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As we go to press we learn that Mr. J. J. Kingsmill, Q.C., Judge of the County Court of the County of Bruce from 1866 to 1893, died on the voyage to Europe. This announcement will bring sorrow to a large circle of friends.

Whilst quite unable to see any connection between legal matters and recent successes in South Africa, we do know that amongst the most loyal subjects of Her Most Gracious Majesty are the members of the legal profession. We therefore make no apology for joining in the rejoicings of the Anglo-Saxon world over the capitulation of Paardeburg and the relief of Ladysmith, this day announced.

It is with much regret that we record the recent death of His Honour Edmund John Senkler, Judge of the County Court of the County of Lincoln. He was at the time at Winnipeg, acting as Chairman of a Royal Commission. Mr. Senkler was born in England on January 29th, 1835, being the son of the Rev. E. J. Senkler, who came to Canada in 1843, and was for some time rector of the High School, Quebec. He was called to the Bar in 1860, and practiced his profession in the town of Brockville. In 1863 he was appointed County Attorney for Leeds and Grenville, made a Q.C. by the Ontario Government in 1876, and elected as a bencher of the Law Society in 1877. In the same year he was appointed County Judge of the County of Lincoln, which position he occupied up to the time of his death. He was a member of several government commissions, the utmost confidence being reposed in his integrity and capacity. The late judge was a man of sound judgment as well as of great learning, and was held in the highest esteem by all the members of the Bar who practiced before him. He was the soul of honour, and, whilst fearless in the discharge of his duties, was always kind and considerate. His death will be felt as a distinct loss to the profession and to the public.

A correspondent who has large experience in matters of practice, thus takes exception to the Ontario Rules of Court recently promulgated, and which appear in another place: "We were in hopes

that the process of tinkering the Rules might be considered as definitely abandoned, but it seems it has not, and a new batch of verbal amendments, the necessity of which is not very obvious, has been passed. Could not all practical purposes have been as well served by the Court issuing direction to its officers?"

The recent decision of the Court of Appeal in *Allcroft* v. *Morrison*, noted ante p. 98, affords a very complete vindication of the justice of our remarks made in June last, (see ante vol. 35, pp. 402-3) touching the injustice which may result from a Divisional Court being composed of two instead of three judges. We there referred to the cases of *Denier* v. *Marks* and *Earle* v. *Marks*, which had been recently disposed of by a Divisional Court of two judges, one of whom though agreeing in the decision did so doubtingly. It now turns out that the judge who doubted was justified in his doubts; and the decision then rendered is now overruled, but the fact remains that in two cases in which, according to law, the defendants were entitled to get security for costs from the plaintiff, they were denied their rights, and this, very probably, owing to the Court being composed of only two judges, and not only were they denied their rights, but were ordered to pay the costs of the attempt to vindicate them.

While on the subject, we may point out, that out of three practice cases recently appealed to the Court of Appeal from Divisional Courts, two of the appeals were successful, which would seem to show that to constitute the Divisional Courts final courts of appeal on questions of practice would not be very satisfactory, one of these decisions, *Allcroft* v. *Morrison*, we have already referred to, the other *In re Confederation Life and Cordingly*, was on a question of interpleader practice, and in both cases the decision of the Court of Appeal appears to be preferable to that of the Divisional Court.

Nothing is needed in these days to emphasize the drawing together of the component parts of the great and world-wide empire of which we form a part. During the past few days the life blood of a number of those who left this Dominion to fight for Queen and country has been shed to cement a union which cannot but make

for the benefit of mankind at large. But even in the peaceful things and the administration of law (which it is our province more particularly to refer to) we see interesting evidences of the gradual unification of the various races and systems of law which are to be found under the protection of the Union Jack. Amongst our exchanges we have legal periodicals from the four continents and from the islands of the Southern Ocean, showing how the English language and English law is overspreading the earth. Amongst these exchanges we have recently received a number of the *Kathiawar Law Reports*, containing "the decisions of the original and appellate cases of the Chief Court of Civil and Criminal Justice in Kathiawar, and the decisions of the political cases, and the appellate decisions of the Bombay Government on these and on the Rajasthanik Court decisions." These reports are published with the permission of the Political Agent by Ganeshji Jethabhai, Kathiawar Agency Pleader, and appear monthly in the English and Gujarati languages. It is interesting to note that, whilst the judges are English, the counsel or agents engaged are natives. For example, in the Court of the Deputy Assistant Jhallawad, before C. A. Kincaid, Esq., I.C.S., appeared Mr. Harakchand Hemsi as counsel for the appellant, Shah Natha Virji of Khodu, and Gulalrai Vajeshankar as counsel for the respondent, Shah Devjee Gokal of Gokal Ladhu. Amongst the advertisements appears somewhat suggestively that of the Encyclopædia Brittanica. The inevitable bicycle also comes to the front in the same connection, Vatcha Bros. publishing their advertisement thereof in two languages. Advertisements of talking machines, phosphates, etc., etc., add their quota to the general make up.

NEW SHARES AND BONUSES—CAPITAL OR INCOME.

The statutes which in later years in England and her colonies have authorized the investment of trust funds in the stock or shares of commercial companies have created not a few new dangers in the position of a trustee. One of these is very clearly indicated in the cases of which this article proposes to treat. The question is shortly this,—for whose benefit does a trustee hold bonus dividends or new shares in a company allotted to him as one of the former shareholders, if the instrument of trust contains no specific direction on the subject? Are such bonuses and the

right to the new shares or either of them in the nature of profits resulting from the operations of the concern, to be applied therefore as income for the benefit of the life tenants of the fund, or are they an accretion to the capital of the trust to be invested for the benefit of all?

The question is one of obvious importance to the trustee as he will be personally liable to make good to any of his cestuis que trustent any loss they may sustain in consequence of his decision.

It is important firstly to distinguish a mere bonus or extra dividend from such a privilege as the right to subscribe for new shares. A special increased dividend following upon unusual prosperity whether declared simply as dividend or in the form of a bonus is in the great majority of cases a profit resulting from the original shares and has been held in most instances, as we shall see, to be income in the hands of the trustee, applicable for the benefit of the life tenant alone. Should a company, however, decide for any reason to increase its capital by the issue of more stock the right to take up the new shares is not necessarily a profit at all. It may indeed be no benefit to the original shareholders as if the new stock is issued at a price equal to the market price of the old shares, or if in consequence of the new issue the price of old shares depreciates in the market. Even, however, if the new shares are offered to the old shareholders at a less price than the market value so as to make it obviously in their interest to take them up, it is nevertheless not an easy matter to decide whether the benefit thus accruing is a profit on the original investment or an additional outlay of capital by the subscribers for new shares.

Some confusion arises moreover from the frequent practice amongst companies of issuing new shares at the same time that a bonus is declared and setting off the bonus payable to each shareholder against the price of the new shares allotted to him. It will be well therefore to take the two questions up together as the authorities in almost all cases will be found to deal with both.

The first decision to be considered is *Brander* v. *Brander* (1799) 4 Ves. 800, which Lord Herschell in *Bouch* v. *Sproule* speaks of as the earliest case on this question. The Bank of England, having paid out of its surplus funds for the public service £1,000,000, received from the Government £1,125,000 five per cent. annuities, which it directed to be distributed amongst its stockholders in

proportion to the amount of stock held by them. The Bank had a capital limited by statute which it was not authorized to increase. Lord Chancellor Rosslyn held that the annuities so distributed were capital money in the hands of the stockholders and that the dividends upon them alone were to be paid to the life-tenants. The principle upon which this case was decided, as stated by Lord Herschell, in *Bouch* v. *Sproule*, was that the accumulated profits paid to the Government had become part of the floating capital of the bank, and consequently the annuities received in return were capital money in the bank's hands.

The next case is a decision of the House of Lords *Irvine* v. *Houstoun* (1803) 4 Paton, Sc. App. 521, in which stock in the Bank of Scotland was in question. Lord Eldon puts the point for decision thus :—"The case therefore comes to be purely that of a tenant for life and of those interested in remainder in the stock in question ; and the point for our decision is which of these parties should be entitled to an extraordinary dividend declared by the bank . . . which is known in both countries by the name of a bonus." As in the case of *Brander* v. *Brander* the bank in this case was not authorized to increase its capital but had been in the habit of investing its surplus profit annually in exchequer bills and other readily convertible securities which became in this way part of its actual capital fund spoken of in the judgment as its "floating capital." Speaking of this floating capital Lord Eldon says :—"Every person who buys bank stock is aware of this, and if he gives the life interest of his estate to any one it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century." And he declared the bonus to be capital. These two cases were followed in *Paris* v. *Paris* (1804) 10 Ves. 185, where the bonus was paid in money and not in stock, as in the earlier cases, and was also shewn to have been earned during the lifetime of the testator ; Lord Eldon holding these circumstances to be insufficient to distinguish it.

