal matters vested? Do these statutes, in truth, after the extensive paring down—the drastic remodelling that has been undergone—preserve full jurisdiction of this nature in the present Courts?

It was decided, in 1888, by the Queen's Bench Division, in *Reg.* v. *Beemer*, 15 O.R., 266, that the jurisdiction to quash convictions — the most important province, perhaps, of a Criminal Court of Review under our system—resided in, and was exercisable by, the Judges of the Queen's Bench and Common Pleas Divisions respectively, sitting *in banc*, and was to be regarded as something quite apart from the functions enjoyed by them as the members forming, in each case, a Divisional Court. The decision, in brief, was to the effect that this jurisdiction was acquired, or rather retained by these Courts, by reason of their sittings being analogous to, and representing the sittings, in Term, of the old Courts of Queen's Bench and Common Pleas; and in this view, must be taken as disposing of the larger question of the tribunal to which other matters within the domain of criminal jurisdiction, allied, more or less, in aspect or complexion, should be held to appertain, excluding the case of the special statutory reference to the various Divisional Courts, of the hearing of Crown Cases Reserved—lately extended, by the Criminal Code, to applications for new trials.

Again, in the case of *Reg.* v. *Runchey*, 18 O.R., 478, where the question was whether or not the Court that should entertain these motions to quash convictions was properly constituted of two judges, the full Court of Common Pleas practically concede the soundness of the doctrine contended

for, and first established in *Reg.* v. *Beemer*, holding that the circumstance of the weakened numerical composition of the Court worked no deprivation of jurisdiction, but was a mere incident in its exercise. These declarations of the respective Courts—from the standpoint of the now obsolete procedure—were thenceforward recognized as settling, finally and authoritatively, the practice that should obtain in connection with this branch of the law, to the extent even of provoking from the Judges of the Chancery Division, though by an equal division of opinion on each occasion, deliverances, in which they declined to accept a jurisdiction which had been so deliberately stated to be inherent in the other divisions alone: *Reg.* v. *Birchall*, 19 O.R., 697; *Reg.* v. *Davis*, 22 O.R., 652.

In matters more properly of criminal practice, as distinguished from those which involved jurisdiction, the clear principle so laid down has not been less strongly emphasized by expressions, at different times, of the Court. Thus it has been decided, confirming judgments of a single Judge, that the right to cross-examine a deponent on an affidavit filed on an application of this sort, does not exist, the rules of the Judicature Act not applying for the governance of the proceedings of a tribunal exercising this criminal jurisdiction: *Reg.* v. *Harriet Hayward*, in full Court of Common Pleas, 1893, (hitherto unreported, but a note of which we have prepared and publish in this number, *post p.* 30)

That these Rules have not been designed to affect other than purely civil controversies in reality, could admit of no doubt, since the decision of the Court of Appeal in *Re Boucher*, 4 A. R. 191, which has a long line of later authorities harmonizing with and supporting it.

Now, by the new Acts, although it is enacted that the High Court of Justice "shall continue to consist" of the three separate divisions that previously formed it, these branches of the Court "shall not" (with the reservation as to cases—already noticed—coming within the Code) "*sit* or *give judgments* as such divisions," so that the proposition, which was the basis for the decision in *Reg.* v. *Beemer*, that the former Courts of Queen's Bench and Common Pleas have become merged in the Queen's

Bench and Common Pleas Divisions, continuing as amply endowed in respect of jurisdiction as before, has ceased to be maintainable.

Furthermore, as the provision of the Judicature Act sanctioning the composition of the Divisional Courts, in an emergency, of Judges drawn indifferently from any division (one of these, independently of the Criminal Code, being absolutely without criminal jurisdiction, as already shown), could not authorize any such importations, or mutual exchange of members, where the Court to be constituted was one fulfilling duties of the character under discussion, it must be apparent that the present Statutes, with their essential variances from the old law, if they profess to assign this jurisdiction to any particular quarter, impugn and nullify the authority of *Reg.* v. *Beemer*. Thus do the several parts of the High Court, as independent organizations, but feebly survive, the constituents of its Common Law side, having their powers substantially impaired, and shorn apparently, of an important element of a transmitted jurisdiction.

In conclusion, then, if the argument be one which can be fairly deduced from that case, that it has been solely by virtue of the perpetuation of the old Courts of Queen's Bench and Common Pleas, which the Ontario Judicature Act had ordained —this Statute at the same time repudiating all intention of dealing with criminal matters (see Cousol, Rule 1, founded on sec. 163 of Judicature Act), that any jurisdiction of this kind existed—how is the difficulty presented by the changed order of things to be met and surmounted? Can it be by anything short either of an adequate amendment of the Ontario Statute, assuring the full continuity of these former Courts, or by the passage by the Dominion Parliament (which admittedly has the power under the B. N. A. Act) of an enactment conferring upon the new Divisional Court, or a Single Judge, if thought expedient, the functions previously belonging to the original Courts of Queen's Bench and Common Pleas?

The Dominion Legislature has for some time back had upon the statute book a measure (52 Vict. c. 40) which empowers the Judges of the Supreme Court of Judicature to prescribe rules for the conduct and disposal of criminal matters; but is it not manifest that, to make them efficacious, the Court whose practice they are intended to regulate must first be created, or have imposed upon it this class of legal business by legislation proceeding from a competent source?

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

We conclude in this number our review of the cases appearing in the English Law Reports comprising (1895) 2 Q.B. pp. 497-538; (1895) P. pp. 301-340; (1895) 2 Ch. pp. 601-773; and (1895) A. C. pp. 541-665.

COMPROMISE—CLIENT AND COUNSEL—MISTAKE—SETTING ASIDE COMPROMISE—EVIDENCE OF COUNSEL AS TO MISTAKE.

In *Hickman* v. *Berens*, (1895) 2 Ch. 638, the plaintiffs applied to be relieved from the effect of a compromise assented to by their counsel under a mistake. The point arose as to the proper mode of showing the alleged mistake to the Court. Kekewich, J., held, adopting the practice pursued by the Court of Appeal under similar circumstances in the unreported case of *Kempshall* v. *Holland*, that the Court should not require an affidavit from counsel, but should accept the statement of counsel as to his understanding of the matter, from his place in Court; and after hearing that statement he came to the conclusion that the mistake was one which could not be relieved against. The Court of Appeal (Lindley, Lopes and Rigby, L. JJ.,) took a different view, and came to the conclusion that as the parties were really not *ad idem* in the agreement which had been made, relief could be given against the consent on motion. It may be noted that no order had been drawn up embodying the compromise. Where that has been done it may in some cases be difficult to get relief on motion: see *ante*, vol. 31, p. 508.

"CHARITY," MEANING OF—GIFT TO ENCOURAGE YACHTING.

In *re Nottage*, *Jones* v. *Palmer*, (1895) 2 Ch. 649; 13 R., July, 165; 12 R., Nov., 95, the testator made a bequest of a fund in trust to provide annually in perpetuity a cup to be given as a prize for the most successful yacht of a certain class for the year, and by which the testator stated that he intended to encourage the sport of yacht racing, and the question was raised whether the object of the gift came within the legal definition of a "charity." The Court of Appeal (Lindley, Lopes and Rigby, L.JJ.,) agreed with Kekewich, J., in answering that question in the negative. A useful review of the authorities on this point may be found in the English *Law Times* of Nov. 16, 1895.

WILL—CONSTRUCTION—MIS-DESCRIPTION—SPECIFIC GIFT.

In *re Nottage, Jones* v. *Palmer*, (1895) 2 Ch. 657, a further point arising under the will of the same testator, as in the preceding case, is discussed. The testator gave to each of his two nephews, "£500 debenture stock or shares" in the S. company; to each of his three cousins, "350 ordinary shares" in the S. company; to J. L. M., "250 fully-paid shares in the said company"; and H. C., "50 shares in the said company." He then gave "the pecuniary legacies following," giving a list of them. He then bequeathed to his trustees, "£5,000 debenture stock or shares of the S. company, 350 ordinary shares of the same company, £1,500 debenture stock or shares in the B. company, and 35 shares in the D. and H. company, upon trust to continue the same in their *present state of investment*," with power to convert, etc. His residuary estate he gave in trust to convert it into money and pay his funeral expenses and debts, and "pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." The testator at the time of his death had debentures and ordinary shares of the S. company, and debentures of the B. company, but he had not, nor had either company, issued any "debenture stock or shares," nor any shares therein other than ordinary shares. Kekewich, J., held that all the legacies of shares were general and not specific, and that the legatees of "debenture stock or shares" took nothing, as being gifts of something which had no existence. The Court of Appeal (Lindley, Lopes and Rigby, L. JJ.,) were, however, able to place a less technical construction upon the will; by "debenture stock or shares" they held that the testator intended to describe something different from ordinary shares, but as to the proper designation of which he was in doubt, and must be taken to have meant debentures. They also held that inasmuch as the gift of the £5,000 was, from the terms of the will, clearly specific, as the testator spoke of its present investment, and from this and other indications in the will it appeared that the testator was intending to deal with something which he had, and that the legacies of debentures and shares were all specific.

WILL—REMOTENESS—GIFT TO CLASS—PROVISO FOR SETTLEMENT OF SHARES, INVALID AS TO SOME MEMBERS OF CLASS.

