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The profession in Ontario will be glad to know that the revision of the statutes is in a forward state. The Ontario Statute Commission consists of all members of the Executive Council: The Chancellor, Meredith, C.J., Maclennan and Osler, JJ.A., Ferguson, J., Rose, J., and Falconbridge, J., together with B. M. Britton, Q.C., J. G. Scott, Q.C., Thomas Langton, Q.C., and A. M. Dymond, Law Clerk of the House of Assembly. The Chancellor is Chairman, and Mr. Dymond is Secretary of the Commission.

The amendments suggested by the Commission will be brought before the House this session. It is also intended, we understand, to introduce a number of omnibus Acts, making various changes, and the Commission will then be given power to incorporate all this legislation, together with such other changes as may be made, and so complete the revision. The Revised Statutes of 1897 will, we presume, come into force by proclamation as usual, and be ready for distribution at the end of the year. We sincerely trust that the Legislature will not be economical in the matter of the index. The indexing of the Revised Statutes of the Dominion and of the province has hitherto been of an incomplete character. Such indices should, as a matter of course, be not merely of the statutes, but of all their contents; cross references should, as much as possible, be avoided, and if given, should indicate either the page of the book or of the index to which they refer. Very few men know how to make a good index, and money is well spent in having this troublesome work properly done.

THE QUEEN'S COUNSEL CASE.

The recent decision of the Court of Appeal on the case submitted to it on the subject of Queen's Counsel: 23 App. R. 792, still leaves several questions undecided. One of them is referred to in the judgment of Burton, J.A., touching the right of Queen's Counsel to act as Judges of Assize. The learned judge on that point says: "By statute a judge of a Superior Court in Ontario has the power of deputing any of Her Majesty's counsel to perform his judicial duties, both civil and criminal, at the assizes. Serious consequences might ensue, as in the event of a Queen's Counsel being so deputed who did not hold his commission from the proper authority, all proceedings would be illegal and *coram non judice*, and convictions, even in capital cases, invalidated." But the question, as to who is the proper authority does not appear to be settled by the Court.

The result of the judgment appears to be to declare that the Lieutenant-Governor has the exclusive right to appoint Queen's Counsel, with rights of pre-audience in the provincial courts. Beyond this nothing appears to be settled.

One of the judges (Street, J.) says (but, of course, this is a mere obiter dictum)—that the Dominion Government has the same right of appointment as regards Dominion Courts; but Maclennan, J.A., says that the case submitted did not involve that question, and he expresses no opinion on it, although he afterwards says that he does not deny that there may be Dominion Queen's Counsel.

Hagarty, C.J.O., and Burton, J.A., refrain from expressing any opinion on that point; and there is really no authoritative statement of opinion on the question stated by Burton, J.A., above referred to.

The right of a judge of the Supreme Court to nominate a Queen's Counsel to act as a judge of Assize, is based on s. 85 of the Ontario Judicature Act, 1895, which section is in this respect merely a reproduction of a similar enactment to be found in the C.S.U.C., c. 11, s. 3, which of course antedates Confederation. The Judicature Act, however, varies

slightly from the old statute of Upper Canada by expressly providing that the Q.C. to be so appointed must be one appointed for Upper Canada "or for the Province of Ontario."

It is necessary to bear this in mind, because the B.N.A. Act vests the power of appointing judges in the Governor-General: see B.N.A. Act, s. 96. And the power of appointing judges being thus vested in the Governor-General, it may be asked, can the provincial legislatures empower judges so appointed to delegate their duties? To do so would be virtually to assume in an indirect way to appoint a judge, for a temporary purpose, it is true, but still, so long as his authority lasts, to all intents and purposes a judge. That such a power is vested in the provincial legislatures seems doubtful. R.S.O. c. 45, s. 3, which empowers the Lieutenant-Governor to include Q.CC. in commissions of assize seems open to the same objection. Assuming therefore that the provisions of the Ontario Judicature Act, 1895, enabling a judge of the Supreme Court of Judicature to appoint one of Her Majesty's Counsel to act as a judge of Assize, are ultra vires, there would still remain the provisions of the old pre-Confederation legislation, which would continue in force, and the question then would arise whether the Queen's Counsel referred to, are to be deemed to be, or to include those created by the Lieutenant-Governor, or only those created before Confederation, or since then, by the Governor-General. On the one hand, it may be argued that the Lieutenant-Governor having power to appoint Queen's Counsel, in and for the province, has power to appoint them for all purposes within the province, including the capacity to act, on request, as judges of Assize. On the other hand, it may be argued that inasmuch as the power of appointing judges is vested in the Governor-General, so also by necessary intendment must also be vested in him the appointment of those Queen's Counsel qualified to act as judges of Assize. The power of appointment of judges is plainly one to be exercised with a due regard to strictly personal qualifications, and that being the case, it may not unreasonably be contended that the power authorized to appoint the judges is the only power which can appoint

those qualified to act as substitutes for the judges. Clearly the Parliament which originally conferred the right on judges to appoint a substitute, was the power whose chief executive officer, the Governor-General, alone had the right to appoint Queen's Counsel. This of course does not conflict with the recent decision, as it does not follow that the Governor-General has an exclusive right to appoint all Queen's Counsel, but merely that he has the exclusive right to appoint those Queen's Counsel who are qualified to act as judicial substitutes.

We do not pretend to say which of these views should prevail. We have merely endeavored to show that concerning one of the principal questions connected with the matter, we have no judicial opinion, and as Sir Roger de Coverley said, "There's a good deal to be said on both sides."

Whether the Governor-General has any, and if any, what power to make appointments of Queen's Counsel, is also a question still left open. Another point of minor importance, but still, we think, deserving of attention, is this, assuming it to be ultimately authoritatively decided that both the Governor-General and the Lieutenant-Governors have power to appoint Queen's Counsel, the one for Dominion Courts and the other for Provincial Courts, we should have then (in deed even now we have de facto) two classes of Queen's Counsel, the one having no more rights than those of "utter barristers" in the Courts of the Dominion or the Province, as the case may be. How are the Courts to distinguish to which class of Queen's Counsel a man belongs? How are the "utter barristers" to bear in mind whether a man is a Dominion or a Provincial Q.C.? A barrister may come and sit within the bar of a Court when he has no right to do so. The Courts have hitherto accorded the privileges of Queen's Counsel to all Q.CC., whether appointed by the Governor-General or the Lieutenant-Governor. After the present decision can they any longer properly do so, without injustice to the outer bar? We do not think they can. Such being the case, in order to prevent confusion in this respect, it has been suggested by some that a Dominion Q.C., when he comes into a provin-

cial Court, should don a stuff gown, and that a provincial Q.C. should in like manner wear stuff in a Dominion Court. We do not think that that is desirable; when a man has been appointed a Q.C., whether by the Governor-General or a Lieutenant-Governor, we think he should always be entitled to wear the insignia of his office in whatever Court he may appear. At the same time it does not appear to be right or just to other members of the Bar, that he should obtain privileges to which he is not lawfully entitled; and the right to sit in the front rank of the bar is often a very important privilege. In order to get over this difficulty it is suggested that Dominion Queen's Counsel should be styled Q.C.D., and Provincial Queen's Counsel, Q.C.P., and that some distinctive difference in garb should be adopted. Those of the Dominion might perhaps like to assume the wig and bands! If not, some distinctive mark might be made in their professional attire, for instance a scarlet stripe or band upon the sleeves, or the silks of Ontario might like to have the arms of the province embroidered on the left breast of their robes. We do not desire to copyright these suggestions, but give them for what they may be worth. Many perhaps would think it best to abolish a distinction which unfortunately has ceased to be a mark of professional merit, and so save much inconvenience and difficulty, as well as the time and expense of determining the constitutional questions involved.