The next case is *Witts* v. *Steere* (1807) 13 Ves. 363, where a bonus dividend was again declared to be capital. Lord Erskine however expressed the opinion that if instead of declaring a special bonus, the bank had merely increased its ordinary dividend there would have been nothing to shew that the whole was not the ordinary fruit of the stock and therefore income for the life tenant. This

was exactly what happened in the next case for consideration which was decided in the same year: *Barclay* v. *Wainewright*, 14 Ves. 66. Here the dividend had been increased gradually from 2¾ per cent. to 3½ per cent. at which rate it continued till 1807 with variations by occasional bonuses making it sometimes as much as 8½ per cent. In that year the regular dividend was suddenly increased to 5 per cent. no part thereof being declared to be bonus or special dividend. Lord Eldon gave the whole to the tenant for life leaving it open, however, apparently, to any one interested to shew by affirmative evidence that any part of it was paid out of the accumulated capital of the bank and was for this reason to be itself treated as capital. The view favouring the life tenant was carried one step further in *Preston* v. *Melville* (1848) 16 Sim. 163, where a bank declared its ordinary and also a bonus dividend "out of interest and profits" but included both dividends in one dividend warrant. On the authority of *Barclay* v. *Wainewright* the whole was given to the life tenant.

In re E. Barton's Trust (1868) L.R. 5 Eq. 238, a new aspect was given to the question. In this case a company directed that of "the net earnings during the half-year" a portion should be applied to necessary works and new shares issued to represent the money so applied and that the balance of the earnings should be paid out as dividend. Vice-Chancellor Sir W. Page Wood determined that the company had the right to say whether their profits should be paid out as income or go in augmentation of capital, and held that the new shares in this case being a capitalization of profits by the company were themselves capital. He says: "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare."

We now come to what may be called the leading case on this question, *Bouch* v. *Sproule* (1887) 12 A.C. 385, where all the prior authorities are reviewed. The company whose transactions were here in question had power to increase its capital, and had also power before declaring a dividend to set apart out of profits a sum sufficient to meet contingencies, repairs, etc. Having created a large reserve fund under this provision they divided it amongst the shareholders as a bonus dividend. At the same time it was resolved "that the company's operations render it desirable to raise an amount (equal to the gross amount of the bonus) as capital account" and it was proposed to issue new shares to each

former holder in such a proportion that the bonus on the old shares would just pay the price of the new shares. The actual facts were that the whole amount of the accumulated profits had been expended in new plant and the intention was to capitalize this outlay by the issue of new shares against it, declare the profits as bonus and then set off the bonus against the price of the new shares.

Fry, L.J., in his judgment in the Divisional Court, L.R. 29 C. D. 653, lays down the test as to when new shares created out of accumulated profits are income and when capital. "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settler in the shares, and consequently what is paid by the company as dividend goes to the tenant for life and what is paid by the company to the shareholder as capital or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word what the company says is income shall be income and what it says is capital shall be capital."

Lord Herschell quotes this statement of the law with approval in his judgment in the House of Lords and draws a clear distinc tion between companies which can, and companies which cannot, increase their capital, in the following words:—"And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having converted any part of its profits into capital when it has made no such increase even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such." He then goes on to hold that if a company having power to increase its capital declares a bonus out of accumulated profits without declaring such bonus to be capital it will remain income.

Lord Watson referring to this question says that where, as in this case "the company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital the interest of the life tenant depends in my opinion upon the decision of the company."

The intention of the company was thus made the crucial test in all cases where such company is authorized to increase its capital. Taking this as the criterion in this case the Court held that looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend but intended to and did appropriate the undivided profits as an increase of the capital stock, that the bonus dividend was therefore capital of the testator's estate and that the life tenant was not entitled to the bonus or the new shares. *Irvine* v. *Houstoun* and the cases which follow it are therefore now limited to companies which have no power to increase their capital, and the profits of such companies if accumulated and used as capital become for this purpose at least part of the capital of the concern and a subsequent division of them as a bonus or otherwise is not sufficient to make them income. The simple case of the issue of new shares uncomplicated by the contemporaneous declaration of a bonus cannot of course arise in the case of companies not authorized to increase their capital and to which the decision of *Irvine* v. *Houstoun* applies.

In the case of companies authorized to increase their capital, however, we have still to consider whether new shares issued without reference to any bonus are capital or income. This point had been dealt with many years before in *Rowley* v. *Unwin* (1855) reported shortly in 2 K. & J. at p. 138. New shares were allotted to trustees of a marriage settlement in respect of their former holding, the calls upon which were paid by the trustees out of the income of the life tenant. The trustees then sold the new shares and invested the proceeds. Vice Chancellor Sir W. Page Wood held that the new shares were capital of the trust and that the tenant for life had only a charge on the proceeds for the amount of the calls paid out of her income. He compared the case to that of a tenant for life renewing leasehold property and advancing money for the fine due on the renewal.

The last decision for consideration is that of *Re Malam* (1894) 3 Ch. 578 where *Bouch* v. *Sproule* and *Rowley* v. *Unwin* were followed and the rules of law laid down in these cases quoted and approved. The company whose shares were in question was a most prosperous one and had been paying the astonishing dividend of 50 per cent. as appears by the report. In 1893 this dividend was increased to 100 per cent. The directors at the same time decided to issue new shares to raise a fund for certain capital expenditures,

and for convenience allotted them, at the same time that the dividend was declared, the amount called upon the new shares being covered by one-half of the increased dividend declared on the old shares. Sterling, J., says:—"I do not think that it was intended to capitalize any existing assets of the company under the guise of first declaring a dividend and then issuing new shares to the existing shareholders and I think the object was to give any share holder who might desire it an opportunity of increasing his holding in the company (this being a benefit) and to do so in a way which would at once secure to the company the desired increase of capital without putting the shareholders under an obligation to find the money out of their own pockets . . . the conclusion at which I arrive on the question of fact is that the company by the resolutions . . . did really intend to distribute its accumulated profits as dividend to the extent to which those resolutions purported to sanction such a division. In my opinion, therefore, the tenant for life was on the principle laid down in *Bouch* v. *Sproule* entitled to the dividend declared by these resolutions. . . . If an offer were made to the trustees unconnected with the payment of any dividend the option would have to be exercised on behalf of all the beneficiaries, and if the instrument creating the trust did not authorize the retention of the shares it would be the duty of the trustees to sell them and deal with the proceeds as capital; and, in fact, such a course has been repeatedly authorized by the Court." The shares taken up by the executors in this case having been sold the Court held that the life tenants were entitled to the full amount of the dividend out of the proceeds of the sale of the new shares, the balance of such proceeds being capital.

The result of the cases may be summarized as follows: In the case of companies with a capital stock limited by law a bonus or special dividend out of the accumulated profits of the company which have been held and used by the concern as part of its working capital is capital and so remains in the hands of the shareholders. In the case of companies authorized by law to increase their capital stock what is declared by them as dividend is income for the old shareholders, but any capitalization of profits by the company, whatever form it may take, is binding on all the holders of stock and enures to the benefit of all persons interested in such

stock. New shares issued by such companies unconnected with any distribution of profits are capital in the hands of the former shareholders to whom they are allotted.

Toronto. W. MARTIN GRIFFIN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

HUSBAND AND WIFE—SEPARATION DEED—INTERCOURSE WHILE LIVING APART —EVIDENCE .r.

In *Rowell* v. *Rowell* (1900) 1 Q.B. 9, the action was brought by a wife against her husband to recover arrears of weekly payments due under a separation deed. The defendant set up that the deed had been put an end to by the plaintiff's subsequent return to cohabitation with the defendant, and that having once been put an end to, it was absolutely at an end. The only evidence in support of this defence was the fact that the plaintiff, in the middle of 1897, yielded to the defendant's solicitations, and submitted to acts of intercourse on three or four occasions, whilst living apart from him; that the parties thereafter continued to live apart, and the payments were continued by the defendant, under the deed, up to January, 1898, and that neither party understood or intended by such acts of intercourse that cohabitation should be resumed. Grantham, J., who tried the action, gave judgment for the plaintiff, and the Court of Appeal (Lord Russell, C.J., and Smith and Williams, L.JJ.,) affirmed his decision, Lord Russell, however, expresses some hesitation, which does not appear to have been shared by the other members of the Court.

MALICIOUS PROSECUTION — CORPORATION, LIABILITY OF, TO ACTION FOR MALICIOUS PROSECUTION.

Cornford v. *Carlton Bank* (1900) 1 Q.B. 22, is reported, we presume, for the purpose of shewing that notwithstanding that Lord Bramwell said in the House of Lords, in *Abroth* v. *N.E. Ry. Co.*, 11 App. Cas. 247, "I am of opinion that no action for a malicious prosecution will lie against a corporation," the general consensus

of opinion of the Bench and the Bar is, that it will. The point was raised at the trial before Darling, J., (1899) 1 Q.B. 392 (noted ante vol. 35, p. 301), but was abandoned before the Court of Appeal.

LANDLORD AND TENANT—NOTICE TO QUIT—YEARLY TENANCY—"END OF THE CURRENT YEAR."