In *re Russell, Dorrell* v. *Dorrell*, (1895) 2 Ch. 698; 12 R. Nov. 23, the question was whether a residuary bequest was void for remoteness. By the will in question the testator gave his residuary estate, after the death of his niece Mary and her husband, for all the daughters of Mary who should attain 21 or marry under that age;

with a proviso that the share of any daughter should be held in trust for her for life, and after her death on similar trusts for her children as thereinbefore declared for the children of Mary. Mary had only one daughter, the plaintiff, born in the lifetime of the testator. It was contended that the proviso for the settlement of the shares in favor of the grandchildren of Mary was void for remoteness, inasmuch as there might have been a daughter of Mary born after the testator's death who would live to take a vested interest, and whose children would not necessarily attain 21 within the period allowed by law for the postponement of the vesting of a benefit. But the Court of Appeal (Lord Halsbury, L.C., and Lindley and Rigby, L.JJ.) affirming Chitty, J., held that the proviso for the settlement of the shares must be construed as applicable to each share separately, and that although, as to the share of a daughter born after the death of the testator, the proviso in favor of her children would have been void, yet as regards the share of the plaintiff, who was born in the testator's lifetime, it was valid, and therefore she was only entitled to a life interest in the fund.

STATUTE OF LIMITATIONS.—(2 & 3, W. 4, c. 71), ss. 3, 4, (R.S.O., c. 111, ss. 34, 35.) —LIGHT—COMMENCEMENT OF RIGHT OF ACTION—ENJOYMENT FOR MORE THAN 19 BUT LESS THAN 20 YEARS.

Battersea v. *Commissioner of Sewers*, (1895) 2 Ch. 708; 13 R. Nov. 139; was an action for an injunction to restrain the interference by the defendant with the plaintiff's ancient lights. It appeared that the buildings on the defendant's site had been pulled down in October, 1875, and no buildings had been erected since which would interfere with the plaintiff's lights, but the defendant was about to erect buildings thereon which would interfere therewith. The writ was issued in July, 1895, consequently before the full period of twenty years had expired from the pulling down of the original buildings, and the plaintiff contended that as his inchoate right of prescription could not now be defeated, he was entitled to an injunction, but North, J., held, following a similar decision of Kekewich, J., in *Bridewell Hospital* v. *Ward*, 68 L.T., 212; 62 L.J. Ch. 270, that the plaintiff was only entitled to an injunction restraining the defendant from building higher than the buildings existing on the defendant's premises in July, 1875, so as to obscure the plaintiff's windows—that so long as the plaintiff's right was inchoate he had no right of action, and the fact that there could be now no effective interruption which would prevent that right becoming absolute at the expiration of the twenty years, did not entitle the plaintiff to an injunction before the twenty years had actually elapsed.

PRACTICE—INTERLOCUTORY MOTION FOR PAYMENT INTO COURT - ADMISSION BY DEFENDANT—MONEY RECEIVED, BUT IMPROPERLY PAID AWAY.

Crompton & Evans Bank v. *Burton*, (1895) 2 Ch. 711; 13 R., Nov. 136, is a decision on a point of practice which seems not uncommon in England, although not very common in Ontario. The plaintiff made an interlocutory application for an order to compel the defendants (the first mortgagees and their solicitor) to pay into Court the surplus proceeds of the sale of the mortgaged property which the plaintiff claimed to be entitled to as second mortgagees. The defendant solicitor admitted the receipt of the money, but he claimed to retain thereout the amount of payments which he made to the executors of the mortgagor under an alleged agreement with them that he was to be recouped out of the proceeds of the sale. Following the recent cases of *Neville* v. *Mathewman*, (1894) 3 Ch. 345, and *Nutter* v. *Holland*, (1874) 3 Ch. 408 (noted *ante* pp. 83, 87), North, J., though of opinion that the payment to the executors of the mortgagor was a clear breach of trust, yet considered that on an interlocutory application the defendants could only be ordered to pay into Court the moneys admitted to be actually in their hands.

PRACTICE—BANKRUPTCY OF SOLE PLAINTIFF—REVIVOR.

Farnham v. *Milward*, (1895) 3 Ch. 730; 13 R. Nov. 154, is a decision of Stirling, J., on a point of practice. The action was commenced by the committee of a lunatic in her own name and in the name of the lunatic, for an account against the defendants, who had acted as solicitors and confidential agents of the lunatic. After an order had been made directing the taking of the accounts, the lunatic was adjudicated a bankrupt, and the trustee in bankruptcy refused to continue the proceedings, whereupon the defendants obtained an order amending the writ and making the trustee a co-defendant, and directing that the taking of the accounts should be proceeded with. After service of the order the trustee attended certain applications in Chambers on the taking of the accounts, and then moved to set aside the order making him a party defendant. Stirling, J., had himself made the order on the supposed authority of *In re Wathman*, W. N. (1889) 213, but came to the conclusion on the present application that he was wrong in making the order, and rescinded it, holding that on the bankruptcy of the lunatic the right of action passed to the trustee, and that the committee could no longer continue the action. Under the circumstances he considered the trustee had not, by attending on the application in Chambers, waived his right to object, inasmuch as his objection went to the root of the proceedings. This case seems to show that the procedure adopted in *Chambers* v. *Kitchen*, 16 P.R.

219, where, after judgment, the defendant obtained an order on præcipe, reviving the action in the name of the executor of a sole deceased plaintiff, was erroneous. The proper procedure in that case, it appears to us, would have been for the defendant to have moved against the executor for an order requiring him to revive the action within a limited time, and in default staying all further proceedings: see *Watson* v. *Watson*, 6 P.R. 229. To permit a defendant to revive a suit in some other person's name as plaintiff, seems contrary to sound principle.

LIFE POLICY—TENANT FOR LIFE AND REMAINDER-MAN PREMIUMS—INCOME AND CAPITAL—APPORTIONMENT OF POLICY MONEYS.

In *re Morley, Morley* v. *Haig*, (1895) 2 Ch. 738; 13 R. Sept. 102, it became necessary for Kekewich, J., to adjust the rights of a tenant for life, and remainder-man. Part of a testator's estate consisted of a policy of insurance on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one for life, with remainders over. After the testator's death his executor paid the premiums on the policy, and the interest on the mortgage, out of the testator's personal estate, until the death of the assured, when the Insurance Company paid to the executors the amount of the policy after deducting the mortgage debt; and the question was, how this fund was divisible as between the tenant for life and remainder-man; in other words, how much of it was to be treated as income and how much as capital? Kekewich, J., held that to the extent of the amounts paid out of the income of the personal estate for premiums and interest on the mortgage, the fund must be regarded as income and be paid to the tenant for life, together with interest on the sums so paid at 4% per annum, and that the balance of the fund must be apportioned between income and capital according to the principle laid down in *Re Chesterfield*, 24 Ch. D. 643, viz.: by ascertaining the sum which put out at interest at 4% per annum on the day of the testator's death and compounded yearly, would, with such accumulations, after deducting income tax, amount with the accumulations to the amount of such balance; and the sum so ascertained is to be regarded as capital and the residue as income.

VENDOR AND PURCHASER—CONTRACT—CONDITION PRECEDENT—WAIVER OF CONDITION.

Lloyd v. *Nowell*, (1895) 2 Ch. 744; 13 R. Oct. 114, was an action by a vendor of lands for specific performance, and the defence was that there was no contract. A memorandum in writing had been signed by the plaintiff and defendant purporting to be an agreement for the sale and purchase of the land in question, but it contained the words, "subject to the preparation by the vendor's solicitor and

completion of a formal contract." No such formal contract had ever been prepared, and the vendor claimed it was a condition which he was entitled to waive. But Kekewich, J., held that it was not a condition for his benefit alone, and therefore that he could not waive it so as to constitute the rest of the agreement a final and conclusive contract against the purchaser, and he dismissed the action and ordered a return of the deposit which had been paid by the defendant.

PRACTICE—MOTION FOR ORDER ON ADMISSIONS—DISCRETION—PARTIES—ORDER XVI., RR. 1-11; XVIII, R. 6; XXXII, R. 6. (ONT. RULES, 300, 324, 345 756).

In *re Wright, Kirke* v. *North*, (1895) 2 Ch. 747, the action was brought by a tenant for life and reversioners against the trustees of a settlement, to compel them to make good an alleged breach of trust. The reversioners alone applied under Ord. xxxii r. 6 (Ont. Rule 756), for an order on one of the defendants to pay capital moneys into Court on admissions. A preliminary objection was taken that the motion could not be entertained because all of the plaintiffs had not joined in it. This objection was sustained by Kekewich, J., and leave was then obtained to renew the motion on joining the tenant for life as a party; but on the motion coming on again he held that as the defendant had raised several questions, among others that the tenant for life had assented to the alleged breach of trust, the order ought not to be made as a matter of judicial discretion at that stage of the action, and the motion was accordingly refused.

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—FRAUD—SOLICITOR AND CLIENT—PRIVILEGED COMMUNICATION—INSPECTION BY JUDGE.

In *Williams* v. *Quebrada Ry. Co.*, (1895) 2 Ch. 751, the action was brought by debenture holders of the defendant company to enforce their security and claiming priority over certain other debentures alleged to have been issued by the company in fraud of the plaintiffs, and for the purpose of defeating their security. In the course of the proceedings the liquidator filed an affidavit of documents claiming privilege for certain opinions of counsel and advice of solicitors of the company, and also for documents submitted to the company's legal advisers for the purpose of obtaining their advice. The plaintiffs claimed that inasmuch as fraud was charged the documents in question were not privileged. Kekewich, J., on the authority of *Reg.* v. *Cox*, 14 Q.B.D. 153, and other cases, held that the privilege could not be allowed where fraud is charged, even though the solicitor is not alleged to have been a party to the fraud; but before ordering the production of the documents he inspected them himself, and after doing so decided that they must be produced.

The provision of Eng., Ord. xxxi, r. 19A, sub. r. 2, providing for the inspection of documents by a judge in cases of dispute, might well be adopted in Ontario.