MORTGAGEES AND THE STATUTE OF LIMITATIONS.

An interesting article on this subject from the pen of Mr. Holmested, appears in a recent number of the JOURNAL. The article questions, with due deference, the soundness of those decisions which hold that the giving of a mortgage interrupts the running of the statute as against a person in adverse possession to the mortgagor, at the time the mortgage is given.

A few remarks on the other side (that is, in support of these decisions) will perhaps be deemed in place. It is to be noted that throughout Mr. Holmested's article much stress is

laid on the alleged defeating, divesting and interfering with the rights of the person in possession, which is the result of these decisions. Argument on this line is apt to be confusing, or misleading, or both. What we may call the common law rights of the person in possession (that is to say, the rights incident to his mere possession, or his further rights in connection with the defective title under which he may have taken possession), are manifestly in no wise prejudiced, either by the statute, by the giving of a mortgage, or by the decisions referred to. They are therefore out of the discussion entirely. His rights derived under the statute must also be excluded, not because they are foreign to the discussion, but because they are the subject of it. The question is, What rights does the statute, on a proper construction of it, confer on the person in possession as against a mortgagee and those claiming under him? It is obvious that a construction in favour of the rights contended for cannot be upheld by reasoning which assumes that these rights have been conferred. To do so would be to reason in a circle. It may be very disappointing to the man in possession to find that when he has almost reached the goal he is compelled to make a fresh start, simply because the owner has mortgaged the land, and the statute says that in that case the time must run anew against the mortgagee. He may contend that the statute is capable of a different construction, and that the other construction is to be preferred because it is more just, or more consistent, or better accords with the policy of the law; but he cannot base any argument against the adverse construction on the ground that it takes away his rights.

What then, on general principles, ought to be the law? A statute of limitation being admittedly desirable for general cases, how far, if at all, should it be modified in favour of mortgagees? The general rule seems a just one, that time should begin to run from the first accrual of the right of action against the person in possession. In the case of mortgages, should the time count from the accrual to the mortgagor or the accrual to the mortgagee himself? What should we deem just if we had now to make the law?

The first reflection that occurs to one would be that vast sums of money are continually being lent on mortgage security; that it would be a serious blow to both the borrowing and the lending classes to alarm capital by imperilling the security; and that it would be a grave peril if the mortgagee had to stand in the mortgagor's shoes as to the rights of persons previously in possession. It would have to be remembered that on lending money in that state of the law it would not suffice to satisfy oneself that there was no one in adverse possession, according to the old use of the word. The friendly possession of a tenant or of a relative of the mortgagor, might ripen into a title and cut out the mortgage, though it looked harmless enough at the time the mortgage was made. To have to secure satisfactory evidence of payment of rent or acknowledgment of title at the time of taking the mortgage (often on property at a distance) would be an intolerable burden and risk. Add to all this the fact that the person in possession has no claim on the Legislature to perfect his title. It is being perfected as a matter of policy only, not of right, and opposing considerations of policy must receive equal attention.

We should conclude, therefore, that in the case of a purchaser it would be no hardship to require him to get possession, or at his peril to neglect it, but in the case of a mortgagee it would be unreasonable to expose him to risk. The conveyance to him is only for security, and it is desirable that the multitude of such securities in the country be kept good and free from doubt, even if occasionally a possessory title is delayed in being perfected.

So much for what the law ought to be; and next, in defence of those decisions which say that the law is so. For this a good foundation is already laid if the former paragraph satisfactorily proves what it sets out to prove. The question now is as to the time of the first accrual within the meaning of the statute by which the mortgagee is affected. The mortgagee is not an owner; he has only a charge on the land, and has no estate in the land until after default. Even at law he is not entitled to possession, under a mortgage in

the ordinary form. He cannot bring ejectment while his payments have been regularly made. That is his normal state, and it may continue for ten years or for twenty. He may sooner, by default, acquire an estate, with its attendant rights, but he has no means of bringing about that state of things. In fact it is one which primarily he does not want, and he has in a sense secured himself as far as possible against it by his mortgagor's covenant for payment. He cannot protect the land for himself until the event happens, and the event is beyond his control. On principle therefore it would seem that the time of first accrual to him should be the time of default. Lord St. Leonards intimates in *Wrixon* v. *Vize*, 3 Dr. & W., 117, that the section corresponding to section 5, subsection (9) alone governs the case of mortgagees, and that the right first accrues when the forfeiture is incurred. In either case if the right first accrues to the mortgagee on the mortgagor's default, there would seem to be nothing either in the act itself or in principle to prevent the plain consequence that the right would be good against a person in possession prior to the mortgage. If such be not the law, then there would be good grounds, as already indicated, for holding that by section 22 the Legislature intended to make it so. That section is broadly worded; it nowhere makes mention of the mortgagor, and in terms it covers the case of a mortgagee against the world.

It is submitted that the foregoing considerations go well towards establishing the following propositions:

1. That it was the intention and policy of the Legislature to to confer on mortgagees the special rights and privileges in question.

2. That as a matter of public policy the conferring of these was both justifiable and proper.

3. That the plain construction of the statute is in this case the sound one, and that as a matter of law the Act does confer these rights. That, moreover, the rights themselves are in accord with sound principles of law.

4. That the alternative state of the law would be undesirable and unjust.

J. B. McLAREN.

Morden, Man.

AMENDMENTS TO THE OVERHOLDING TENANTS' ACT.

The amendments to the Overholding Tenants' Act, contained in 58 Vict., c. 13, s. 23, and 59 Vict., c. 42, s. 4, Ont., received, as your readers are aware, judicial construction at the hands of the Divisional Court of Common Pleas, consisting of Sir William Meredith, C.J., and Rose, J., in the case of *Magann* v. *Bonner*, on appeal from the judgment of His Honor, F. M. Morson, one of the junior judges of the County of York, sitting for the senior judge. The decision is noted ante, vol. 32, p. 643, reported 28 O.R. p. 37.