Wride v. *Dyer* (1900) 1 Q.B. 23, was a case stated by justices on an application by a landlord to recover possession of the premises against an overholding tenant. The case turns on the sufficiency of a notice to quit. The tenant held on a yearly tenancy from Lady Day to Lady Day. On 24th March, 1898, the landlord gave notice to quit "on 24th June, 1898, or at end of your current year's tenancy." It was contended by the tenant that this was either a three months' notice to quit on 24th June, 1898, which was not the end of a year of the tenancy, or else a one day's notice to quit on 25th March, 1898, which day, it was claimed, was the end of the year's tenancy current when the notice was given. Ridley and Darling, JJ., thought that the reasonable construction to be placed on the notice was that it was a notice to quit on the 24th June, 1898, or the 25th March, 1899, and was therefore sufficient. The Court preferred to follow *Doe* v. *Culliford*, 4 D. & R. 248, and *Doe* v. *Smith*, 5 A. & E. 350, notwithstanding that in *Doe* v. *Morphett*, 7 Q.B. 577, *Doe* v. *Culliford* was declared to be "bad law."

TROVER—JOINT TORT FEASORS—COMPROMISE OF ACTION AGAINST ONE OF TWO TORT FEASORS — MONEY HAD AND RECEIVED, ACTION FOR — WAIVER — ACCEPTANCE OF PART OF PROCEEDS OF SALE.

Rice v. *Reed* (1900) 1 Q.B. 54, was an action to recover damages for the tortious conversion of the plaintiff's goods. The facts were somewhat peculiar. A person named Soltau, formerly in the plaintiff's employment, had wrongfully sold a large quantity of the plaintiff's sawdust to the defendant Reed. The plaintiff, having discovered that Soltau had deposited £1,500, part of the proceeds, in a bank to his own credit, commenced an action against him for the wrongful conversion of the sawdust, and in the alternative for the payment of the £1,500 as money had and received to the plaintiff's use. In that action the plaintiff obtained an injunction against the withdrawal of the £1,500 until the trial, and the action was ultimately compromised on the terms that £1,125 out of the £1,500 should be paid to the plaintiff in settlement of his claim

against Soltau, but without prejudice to the plaintiff's claim against Reed. The defendant Reed contended that this amounted to an election on the part of the plaintiff to waive the tort and adopt the sale, and was a bar to the present action. The jury found as a fact that the defendant Reed knew that Soltau was dealing with the sawdust in an improper manner, and Lawrance, J., who tried the action, gave judgment for the plaintiff for the damages he had sustained over and above the amount received from Soltau, and this judgment was affirmed by the Court of Appeal (Lord Russell, C.J., and Smith, and Williams, L.JJ.), that Court holding that although if the plaintiff had taken judgment in his action against Soltan upon the claim for money had and received, that would have been a conclusive election on his part to waive the tort, yet that the compromise which had been made had not that effect, and that the plaintiff's express reservation of his rights against Reed was effectual.

RAILWAY—SPEED OF TRAINS—BREACH BY COMPANY OF STATUTORY PROVISION —INFORMATION—INJUNCTION—EVIDENCE OF INJURY TO PUBLIC.

Attorney-General v. *London & North Western Ry. Co.* (1900) 1 Q.B. 78, was an action in the nature of an information against the defendant company, for an injunction restraining them from committing a breach of a statutory provision regulating the speed at which they should run their trains over a level crossing. The injunction was granted by Bruce, J., and the only point argued on the appeal from his decision, was that the Court had a discretion to grant or refuse the injunction, and that as there was no evidence of any injury having been occasioned to the public by the defendants' breach of the statutory provision in question, the injunction ought not to have been granted. The Court of Appeal (Smith, Collins and Williams, L.JJ.), however, was of opinion that, when an information is filed by the Attorney-General to enforce the express provisions of an Act of Parliament made in the interests of the public, the Court cannot go into the question whether the breach of such provisions is or is not, an injury to the public, and is bound to grant the injunction, and the judgment of Bruce, J., was unanimously affirmed.

COMPANY—MONEY PAID ULTRA VIRES BY DIRECTORS TO SHAREHOLDERS—LIABILITY OF DIRECTORS TO REPLACE MONEY PAID ULTRA VIRES—INDEMNITY.

In *Moxham* v. *Grant* (1900) 1 Q.B. 88, the Court of Appeal

(Smith, Collins and Williams, L.JJ.,) have affirmed the judgment of the Divisional Court (1899) 1 Q.B. 480 (noted ante vol. 35, p. 375). The facts were that the plaintiffs, the directors of a limited company, had, without authority, paid back to the defendant and other shareholders part of the capital, with the knowledge and consent of such shareholders. Subsequently, in liquidation proceedings, the directors had been compelled to replace the money so paid, and the present action was brought to compel the defendant to pay back the amount he had been improperly paid. The Divisional Court based their decision on the ground that the plaintiffs and defendant stood in the position of trustees and cestui que trust, and that it was a case of breach of trust with the assent of the cestui que trust, and the latter was, therefore, bound to indemnify his trustees. Smith, L.J., however, bases his decision on the ground that by the payment the defendant became a constructive trustee of the money for the company, and it was, therefore a case of two trustees in pari delicto, and that the plaintiffs, having been compelled to make good the breach of trust, were entitled to contribution from the other trustees. Collins and Williams, L.JJ., on the other hand, consider that as the liquidator might have recovered the money direct from the shareholders, the payment made by the plaintiffs was in ease of the defendant, and on that ground was recoverable. All agree that the rule as to there being no contribution or indemnity as between joint tort feasors had no application.

LANDLORD AND TENANT — DISTRESS — GOODS DISTRAINED, IMPOUNDED ON DEMISED PREMISES — 11 GEO. 2, C. 19, S. 10 — MAN IN POSSESSION — POUND BREACH.

Jones v. *Biernstein* (1900) 1 Q.B. 100, is the case reported (1899) 1 Q.B. 470 (noted ante vol. 35, p. 374). The short point was, Whether, when goods distrained for rent are impounded on the demised premises, it is necessary that the bailiff should remain continuously on the premises, or whether his temporarily leaving the premises amounts to an abandonment of the distress? The Divisional Court decided both questions in the negative, and the Court of Appeal (Smith, Collins and Williams, L.JJ.,) have affirmed that decision. On the appeal, the defendant attempted to argue that there had been no impounding of the goods, but the Court of Appeal refused to consider that point, as the leave to appeal granted by the Divisional Court was limited to the other point.

LANDLORD AND TENANT — LEASE TO TRUSTEE — COVENANT BY LESSEE IN TRUST TO REPAIR — OCCUPATION OF DEMISED PREMISES BY CESTUI QUE TRUST —CESTUI QUE TRUST, LIABILITY OF, FOR BREACH OF TRUSTEE'S COVENANT.

Ramage v. *Womack* (1900) 1 Q.B. 116, was an action brought by a landlord who had leased certain premises to a trustee, who had entered into a covenant to repair, to recover damages for breach of this covenant from the cestui que trust who had been in the actual occupation and enjoyment of the premises. The preliminary question of law, as to whether there was any liability, was tried without pleadings by Wright, J., who held that the defendant was under no liability, legal or equitable, to the plaintiff under the covenant made by her trustee, and he dismissed the action.

FRAUD—FALSE REPRESENTATION—TESTIMONIALS, IMPROPER USE OF — INJUNCTION.

Tallerman v. *Dowsing Radiant Heat Co.* (1900) 1 Ch. 1, is an action to restrain the defendant company from printing or publishing circulars containing any press notice written in favour of the plaintiff's business, so as to suggest or lead to the belief that such notice referred to the defendant's business. The facts were as follows: The plaintiff had invented a system of treating diseases by the local application of hot air, and there appeared in a medical paper a favourable account of this system, with particulars of its application to certain uses. The defendant was the inventor of a rival system of hot air treatment, and circulated among the patients of the plaintiff a pamphlet for the purpose of advertising the defendant's system, in which were inserted extracts from articles written by certain physicians in reference to the plaintiff's system which had been published by *The Lancet*, but which extracts omitted anything to shew that they in fact related to the plaintiff's system; and the extracts were so made that a reader would infer that they related to the defendant's system. There was evidence that some of the plaintiff's patients had been misled by these extracts, but there was no evidence of any actual damage to the plaintiff. Stirling, J., was of opinion that, as it was admitted there had not been any attempt by the defendants to pass off his system as that of the plaintiff's, there was no ground for granting an interlocutory injunction, although he conceded that the plaintiff had reason to complain of the defendants' action. An appeal was taken from this decision, and it was agreed that it should be treated

as an appeal from a judgment for the defendants at the trial, but the appeal was not heard, but on the defendants giving a perpetual undertaking not to print matter originally written in favour of the plaintiff's system of heating, it was ordered that the defendant should pay the plaintiff £25 costs, and further proceedings in the action were stayed. It would almost seem, therefore, that the defendant had not much confidence in being able to maintain the decision of Stirling, J.

MUNICIPAL LAW—VALIDITY OF BY-LAW.