COMPANY—WINDING UP—CONTRIBUTORY—AGREEMENT TO PAY FOR SHARES OTHERWISE THAN IN CASH—REGISTRATION OF AGREEMENT—COMPANIES ACT, 1867 (30 & 31 VICT., C. 131), S. 25; (R. S. C., C. 119, S. 27).

In *re Common Petroleum Co.*, (1895) 2 Ch. 759, the question was whether there had been a valid agreement made for paid-up shares, registered before the issue of the shares, as required by the Companies Act, 18 67 (30 & 31 Vict., c. 131), s. 25, (R.S.C., c. 119, s. 27). The agreement in question was in writing between the Spiels Company and a trustee for the Common Petroleum Co. (then being formed), that the latter company should purchase from the Spiels Company certain patent rights, the consideration therefor to be paid up shares in the Common Petroleum Co.; and it was provided that the latter company was to allow to every shareholder in the Spiels Company who should apply for the same three shares of £1 each in the C. P. Company, with 19s. credited as paid up, for every two shares held by the allottee in the Spiels Company. The C. P. Company, when incorporated, by deed indorsed on the agreement, adopted it, and the agreement and deed were duly registered. Two persons who were not shareholders of the Spiels Company, but who were nominees of persons who were shareholders and entitled to shares in the C. P. Company under the above-mentioned agreement, applied for and were as such nominees allotted shares, and on paying 1s. per share, were registered as holders of the shares as fully paid up. The C. P. Company having been ordered to be wound up, the liquidator placed these two persons on the list of contributories as liable for 19s. unpaid on each share. It was contended that as these allottees were not shareholders in the Spiels Company, they were not within the consideration given for the patent rights. But Romer, J., was of opinion that an agreement to be valid under the Act need not necessarily be made directly with the allottee nor with the company directly. It is enough if the company adopt the agreement. Nor is it necessary that the contract should identify the particular shares intended to be affected by it, but the onus is on the allottee to show that the shares allotted were issued pursuant to the agreement. This he held had been done in this case, and he therefore dismissed the application of the liquidator to compel the shareholders in question to pay up 19s. per share.

COMPANY—AGREEMENT TO PAY FOR SHARES OTHERWISE THAN IN CASH—ISSUE OF SHARES BEFORE REGISTRATION OF AGREEMENT—RECTIFICATION OF REGISTER —COMPANIES ACT, 1867, (30 & 31 VICT. C. 131) S. 25; (R.S.C., C. 119, S. 27).

In *re Preservation Syndicate*, (1895) 2 Ch. 768; 13 R. Sept. 123, a valid agreement had been made for the issue of paid-up shares, but by mistake the agreement was not registered as required by the Companies Act, 1867 (30 & 31 Vict., c. 131) s. 25, (R. S. C., c. 119, s. 27), until after the shares had been issued. The allottees of the shares then applied to rectify the register by cancelling the shares and registering the applicants as holders of new paid-up shares for the like amount. Before the motion could be heard the company was ordered to be wound up, and Williams, J., though of opinion that the applicants were entitled to have the register rectified as asked, considered that the relief could only be granted upon the terms of due provision being made for the claims of creditors of the company, whose claims had arisen between the date of the issue of the shares and the giving of the notice of the motion.

RAILWAY COMPANY—RATES FIXED BY STATUTE—CONSIGNORS, RIGHT OF, TO BENEFIT OF STATUTORY RATES.

Davis v. *The Taff Vale Ry. Co.* (1895) A.C. 542; 11 R. July, 6, may be briefly noticed. In this case the House of Lords have decided that where an Act is passed as the result of a parliamentary contest between two companies, limiting the rate of freights, such a clause has the effect not merely of a contract between the two companies, but of a statutory obligation enforceable by a consignor of goods to be carried on such railway, chargeable with the rates for such traffic.

WATER COURSE—UNDERGROUND SPRINGS—INTERFERENCE WITH FLOW OF WATER— RIGHT ASSERTED FOR SINISTER PURPOSE—MALA FIDES—LAWFUL ACT DONE WITH MALICIOUS MOTIVE.

In *Bradford* v. *Pickles*, (1895) A.C. 587; 11 R. 1, the House of Lords (Lords Halsbury, L.C., Watson, Ashbourne and Macnaghten) have affirmed the judgment of the Court of Appeal, (1895) 1 Ch. 145, (noted *ante*, vol. 31, p. 204). The action was brought to restrain the defendant from interfering with the flow of water underground, so as to intercept it from reaching the wells from which the Town of Bradford drew its water supply. The interference, it was claimed, was committed by the defendant, not in the *bona fide* exercise of his rights, but for the indirect purpose of compelling the plaintiffs to buy up his rights. North, J., on this ground, granted an injunction, but the Court of Appeal held it to be immaterial for what purpose the defendant committed the Act complained of, the sole question being

whether he had a legal right to do it, and being of opinion that he had, they dismissed the action, and that judgment is now affirmed by the House of Lords. The legal right of an owner of land to obstruct or direct any water beneath it to his own purposes, and so as to prevent it flowing upon the land of his neighbour is affirmed. We notice that Lord Watson denies that on this point the law of Scotland differs from the law of England.

GOVERNMENT, LIABILITY OF, AS BAILEE FOR HIRE—NEGLIGENCE OF BAILEE—VOLENTI NON FIT INJURIA.

Brabant v. *King*, (1895) A.C. 632; 11 R. 18, was an appeal from Queensland. The action was brought against the Government of that Colony for damages resulting from the injury resulting to the plaintiff's goods while in the custody of the Government, owing to the alleged negligence of the Government or its officers. The goods in question were explosives which under a colonial Act were required to be stored in the Government storehouses. These storehouses were near to the water's edge, and the goods were injured by the water overflowing into them. The Colonial Court held that the Government were liable for any negligence in the manner in which the goods were dealt with, but that they were not liable for any damage resulting from any unsuitability in the storehouses, as this was known to the plaintiffs, and the maxim *volenti non fit injuria* applied. The Judicial Committee of the Privy Council (The Lord Chancellor and Lords Watson, Hobhouse, Macnaghten, Morris, Shand and Davey, and Sir R. Couch) considered that the selection of such a site for the storehouses rendered it incumbent on the Government to take precaution to place the goods at such a level as would in all probability insure their injury from the incursion of water; and that the plaintiffs were entitled to rely on the care and skill of their bailees, and could not be deemed to have accepted any risks of defective storage of which they had no knowledge. A new trial was therefore ordered to ascertain whether the Government negligently stored the goods at too low a level, or whether on the advent of the floods occasioning the injury, they failed to take reasonable and proper measures for saving the goods, or any part thereof. These questions are, as their Lordships point out, alternative in this sense, that if the jury affirm the first, it will be unnecessary for them to take the second into consideration.

PRACTICE—PARTIES—MISJOINDER OF PLAINTIFFS—LORD CAMPBELL'S ACT—(9 & 10 VICT., C. 93), ACTION UNDER—(R.S.O., C. 135).

Peninsular & Oriental Steam Navig. Co. v. *Tsune Kijima*, (1895) A. C. 661, was an action under Lord Campbell's Act (9 & 10 Vict., c.

93), (R.S.O., c. 135) in which the representatives of several persons drowned in the same disaster joined together as plaintiffs. The appeal was from the Supreme Court of China and Japan. The Judicial Committee of the Privy Council, (the Lord Chancellor, (Herschell), and Lords Watson, Macnaghten, Shand and Davey, and Sir R. Couch) held, following *Smurthwaite* v. *Hannay*, (1894) A. C. 494, (noted *ante*, vol. 31, p. 154) that this could not be done, and that each group of plaintiffs must bring separate actions, and they dismissed the action. This case may be considered as bearing on the proper construction of Ont. Rule 300.

CORRESPONDENCE.

SUPREME COURT BENCH.

To the Editor of the Canada Law Journal.

A question which has been agitating the *Western Law Times* lately is, "Shall Manitoba have a representative from her Bar in the Supreme Court?"

It is declared by the Act establishing the Supreme Court that it shall be composed of a Chief Justice and five Puisne Judges, at least two of whom shall be appointed from the Province of Quebec.

Western Canada has never been represented in the Court, as it is only of late years that it has developed a strong Bar. It is now urged that the time has come when the West should no longer be ignored. But to my mind our Western brothers have chosen a most unfortunate time to press their claims. The vacancy which it is said may shortly occur in the Court will leave Ontario with but a single representative; and I most strongly object to the due representation of this Province in the Court being so reduced to provide a representative for the West. Ontario is at least entitled to an equal representation with Quebec, and never since the establishment of the Court has our Province had less than two members, while part of the time she had three. She is the largest contributor to the business of the Court, and has a larger bar than any other Province, among whom could be found many men capable of representing her with distinction.

Whilst the West was sleeping, the Eastern Provinces secured the advantage of an extra member in the Court, but this fact forms no reason why Ontario's interests should be sacrificed in the manner proposed.

Ontario is entitled to the new member, and an appointment from any other Province, east or west, would seriously interfere with the proper balance of the Court.

BARRISTER.

[We need the best men in the Supreme Court that the Dominion can produce, irrespective of locality. We have already expressed shortly our thoughts on this matter. (see vol. 31, p. 526.)—ED. C.L.J.]

DIARY FOR JANUARY.