Contrary to the opinion entertained by many of the profession and some of the County Court judges throughout the province, the amendment has been held not to effect such a radical change in the jurisdiction of the County Court as was anticipated.

To understand aright the effect of the amending Acts, as they are now finally construed by the Divisional Court, it is necessary to look at the decisions under the original Act respecting overholding tenants, R.S.O., c. 144, prior to the amendments.

In *Price* v. *Guinane*, 16 O.R. 264, Armour, C.J., refused to follow Mr. Justice Gwynne's construction in *Gilbert* v. *Doyle*, 24 C.P., p. 60, of the words "colour of right," wherein he decided that holding "without colour of right," meant having no right or wrongfully holding. The Legislature has now adopted this holding in preference to the view of Armour, C.J., and struck out the words "colour of right," and (for the purpose of removing all doubts) inserted instead "wrongfully holding," leaving still the decision of Armour, C.J., in other respects standing.

The Chief Justice in *Price* v. *Guinane* puts his decision on two grounds, viz.: (1) That colour of right as used in the Act means such semblance or appearance of right as shows that the right is really in dispute. (2) That s. 6 of the Act precludes the judge from trying the right. At p. 267 he says as to this: "The Judge cannot try whether the tenant holds over without right is apparent not only from what has

been said, but from what is to be done by the High Court after the proceedings have been sent up." They "may examine into the proceedings, and if they find cause may set aside the same, and may, if it is necessary, order a writ to issue." He goes on to say: "It would be strange indeed if the County Court Judge should be held to have authority under this Act to try whether the tenant holds over without right when the County Court would not have jurisdiction to try it," referring to R.S.O., c. 47, s. 20.

It must be remembered that *Gilbert* v. *Doyle*, 24 C.P., p. 60, is only the judgment of Gwynne, J., as to the definition of "colour of right." Galt, J., who concurs in the result, puts his judgment on the sole ground that the tenant had shown nothing which entitled him to retain possession against the landlord, while Hagarty, C.J., dissents in a powerful judgment both on the definition of "colour of right" and as to the meaning of s. 6 in the Act, as to which he says at p. 73: "If the Legislature meant here to give the County Judge the absolute right to try the title on the general merits, I repeat it is an inexplicable mystery to me why on appeal to us we should be directed not to decide the right one way or the other, but, in one view of the evidence, to send the question of right to be tried in an action by ejectment."

Now taking this very strong opinion, backed up and adopted by Armour, C.J., in *Price* v. *Guinane*, and which was afterwards affirmed in *Bartlett* v. *Thompson*, 16 O.R., 716, by the Divisional Court of Queen's Bench, it would seem that the change in the wording of the statute has only given jurisdiction in very simple cases, as it leaves the power to review untouched under s. 6 of R.S.O., c. 144.

Mr. Justice Gwynne, at p. 69, in discussing the jurisdiction to review which must control and fix the original jurisdiction of the County Court Judge under the Act, says: "We should be well satisfied that not only is there a question of right in reality to be tried, but that there is strong reason for believing that it should be found for the tenants contention."

Of course, as pointed out by Armour, C.J., in *Price* v.

Guinane: There are always under the statute two questions to be tried. (1) Is this a case coming clearly under s. 2 of the Act? (2) Does the tenant hold without colour of right, which is now changed to, Does the tenant wrongfully hold over?

As to the first question, if there is a doubt raised as to whether it comes under s. 2 of the Act, and as to whether the relation of landlord and tenant existed when the notice was given, and as to the landlord's right to give notice, then that doubt must be resolved in favour of the tenant, and the landlord left to his ordinary remedy in ejectment. Of course if this question be decided in favour of the tenant, that ends the proceedings, as the County Court has no jurisdiction.

The amending Act, as pointed out, makes a difference in the second question of Armour, C.J., and now the question is does the tenant wrongfully hold over? And what does that mean? And can the Judge in Chambers summarily try that question if it is disputed?

It would appear that if the tenant discloses what would be a good defence to an ejectment, and which would defeat a motion for judgment before trial in an ordinary actior for the recovery of land, then the County Court Judge has no jurisdiction to try the question, and has no option but to dismiss the application. The Judges of the Divisional Court in *Magann* v. *Bonner* practically hold that this was the right view to take of the Act and amending Acts, and allowed the appeal.

JNO. MACGREGOR.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

The Law Reports for January comprise: (1897) 1 Q.B., pp. 1-131; (1897) P., pp. 1-18 and (1897) 1 Ch. pp. 1-63.

PRACTICE—WRIT, SERVICE OF—FIRM—RECEIVER, AND MANAGER OF BUSINESS OF FIRM—(ONT. RULE 266).

In re Flowers, (1897) 1 Q.B. 14, a receiver and manager had been appointed by the High Court in respect of the business of a firm in an action for the dissolution of the firm. It was desired to serve a bankruptcy notice on the firm, and the Rules in Bankruptcy contain a similar provision to that contained in Ont. Rule 266 as to the persons on whom such notice may be served. The notice was served upon the receiver and manager, but on the application to adjudicate the firm bankrupt the objection was taken and allowed that the notice had not been properly served on the firm, and the application was consequently dismissed: and the Court of Appeal (Lord Esher, M.R., and Lopes, and Rigby, L.JJ.) agreed that the receiver and manager was not a person having "the control or management of the partnership business" within the meaning of the Rule.

STATUTE—CONSTRUCTION—WITNESS, "DESCRIPTION" OF.

In *Sims* v. *Trollope*, (1897) 1 Q.B. 24, it became necessary to determine the meaning of a statute which required that "the description" of the witness to the execution of an instrument should be stated. The name and address of the attesting witness was stated, but no description of him was given. It appeared from evidence that he had no occupation but lived at the address stated, on an allowance made him by his father. Grantham, J., who tried the case, held that the instrument (a bill of sale) was void for non-compliance with the statutory requirement as to stating the description of the attesting witness. It was argued on the appeal from his decision that the word "description" was equivalent to "occu-

pation," and that its omission was equivalent to a statement that the witness had no occupation. The Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) were, however, unanimous that the case was covered by authority and that "description" was not equivalent to "occupation," and that the omission to give any description of the witness was fatal.

COMPANY—LIQUIDATION—WINDING UP—JUDGMENT IN REM—PROCEEDINGS IN REM IN FOREIGN COURT—RIGHT TO RETAIN PROCEEDS OF JUDGMENT IN REM AS AGAINST LIQUIDATOR.