Thomas v. *Sutters* (1900) 1 Ch. 10, was an action brought for the dissolution of a partnership and for taking of the partnership accounts. The defence was that the principal business of the partnership was the carrying on of betting in streets and public places in the City of London, and that by a by-law of the County Council it was provided that "no person shall frequent and use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet a wager with any person, or paying or receiving or settling bets," and that consequently the partnership business was illegal, and the plaintiff had no right of action. The plaintiff contested the validity of the by-law. The by-law was made by the Council in pursuance of a statute enabling it to make by-laws for the "good rule and government" of the county. Kekewich, J., following *White* v. *Morley* (1899) 2 Q.B. 34, held the by-law to be valid, and his decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.), and the fact that there was a statute expressly dealing with betting on streets, was held to afford no objection to the by-law, the object of the Act in question being to regulate the traffic in the streets, and the by-law in question was not repugnant to it in any way.

STATUTE OF LIMITATIONS—POSSESSORY TITLE—ACTUAL VISIBLE POSSESSION—CONSTRUCTIVE POSSESSION—ERECTION OF GATES—EQUIVOCAL ACTS OF POSSESSION—3 & 4 WM. 4, C. 27, S. 3—(R.S.O. C. 133, S. 5).

Littledale v. *Liverpool College* (1900) 1 Ch. 19, is a case which illustrates the rule that an adverse possession of land sufficient to give a title under the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 3 (R.S.O. c. 133, s. 5), must be an actual visible, exclusive and continuous occupation, and that such a title cannot be acquired by

mere equivocal acts of possession. In the present case the contest was as to the ownership of a narrow strip of land lying between two fields owned by the defendants, which strip had been conveyed to the defendants with the fields, but the plaintiffs had a right of way over the strip to a field belonging to them. The strip was originally open at both ends, and the end farthest from the plaintiffs' field communicated with a public highway. More than twelve years before action, the plaintiffs erected a gate on the strip where it adjoined the highway, and a gate was also erected at the other end of the strip, but it was not clear whether it was on the strip or on the plaintiffs' own land. There was no evidence that the plaintiffs had erected the gates with the intention of excluding the defendants from the strip. The present action was brought to restrain the defendants from trespassing on the strip. Bigham, J., tried the action. It is not stated explicitly in the report what judgment he gave, but it may be inferred that he dismissed the action. The Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.,) agreed that the plaintiffs could not succeed. The erection of the gates and keeping them locked so as to exclude every one, it was conceded, would have been a sufficient possession to give the plaintiffs a title under the statute, if the plaintiffs had had no right to, or over, the strip in question ; but inasmuch as the plaintiffs had a right of way, the erection of the gates was an equivocal act, and it might be inferred that they were put up merely to protect the plaintiffs' right of way from invasion by the public, and not for the purpose of dispossessing the defendants. When they commenced the action, and for some time before, the plaintiffs only claimed a right of way, and no more ; and, on the evidence, the Court was satisfied that the gates were not put up originally with any intention of excluding the defendants. The judges of the Court of Appeal, however, admit that the case was not free from difficulty.

MORTGAGE—POWER OF SALE—SETTING ASIDE SALE UNDER POWER—LACHES.

In *Nutt* v. *Easton* (1900) 1 Ch. 29, the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.,) dismissed an appeal of the plaintiff in person from the judgment of Cosens-Hardy, J., (1899) 1 Ch. 873 (noted ante vol. 35, p. 630). The action was brought by a mortgagee to set aside a sale made by the mortgagee to her own solicitor, under a power of sale contained in the

mortgage. The sale was of a reversionary interest, and took place in 1888, and the plaintiff was immediately notified of the sale, and took legal advice, and was informed that the sale might be impeached, but she took no steps until 1897, about eight months after the reversion had fallen into possession. The Court of Appeal, without calling on the defendant, held that the plaintiff was barred by her laches.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] BINGHAM *v.* MCMURRAY. [Nov. 29, 1899.

Contract—Sale of patent—Future improvements.

By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. & S. The latter received an assignment of the Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same they demanded, by counterclaim, a return of what had been paid on account.

Held, reversing the judgment of the Court of Appeal, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement, and that as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover.

Held, further, GWYNNE, J., dissenting, that as B. & S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked for their own profit, and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. Appeal allowed with costs, and cross-appeal dismissed.

Nesbitt, Q.C., and *Biggar*, for appellant. *W. B. Raymond*, for respondent.

Ont.] RANDALL *v.* HOME LIFE ASSOCIATION. [Nov. 29, 1899.

Life insurance—Action on policy—Pleading—Condition precedent—Burden of proof—Waiver.

A life insurance policy contained a condition providing for payment in ninety days after satisfactory proofs of death were furnished to the association; another that death from consumption and certain other diseases was not covered by the policy; and another setting out what proofs must be given. In an action on this policy the plaintiff alleged that she had furnished proof of the death of the insured on a certain date, and that all conditions were performed and all times elapsed to entitle her to payment. The defendants denied these allegations and put plaintiff to strict proof thereof.

Held, that under the Ontario Judicature Act, differing in this respect from the practice in England, the plaintiff was bound to prove the truth of the above allegations; that giving of satisfactory proofs was a condition precedent to her right of action, performance of which she had to allege and prove; that no rule of law obliged defendants to prove non-performance; that there was no evidence of waiver of proof as contended by the plaintiff; and that in any case plaintiff could not recover as the proofs given, taken in connection with the evidence, shewed deceased to have died of consumption which was not covered by the policy. Appeal allowed with costs.

Osler, Q.C., and *Hoskin*, Q.C., for appellant. *Watson*, Q.C., and *Lancaster*, for respondent.

Que.] TOWN OF RICHMOND *v.* LAFONTAINE. [Nov. 29, 1899.

Municipal corporation—Construction of waterworks—Improper construction—Notice—Use of works—Waiver—Mise en demeure—Condition precedent.

A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract.

Held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. Appeal dismissed with costs.

H. B. Brown, Q.C., and *Lawrence*, for appellant. *Panneton*, Q.C., and *Belcourt*, Q.C., for respondents.

Ont.] DOMINION CONSTRUCTION CO. *v.* GOOD. [Nov. 29, 1899.

Contract — Construction of railway — Certificate of engineer — Condition precedent.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the party named as arbiter proved to be, in fact, the engineer of the other party to the contract. Appeal dismissed with costs.

D'Arcy Tate, for appellant. *Aylesworth*, Q.C., and *Washington*, for respondent.

Province of Ontario.

COURT OF APPEAL

From Robertson, J.] ROMBOUGH *v.* BALCH. [Jan. 16.

GREEN *v.* NEW YORK & OTTAWA R.W. CO.

Master and servant—Negligence—Damages—Death of child—Railway—Want of lock at switch.

The omission to have a lock at a railway switch, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants, resulting from the switch becoming misplaced.

A parent cannot recover damages for the death of his child unless there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. Judgment of ROBERTSON, J., affirmed.

Cassels, Q.C., and *A. W. Anglin*, for appellants. *Aylesworth*, Q.C., and *C. H. Cline*, for respondent Rombough. *G. I. Gogo* and *H. Beattie*, for respondent Green.

From Drainage Referee.] [Jan. 16.

TOWNSHIPS OF ADELAIDE AND WARWICK *v.* TOWNSHIP OF METCALFE.

Drainage Act—Amendment of engineer's report—Jurisdiction of referee—Appeal—Court of Appeal—R.S.O. c. 226, ss. 89, 90.

The Drainage Referee cannot, under s. 89 of the Drainage Act, R.S.O. c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. That course can be adopted, if at all, only with the engineer's consent and upon evidence given. Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of the Drainage Act, R.S.O. c. 226, and an appeal lies to the Court of Appeal against it.

Aylesworth, Q.C., for appellants. *J. Folinsbee*, for respondents.

From Robertson, J.] LAZIER *v.* ROBERTSON. [Jan. 16.

Settlement—Contingent or vested estate.

Held, affirming the judgment of ROBERTSON, J., 30 O.R. 517, 35 C.L.J. 281 that under the settlement in question the child who died before the period for conveying took a vested interest.

H. W. Mickle, for appellant. *W. H. Blake*, for respondent.

From Street, J.] [Jan. 16.

IN RE TOWN OF CORNWALL AND CORNWALL WATERWORKS COMPANY.

Municipal corporations—Waterworks company—Arbitration and award—Payment into Court—Interest.

Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded with interest to the date of payment in, and six months' interest in advance. Judgment of STREET, J., 30 O.R. 81, affirmed.

S. H. Blake, Q.C., and *Leitch*, Q.C., for appellants. *Aylesworth*, Q.C., and *C. H. Cline*, for respondents, the waterworks company. *Bruce*, Q.C., for respondents, the mortgagees.

From Rose, J.] BREWER *v.* CONGER. [Jan. 16.

Lease—Renewal—Option—Mortgage—Redemption.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee

should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances.

A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land.

Held, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. Judgment of ROSE, J., affirmed.

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

From Meredith, J.] KIRBY *v.* BANGS. [Jan. 16.

Will—Construction—Contingent or vested interest—Legacy.

A testator devised certain property to trustees to hold it in trust for twenty years after his decease, during that time to pay the income to his widow and children, naming them in certain shares; and, after the expiration of twenty years, to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees, upon trust, to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the corpus among his children, naming them, in certain shares.