1 Wednesday ....New Year's Day.
4 Saturday .....Chief Justice Moss died, 1881.
5 Sunday .....*Second Sunday after Christmas.* Christmas vacation ends.
6 Monday.....Epiphany. Heir and Devisee Commissioners sit. Last day for notice for Call.
7 Tuesday.....Weekly Court at London and Ottawa.
12 Sunday .....*First Sunday after Epiphany.* Sir Chas. Bagot, Governor-General, 1842.
13 Monday.....Winter (Jury) Assizes at Toronto, Hamilton, London and Ottawa.
14 Tuesday .....Court of Appeal for Ontario sits. Weekly Court at London and Ottawa.
19 Sunday .....*Second Sunday after Epiphany,*
21 Tuesday ..... Lord Bacon born 1561. Weekly Court at London and Ottawa.
23 Thursday.....William Pitt died, 1806.
26 Sunday.....*Third Sunday after Epiphany.* Sir W. B. Richards died, 1889, aged 74.
28 Tuesday .....Weekly Court at London and Ottawa.
31 Friday .....Earl of Elgin, Governor General, 1847.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [June 26, 1895.

NORTH-WEST TRANSPORTATION CO. *v.* MCKENZIE.

Contract—Correspondence—Carriage of goods—Transportation Co.—Carriage over connecting lines—Bill of lading.

Where a court has to find a contract in a correspondence and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. *Hussey* v. *Horne Payne*, 4 App. Cas. 311, followed.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods were shipped.

Where a shipper accepts what purports to be a bill of lading under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent.

Appeal dismissed with costs.

Osler, Q.C., and *Lister*, Q.C., for appellants.

Laidlaw, Q.C., and *Kappele* for respondent.

Nova Scotia] [Dec. 9, 1895.

LAW *v.* HANSEN.

Action—Bar to—Foreign judgment—Estoppel—Res judicata—Foreign judgment obtained after action begun.

A collision occurred at sea between the ship "Rolf" belonging to H., and the barque "Emilie L. Boyd" belonging to L., by which both vessels were damaged. L. took proceedings against the "Rolf" in the District Court for the Eastern District of New York, which resulted in a decision that the "Boyd" was solely to blame for the collision, and this decision was affirmed by the final Court of Appeal for such cases. Before this judgment was obtained H. had taken an action in the Supreme Court of Nova Scotia against L., to which L. pleaded that the negligence of those in charge of the "Rolf" was the sole cause of the accident. After the American Court had given judgment in the former cause, H. replied to this plea, setting up the said judgment as a conclusive answer, and on the trial it was held that such judgment estopped L. from again contesting the question as to his negligence, though the trial judge was of opinion that the "Rolf" was to blame. This decision was affirmed by the full Court.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the judgment of the American Court, in proceedings between the same parties and involving the same issue, was a bar to a later action in Nova Scotia, and it made no difference that such later action was begun before said judgment was obtained.

Appeal dismissed with costs.

Borden, Q.C., for the appellants.

Newcombe, Q.C., and *Drysdale* for the respondent.

British Columbia.] [Dec. 9, 1895.

LOWENBERG *v.* WOLLEY.

Principal and agent—Negligence of agent—Financial brokers—Lending money for principal—Liability for loss—Measure of damages.

W. having money to invest, consulted a member of the firm of L. & Co., brokers and real estate agents, who informed him that he had a first-class "gilt-edged" investment, and W. gave him $5,500, authorizing him to lend it on the security mentioned, and as it was represented by the broker. The security was a mortgage on land, and the broker personally knew neither the borrower nor the property, but acted on the certificate of two friends of the borrower, neither of whom had experience in valuing real estate, which represented the land to be worth $7,000. No interest was ever paid on the mortgage, and on attempting to realize on the security it was found that the land was not worth more than half of the amount loaned. W. then brought an action against L. & Co. for the amount of the loan, claiming that they were guilty of negligence in the transaction.

Held, affirming the decision of the Supreme Court of British Columbia, that the evidence established that L. & Co. were agents of W. in the matter of the loan, as they professed to act for him and in his interest, and it made no

difference that they were remunerated by the borrower and not by W. their principal ; and it was also proved that L. & Co. were guilty of gross negligence and liable to make good the loss sustained by W. in consequence thereof.

Held also, reversing the decision appealed from, Taschereau and Gwynne, JJ. dissenting, that W. was not entitled to recover back the whole sum advanced by the brokers with interest at the rate in the mortgage, as held by the Court below, but could only recover the loss occasioned by the over-valuation adopted and acted on by the brokers.

Held per GWYNNE J., that W. was entitled to the sum advanced, but with interest at 6 per cent. only.

Appeal dismissed and judgment varied without costs.

Robinson, Q.C., for the appellants.

Moss, Q.C., for the respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Common Pleas Division.

Full Court] [Easter Sittings, 1893.

REGINA *v.* HARRIET HAYWARD.

Cross-examination on affidavit filed on pending motion—Right to procure in criminal matter—Con. Rule 578—Inapplicability of.

The Police Magistrate of the Town of Woodstock, and the informant, in the case of a conviction made by the former and removed into this court by certiorari, applied for an order to cross-examine the defendant on an affidavit made by her.

Held, that Rule 578 of the Consolidated Rules of Practice, does not authorize the cross-examination of deponent on an affidavit filed in connection with a pending proceeding before the Court to quash a summary conviction of a Justice of the Peace, this being a criminal matter, and, by Consolidated Rule 1, interpreting and confirming section 163 of the Ontario Judicature Act, brought outside the operation of the Rules.

Langton, Q.C., for the applicant.

DuVernet, for the defendant.

Chancery Division.

BOYD, C.) [Dec. 17. 1895.
ROBERTSON, J.)

GARLAND *v.* CITY OF TORONTO.

Master and servant—Workmen's Compensation for Injuries Act, 1892—Order to which workman injured was bound to conform—55 Vict., c. 20, s. 3, s-s. 3.

The order within the meaning of 55 Vict., c. 20, s. 3, s-s. 3, may be implied from the ordinary course of business in the construction of the work in question,

and so may the fact that a fellow workman is in charge of a particular branch of business in such wise that his assistants are required to conform to his way of doing things and ordering things to be done ; and held, that the evidence in this action was such that the jury might have found such a case to have been established, and there must be a new trial.

Elgin Myers, Q.C., and *W. J. Clark*, for the plaintiff.

Fullerton, Q.C., for the defendant.

MACMAHON, J. } In Chambers. } [Sept. 25, 1895.

MULHOLLAND *v.* MISENER.

Discovery—Examination of parties—Adultery—Compellable witness—R.S.O., c 61, s. 7.

Motion by the plaintiff, in an action for damages for alienation of wife's affections, to compel the defendant to attend for examination for discovery.

Held, that under R.S.O. (1887), c. 61, s. 7, the parties to a proceeding instituted in consequence of adultery are competent but not compellable witnesses.

McLaughlin v. *Moore*, 10 P.R. 326, distinguished.

Motion refused.

W. S. McBrayne for the plaintiff.

D'Arcy Tate for the defendant.

ROSE, J.] [Dec. 4, 1895.

Common Pleas Division.

RE MCCABE *v.* MIDDLETON.

ANCIENT ORDER OF UNITED WORKMEN—Garnishees.

Division Courts—Garnishee proceedings—"Cause"—"Action"—Jurisdiction.

A garnishee summons in a Division Court may be issued out of the division in which the garnishee lives or carries on business, notwithstanding the cause of action did not arise and the primary debtor does not reside or carry on business therein.

A garnishee proceeding under s. 185 of the Division Courts Act is an "action" or a "cause" within the meaning of section 87.

Hobson v. *Shannon*, 26 O.R. 554 ; *Re McLean* v. *McLeod*, 5 P.R. 467, and *Re Tipling* v. *Cole*, 21 O. R. 276, referred to.

Tytler, for the primary creditor.

Armour, Q.C., for the primary debtor.

Totten, Q.C., for the garnishees.

[This case was argued before the Divisional Court on January 10th, 1896, and now stands for judgment.—ED. C. L. J.]

Queen's Bench Division.

ROSE, J.] [Dec. 31, 1895.

ATTORNEY-GENERAL *v.* HAMILTON STREET RAILWAY.

Sunday—Street Railways—Lord's Day Act, R.S.O., c. 203, s. 1—Construction—Exception.

The words "or other person whatsoever" in s.1 of the Lord's Day Act, R.S.O., c. 203, are to be construed as referring to persons *ejusden generis* as the persons named, merchant, tradesman, &c.; and an incorporated company or persons operating street cars on Sunday is not within the prohibition of the enactment.

Sandiman v. *Beach*, 7 B. & C. 96; and *Regina* v. *Somers*, 24 O.R. 244, followed.

Semble, also, that the defendants, if the enactment applied, were within the exception as to "conveying travellers."

Regina v. *Daggett*, 1 O.R. 537, followed.

Regina v. *Tinning*, 11 U.C.R. 636, not followed.

Moss, Q.C., and *A. E. O'Meara*, for the plaintiff.

Edward Martin, Q.C., and *Kirwan Martin*, for the defendants.

BOYD, C.
ROBERTSON, J. } Jan. 7.

FARMERS' BANK *v.* SARGENT.

Summary judgment—Promissory note—Unconditional leave to defend.

On a motion for summary judgment under Rule 739 in an action upon a promissory note, one of the defendants gave facts on affidavit showing that the note was without consideration, invalid, and fraudulent as to the first holders, and stated his belief that the plaintiffs were suing on behalf of the first holders and had notice of the circumstances invalidating the note, but stated no facts as to such notice.

Held, that the defendant should have unconditional leave to defend.

E. T. English, for the plaintiffs.

M. Wilkins, for the defendant.

Divisional Court.

BOYD, C.
STREET, J.
MEREDITH, J. } [Jan. 9.

In re CURRY, CURRY *v.* CURRY.

Administration order—Executor—Reference—Conduct of—Parties.