Minna Craig S. S. Co. v. *Chartered Mercantile Bank*, (1897) 1 Q. B. 55, was an action brought by a liquidator of a company ordered to be wound up, in the name of the company, to recover from the defendants the proceeds of a judgment in rem obtained by the defendants in a foreign Court against the property of the company, after the making of the winding-up order. The facts of the case were, that the plaintiff company owned a ship which was loading in India for a voyage to a German port, and the master of the ship was induced by fraud to sign bills of lading for goods which were never put on board. These bills of lading were indorsed for value without notice of the fraud to the defendants, a banking company, whose registered place of business was in England. By the law of Germany non-delivery of the goods specified in a bill of lading entitles the holder of the bill to a lien on the ship. The ship sailed, and on the day she arrived in the German port the winding-up order was made against the plaintiff company, her owners. On the same day, the defendants, who had discovered the fraud, arrested the ship and took proceedings against her in the German Court, which resulted in the ship being sold, and the claim of the defendants was satisfied out of the proceeds. The plaintiff company was not a party to the proceedings in the German Court, and now claimed that the proceeds of the judgment were money had and received to the company's use, and as such divisible among the general body of its creditors: but Collins, J., held that the judgment of the German Court was a judgment in rem, that the charge on the ship which was enforced in that action, existed prior to the winding up, and the

liquidator took the property subject to that charge, and that it made no difference that the judgment to enforce the lien was made after the winding-up order: that the judgment being in rem, there was no precedent for holding that the proceeds of it could be claimed by the liquidator, in which respect it differed from a judgment in personam. Judgment was therefore given in favor of the defendants.

VENDOR AND PURCHASER—"OUTGOINGS"—AGREEMENT TO PAY OUTGOINGS UP TO COMPLETION—ORDER TO TAKE DOWN DANGEROUS STRUCTURES.

Tubbs v. *Wynne* (1897) 1 Q.B. 74, was an action to determine the meaning of the term "outgoings" in a contract of sale. The vendor of land had agreed to discharge all "outgoings" up to the day fixed for completion of the contract. After the contract and before the day fixed for completion, a magistrate in pursuance of a statutory power made an order for the removal of dangerous structures on the land. The order was not complied with, and after the day fixed for completion the municipality, under its statutory powers, removed the structures and demanded and received from the purchaser the expenses of so doing; and the action was brought to recover them from the vendor. The defendant claimed that they were not "outgoings" within the meaning of the contract, relying on the judgment of Kay, J., *In re Boor*, *Boor* v. *Hopkins*, 40 Ch. D., 572; and even if they were "outgoings" he contended that the liability did not arise until after the work was done, which was subsequent to the day fixed for completion. But Collins, J., was of opinion that the order to remove having been made before the day of completion, the liability for the expense of removal arose as soon as the order was made, and that it was an "outgoing" within the meaning of the contract, which the vendor was liable to discharge, and from which he could not escape by disobeying the order.

INSURANCE—EXECUTION OF POLICY—POLICY RETAINED BY INSURERS AFTER EXECUTION—CONTRACT—RECITAL—PREMIUM—WAIVER OF PREPAYMENT.

Roberts v. *Security Co.*, (1897) 1 Q. B. 111, is a very important decision on the subject of insurance law. A proposal for an insurance of goods against loss by burglary was made by the plaintiff to the defendant company, on 14th Decem-

ber, 1895. On the 27th December, 1895, the seal of the company was affixed to a policy in conformity with the plaintiffs' proposal, and the policy was signed by two directors of the company, and their secretary. No premium had in fact been paid, but the policy recited that a premium had been paid for an insurance against loss by burglary from 14th January, 1895, to 1st January, 1897, and purported to insure the plaintiff accordingly. The policy had never been delivered to the plaintiff, but remained in the possession of the company. There was no evidence that it had been executed or delivered as an escrow. On the night of the 26th December, 1895, the plaintiff suffered a loss by burglary which was unknown to the defendant company when the policy was executed. The plaintiff claimed that this loss was covered by the policy. It can readily be seen that the case afforded plenty of scope for argument. The Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) without calling on the plaintiff, affirmed the judgment of Grantham and Wright, L.JJ., in his favor, holding that the policy was a completed contract, that the defendants could not set up the non-payment of the premium contrary to the recital that it had been paid, and that the retention of the policy in the hands of the company was immaterial.

FRAUDULENT PREFERENCE—"CREDITOR"—ACCOMMODATION INDORSER—PAYMENT TO BANK TO MEET ACCOMMODATION BILL—(R.S.O. c. 124, s. 2, (2).

In re Paine, (1897) 1 Q.B. 122, a bankrupt paid a sum of money into a bank to meet a bill of exchange which one Barnard had accepted for his accommodation. The question in the case was whether Barnard was a creditor within the provisions of the Bankruptcy Act against preferential payments. Williams, J., held that he was, and that the payment made for the benefit of a surety before he was called on to pay, was a fraudulent preference. The same rule would no doubt govern the construction of the word "creditor" in R.S.O. c. 124, s. 2, (2).

None of the cases in the Probate Division call for any notice here.

COMPANY—MEETING OF SHAREHOLDERS—VOTING—SHOW OF HANDS—PROXIES—FORM OF PROXIES.

In *Ernest* v. *Loma Gold Mines*, (1897) 1 Ch. 1, the Court of Appeal (Lindley and Smith, L.JJ.) affirms the judgment of Chitty, J., (1896) 2 Ch. 572, (noted ante vol. 32, p. 708) holding that at a meeting of shareholders of a company, the articles of which allow voting by proxy, upon a show of hands, each person present, though holding proxies, is only entitled to a single vote, and that proxies can only be utilized on a poll being taken. The filling in of blanks, left by mistake in proxies, in accordance with the presumable intention of the shareholders giving them, was held admissible.

COMPANY—LIQUIDATION—DEBENTURES—CHARGE ON PROPERTY BOTH PRESENT AND FUTURE—UNCALLED CAPITAL NOT BOUND BY CHARGE ON "FUTURE" PROPERTY.

In re Streatham and General Estates Co., (1897) 1 Ch. 15, an application was made by the liquidator of a company being wound up, to obtain the opinion of the Court as to whether certain debentures which had been issued by the company prior to the winding-up order, and which were charged on "the undertaking and all its property—both present and future" were effectively "charged upon" capital of the company, which had been called up after the liquidation commenced. The company had power to borrow upon the security of any of its property—both present and future—including uncalled capital; but Chitty, J., held that the debentures were a charge only on the property of the company as it existed at the commencement of the liquidation, and did not extend to capital subsequently called in; the word "future" he held did not extend the meaning of "property" as defined in *Stanley's Case*, 4 D. J. & S. 407, and *In re Colonial Trusts*, 15 Ch. D. 465.

CORRESPONDENCE.

PROBATE LAW IN NOVA SCOTIA.

To the Editor of the Canada Law Journal.