Held, affirming the judgment of MEREDITH, J., that the children took vested interests.

Osler, Q.C., for appellants. *A. J. Boyd*, for official guardian. *W. B. Raymond*, for executors. *Aylesworth*, Q.C., for respondents.

From Boyd, C.] GUTHRIE *v.* CANADIAN PACIFIC R.W. Co. [Jan. 16.

Prescription—Right-of-way—Railways—Crossing.

When a line of railway severs a farm, and no crossing is provided by the company, a right-of-way across the line may be acquired by the owner of the farm by prescription.

A farm crossing provided by the railway company may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing.

A right-of-way may be acquired although the dominant tenement is not contiguous to the servient tenement. Judgment of BOYD, C., affirmed.

Wallace Nesbitt, Q.C., and *Angus MacMurchy*, for appellants. *Guthrie*, Q.C., and *Shepley*, Q.C., for respondents.

From MacMahon, J.] COUNTY OF YORK *v.* ROLLS. [Jan. 16.

Water and watercourses—Flood—Change in course of stream.

When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right or right by estoppel to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel. Judgment of MACMAHON, J., affirmed.

C. C. Robinson, for appellants. *William Cook*, for respondent Rolls. *M. H. Ludwig*, for respondent Hunter.

From Armour, C.J.] [Jan. 16.

IN RE CANADIAN PACIFIC R.W. CO. AND CITY OF TORONTO.

Landlord and tenant—Agreement for lease—Covenant to pay taxes—Evidence—Judicial discretion.

Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Judgment of ARMOUR, C.J., affirmed.

Upon such a reference, the referee is entitled to exercise a judicial discretion as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered.

Aylesworth, Q.C., *Angus MacMurchy* and *J. Shirley Denison*, for appellants. *Robinson*, Q.C., and *Fullerton*, Q.C., for respondents.

From Armour, C.J.] BUGBEE *v.* CLERGUE. [Jan. 16.

Judgment—Foreign judgment—Action in Ontario—Defence available in foreign Court—Principal and surety—Limitation of actions—Statement of claim—Writ of summons—"Absence beyond seas"—Foreigner.

A creditor who has obtained judgment in a foreign country for the amount of his debt may, if entitled to sue at all in this province, sue either upon the foreign judgment or upon the original consideration.

An action upon a foreign judgment must fail if it be proved that the judgment is of such a nature that it would, upon the application of the defendant, be set aside in the Court in which it was recovered.

By the endorsement of his writ, the plaintiff claimed upon the foreign judgment only, but in his statement of claim set up an alternative claim upon the original consideration—a promissory note.

Held, that it was too late to object to this at the trial, and that, as the period of limitation had not expired at the time of the issue of the writ, the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim.

Held, also, that even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the Statute of limitations was of no avail because the defendant, a foreigner, had never been within the province, and the statute had therefore never commenced to run in his favour.

In an action against the maker of a promissory note, it was alleged that he was a surety; and it was shewn that, by the law of the State in which the note was given, a creditor could not recover against a surety without first endeavouring by legal process to recover against the principal.

Held, that the defence of suretyship was not made out; but, *semble*, that such a defence could be matter of procedure only, and no bar to an action in this province. Judgment of ARMOUR, C.J., affirmed.

Riddell, Q.C., and *J. D. Falconbridge*, for the appellant. *William Macdonald*, Q.C., for the respondent.

From Boyd, C.] HAVEN *v.* HUGHES. [Jan. 16.

Contract—Mineral rights—Right to possession.

By an agreement made Jan. 13, 1897, in consideration of one dollar, the owner of certain lands agreed "to lease and hereby does lease to the plaintiff the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said plaintiff all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery and conveniences for mining, quarrying and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises, and to build necessary railroad thereon." "Said plaintiff also agrees, if he uses said property under this agreement, to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said owner hereby agrees that he will give no other party or corporation any rights on said premises for the above-described purposes on or before August 1st, 1897." "Unless said plaintiff utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void."

Held, affirming the judgment of BOYD, C., that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords.

Aylesworth, Q.C., and *C. A. Moss*, for appellant. *Osler*, Q.C., and *W. M. German*, for respondents.

From Board of County Judges.] [Jan. 16.

IN RE LONDON STREET RAILWAY ASSESSMENT.

Assessment and taxes—Street railway—Rails, poles and wires—Bridges—Road-bed—Adding items on appeal.

Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles and wires, in each ward, must be assessed in that ward, and in making the assessment the rails, poles and wires must be treated as so much dead material, and not as necessary portions of a going concern.

Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles and wires.

Consumers' Gas Co. v. *Toronto* (1897) 27 S.C.R. 453; *In re Bell Telephone Company Assessment* (1898) 25 A.R. 351; and *In re Toronto Railway Company Assessment* (1898) 25 A.R. 135, applied.

Upon an appeal to the Board of County Judges from the Court of Revision coming on for hearing, the Board, at the request of the city, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company.

Held, that the Board of County Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 Vict., c. 27 (O), not then being in force.

Semble, the railway company was not liable to assessment in respect of the portions of the streets occupied by them. Judgment of the Board of County Judges reversed.

I. F. Hellmuth, for appellants. *T. G. Meredith*, for respondents.

From Divisional Court.] RICE *v.* RICE. [Jan. 25.

Fraudulent conveyance—Husband and wife—Income—Gift.

An appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.] was argued before OSLER, MACLENNAN, MOSS and LISTER, JJ. A., and FERGUSON, J., on Jan. 24, 1900, and on Jan. 25, 1900, was dismissed with costs, counsel for the respondent not being called upon to argue. See 35 C.L.J. 498.

Johnston, Q.C., and *J. Heighington*, for appellants. *Aylesworth*, Q.C., and *H. W. Mickle*, for respondent.

HIGH COURT OF JUSTICE.

Falconbridge, J.] COYLE *v.* COYLE. [Dec. 27, 1899.

Summary judgment—Rule 616—Dismissal of action—Admissions on examination for discovery—Disclosing case.

The court or a judge has power in a proper case, to dismiss the action on an application under Rule 616.

In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book of her father that he had lent the defendant money on a certain day.

Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call; she could have been asked if she had disclosed her whole case, but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case and the action should not be dismissed.

O'Rourke, for plaintiff. *Mikel*, for defendant.

Boyd, C., Ferguson, J., Robertson, J.] [Jan. 8.

GLOVER *v.* SOUTHERN LOAN CO.

Execution creditor—Mortgage sale—Application of surplus—Lien notes.

C. B. was owner of a farm subject to mortgages to the defendants, and also subject to a lien for the price of a machine purchased from the Sawyer-Massey Company. The machine had been bought by T. and promissory notes were given by T. and R.B. as surety for T. R.B. then owned part of the farm and executed a document giving a lien on his part of the farm for the price of the machine. The plaintiffs recovered judgment against G.B. and placed an execution against the lands in the sheriff's hands, which bound G.'s estate and interest in the lands as the then sole owner, he having acquired R.'s share. After this the defendant-mortgagees exercised their power of sale and sold the farm for enough to pay their mortgages and the lien charged on the land. The lien was thus satisfied out of the proceeds of the sale and an assignment was taken at the instance of the solicitor for the mortgagees both of the lien paper and the notes, which it guaranteed, to one N. who was an execution creditor for a small amount subsequent to the plaintiff's executions. This assignment was made on Feb. 17th, 1894, to N. absolutely by the Sawyer-Massey Company, and the notes were held by N. under her assignment until

December, 1898, when she brought action upon them, which action turned out fruitless as both makers were worthless. It was proved in this action that had T. been promptly proceeded against in 1895 when the notes had become payable the amount due upon the notes could have been recovered; and he was the person primarily and properly liable to pay as he bought and had the machine.

Held, that the duty of the defendant-mortgagees on satisfying the lien for the machine out of the proceeds of the sale was to get in the notes forming part of the security for the machine; that the notes were not paid by the application of the proceeds of the sale in discharge of the lien, because T. was the principal debtor in respect to them and the land was pledged merely as security for him; that the defendant mortgagees being aware of the plaintiff's executions in the sheriff's hands should have secured the notes for the execution creditors; and that inasmuch as through their inaction the value of the notes had been lost to the latter they were responsible to the plaintiffs in the amount of them.

Aylesworth, Q.C., for the plaintiff. *Wilson*, for the defendant, Ramsdell. *Farley*, Q.C., for defendant Loan Company.

Armour, C.J., Falconbridge, J.] [Jan. 9.

GREENWAY *v.* GARDINER.

Contract—Furnishing heating appar Guaranty as to degree of heat to be produced—Construction of.

On May 7th, 1898, the plaintiff entered into a contract in writing with the defendant to construct and complete by the 31st August, 1898, a hot water heating apparatus in a house being erected for the defendant, for which he was to be paid $316, 80 per cent. thereof as the work progressed and the balance on the completion thereof, and he thereby also agreed that the apparatus would give seventy degrees of heat when the weather was ten degrees below zero. The apparatus was constructed and completed by the plaintiff, but wholly failed to give the promised heat. Thereupon, on Dec. 8, 1898, the plaintiff entered into a contract with the defendant, for the purpose of remedying, if possible, his breach of contract, for the consideration of the further sum of $75, to make certain changes, and thereby guaranteed that the apparatus would heat the rooms in which the radiators were changed, to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside; the $75 to be paid at such time as the apparatus had been tested under the above conditions, or, in the event of the temperature outside not marking ten degrees below zero before March 1, 1899, the $75 to be paid at that date.