An accounting party should not have the carriage of the proceedings in the Master's office, especially where there is competition between an executor and beneficiaries as to who should be first in obtaining an administration order.

Such an order, obtained on the application of an executor, was varied by giving the conduct of the reference to two of the legatees, where the Judge had not been referred to the course of practice, and so had exercised no discretion to prevent the interference of the Court.

The order should not have been made without notice to the legatees, who were named as parties defendant in the proceedings taken by the executor.

W. H. Blake, for the executor.

L. G. McCarthy, for the legatees.

MEREDITH, C. J.
ROSE, J.

[Jan. 11.

REGINA *v.* COULSON.

Justice of the peace—Summary conviction—Certiorari—Evidence—Motion to quash—Practising medicine—Ontario Medical Act—R.S.O., c. 148, s. 45.

When a summary conviction is removed by certiorari and a motion made to quash it, it is the duty of the Court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, to see if there is any evidence whatever showing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but if there is any evidence at all, it is not the province of the Court to review it as upon an appeal.

Regina v. *Coulson*, 24 O. R. 246, not followed.

The defendant was convicted under the Ontario Medical Act, R.S.O., c. 148, s. 45, for practising medicine for hire. The evidence showed that when the complainant went to the defendant he told him his symptoms; that he did not know what was the matter with himself; that he left it to the defendant to choose the medicine, after learning the symptoms; and that, upon the advice of the defendant, he took his medicine, went under a course of treatment extending over some months, and paid the price agreed upon.

Held, that there was evidence to support the conviction.

Regina v. *Coulson*, 24 O.R. 246, distinguished.

Regina v. *Howarth*, ib. 561, followed.

Aylesworth, Q.C., for the defendant.

L. G. McCarthy, for the informant.

MEREDITH, C. J.
ROSE, J.

Jan. 11.

REGINA *v.* CRANDELL.

Justice of the peace—Summary conviction—Permitting deer hounds to run at large—56 Vict., c. 49, s. 1, s-s. 2—Scienter—Evidence—Amendment—Criminal Code, s. 889—Quashing conviction—Costs—Protection.

By 56 Vict., c. 49, s. 1, s s. 2, it is provided that "no owner of any hound or other dog, known by the owner to be accustomed to pursue deer, shall permit any such hound or other dog to run at large in any locality where deer are usually found."

The defendant was summarily convicted for allowing "his deer hounds to run at large in a locality where deer are usually found, contrary to the statute," etc.

Held, that the conviction was bad on its face, for it was not said that the dogs were "known by the owner to be accustomed to pursue deer."

The evidence taken by the Magistrate was that of a witness who said he saw the defendant's "deer dogs at large in the defendant's premises, in the vicinity where deer are known to inhabit."

Held, that the Court could not be satisfied upon such evidence that an offence of the nature described in the conviction had been committed, and therefore the conviction should not be amended under s. 889 of the Criminal Code.

The statute requires it to be established that the particular dogs were accustomed to pursue deer, and that the owner knew it, and not merely that they were of a breed accustomed to pursue deer.

And the evidence was not sufficient to show that the dogs were permitted to run at large.

The conviction was quashed, but without costs, and with the usual order of protection, because the defendant had made an unsuccessful attack upon the *bona fides* of the magistrate and private prosecutor.

Aylsworth, Q.C., for the defendant.

J. R. Cartwright, Q.C, for the magistrate and prosecutor.

MEREDITH, C. J.
ROSE, J.

Jan. 11.

TRUSTS CORPORATION OF ONTARIO *v.* HOOD.

Principal and surety—Assignment of mortgage—Covenant—Construction—Extension of time—New mortgage—Reservation of rights—Agreement—Parol evidence.

In a deed of assignment of a mortgage the assignor covenanted with the assignee that the mortgage money and interest should be duly and regularly paid.

Held, that the assignor was a surety for the mortgagor for the payment of the mortgage money and interest.

Darling v. *McLean*, 20 U.C.R. 372, followed.

Gordon v. *Martin*, Fitz. 302, and *Guild* v. *Conrad*, (1894) 3 Q.B. 885 distinguished.

The original mortgagor conveyed his equity of redemption to W., who covenanted to pay the mortgage debt and interest. After maturity, and when the whole of the mortgage moneys were in arrears, W. applied to the assignee of the mortgage to reduce the rate of interest, which the latter agreed to do, and thereupon a new mortgage was given by W. to him to secure the principal money, which was made payable in four years, with interest at the reduced rate. No discharge of the original mortgage was given; the assignee refused to release it, saying that he "would reduce the interest because he had no hold on W. on the first mortgage, and that he would still hold on to" his assignor for the deficiency.

Held, that parol evidence of a reservation of rights against the surety was admissible, and upon the evidence, the assignee did so reserve his rights as to prevent the extension of time given by the W. mortgage from operating to discharge the surety.

Currie v. *Hodgins*, 42 U.C.R. 601, followed.

Bristol and West of England Land Co. v. Taylor, 24 O R. 286, distinguished.

It was contended that, as the original mortgagor became after his conveyance to W. a surety for the latter, and there was no reservation of the rights of the assignee against him, he was discharged, and the assignor was consequently discharged, because, upon payment by him of the mortgage debt, he could not get back the security unimpaired.

Held, not so ; for the fair meaning of the reservation of rights against the assignor was that the taking of the W. mortgage was not to operate so as to effectuate anything that should prevent the assignee looking to his assignor for payment of the mortgage and interest because of the default of the mortgagor in paying according to the terms of the mortgage.

Aylesworth, Q.C., for the plaintiffs.

W. M. Douglas for the defendants.

ROSE, J. } Jan. 11
MACMAHON, J. }

QUEBEC BANK *v.* TAGGART.

Chose in action — Absolute assignment — Secret defeasance — Subsequent assignment for value without notice—Equities.

The insured absolutely assigned to a creditor, by indorsement on a life insurance policy, all his interest therein, and the assignee further absolutely assigned such interest to the plaintiffs, by similar indorsement, for valuable consideration. After the death of the insured a written memorandum was found in his desk, purporting to be signed by the first assignee, setting forth that the policy was assigned as security for a small debt, and that, after the assignee had paid his own claim out of the insurance moneys, he was to pay the balance to the wife and children of the insured, the defendants. The plaintiffs had no notice of this. Upon the trial of an interpleader issue the jury found that the signature to the memorandum was that of the first assignee.

It was contended by the defendants that the first assignee could not assign to the plaintiffs any greater interest than the agreement between him and the insured gave him.

Held, that as the terms of the first assignment indicated that it was intended to be unaffected by any equities existing between the parties to it, and clothed the assignee with authority to dispose of it absolutely, the plaintiffs were not affected by the agreement found by the jury, and were entitled to the whole of the insurance moneys.

In re Agra and Masterman's Bank, L.R. 2 Ch., at p. 397, specially referred to.

H. H. Collier, for the plaintiffs.

Aylesworth, Q.C., for the defendants.

MEREDITH, C. J. } Jan. 11.
ROSE, J. }

HARVEY *v.* ATKINS.

Judgment debtor—Examination—Answers—Gambling transactions.

Upon a motion to commit a judgment debtor for unsatisfactory answers upon his examination, the Court should not be called upon to inquire into gambling transactions, that is, practically to take an account to ascertain what money was made and subsequently lost by the judgment debtor, so as to determine whether, arising therefrom, any profits remained as estate in the debtor's possession.

J. W. Nesbitt, Q.C., for the plaintiff.

E. G. Rykert for the defendant.

Province of Nova Scotia.

SUPREME COURT.

EN BANC.] [Nov. 30, 1895.

MACDONALD *v.* CITY OF HALIFAX.

Interpretation of written document—Admissibility of extrinsic evidence to vary or explain.

Where a written contract contains common words free from all ambiguity, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar or unusual sense, evidence *dehors* the writing is not admissible to show that such words bear a surmised or alleged signification.

Plaintiff, who had contracted with defendant for the construction of a sewer "upon such grade lines as the city engineer might direct," received instructions from defendants' engineer by letter containing the following directions: "The grade of sewer at Esplanade will be 2 feet in 100, starting from general level of invert of old sewer. . . . . The grade at electric light pole will be 1 ft. 10⅛ in. below the mark made this morning on old granite boulder . . . ." Plaintiff understood the word "grade," as used in the second instance, to mark "depth of excavation" instead of the fall from surface to inclined plane—which latter signification the word was admitted to bear as used in the first instance—and proceeded to construct the sewer accordingly. Afterwards discovering the impossibility of executing the work on this basis, plaintiff adopted the true plan of construction. On the trial of an action for the additional cost of construction thereby caused, plaintiff offered expert evidence to show that his understanding of the word "grade" was correct, but it was rejected by the judge.

Held (MACDONALD, C.J., dissenting), that the plaintiff having failed to satisfy the Court that the word "grade" was not used in both instances in its primary signification the evidence was rightly rejected.

Appeal dismissed with costs.

C. D. Macdonald for appellant.

MacCoy, Q.C., for respondents.

WEATHERBE, J. In Chambers. [Nov. 19, 1895.

GRAY *v.* HARDMAN.

Practice—Service of notice—Inspection of locus—Ex parte motion.

In an action of trespass against H. & T., joint owners of a mining property, after service on H. and appearance by him, but before service on T., plaintiff obtained an order for inspection of the property. Notice of motion had been served upon H. only. That order T. now moved to set aside on the general ground that as against defendant H., it had been granted *ex parte*. Plaintiff pleaded the urgency of the occasion on which the order had been granted, and the mischief that would have been occasioned by delay, and further argued

that by reason of the unity of interest created by the co-ownership of defendants, notice to one was notice to the other.