SIR,—A Bill is now before the Legislature of Nova Scotia to transfer the whole Probate jurisdiction to the County Court Judges, enlarging the powers of the Registrar of Probate in each county as to the transaction of "non-contentious" business, but requiring the Judge of the County Court to hear all "contentious" business at the various terms of his Court. It is not proposed to allow the Judge anything either by way of payment or indemnity for travel, or living expense abroad in connection with this work, but to make the salaries and allowances fixed by Parliament for his other work applicable to it. Is not this in violation of s. 100 of B.N.A. Act? It may be necessary to explain that in Nova Scotia each Judge has a district embracing three counties under his jurisdiction. Even in the county where he resides he has to hold terms alternately in the three towns and some other town or towns in the county. He has no Division Courts, such as exist in Ontario, but a number of district and separate County Courts, in which he tries de novo all petty cases appealed from the decision of the magistrates, and, with usual exceptions, all actions of tort up to $400, and all actions arising out of contracts from $20 to $400.

Heretofore there has been a Judge of Probate in each county, paid by fees aggregating from $400 to $800 each; and the Government say that the popularity of the proposed measure depends on its abolishing these fees, and making the County Court Judges do the work for nothing. Should not the Minister of Justice advise His Excellency to withhold assent from such a measure, involving, as it must, an actual tax on the salaries of the Judges, and evading the provision by which the Dominion is exempted from paying the Judges of Probate in Nova Scotia and New Brunswick?

JUS.

[We shall refer to this in our next issue.—ED. C.L.J.]

LAW COSTS.

To the Edi[illegible] of the Canada Law Journal.

SIR,—I [illegible]ve taken great interest in a letter by Mr. H. Percy Blanchard which appeared lately in your journal, in respect to our system of costs as opposed to that in vogue in some States in the Union. I have had some pra[illegible]tical knowledge of the working of that system, and as far as I am concerned should oppose its introduction into this country.

In the first place, I suppose, that while there is law there will needs be lawyers, and as no class of workmen can exist without recompense, while there are lawyers there must be some fund from which such recompense shall come. I do no think we are sufficiently advanced in universal brotherhood to get along without courts, nor sufficiently steeped in Socialism to pay the lawyers out of the public purse and give everybody free litigation. The only other practical plans to pursue are to have the costs of both sides paid by the losing party—the English system, or to have each party practically pay his own costs, no matter what the result of the action, which I will call the American system.

Neither system will entirely satisfy everybody, for the honest creditor proceeding to attempt to collect an honest debt will object even more strenuously to pay a part to obtain his rights owing to the negligence or dishonesty of his debtor, than will the dishonest debtor when, after a struggle to avoid payment of his just debt, he finds himself saddled with the costs of both sides. And to all parties one fact must be evident, that the creditor has justice on his side. Of course, owing to the imperfections of human nature and human systems generally, the honest but mistaken suitor sometimes has to pay the piper. But between the two systems there is this distinction; under the English system the honest suitor runs a chance of coming out comparatively easily; under the American system, no matter how good his case, how honest his claim, he must pay heavily for his rights. For my experience is that unrelieved from the guardian eye of the taxing master, the clients fare worse than under the English system. Neither system will deter men from going to law, neither

system will make business brisk in an old and settled community. Professional friends of mine in Michigan complain as much of the decrease of business as the lawyers in Ontario. And why the preparation of bills of costs, if they are honest, and represent value given to the employer, should be repulsive, I cannot understand; and, under the pruning knife of the taxing master extravagant bills take a form more consistent with the honor of the profession.

Under the practical working of the American system I have seen a number of salient points which may be worth considering: (1) That small claims are to a far greater extent thrown away than under our system, for the attorney's bill is sure, and there is no chance for recoupment even if the collections are made. (2) Wealthy men and large corporations enjoy practical immunity as against poor men. Their lawyers are engaged by the year, the length of the litigation does not entail upon them any more expense, and the poor litigant is taken as of course from court to court on appeal, till his victory is a barren one in the end. (3) The large increase in the number of appeals which has kept the United States Supreme Court in arrears for years, and has caused the formation and organization of the Circuit Courts of Appeal, and which caused the Supreme Court of a comparatively small State as that of Washington, to shed reports at the rate of three or more volumes per year. (4) The large increase of contingent fee business which introduces into the profession a tone which, to say the least, does not tend to elevate it. (5) The certainty of paying expenses on both sides, if unsuccessful, is a deterrent from frivolous interlocutory proceedings. And (6) although it may be in the interest of the profession to increase litigation, can it be said to be in the interest of the public at large to do so, by removing the penalty which now falls on the unsuccessful litigant for the benefit of the successful one?

I feel sure that the more experience any one has with the system suggested by Mr. Blanchard, the more he will appreciate our own, both for the public and for the profession.

R. L. REID.

New Westminster, B.C.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

JULIEN *v.* THE QUEEN.

Customs law—Wrongful seizure of vessel—Damages—Jurisdiction.

Damages cannot be recovered against the Crown for the wrongful act of a Customs officer in seizing a vessel for a supposed infraction of the Customs law. Under the provisions of s. 15 of the Exchequer Court Act, however, the claimant is entitled to the restitution of the vessel.

2. The Exchequer Court has jurisdiction to entertain a petition of right founded upon a claim in respect of which the Controller of Customs has given his decision under s. 180 of The Customs Act, but has not referred such claim to the Court as therein provided.

[OTTAWA, Nov. 16, 1896—BURBIDGE, J.

The suppliant brought his petition to recover possession of the schooner "Rising Sun," which had been seized for an alleged infraction of the Customs laws of Canada, and for damages arising from such seizure. The Controller of Customs had maintained such seizure, and the suppliant, within the thirty days mentioned in the ss. 181, 182 of The Customs Act (R.S.C. c. 32), gave notice in writing that the Controller's decision would not be accepted. The Controller, however, did not refer the matter to the Court, but the suppliant was given a fiat for his petition of right.

Rowlings and *Thompson*, for suppliant.

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

BURBIDGE, J.: At the trial which took place at Halifax on the 3rd of October, 1895, I came to the conclusion that a case had not been made out for the forfeiture of the vessel, and I ordered that it should be forthwith restored and delivered up to the suppliant, with her tackle, upon his filing with the Registrar of the Court a personal undertaking that the vessel would be re-delivered to the Crown if the order then made should eventually be set aside and judgment be entered in favor of the respondent. The Crown also had liberty on the first day of the next sitting of the Court at Halifax to move to examine a witness who could not be produced at the hearing on the third day of October, 1895. The personal undertaking I have mentioned was given by the suppliant, and the vessel with her tackle was delivered to him. The witness whom the Crown had desired to examine was not produced at the next sitting of the Court, but counsel for the Crown, in pursuance of leave reserved, moved to set aside the order made on the ground of want of jurisdiction in the Court to entertain the petition. The suppliant at the same time, in pursuance of leave reserved to him, moved for judgment for damages for the arrest and detention of the vessel.