Held, that it could not be reasonably intended that if the thermometer never went down to ten degrees below zero before March 1, 1899, the plaintiff would be entitled to the $75, although it were clearly proved that,

according to the proper construction of the guaranty, the apparatus would not heat the rooms in which the change was made to a temperature of seventy degrees, even when the thermometer registered less than ten degrees below zero.

Guarantees such as these are to be construed reasonably, according to the intent of the parties, and the more strongly against those giving them; *Parkhurst* v. *Smith*, Willes 327; *Hargrave* v. *Smee*, 6 Bing. 244; *Carlill* v. *Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256.

The proper and reasonable construction to be placed upon these guaranties was that the heating apparatus, if fed and managed in the ordinary way, would give seventy degrees of heat when the weather was ten degrees below zero, and would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.

The evidence shewed beyond reasonable doubt that the apparatus did not answer and was incapable of being made to answer these guaranties.

Hellmuth, for plaintiff. *J. M. McEvoy*, for defendant.

Falconbridge, J.] [Jan. 11.

CITY OF TORONTO *v.* METROPOLITAN R. W. CO.

Railways—Railway Committee of Privy Council—Junction of electric railway with C.P.R.—Laying switch on highway—Power to authorize—Expropriation of right of way—Injunction.

The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge Street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the C.P.R. lines. By order of Nov. 23, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order.

Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge Street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as expropriating or professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or

junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union.

Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway," and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

By an agreement made between the plaintiffs and defendants in 1891, the defendants agreed and undertook that upon receiving at any time twenty-four hours' notice from the plaintiff's engineer they would cease running their cars by electricity on the portion of Yonge Street within the city limits.

Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the engineer's notice having been given on the 14th November, 1899, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city.

Osler, Q.C., and *Caswell*, for plaintiffs. *Aylesworth*, Q.C., and *W. Barwick*, Q.C., for defendants.

Armour, C.J., Falconbridge, J., Street, J.] [Jan. 23.

TEW *v.* ROUTLEY.

Landlord and tenant — Lease — Assignment without leave — Forfeiture — Election — New lease — Waiver — Distress — Acceleration clause — Assignment for the benefit of creditors — Notice under R.S.O. c. 170, s. 34, s-s. 2 — Sale of goods on demised premises — Agreement — Condition — Construction.

A lease of a store was made for five years, at the yearly rental of $700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear, and be recoverable by distress or otherwise. During the term, on Jan. 24, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On

the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On April 5, 1898, the lessors distrained the goods of the defendant in the store for $644, made up of $175 rent due on Oct. 1, 1897, $175 rent due on Jan. 1, 1898, $175 for "the next quarter's rent," by virtue of the proviso in the lease, and $119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back $319.32 of it, which action was dismissed on the 14th December, 1898; (*Tew* v. *Toronto Savings and Loan Co.*, 30 O.R. 76.)

On Dec. 17, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from Feb. 14, 1898. In this action the plaintiff alleged that he was entitled to be paid by the defendants $322, being the proportion of the rent from Feb. 1 to July 1, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R.S.O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it.

Held, that the lessors, by granting the lease of Dec. 17, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous Jan. 28, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged.

Aylesworth, Q.C., for defendant. *C. D. Scott*, for plaintiff.

Falconbridge, J., Street, J.] [Jan. 30.

TORRANCE *v.* CRATCHLEY.

Mechanics' lien—Twenty per cent. reserve—Payment before thirty days—R.S.O. c. 153, s. 11.

All work on a building was finished on August 11, 1899. On August 14, 1899, four workmen whose wages remained unpaid and who were entitled to liens for the amount, threatened to register their liens unless paid at once. The owner thereupon paid the amount; and afterwards treated the same as deducted from the twenty per cent. retained under R.S.O. c. 153, s. 11, and proceedings having been commenced the owner paid the balance of the twenty per cent. into court. The balance so paid in, however, was more than sufficient to pay all remaining wage-earners in full.

Held, that under the above circumstances the owner was justified in making the payments out of the twenty per cent. before the expiration of the thirty days mentioned in the Act and could not be required to pay the sum over again into court. By making such a payment, however, the owner takes the responsibility of showing that he has placed the other lien-holders in no worse position by his action as has been shewn in the present case.

Ritchie, Q.C., for appellant, the owner. *Douglas*, for plaintiffs. *McCord*, *Cook* and *Rowen*, for various lien-holders.

Armour, C.J., Falconbridge, J., Street, J.] [Jan. 31.

RAE *v.* RAE.

Alimony—Desertion—Offer to receive wife back—Bona fide.

The decision of MEREDITH, C.J., 35 C.L.J. 612, affirmed on appeal. *Holman*, Q.C., for defendant. *Aylesworth*, Q.C., for plaintiff.

Armour, C.J., Falconbridge, J., Street, J.] [Feb. 5.

IN RE MICHELL *v.* THE PIONEER STEAM NAVIGATION COMPANY.

District Courts—Unorganized territory—Jurisdiction—Vendors and Purchasers Act—R.S.O. c. 109, s. 7.

Held, that notwithstanding anything in R.S.O. c. 109, s. 7, and R.S.O. c. 51, s. 185, the Local Judge of the High Court in the district of Rainy River had no jurisdiction to deal with the applications under the Vendors and Purchasers Act, R.S.O. c. 134, or under the Land Titles Act, R.S.O. c. 138.

C. C. Robinson, for appellants. *Ferguson*, for respondents.

Meredith, J.] TURTLE *v.* TOWNSHIP OF EUPHEMIA. [Feb. 8.

Ditches and Watercourses Act—Award — Engineer — Appointment — Revocation—Notice—Jurisdiction—Estoppel—Appeal.

By s. 4 (1) of the Ditches and Watercourses Act, R.S.O. c. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken." The defendants' municipal council appointed R. such engineer, in manner provided by the Act, in April, 1895, and he accepted the office and acted and continued in it. In 1898 they, without any notice to R., and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint S. as such engineer. In both appointments the form of by-law prescribed by the Act was used; the latter by-law in no way referring to the former to R.

Held, that the prior appointment had not been revoked; that S. did not become "the engineer"; and that an award purporting to be made by him as such engineer under the Act was invalid. S. was not de jure the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; and semble, that the notice required was of intention to revoke. The defendants could not assent that S. was de facto the engineer, for he had not the reputation of being the engineer.

Held, also, even supposing that consent could confer jurisdiction, or that plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and it was the act of the township clerk which called in S. instead of R.; the plaintiffs did not know who was the engineer; they had heard that S. had been appointed, but neither of them knew that R.'s appointment had not been revoked by by-law of which he had had notice. The point was raised upon an appeal against the award and was overruled; but as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now.

T. G. Meredith and *Dromgole*, for plaintiffs. *W. J. Hanna*, for defendants.

IN THE SURROGATE COURT OF THE COUNTY OF LANARK.

Senkler, Co. J.] IN RE ESTATE OF H. S. LECKIE. [Jan. 17.

Administration — Solicitor executor — Costs — Remuneration to executor — Trustee Act, R.S.O. c. 129.

On the passing of executors' accounts, one of the executors, being a member of the firm of solicitors who acted for the estate, the bill of costs of the executor solicitor's firm was objected to on the ground that an executor can make no profit out of the estate.

The facts sufficiently appear in the judgment of:—

SENKLER, Co. J.—This matter comes before me in a rather exceptional manner. The testator appointed three executors, who all took probate, the survivor of whom was the widow, Mary Leckie, who took a life-interest. By her will, J. F. Kellock and J. M. Balderson were appointed executors, and they took probate of her will, thereby becoming executors of Henry S. Leckie's estate. This is an application by the executors to pass their accounts as executors of Henry S. Leckie's estate. Mr. Balderson, the executor, is a member of the firm of Matheson & Balderson, who (Mr. Matheson while practising alone, and the firm since) acted as solicitors for Mr. Leckie in his lifetime and for Mrs. Leckie in her lifetime. These proceedings are in the name of Matheson & Balderson as solicitors. Mr. Balderson appeared on the application, and Mr. F. A. Hall as agent for the official guardian for the infants interested. No one else appeared, though all parties had been notified. Upon reaching the item of solicitor's bill, the quantum was objected to; and upon my stating that unless the amount was agreed upon I should direct a taxation, the amount was then fixed by agreement. The costs of the application were taxed and the balance adjusted, subject to the payment of succession duties. The matter stood over for the payment of the succession duties and filing of evidence of payment. Before the parties dispersed, Mr. J. A. Allan appeared for Mrs. M. J. Kellock, a legatee, and took the figures to submit to his client. Subsequently, Mr. Balderson, Mr. Hall and Mr. Allan appeared before me, when Mr. Allan objected to the allowance of everything in the solicitor's bill beyond costs out of pocket on the ground that a solicitor executor could not recover for professional services rendered by himself or his firm for work out of Court. He also objected, but not so strenuously, that the same objection applied to the petitioner's costs of passing the accounts.