Held, that neither the urgency of the occasion nor the unity of interest of defendants dispensed with the necessity of serving T. with notice of the proceeding, and that the order for inspection, so far as T. was concerned, must be set aside.

Drysdale, Q.C., for motion.

W. Macdonald, contra.

WEATHERBE, J. In Chambers. [Nov. 19, 1895.

RE MOOSELAND GOLD MINING COMPANY.

Winding-up Act—Actions pending against company—General stay of proceedings.

The liquidator of a company wound up under provisions of the Winding-up Act, c. 80, R.S.N.S., applied for a general stay of proceedings pending the adjustment of the company's affairs. On behalf of creditors of the company, some with and others without judgments, it was urged that the application for stay ought to have been made in the several actions, and that the Court or a Judge had no power to grant a general stay; and further, that s. 12, s-s. 5, of the J. A., which says "no cause or proceeding at any time pending in said Supreme Court shall be restrained by prohibition or injunction," over-ruled the provisions of s. 50, c. 80. But it was

Held, that notwithstanding s. 12, s-s. 5, J. A., the Court or a Judge had power to grant a general stay under said s. 50, and a general stay was accordingly granted. Whether c. 88 was not insolvency legislation, *quære.*

Mathers for liquidator.

Kenny and *Barnhill* for creditors.

WEATHERBE, J. In Chambers. [Nov. 26, 1895.

DANIELS *v.* FOSTER.

Lunatic—Judgment in default of appearance—Motion to open up.

No appearance having been entered by defendant, a lunatic living with his son, judgment was obtained by default. Upon application to open up the judgment and admit defence, it was shown that defendant had been long affected with "senile lunacy," and had been confined in insane hospitals. There was, however, no distinct proof that at the period of service of writ and entry of judgment defendant was of unsound mind, nor yet of want of notice of the action on the part of those with whom he lived. Nor did the affidavits disclose merits beyond a general statement that there was a good defence to the action.

Held, that no sufficient ground for disturbing the judgment had been shewn, and that defendant's application must be dismissed, without prejudice, however, to his moving again upon more sufficient grounds.

W. Macdonald for defendant.

W. B. A. Ritchie, Q.C., for plaintiff.

WEATHERBE, J. } [Nov. 29, 1895.
In Chambers. }

OCHTERLONEY *v.* PALGRAVE GOLD MINING CO.

Foreclosure action—Set-off—Particulars.

By way of counter-claim to a foreclosure action, defendants set up certain legal expenses alleged to have been incurred by them in defending previous suits which arose out of a disputed title to certain personal property conveyed to defendants by plaintiff's testator. Plaintiff had previously moved to strike out the said defence as false, but failed on that application.

On motion for particulars of the alleged suits and legal expenses,

Held, that as defendant's affidavits fyled on the previous motion fully disclosed all the requisite facts, no order for particulars could be granted.

Harris, Q.C., for plaintiff.

Kenny for defendant.

WEATHERBE, J., } [Dec. 10, 1895.
In Chambers. }

MCLEAN *v.* MCKINNON.

Capias—Sufficiency of affidavit for arrest—Proof of claim.

Upon application to discharge an order for arrest of defendant in an action for damages for assault and battery, defendant swore that he had no intention of leaving the Province. As adequate grounds of belief to the contrary, plaintiff showed that defendant had made such statements as the following: "That he had no property and that it was easy for him to abscond," "that he was free to leave the country," etc.

Held, that the above expressions contained no necessary implication of an intention to abscond and that the order for arrest must be discharged.

Held also, that O. 44. r. 1, J.A., does not require that the affidavit for arrest should prove the amount of damage suffered by plaintiff. It is enough that such affidavit disclose facts which would enable a judge to decide that plaintiff had suffered sufficient damage to bring his claim within the jurisdiction of the court.

Mellish for defendent.

Fulton for plaintiff.

WEATHERBE, J. } [Dec. 13, 1895.
In Chambers. }

POLLEY *v.* TANNER.

Security for costs—Counter-claim arising out of subject matter of claim.

Plaintiff residing out of the jurisdiction sued for goods bargained and sold, and defendant, while admitting the receipt of a large portion of the goods, counter-claimed for damages for non-delivery of the remainder.

On motion of defendant for security for costs.

Held (following *Winterfield* v. *Bradnum*, 3 Q.B.D. 324), that for such purposes as the present a distinction must be drawn between a counter-claim pure and simple and one arising out of the self-same transaction out of which the plaintiff's cause of action grew; that while security for costs could not properly be granted in the former case, it could properly be granted in the latter; that as defendant's counter-claim fell within the latter class, he was entitled to the usual order for security.

J. A. Chisholm for defendant.

Cahan for plaintiff.

Province of New Brunswick.

SUPREME COURT.

EN BANC] [Nov. 6, 1895.

EX PARTE GORMAN.

Canada Temperance Act—Rule nisi for certiorari—Error in proceedings.

Upon an application to make absolute a *Rule nisi* under the Canada Temperance Act, it appeared that in both the adjudication and the conviction the word "days" was omitted after "forty-five."

The Court made the rule absolute, holding that they had no power to amend the nature of the adjudication.

Teed in support of Rule.

Chandler, contra.

TUCK, J., In Chambers [Dec. 23, 1895.

EX PARTE LEGER.

Case on review—Dismissed without hearing on merits—Power to award costs.

L. was convicted of having sold meat contrary to the by-laws of the Town of Moncton, and a penalty imposed. L. obtained an order for review from Wells, Co. J. At the return of the order the matter was dismissed with costs because of a defective affidavit, without the merits of the case being reached.

On the return of a summons to show cause why an order *nisi* for *certiorari* should not be granted on the ground that Wells, Co. J., had no power to grant costs, as the conviction was neither affirmed nor reversed.

Held that the Judge on review had such power.

Bustin v. *Howell*, 1 All., 596, referred to.

A. G. Blair, Jr., for Leger.

Grant, contra.

VANWART, J. In Chambers. [Dec. 24, 1895.

EX PARTE MCCLEMENTS

Criminal Code—Fine and imprisonment—Power to award both.

M. was convicted at the County Court sittings of having assaulted a peace officer, and the presiding Judge imposed a fine of $50, and also sentenced M. to one month in jail. Sec. 263 of the Criminal Code provides that "everyone is guilty of an indictable offence and liable to two years' imprisonment who assaults any public or peace officer, &c." A habeas corpus order to show

cause why M. should not be released on the ground that both fine and imprisonment could not be awarded, was obtained; on the return of the writ it was

Held that s. 958 of the Criminal Code gave such power.

Slipp supported *habeas corpus.*

Blair, Jr., for the Crown.

COUNTY COURTS.

COUNTY OF SAINT JOHN.

FORBES, Co. J.] [April, 1895.

STICKNEY *v.* RIDEOUT.

Practice—Magistrate's Court—Plaintiff suing by initials.

On review from a magistrate's court it was

Held, that a plaintiff cannot sue by initials in a magistrate's court.

Armstrong in support of review.

Allen contra.

FORBES, Co. J. In Chambers. [Dec. 17, 1895.

WHITE *v.* DEWITT.

Practice—City Court—Excess of jurisdiction—Plaintiff need not abandon where excess is interest and not claimed in the particulars.

W. sued D. in the City Court of St. John (which has jurisdiction in actions of debt where the amount claimed does not exceed $80) to recover the amount of a promissory note for $75, and one year's interest on the same. The cross-examination of the plaintiff disclosed the fact that four years' interest was due and unpaid. Plaintiff was non-suited on the ground that the amount due was in excess of the jurisdiction and plaintiff should have abandoned the excess. The plaintiff stated he did not claim the excess. On review it was

Held—1. That as the writ and particulars showed the case to be within the jurisdiction of the Court, the jurisdiction was not taken away by the plaintiff's statement that an additional amount of interest, sufficiently large to exceed the jurisdiction, was also due.

2. That where the excess was interest, and therefore not debt, but damages, the plaintiff need not abandon.

Non-suit ordered to be set aside and verdict entered for plaintiff.

Chapman v. *Doherty*, 25 N. B., 271; Bills of Ex. Act, 1882, s. 57; B. & L., pp. 11, 52; *White* v. *Mackin*, 1 Kerr, 94; and *Isaac* v. *Wyld*, 7 Exch., 163, were referred to.

W. H. Trueman, for plaintiff.

Armstrong, Q.C., *contra.*

Province of Manitoba.

COURT OF QUEEN'S BENCH.

KILLAM, J.] [Dec. 10, 1895

BOUGHTON *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Principal and agent—Commission on sale of land.

Appeal from the judgment of the County Court of Neepawa in favor of the plaintiff for the full amount of commission claimed by him on a sale of land as agent for defendant.

The plaintiff having been instructed by the defendant's general manager to sell a certain piece of property belonging to defendant, entered into an agreement with one Adair for the sale of the land to him, and received a deposit of $25 on account of the purchase money, which sum he transmitted to the manager, asking him to send the agreement to be signed by the purchaser. The manager afterwards procured the purchaser to execute a written agreement for the completion of the purchase on substantially the same terms as had been arranged verbally with the plaintiff, but independently of him. It appeared, however, that before seeing the plaintiff, Adair had applied to the defendant's manager to purchase the land in question, and had been driven over it by him and informed of the price ; and been requested, if he should purchase, to close the transaction with one Beattie, another agent of defendant. Instead of going to Beattie, Adair consulted the plaintiff as to the proposed purchase, and the result was the agreement and payment of the deposit. On receiving the plaintiff's letter with the deposit, the manager sent him a receipt for the purchaser, and asked whether the sale was made by the plaintiff, or if this was the man whom he, the manager, had driven out to see the farm, and stating that he presumed if this was the same man, that the plaintiff would have no charge for commission. To this letter the plaintiff made no reply.