With reference to the first question, it is argued for the Crown that where the Minister or Controller of Customs makes his decision in respect of any seizure or detention, penalty or forfeiture, and the claimant within the thirty

days prescribed by statute, gives him notice in writing that his decision will not be accepted, the Court has no jurisdiction over the matter unless it be referred to the Court by the Minister or Controller. With that contention I cannot agree. The 15th section of the Exchequer Court Act provides that the Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might in England be the subject of a suit or action against the Crown; and, for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown. And by the 23rd section it is provided that any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises, and if any such claim is so referred no fiat shall be given on any petition of right in respect thereof. If in the present case the Controller had made a reference then there could not have been a petition of right, but in the absence of such a reference there cannot be any doubt that a petition will lie. In this case a fiat has been granted, the petition has been filed, and upon the evidence taken it has appeared that no offence had been committed whereby the property in the vessel in question had passed from the suppliant to the Crown. It is therefore a case in which the property of the subject is in the possession of the Crown, and I entertain no doubt of the jurisdiction of the Court in such a case.

With reference to the other question which arises upon the motion made by he suppliant for damages, I am of the opinion that the suppliant cannot succeed. It is well settled law that no petition will lie against the Crown for damages for the wrongful act of an officer of the Crown, except in cases where the liability exists by virtue of some statute. There is, so far as I know, no statute which makes the Crown liable for the wrongful act of a Customs officer in seizing a vessel for a supposed infraction of the Customs laws. In such cases, except so far as the officer is protected by law, he is himself personally liable for his act, and in an action against him the suppliant may no doubt recover his damages; but I know of no authority for his recovering damages against the Crown in such a case as this. As I have before pointed out, if property wrongfully seized is in the possession of the Crown, the owner may have his petition to recover the same, and so far in this case the suppliant's action has been maintained; but there is no authority for allowing him as against the Crown damages for the wrongful act of its officer.

I think both motions should be dismissed, and under the circumstances, without costs to either party.

Province of Ontario.

HIGH COURT OF JUSTICE.

WINCHESTER, Master.] [Sept., 1896.

BOLTON *v.* LANGMUIR.

Writ of Summons—Service out of jurisdiction—Defendant's nationality.

Motion by the defendant to set aside an order allowing a writ of summons to be issued for service out of the jurisdiction, together with the writ of summons and the service thereof; on the grounds that the cause of action did not arise within the jurisdiction of the Court, and that the defendant not being a British subject should have been served with a notice in lieu of the writ, and not with a copy of the writ.

It appeared that the writ had been served substitutionally pursuant to the order to that effect, on the defendant's solicitor within the jurisdiction; that the defendant was born of a British father in the United States, whence he had removed to France, where he was residing at the date of service.

It was claimed for the plaintiff that a person could be both a British subject and an American citizen at the same time, and that the defendant had never taken the necessary steps to divest himself of his British citizenship.

Without deciding the question of citizenship, the Master held that the service was good, having been effected within the jurisdiction under the order for substitutional service.

Ford v. *Shephard*, 34 W. R. 63, followed.

E. B. Brown, for defendant.

J. MacGregor, for plaintiff.

MEREDITH, J.] [Jan. 2.

IN RE CENTRAL BANK OF CANADA.

Appeal—Leave—Winding-up Act—Successive applications—Special circumstances—Terms.

Orders having been made in the matter of the winding up of an insolvent bank for payment of certain moneys out of Court to the executors of the purchaser of the assets, and the moneys having been paid out to them, the Receiver-General for Canada asserted a claim for such moneys under ss. 40 and 41 of the Winding-up Act, R.S.C. c. 129, and, not having been a party to the applications for payment out made by the executors, presented a petition for payment over to him by them, or repayment into Court of such moneys, or in the alternative, for leave to appeal from such orders. This petition was dismissed, upon the ground that the petitioner was not entitled to complain, even if the moneys had been improperly paid out.

Upon an application by the petitioner for leave to appeal to the Court of Appeal from the order dismissing his petition,

Held, that a Judge of the High Court has power to grant the leave sought, the application not being in effect a second application for leave to appeal from the orders for payment out.

And, under all the circumstances of the case, leave to appeal was granted, upon security for costs being furnished, the question being a new and important one, and the amount involved considerable.

Moss, Q.C., and *F. E. Hodgins*, for the applicant.

S. H. Blake, Q.C., and *W. R. Smyth*, for the executors.

MACMAHON, J.] [Jan. 10.

FOSTER *v.* CORPORATION OF HINTONBURGH.

Municipal corporations—Annual rate limited to two cents—"School rate"—Debentures for school house—Con. Mun. Act, 1892, 55 Vict., c. 42 (O.).

The annual amount required to pay for debentures issued under a by-law passed for the purchase of a school site and the erection of a school house thereon, comes within "school rates" excluded from the two cents, to which by s. 356 of the Con. Mun. Act, 1892, 55 Vict., c. 42 (O.), the annual rate required to be levied by municipalities, is limited.

G. C. S. Lindsay, for the plaintiff.

Clement, for the defendants.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [Jan. 25.

SCOTTISH ONTARIO LAND CO. *v.* CITY OF TORONTO.

Municipal corporation—Action for not supplying water according to contract—General issue—Notice of action—Reasonable and probable cause—R.S.O. c. 73, ss. 1, 13, 14, 15.

The plaintiffs brought their action alleging that in consideration that the plaintiffs would pay to the defendants their charges for the proper supply of pure water for the purpose of supplying power to the plaintiffs' hydraulic elevator, the defendants undertook and agreed to supply the plaintiffs with such water; that in supplying such water the defendants negligently caused and allowed such water so furnished by them during six years prior to the commencement of this action to be impregnated with sand and such deleterious matter held in suspension therein (said water being in such condition to the knowledge of defendants), that it so greatly damaged the said apparatus of the plaintiffs' elevator that the same became totally useless to the plaintiffs, etc., whereby, etc.

The defendants pleaded not guilty by statute, and that it was not expressly alleged that the act complained of was done maliciously and without reasonable or probable cause; that the act complained of was done by them in the execution of their office, etc.; that the act was not caused within six months; and that no notice of action had been given, setting up 35 Vict., c. 79; 41 Vict., c. 41, ss. 1-3, R.S.O. c. 73, ss. 1, 13, 14, 15.

Held, affirming the judgment of Robertson, J., that the action being one for breach of contract none of the statutory defences set up were applicable or could be pleaded.

Fullerton, Q.C., for the defendants, appellant.

H. M. Mowat, for the plaintiffs.

Divisional Court.] [Jan. 25.

MARSHALL *v.* ONTARIO CENTRAL RAILWAY.

Wrongful dismissal—Railways—Road-master—Drinking on duty—Railway Act, 51 Vict., c. 29 (D).