The rule in England is to follow the old rule, long established, that a trustee or executor cannot make a profit out of his office. An exception was made in *Craddock* v. *Piper*, 1 Mac. & G. 664, to the effect that a solicitor, trustee, etc., a member of a firm who acted in suits as solicitors for all the trustees in some suits, and for cestuis que trust in others, did not prevent the firm recovering costs of suits awarded, provided the costs were

not increased by the addition of the solicitor trustee as a party. In *Broughton* v. *Broughton*, 5 DeG. M. & G. 166, it was held that work out of Court under similar circumstances did not come within the exception. There are doubts expressed as to the propriety of the exception, as decided in *Craddoch* v. *Piper*, but that case is now considered as too well settled to be disturbed. In this country *Craddoch* v. *Piper* has been followed in *Meighen* v. *Buell*, 25 Gr. 604, and *Strachan* v. *Ruttan*, 15 P.R. 101.

The point as to services performed out of Court has not been decided in this country, so far as I can find. In Holmested & Langton, at p. 848 (note), there is a suggestion that the English rule does not apply in this country, owing to R.S.O. c. 129, s. 40. Sec. 43 of that Act applies to this Court (Surrogate Court).

In an experience extending over twenty-six years, this is the first occasion in which I have had to face this question. In the absence of any decision in this country, I must dispose of the question as one of first impression. The Legislature having enacted by s. 43 that "The Judge of the Surrogate Court may allow the executor, trustee or administrator, acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee or administrator in passing his accounts," has made a departure from the rule in England, which was probably introduced into this country, that a trustee cannot make a profit of his office. It must be observed that the allowance is for services in the most comprehensive words, but is hedged round with care, for it can only be allowed by the judge; can never be ex parte. If made on a substantive application, it can only be made after due notice, and, when made, is a judicial adjudication. If made, as is usually the case, on the passing of accounts, which can only be done on the application of a party adverse in interest, or when infants are interested, R.S.O. c. 50, s. 73. In the latter case, the official guardian represents the infants; therefore, in all cases the claim for allowance of remuneration is subject to close scrutiny. It seems to me that for a class of work like solicitor's work a bill of items which can be scrutinized is more satisfactory than the fixing of a percentage.

I therefore allow the solicitor's bill of costs as part and parcel of the remuneration. The costs of passing the accounts being entirely work in Court must be allowed. If, upon appeal, it should be held that the solicitor's bill should not be allowed them, in my opinion the quantum of the allowance to the executors should be reconsidered, as I took into account the solicitor's bill in fixing the remuneration.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] CRAIG *v.* MATHESON. [Feb. 7.

Building contract—Sub-contractor — Consideration — Burden of proof—Acceptance of order for payment—Authority—Bills of Exchange Act, s. 23—Money had and received—Costs.

Plaintiff contracted with F. for the sum of $200 to do the plumbing of a house which F. had contracted to build for the defendant, W.E.M., according to specifications which included plumbing. F. having failed to complete his contract plaintiff sought to recover the amount due him from W.E.M., whose wife, M.M., was joined as a co-defendant, alleging that before he undertook the work he saw M.M., who was acting for W.E.M. in his absence, and that she agreed to pay him the $200 and keep it out of the contract.

Held, that the promise alleged, if made, was gratuitous and not legally binding; that it would take strong evidence as to consideration and as to the intent of the parties to give the promise an effect which would make the party promising liable to pay plaintiff; that the burden of proof was on plaintiff, and the evidence on the point contradictory and unsatisfactory. The finding of the trial judge that plaintiff looked to defendants as his paymasters and did the work for them and not for F. must be set aside.

After the work which plaintiff contracted to do had been completed, F. drew an order on M.M. for the amount to which plaintiff was entitled, which M.M. accepted in these terms: "Accepted by Mrs. Matheson."

The trial judge found that M.M. had no authority to accept so as to bind her husband, but that the latter had ratified his wife's act and was liable on the order.

Held, 1. Reversing this finding, that the acceptance being one which purported to be binding only upon M.M. was incapable of ratification by the defendant W.E.M., and that the doctrine of ratification was inapplicable.

Held, 2. The document was governed by s. 23 of the Bills of Exchange Act and that no one could be made liable on it as acceptor who had not signed it as such.

Held, 3. The action for money had and received was inapplicable to the case under consideration, such action lying only where a person has received money under circumstances rendering the receipt of it a receipt by such person to the use of the plaintiff.

Appeal allowed and judgment entered for defendants with costs.

A. E. Silver, for appellant. *F. J. Tremaine*, Q.C., for respondent.

Full Court.] GROWELL *v.* SMITH. [Feb. 7.

Fishing voyage—Action for goods furnished, etc., in connection with—Managing owner held not liable in absence of contract—Costs.

In an action by plaintiff, part owner of a fishing vessel, against defendant, managing owner of the vessel, for supplies furnished and advances made to the captain and crew in connection with a fishing voyage, it appeared that prior to the time of the alleged furnishing of supplies, etc., the vessel was let to the captain on the quarter lay, viz., on terms that the captain and crew should prosecute the voyage, and should, at the end of the fishing season or sooner, dispose of the fish caught and render to the owners of the vessel one-quarter of the proceeds, the remaining three-quarters to be the property of the captain and crew.

Held, that there being no legal liability on the part of defendant it was incumbent upon plaintiff to establish a contract against defendant, and there being no evidence express or implied of such contract, the judgment entered for plaintiff at the trial should be reversed, and judgment entered for defendant with all costs.

McCoy, for plaintiff. *Drysdale,* for defendant.

Province of New Brunswick.

SUPREME COURT.

En Banc.] VIOLET *v.* MARTIN. [Feb. 9.

Security for costs—Temporary residence within province.

The plaintiff resided at VanBuren, Me., and removed across the line to New Brunswick, temporarily, for the purpose of bringing this action.

Held, on an application for security for costs, that her residence within the Province at the time of the application, though temporary and for the purpose of defeating an application for security of costs, was a sufficient answer to the application.

A. R. Slipp, for defendant. *C. E. Duffy,* for plaintiff.

En Banc.] HICKS *v.* OGDEN. [Feb. 9.

Particulars—Amendment at trial—Affidavit of prejudice—Postponement—Offer to suffer judgment.

In opposition to an application for the amendment at trial of plaintiff's particulars by the addition of an item for an account stated, and an item for ten month's additional wages, defendant's attorney made affidavit that when he saw the plaintiff's claim was less than the payments made by defendant and his set-off, he did not in preparing for trial enquire particularly into the plaintiff's account, considering a judgment against plaintiff of no value; that had his claim contained the additional items sought to be added he would, had he found them to be correct,

offered to suffer judgment; that he was absolutely unprepared to make defence to the additional claim, and that great injustice would be done to defendant if the amendment were allowed, and defendant forced to go to trial at the circuit then being held. Defendant also made affidavit that he could not safely enter upon his defence to the additional claim without the evidence of one whose attendance he could not procure for two or three days. The judge allowed the amendment, but waited for the witness referred to and then proceeded, when the jury found for the plaintiff.

Held, on motion for new trial, Barker and McLeod, JJ., dissenting, that the amendment should not have been allowed under the circumstances without postponement of trial till next circuit. New trial ordered.

M. G. Teed, for plaintiff. *H. A. Powell*, Q.C., for defendant.

En Banc.] EX PARTE VANWART. [Feb. 9.

Judgment debtor—Ex parte order for examination—Judge of Supreme Court—Privilege.

Held, Tuck, C.J., dissenting, that an order for examination of a judgment debtor under s. 36 of 59 Vict., c. 28, should not be made ex parte.

Held, also, per Tuck, C.J., Landry and Barker, JJ., Hannington J., dissenting, that a Judge of the Supreme Court is not privileged from examination as a judgment debtor under said Act. Rule absolute for certiorari to remove order for examination.

A. H. Hannington, Q.C., and *W. Pugsley*, Q.C., in support of rule. *G. F. Gregory*, Q.C., contra.

En Banc.] STEWART *v.* CANADIAN PACIFIC RAILWAY CO. [Feb. 9.

Writ—Wrong name for that of plaintiff in conclusion—Amendment.

An attorney's clerk in preparing county writ, inserted a wrong name for that of the plaintiff in the conclusion of the writ. The defendant did not appear and the plaintiff signed interlocutory judgment. An application was afterwards made to the County Court Judge to set aside the writ and interlocutory judgment. The plaintiff asked for leave to amend. The judge, however, held that the writ was a nullity, refused the application for leave to amend, and set aside all the proceedings.

Held, on appeal, that the County Court Judge was wrong in treating the writ as a nullity, and should have granted the leave to amend.

Thos. Lawson, for appellant. *A. B. Connell*, Q.C., for contra.

En Banc.] EX PARTE JONES. [Feb. 9

Costs of appeal—Execution against corporation—Leave to issue.