Held, that the plaintiff was entitled to be paid for his services in procuring the agreement and deposit, although he did not procure the purchaser to sign the written contract, because the defendant had availed itself of his services and adopted the bargain which he had made, and because the circumstances showed that the plaintiff was not expected to procure the signature of a written contract ; and that he should be allowed one-half of the full commission payable in case the agent procures the signature of the written contract in addition to making the verbal sale.

Sometimes the agent is required to procure the signature to a written contract before he earns any commission, but under the circumstances of this case such would not be a proper conclusion.

In other cases, perhaps, it might be inferred that there was an implied contract on the part of the principal to furnish the written agreement, so that the agent might get it signed and earn his whole commission, for breach of which contract damages could be recovered, but no such contract could be implied here.

Judgment reducing the verdict one-half without costs of the appeal.

R. M. Smith for plaintiff.

O. H. Clark for defendant.

BAIN, J.] [Dec. 10, 1895.

BOOTH *v.* MOFFAT.

Negligence—Fire, damages for setting out.

Appeal from the decision of the Judge of the County Court of Carberry, who entered a verdict for defendant.

The plaintiff claimed $250 damages, occasioned by a fire which spread from defendant's land and destroyed the plaintiff's property.

The defendant had started a fire to burn some reeds at the edge of a creek about 10 o'clock in the morning. The reeds were burned through in about fifteen minutes, when the defendant, who had been watching the fire and thought it was out, went away to his work in a field adjoining the place where the fire was. At about 11 o'clock in the morning of the same day the defendant observed a fire burning in the grass a short distance to the east of the ground that had been burned over; this fire was carried by a high north-west wind then blowing, and spread with great rapidity over the prairie land until it reached the plaintiff's land and destroyed the property, for the loss of which he sought to recover damages.

At the trial the Judge of the County Court found as a fact that the fire which did the damage was caused by the fire which the defendant had himself set out early in the morning; but was of the opinion that defendant was not guilty of negligence and was not bound at all hazards to prevent the spreading of the fire. The wind had been getting stronger until it blew quite a gale, and when defendant noticed the fire spreading, it was impossible for him to do anything to stop it, although he had a man working with him.

Held, that the defendant could not be made liable for starting a fire on his own property for purposes of husbandry, nor was he bound at all hazards to prevent the spread of the fire to his neighbor's property; but he was bound to exercise precaution and care proportionate to the risk of fire spreading in a dry and windy country like Manitoba, where the adjoining property was covered with long and inflammable grass, and that whatever falls short of taking every precaution that is reasonably possible under the circumstances to prevent the spread of the fire, should be held to be negligence: *Furlong* v. *Carrol*, 7 A. R. 145.

The judge in appeal will not reverse the finding of the trial judge on any question of disputed facts, but he may differ from him in the inference to be drawn from the facts that are not really in dispute, and thus differing the appellant is entitled to the benefit of his opinion: *Smith* v. *Chadwick* 9 App. Cas., per Blackburn, J., p. 194.

It was negligence under the circumstances to go away to his work leaving a fire still smouldering; it was also shown that he afterwards looked back from the field in which he was working and saw small pieces of manure still smouldering which he did nothing to extinguish, although he knew that the wind was steadily rising. Defendant's own statement that he did not see the second fire until it was so far advanced that nothing could have been done to stop it, was in itself sufficient evidence to convict him of negligence.

Appeal allowed and verdict entered for plaintiff for $250 damages.

Pitblado for plaintiff.

Clark for defendant.

BAIN, J.] [Dec. 19, 1895.

MCCUAIG *v.* PHILLIPS.

Contract– Meaning of "to" a certain date.

The point of law decided in this case was as to the construction of the following clause in an agreement signed by the defendants for the purchase of the plaintiff's wheat, viz. : "P. & R. to give him (plaintiff) any rise in market prices, to the first of May." Plaintiff contended that he was entitled to the rise of prices which occurred on the first of May, but defendants argued that the 30th of April was the last day up to which the plaintiff could claim any rise in prices, and paid into court the balance due for the price of the wheat on that basis.

Held that "to" in such an agreement would sometimes include the day named, and sometimes exclude it ; but that if it was permissible to consider the conduct of the parties themselves to show in what sense they used the ambiguous word, it was clear that the plaintiff considered that the period provided for did not extend past the 30th of April, for on that day he went to the defendants' office in order to have a settlement for his wheat.

Held, also, following *Nichols* v. *Ramsel*, 2 Mod. 280, and *People* v. *Walker*, 17 N. Y. 502, that the word "to" in the present case should not be held to include the day named, but that the period expired on the 30th of April. Judgment for defendants with costs.

Anderson for plaintiff.

D. A. McDonald for defendant.

TAYLOR, C. J.] [Dec. 27, 1895.

DIXON *v.* WINNIPEG ELECTRIC RAILWAY CO.

Practice—Examination for discovery—Officer of company.

There was a motion to commit one Somerset for contempt in refusing to attend for examination upon an appointment under rule 379, "Queen's Bench Act, 1895." The plaintiff's cause of action was stated to be that while in the employment of defendants, and working with some wires from which the electric current had been cut off for the purpose of carrying on the work on which he was engaged, the electric current was turned on and he thereby sustained injury. The current was generated in the building called the power house, and it was claimed that there was faulty construction of the switch-board and electric plant in that building, whereby the current became connected with the wires on which the plaintiff was working. It was also sworn that Somerset was the foreman at the power house which, together with the action of the current, was under his control and management. An affidavit was filed on behalf of defendants to say that although Somerset was an electrician in the employment of the company at the power house, his duties as such had never been defined by the directors, nor had any resolution or by-law been passed making him an officer of the company ; and he had never been named or called foreman or superintendent.

Held that he was an officer of the company within the meaning of Rule 379, and that he must attend for examination.

Howell, Q.C., for plaintiff.

Munson, Q.C., for defendant.

Province of Prince Edward Island.

SUPREME COURT.

FULL COURT.] Dec. 4, 1895.

DIXON *v.* GORMAN.

Arrest—Ca. sa.—Bona fides.

Statutes of Prince Edward Island, 42 Vict., c. 15, s. 17, enacts that where the plaintiff by an affidavit satisfies a judge of the Supreme Court "that there is good and probable cause for believing either that the defendant, unless he is forthwith apprehended, is about to quit Prince Edward Island, with intent to defraud his creditors generally, or the plaintiff in particular, or *that the defendant has parted with his property*, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution, such judge may, by special order, direct that a capias *ad satisfaciendum* be issued out of the Supreme Court, and such writ may thereupon be issued upon such judgment according to the practice of the said Court."

The plaintiff's affidavit herein stated that plaintiff obtained a verdict in the above court in July, 1895, against the defendant for $180.80 and costs, that plaintiff gave defendant notice of taxing costs on the 5th Sept., 1895, and that between that time and the entering up of the plaintiff's judgment several encumbrances were registered against the defendant: viz., a judgment (confessed on warrant of attorney), chattel mortgage and land mortgage, each respectively for $447.00, to his mother; a judgment (confessed), a chattel mortgage and land mortgage securing $597 42, to his solicitor; a rent charge on his farm securing an annuity of $60.00 to his mother-in-law, and other encumbrances.

The plaintiff entered up judgment on his indictment, and issued *fi. fa's* thereon which were returned *nulla bona*.

Plaintiff further stated that he had reason to believe "that the defendant had parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution."

On this affidavit, an order for a *Ca. sa.* against the defendant was granted and defendant was arrested accordingly. An order *nisi* was afterwards granted to set aside the order for arrest, and to discharge the defendant from custody. This was issued on the affidavits of the mortgagees and judgment creditors, stating that the transactions were *bona fide*, and were not done at the instance or suggestion of the defendant, but were solicited and demanded from him. The plaintiff produced no affidavits contradicting the *bona fides* stated in the defendant's affidavits, but contended that, notwithstanding the *bona fides*, the defendant having parted with his property so that the plaintiff was prevented from realizing on his judgment, brought the order within the statute. On the return of the order, it was referred to the full court for argument.

Held, (HODGSON, J., dissenting) that the circumstances of the giving of the securities, being suspicious enough to warrant the arrest, the order for arrest must stand, but that the prisoner be discharged from custody without costs.

Held, also, that the defendant be restrained from bringing any action against the plaintiff for his arrest.

Per HODGSON, J., that the order for arrest should be set aside with costs. That the case should be considered in the light of all the facts and that *Maxwell* v. *Ferrie*, 8 U.C.C.P. 11, should not be followed.

Peters, Atty.-Gen., and *H. C. McDonald*, for plaintiff.

W. S. Stewart, Q.C., *D. C. McLeod*, and *J. J. Johnston*, for defendant.

HODGSON, J.
In Chambers.

PATTERSON *v.* MCLEAN.

One-third costs.

Sec. 317 of C. L. P. Act, 1873, enacts "Where any action shall be brought in the Supreme Court, where the plaintiff's demand for which such action is brought shall not exceed $65, then the plaintiff, or the defendant, as the case may be, shall only have taxed and allowed him one-third of the costs to which he would have been allowed and entitled if the claim for which the plaintiff had brought such action had exceeded $65."

The plaintiff sued upon three promissory notes,

The 1st	with	interest	amounting	to	$40.90.
" 2nd	"	"	"	"	38.70.
" 3rd	"	"	"	"	36.58.

Each note was declared on in a separate count. At the trial, judgment was entered for the defendant on the first and second counts, and for the plaintiff on the third, for $36.58.

The plaintiffs claim only one-third costs, but the defendant insists on his right to full costs.