Where a person occupying the position of roadmaster on the defendants' railway, while on duty in charge of a gang of men on a special train, picking up ties along the road, was proved to have been drinking with the engine driver and the conductor, from a bottle of whiskey from time to time during the trip, such conduct justified his dismissal, as being inconsistent with the faithful discharge of his duty, and prejudicial, or likely to be prejudicial, to the defendants' interests ; the dismissal being also justifiable in that his conduct constituted the participation in a criminal offence under s. 293 of the Railway Act, 51 Vict., c. 29 (D), which prohibits under a penalty, etc., anyone giving or bartering spirits or intoxicating liquor to or with any servant or employee of the company while on duty.

Clute, Q.C., for the plaintiff.

W. R. Riddell, and *E. Munro Grier*, for the defendants.

ROSE, J.] [Feb. 1.

MARTIN *v.* SAMPSON.

Costs—Taxation — Defendants severing—Parties— Action to set aside chattel mortgage.

An appeal by the plaintiff from the ruling of a local taxing officer allowing a separate bill of costs to the defendant Angus, the action having been dismissed as against both defendants with costs : 24 A.R. 1.

The action was brought by the assignee for the benefit of the creditors of the defendant, Angus, to set aside a chattel mortgage made by that defendant to the defendant Sampson. The defendants appeared and defended by different solicitors.

Held, that it was not necessary for the defendants to join in their defences, and the defendant Angus was entitled to a separate bill of costs, the plaintiff having joined him as a party and asked for costs against him ; but that his costs should be kept down on taxation, as his interest after a certain stage was only that of a " watching " party.

Semble, also, that he was not a necessary party.

Gibbons v. *Darvill*, 12 P.R. 478, distinguished, as being an action brought by a simple contract creditor, and a decision that all persons interested should be parties to the record.

The appeal was dismissed with costs.

C. D. Scott, for the plaintiff.

H. Cassels, for the defendants.

BOYD, C., FERGUSON, J., MEREDITH, J. [Feb. 5.

BREESE *v.* KNOX.

Fraudulent preference—Chattel mortgage given within 60 days pursuant to agreement prior to 60 days—Promise of preference—54 Vict., c. 20 (O.).

Where a debtor on June 25th, 1895, gave an agreement under seal to a creditor that in case he made default in payment of any sum he might owe the creditor upon demand, he would give a chattel mortgage on all his stock in trade; and on Nov. 11th, 1895, executed a mortgage accordingly to the creditor, and on Dec. 2nd, 1895, made an assignment for the benefit of his creditors.

Held, upon action brought by the assignee to set asside the chattel mortgage as a fraudulent preference, that notwithstanding the said agreement, the Act 54 Vict. c. 20, s. 1, applied, and the presumption thereby created was not done away with by reason of the agreement.

W. R. Riddell, for the defendant, appellants.

George Kerr and *R. W. Evans*, for the plaintiff, respondent.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. [Feb. 8.

BROWN v. NEFF.

Action—Issue under Partition Act—Trial in High Court—Judicature Act, 1895, s. 91.

An appeal by the plaintiff from an order of Meredith, J., in Chambers, dismissing an application made by the plaintiff under s. 91 of the Judicature Act, 1895, for an order directing the trial in the High Court of an issue arising out of a proceeding taken under the Partition Act, which issue had been tried n a County Court, when the jury disagreed.

F. E. Titus, for the plaintiff: It is a proper case for trial in the High Court, inasmuch as difficult questions of law and fact arose, and that there was jurisdiction to make the order, citing *Symonds* v. *Symonds*, 20 C.P. 271.

Swabey, for the defendant: There was no jurisdiction to make the order because neither the issue nor the proceeding out of which it arose was an "action," and the words of s. 91 of the Judicature Act, 1895, were "in any action pending in a County Court." The same words were used in the Law Reform Act, under which *Symonds* v. *Symonds* was decided, but in the judgment of the Court the words "in any action" were omitted in quoting the section, and therefore the decision seemed to have proceeded upon a misapprehension, or upon a different enactment from that now in question. The issue here was not an "action"; see the interpretation clause of the Judicature Act, 1895, s. 2, sub-sec. 3, and *Hamlyn* v. *Betteley*, 6 Q.B.D. 63.

Per CURIAM: The decision in *Symonds* v. *Symonds* must be followed. We cannot assume that it proceeded upon an enactment which had no existence. We must rather suppose that the words "in any action" were omitted in quoting the section, by a printer's error. The case is a proper one for trial in the High Court, and the appeal must be allowed. Costs here and below to be costs in the cause.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. } [Feb. 8.

D'IVRY *v.* WORLD NEWSPAPER CO.

Security for costs—Præcipe order—Increased security—Election.

An appeal by the defendants from an order of Meredith, J., in Chambers, affirming an order of Mr. Cartwright, an official referee, sitting for the Master-in-Chambers, dismissing a motion by the appellants for an order for increased security for costs.

The action was for libel.

The plaintiff's residence, as indorsed on the writ of summons, being out of the jurisdiction, the defendants issued a præcipe order for security for costs, with which the plaintiff complied by paying $200 into Court.

The referee held, following *Trevelyan* v. *Myers*, 31 C.L.J. 284, that the defendants having elected to take a præcipe order for a definite amount of security, instead of making a special application, were bound by their election, and must abide by it.

J. King, Q.C., for the defendants, contended that *Trevelyan* v. *Myers* was not well decided, Rule 1250 having made a difference in the practice since *Bell* v. *Landon*, 9 P. R. 100.

H. M. Mowat, for the plaintiff, was not called upon.

The Court dismissed the appeal, not seeing fit to overrule the cases cited, and not thinking that Rule 1250 made any difference in the practice, as the Court had always power to increase or diminish the security in a proper case.

MEREDITH, C.J. [Feb. 11.

SMYTH *v.* STEPHENSON.

Security for costs—Libel—Newspaper—R.S.O. c. 57, s. 9—Criminal charge—Pleading—Inuendo.

Where a statement of claim in an action for libel contained in a public newspaper is not so defective as to be demurrable, and the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception contained in clause (a) of s. 9 (1) of the Act respecting actions of libel and slander, R.S.O. c. 57, and the defendant is not entitled to security for costs. That clause is applicable to cases where an inuendo is necessary to give the words complained of a defamatory sense; and upon an application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge.

H. J. Scott, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendant.

GENERAL SESSIONS OF THE PEACE.

COUNTY OF YORK.

REG. *v.* STRONG.

Municipal election—Personation—Penalty—Mode of enforcing.

The penalty imposed under Municipal Act of 1892, s. 210, is recoverable by civil action only, and not by proceedings on summary conviction.

[TORONTO, Oct., 1896. McDOUGALL, Co.J.

The appellant had been convicted before the Police Magistrate of the city of Toronto, under s. 210, sub-sec. 2, of the Municipal Act of 1892, upon one of the charges of personation therein enumerated; and was required to pay the penalty of $200 thereby imposed, and in default of payment to be imprisoned for a stated term.