Held, that it is not necessary to apply for leave to issue execution against a corporation for costs of appeal to the Supreme Court of Canada.

L. A. Curry, Q.C., for applicant.

En Banc] EX PARTE ALLAIN. [Feb. 9.

Affidavit—Marksman—Jurat—Deviation from Rule of Court.

Held, on motion to make absolute an order nisi for certiorari, that the omission from the jurat of the affidavit of a marksman of the word "he" and the use of the words "seemed fully to understand," instead of "appeared perfectly to understand," was not such a deviation from the rule of Court as would invalidate the jurat. Rule absolute for certiorari.

M. G. Teed, in support of rule. *J. D. Phinney*, Q.C., contra.

En Banc.] EX PARTE MCCLEVE. [Feb. 9.

C. T. Act—Search warrant—Order for destruction executed by informant.

Held, Tuck, C.J., and McLeod, J., dissenting, that a constable, upon whose information a search warrant and an order for the destruction of liquors under the C. T. Act were issued, could not legally execute the search warrant or the order for destruction of the liquors. Rule absolute for certiorari to remove order for destruction.

M. J. Teed, in support of rule. *W. B. Chandler*, Q.C., contra.

En Banc.] ADAMS *v.* STOUT. [Feb. 9.

Runaway—Neligence in not getting out of way of—Damage sustained by owner of runaway.

In an action in the St. John County Court for damages caused by a collision between plaintiff's and defendant's waggons, plaintiff's evidence was that his horse became frightened, that he was unable to hold him in, but kept him as close as possible to the gutter on the left hand side of the road; that he saw defendant, about 1000 feet away, coming towards him on the same side of the road and shouted to him to get out of the way, but that the latter failed to do so, the result being a collision by which plaintiff's waggon and harness were damaged. Defendant's evidence was that he went over to his right hand side of the road to speak to a man sitting on a door step, when he saw plaintiff's horse coming towards him on the run, about 100 yards off; that he sheared off to the left and was about five feet from the gutter when plaintiff's waggon struck his. The judge found a verdict for plaintiff.

Held, per Tuck, C.J., and Hannington, Landry and VanWart, JJ., that verdict should have been for defendant.

Per Barker and McLeod, JJ., that although they might have found differently on the evidence, the County Court Judge's finding should not be disturbed.

Appeal allowed with costs, with direction for a new trial, no leave having been reserved to move for verdict for defendant.

W. Pugsley and *E. R. Chapman*, Q.C., for appellant. *A. O. Earle*, Q.C., and *W. A. Erving* contra.

En Banc.] RECEIVER GENERAL OF N.B. *v.* TURNBULL. [Feb. 9.

Succession Duty Act—Voluntary transfer in contemplation of death.

Testator, who died in 1899, seven years before his death voluntarily transferred 1146 shares in the Turnbull Real Estate Co., of the value of $114,600, to his children.

Held, that they were not liable to succession duties under s. 5 of The Succession Duty Act of 1896, relating to voluntary transfers of property in contemplation of death.

A. S. White, Q.C., for plaintiff. *A. O. Earle*, Q.C., and *S. Alward*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.] ROBERTSON *v.* BEERS. [Dec. 12, 1899.

Practice—Ca. re.—Affidavit—Irregularity—Waiver by giving bail.

Summons to set aside an order and the writ of capias issued thereunder and for delivery up of the bail deposited with the sheriff, on the grounds that: (1) The affidavit did not disclose a good and sufficient cause of action and is bad. (2) That the writ of ca. re. was not in the statutory form. (3) That the affidavit was not sufficient as to the defendant's intention to leave British Columbia.

The following were the irregularities in the writ of capias complained of: (1) That the style of cause was inserted, whereas there should be no style of cause, the form not making provision for this. (2) Vancouver was specified as the place for putting in special bail, whereas the form provides no place. (3) The expression, proceedings "may be taken" instead of "may be had and taken." (4) In the warning "a defendant" instead of "the defendant" and "plaintiff" instead of "plaintiffs."

The affidavit of J. H. S., on which the order for arrest was made, was in part as follows: "(1) That I am bookkeeper for the plaintiffs, and as such have a personal knowledge of the state of the accounts between the plaintiffs and defendant. (3) That the defendant, Norman Beers, is justly and truly indebted to the plaintiffs in the sum of $482.19 for lumber and material supplied to the said Norman Beers at his request. (4) That on or about the 29th day of November, A.D. 1899, I saw the defendant Norman Beers, and pressed him for payment of the plaintiff's account. He then promised to give me an order on Messrs. Bowser, Godfrey & Co., for at least $200 of the plaintiff's claim. (7) That I am informed by Ernest Evans, of the City of Vancouver, merchant, that the said Norman Beers informed him that he intended leaving for Dawson, and the said defendant also informed me to the same effect himself."

Paragraph 2 of the defendant's affidavit read on the return of the summons was as follows: "I did not intend leaving the Province of British Columbia permanently, but I have changed my residence from the City of Vancouver to the City of Victoria, and on my leaving Vancouver on the 3rd instant I intended to return to Vancouver, and then procured and have now in my possession a return ticket from Victoria to Vancouver.

Held, 1. That the statements in the affidavit as to the debt and intention to leave the province were sufficient.

2. A defendant arrested under a writ of ca. re. admits by implication his intention to leave the province by denying his intention to leave it permanently.

3. By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ.

Harris, for summons. *Marshall*, contra.

North-West Territories.

SUPREME COURT.

Rouleau, J.] WRIGHT *v.* SHATTUCK. [Jan. 27.

Practice—Commission to take evidence of witnesses abroad—Examination of party thereunder.

Upon the application of the defendant, an order was made for the issue of a commission to take the evidence of witnesses in the Province of Ontario. The plaintiff had consented to the order upon the condition that he should also be allowed to call witnesses before the Commissioner on his own behalf. The order accordingly provided that a commission issue for the examination of witnesses on behalf of both the plaintiff and the defendant. It contained the names of none of the witnesses intended to be examined. Upon taking the evidence under the commission, the plaintiff's counsel tendered the evidence of the plaintiff himself, having given the two days' notice of his intention to do so provided for in the order, and his evidence was taken subject to objection. The commission was opened at the trial of the action and the defendant objected to the reading of the plaintiff's evidence on the ground that the commission and the order under which it was issued were not wide enough to include the taking of the plaintiff's evidence.

Held, that the evidence given by the plaintiff under the commission must be suppressed, as the Commissioner had no authority to examine him; also, that the application to suppress could either be made in Chambers by summons or to the Court directly, upon the trial of the action.

R. B. Bennet, for the plaintiff. *McCarthy*, Q.C., for the defendant.

Book Reviews.

Limitation of Actions against Trustees and Relief from Liability for Technical Breaches of Trust, being a concise treatise upon the position of trustees, by FRANCIS A. ANGLIN, B.A., Barrister-at-Law. Toronto: Canada Law Book Company, 1900.

The law regarding the liability of trustees as affected by Statutes of Limitations has been radically changed during the last few years by the Imperial Act, 51 & 52 Vict., c. 59, s. 8, adopted in Ontario in 1891, see R.S.O. (1897) c. 129, s. 32, and in Nova Scotia in 1889 by 52 Vict., c. 18, s. 17; but we are not aware of any text-book which deals with this subject at all comprehensively.

Mr. Anglin, in the excellent little treatise before us, begins by concisely stating the difficulties under which trustees formerly laboured and which these enactments were designed to remove for the relief of "the honest trustee." He then proceeds to give a clear and well-arranged exposition of the effect of our statutes, dealing first with its scope and the cases excepted from its remedial operation, and then discussing and illustrating the many instances in which the statute will be found of substantial benefit to the trustees. The second part deals with the enactments whereby courts are enabled to relieve trustees from liability when, without dishonesty or culpable negligence or imprudence, some technical breach of trust has been committed.

Though professing to deal with a comparatively narrow branch of the law of trust and trustees, the author has introduced much information which will be of service to those seeking it upon other points connected with the duties and responsibilities of trustees and with the general law of limitations of actions. The work contains an appendix in which the statute law of England, Ontario, Nova Scotia, New Brunswick, Manitoba and British Columbia, affecting the subject dealt with in the text, is collated, and concludes with what appears to be a copious and satisfactory index. Mr. Anglin writes in a clear and forcible style, which makes easy the reading of his book. The publishers have done their part excellently well, the work being both in style, paper and printing quite equal to anything that we have seen published in England.

RULES PASSED 17TH FEBRUARY, 1900.

1230. (26) Clause 4 of sub-section (*b*) of Rule 26 is amended by adding thereto the following:—"when the same shall be transmitted to the Central Office, to be dealt with under Rule 340."

1231. (341) Rule 341 is hereby amended by striking out the word "Toronto" and the words "or in a Divisional Court" in the second line thereof.

1232. (792) Sub-section 2 of Rule 792 is hereby repealed and the following substituted for it:—

(2) The party making the motion shall not be entitled, unless by leave of a Judge or of the Court, to set it down until the Record and Exhibits have been, and it shall be his duty to cause them to be, transmitted to the Central Office.