Held, that the defendant is entitled to full costs of the issues found in his avoi, and which are directed to be deducted from the plaintiff's taxed costs.

D. A. McKinnon for plaintiff.

Peters, Q.C., for defendant.

FITZGERALD J.
In Chambers.

MCLEOD *v.* JOY.

Interpleader—Fi. fa.—Goods taken out of Sheriff's bailiwick.

On June 15th, fi. fa.'s were issued against defendant, and placed in the hands of the Sheriff. Defendant at that time was the owner of certain chattels which were then in Sheriff's bailiwick. These were afterwards shipped out of the bailiwick, and there sold by the defendant, who received part of the purchase money on account. At the time of the sale, the purchaser knew nothing of the execution against the defendant. The goods were afterwards brought back into the Sheriff's bailiwick, and were then seized under the execution of June 15th. The purchaser claimed the goods, and the Sheriff interpleaded.

Held, that the sale of these goods to a *bona fide* purchaser did not affect the plaintiff's right to sieze them under his execution.

Morson, Q.C., for plaintiff.

H. James Palmer, for the purchaser.

Stewart, Q.C., for Sheriff.

HODGSON, J., In Chambers.

RE PHELAN.

Habeas Corpus—Sheriff acting as a J. P.

P. was committed to jail for an offence under the C. T. Act. The commitment was signed by Logan and Horne, before whom he was convicted. After conviction, and before the commitment was issued, Horne became sheriff, and was such sheriff when he signed the warrant of commitment.

Application was made to set commitment aside on the ground that Horne could not act as J. P. and sheriff at the same time.

HODGSON, J. "The application must be refused. It is true that the schedule to 51 Vic., c. 34, 'An Act to Amend The Canada Temperance Act,' gives the forms of warrants of commitments, in which appears E. T. J. P. G. H. J. B., which forms by s. 14 are declared to be 'sufficient in the cases thereby respectively provided for.' But I cannot concede any force to the argument that these forms override the provisions of the Summary Convictions Act, which permits a warrant to be issued by one J. P.. If Horne's signature is a nullity, Logan's signature is sufficient. The prisoner must be remanded to prison."

W. S. Stewart, Q.C., for application.

COURT OF CHANCERY.

HODGSON, M. R. In Chambers.

GILLIS *v.* GILLIS.

Service of subpœna in Chancery abroad—Mode of service.

In this case application was made for deductions as to the mode of service of a subpœna in Chancery on four defendants residing in Boston U.S.A. Under C.L.P. Act, 1873, and amending Acts, s. 9, power is given to a judge to direct the subpœna to be published in a newspaper of this Province, or to order a copy to be sent by mail to the defendant's address, "*or generally to make such order as to the mode of service as he may deem expedient.*"

It was ordered that a copy of the subpœna be served personally on the defendants in Boston, who were British subjects. But it is different with the defendant who is an American citizen. The Queen's writ cannot be issued into a foreign country, commanding a foreigner in Her Majesty's name to enter an appearance in this court, for that would not be compatible with the comity of nations: *Crothy* v. *The Oregon and Transcontinental Railway Co.*, 3 Man. R. 182. It is directed that a notice of this writ be served on the defendant, who is an American citizen, following Rule 6 of Ord. XI. of Rules of the Supreme Court, as applicable to the Chy. Div. of the High Court of Justice in England.

McDonald and *Martin* for complainants.

Morson, *McQuarrie* and *M. McLeod*, Q.C., for defendants.

North-West Territories.

NORTHERN ALBERTA JUDICIAL DISTRICT.

SCOTT, J.] [Sept. 11, 1895.

MORRIS *v.* BENTLEY.

Registry laws—Territories Real Property Act—Equitable rights—Subrogation—Res judicata—Assurance fund—Distribution of costs.

This action was brought against the Registrar of the South Alberta Land Registration District as nominal defendant to recover out of the Assurance Fund provided by the Territories Real Property Act, on the facts stated below, and by amendment, Bentley, the registered owner of the lands, was made a party defendant, the plaintiff claiming as against him, in the alternative, subrogation to the extent of the Primrose mortgage below mentioned.

On the 26th September, 1889, one Gay, being the registered owner of the west half of Lot 8, Block "H," Lethbridge, subject to a mortgage for $300 and interest to one Primrose, gave a mortgage to the plaintiff to secure $500 and interest, and on the 14th of October, 1889, the plaintiff having obtained from Primrose the certificate of title and a discharge of his mortgage, caused his mortgage and the Primrose discharge to be registered, on finding no other encumbrance registered against the said lands, and, on the receipt from the Registrar of the duplicate certificate of title showing his mortgage to be the only encumbrance, paid Primrose $307, the amount of his mortgage, and advanced the remainder of the $500, viz., $193, to Gay.

A few days prior to the registration of the Primrose mortgage, viz., on Oct. 7th, 1889, the defendant Bentley had handed in to the Registrar a mortgage of these and other lands from Gay to himself to secure $2,000, but unaccompanied by the duplicate certificate of title of these lands, which mortgage was filed by the Registrar and an entry made in the day book, the registration not being completed by the entry of a memorial on the certificate of title in the Register until March, 1890, when defendant Bentley handed to the Registrar the duplicate certificate of title which he had obtained from the plaintiff, whereupon the Registrar endorsed a memorial of the Bentley mortgage on the certificate of title and the duplicate under the memorial of the plaintiff's mortgage.

In October, 1891, on a summary application on notice to the plaintiff, Bentley obtained an order from Magurie, J., declaring the Bentley mortgage to have been registered on October 7th, 1889, and to be entitled to priority over plaintiff's mortgage and directing the Registrar to amend the registration in accordance therewith.

Default having been made under defendant Bentley's mortgage, after notice to Gay and the plaintiff, he offered the lands for sale, and, failing to make a sale, after further notice to the plaintiff, applied for and on the 15th September, 1892, obtained an order for foreclosure, on the registration of which the Registrar cancelled the certificate to Gay and issued a new one to Bentley. Some evidence was given of an offer by defendant Bentley, prior to the application to Maguire, J., to purchase plaintiff's mortgage.

The learned judge found that plaintiff had paid off the Primrose mortgage in the belief that there was no other encumbrance, and that he was thereby obtaining a first mortgage on the lands; that at no time after the registration of the Bentley mortgage was the land of sufficient value to realize the amount

secured thereby; and that Gay was never, after plaintiff learned of Bentley's prior mortgage, in solvent circumstances so that plaintiff could recover from him.

Held, following the principle laid down in *Brown* v. *McLean*, 18 O.R., 533, and *Abell* v. *Morrison*, 19 O.R., 669, that the plaintiff was entitled to a first lien or mortgage to the extent of the Primrose mortgage which he had paid off, and that the question of his right so to be subrogated was not *res judicata* by the judgment of Maguire, J., which was merely a direction for the guidance of the Registrar, and did not and could not decide the equitable rights of the parties, nor by the foreclosure order, for the claim now is under the Primrose mortgage, which was not subsequent but prior to the mortgage foreclosed and consequently could not have been affected by the foreclosure order; and distinguishing *McLeod* v. *Wadland*, 25 O.R., 118, that the plaintiff was not precluded by his laches from enforcing his right to subrogation, there having been no excessive delay, nor any depreciation in the value of the property, nor any material alteration in the position of the parties.

Held, that the plaintiff was entitled under s. 108 to recover out of the assurance fund for the balance of his claim, viz., $193 and interest, and that it is not necessary that he should have been deprived of land or of some estate or interest therein (the case of *Oakden* v. *Gibbs*, reported in 8 Victoria Law Reports, not being analogous, the reading of the Victorian Act being different), the proper construction of s 108 making it read in effect:

"(1.) Any person sustaining loss or damage through any omission, mistake or misfeasance of the Registrar or of any of his officers or clerks in the execution of their respective duties under the provisions of this act, and

"(2) Any person deprived of any land or of any estate or interest in lands by the registration of any other person as owner of such land, or by any error, omission or misdescription in any certificate of title, or in any entry or memorial in the registrar, and who by the provisions of this Act is barred from bringing an action of ejectment or other action for the recovery of such land, estate or interest, may in any case in which the remedy by action for recovery of damages as hereinbefore provided is barred, bring an action against the Registrar as nominal defendant for the recovery of damages, &c.," and that the words "remedy as hereinbefore provided is barred," do not refer, as was contended on behalf of the Registrar, merely to ss. 104 and 105, but to all the provisions of the Act preceding s. 108, including s. 32, but for which section an action might be brought against the Registrar personally, and it is not necessary to show that all remedies direct or indirect have been barred, but it is sufficient to show that the principal remedy, viz., that against the Registrar, has been barred.

Held, also, that the endorsement on the certificate of title of the memorial of the plaintiff's mortgage was equivalent to a certificate by the Registrar that there was no prior encumbrance affecting the land other than those appearing on the certificates of title prior to the plaintiff's mortgage, and that the plaintiff was entitled to rely on such certificate.

Held, also, that even if there had been a binding agreement on the part of Bentley to purchase plaintiff's mortgage, plaintiff was not bound to proceed on it, nor would his failure to do so prevent him from recovering against the assurance fund.

Subsequently on an application for distribution of costs,

Held, that the Registrar should pay plaintiff's general costs of suit and that defendant Bentley should pay the costs of the plaintiff and the Registrar that had been caused by reason of Bentley's defence.

C. F. P. Conybeare, Q.C., and *G. S. McCarter* for plaintiff.
P. McCarthy, Q.C., and *Horace Harvey* for defendant Bentley.
James Muir, Q.C., and *C. C. McCaul*, Q.C., for the Registrar.