Du Vernet, for the appellant: The theory of any criminal jurisdiction attaching in the premises is excluded, not only upon general principles, but by virtue of s. 8, sub-headings 30 and 31, of the Interpretation Act, R.S.O. c. 1, which, where material, read as follows (s. 30): "Where a pecuniary penalty or a forfeiture is imposed for a contravention of any Act, then, if no other mode is prescribed for the recovery thereof, the penalty or forfeiture shall be recoverable with costs by civil action or proceeding at the suit of," etc. (s. 31). "Where a pecuniary penalty or forfeiture is imposed by an Act of this province, and the amount of the penalty or forfeiture is in any respect in the discretion of the Court or Judge, or in case the Court or Judge has the right to impose imprisonment in addition, or in lieu of the penalty or forfeiture . . . the same may be recovered upon indictment in the High Court of Justice, or General Sessions of the Peace."

Dewart, for the respondent, relied upon s. 420 of the Municipal Act, as prescribing a specific method of recovery for the penalty in this case. This section reads, "Every fine and penalty imposed by or under the authority of this Act may, unless where other provision is specially made therefor, be recovered and enforced with costs, by summary conviction, before any Justice of the Peace," etc.; and in default of payment the offender may be committed, etc., there to be imprisoned for any time, in the discretion of the convicting justice, not exceeding (unless where other provision is specially made) thirty days, and with or without hard labour," etc.

In reply it was contended that by reason of the alternative condition of hard labour created, as well as on other grounds, the application of the medium for the enforcement of the fine there indicated was clearly negatived.

The Police Magistrate considered that s. 420 provided the remedy, and made a conviction, from which an appeal was taken to the General Sessions.

MCDOUGALL, Co. J., Chairman: It may be useful to notice that s. 210 was, in the interim between the original hearing and the appeal, repealed by the Legislature, and the earlier allied section, 167—prescribing direct imprisonment for violation—which was discussed at large by the Chancellor in *Reg.* v. *Rose*, 27 O.R. 195, and which might or might not have been wide enough to include the offence charged here, being apparently designed by them to continue in force.

On a fair reading of the various enactments, process by civil action can alone be resorted to for the recovery of the penalty, and the principle of proceeding by summary conviction has been improperly adopted. The conviction must therefore be quashed.

COUNTY OF BRANT.

REG. *v.* JOHNSON.

Worrying sheep on Indian Reserve—R.S.O. c. 214, s. 15—Scienter.

A sheep was worried on an Indian Reserve by a dog owned by an Indian resident thereof, who was sought to be made chargeable for the injury by the owner.

Held, 1. That R.S.O. c 214, s. 15, is not applicable, and a scienter must still be proved against such a resident.

2. That without express power given by the Indian Act the Indian Council cannot alter the common law rule in this respect.

[BRANTFORD, Dec. 11, 1895, JONES, Co.J.

Appeal from a summary conviction for injury caused by a dog worrying sheep on an Indian Reserve.

The appellant, an Indian, living on the Six Nations Reserve in the township of Tuscarora, and the owner of an alleged vicious dog, had, on complaint of the respondent, been cited before a Magistrate to answer the vicarious charge of injury inflicted by such animal upon sheep belonging to respondent. The latter was unable to prove, either before the Magistrate, or on appeal, that the appellant was aware of any aggressive propensity of his dog with regard to sheep; but, invoking the Ontario Act (R.S.O. c. 214, s. 15), claimed that the necessity for establishing scienter was dispensed with.

Mackenzie, Q.C., for appellant.

Brewster, for respondent.

JONES, Co. J., Chairman: The Act referred to (R.S.O. c. 214, s. 5) has no operation within the limits of the Indian Reserve, in respect of which the jurisdiction of the Dominion Parliament was absolute and exclusive, under the provisions of the B.N.A. Act. Regulations purporting to deal with the subject have been framed under the direction of the Indian Agent, and thus authenticated have been duly passed by the Indian Council. The learned Judge proceeded to declare that, in the absence of express power conferred upon that body, by the terms of the Act, to supersede the common law principle of the scienter, it could not be disregarded as an element requiring to be proved. The conviction was therefore quashed.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Dec. 19, 1896.

ATTORNEY-GENERAL EX REL. EVANS *v.* TEMPLE.

Mines and Minerals Acts—R.S. (5th series) c. 7, Acts of 1889, c. 23: Acts of 1890, c. 19; Acts of 1892, c. 1; Acts of 1893, c. 2—Conditions of lease—Payment of rental in advance—Application of payments by statute—Forfeiture—Necessity for proceedings and judgment—Distinction between leases issued and to be issued under Acts of 1889, c. 23, s. 1, sub-secs. a, c—Necessity for notice of forfeiture proceedings—Words "preceding section" held to extend to all preceding sections on same subject matter—Registry book—Evidence necessary to overcome—Relevant proof—Words of receipts rejected in favor of construction placed upon words of Act—Falsa demonstratio—Grounds not open to defence—Principle as to forfeiture applicable to private rights under contracts, etc., not applicable to rights under statute.

The relator, E., was lessee, under a lease dated June 10th, 1889, of certain gold mine areas in Montague district, for the term of 21 years, to commence from the 21st day of May, 1889.

Prior to June, 1889, the mining law of the Province of Nova Scotia, (R.S. 5th series, c. 7, s. 29) required the leaseholder, every year, to perform a certain number of days' work, according to the number of areas held by him, in default of which the lease was liable to forfeiture on proceedings to be taken by the Commissioner of Mines, after notice to the lessee.

On the 17th June, 1889, certain sections of an Act passed April 17th, 1889, (Acts of 1889, c. 23, ss. 1-7) came into force under which (s. 1, sub-sec. a) leaseholders were enabled on or before the expiration of the first year of the lease to pay in advance to the Commissioner the sum of 50c. for each area, and thereafter to make the same payment annually in advance for the remaining number of years that the lease was outstanding. In default of any such annual payment in advance, the lease was declared to be forfeited at the expiration of the year for which the last annual payment was made, and applications for licenses or leases for the areas declared forfeited might be made at the Mines Office at 10 o'clock on the morning of the following day.

In respect to leases already issued it was provided (s. 1, sub-sec. *c*) that the owner of any lease by duplicate agreement in writing with the Commissioner might avail himself of the provisions of the Act with respect to annual payments in advance, such advance payments to be construed to commence from the nearest recurring anniversary of the date of the lease.

Under the form of agreement the leaseholder covenanted to pay the annual rental in accordance with the terms and provisions of the Acts of 1889, c. 23, and, on the part of the Commissioner, it was covenanted that, so long as the payments were so made, the lease should not be set aside or forfeited for non-working.

On the 1st June, 1889, the relator entered into an agreement with the Commissioner of Mines for the purpose of taking advantage of this provision.

By the Acts of 1893, c. 2, s. 2, sub-sec. *a*, after making provision for payment of rental in advance, by the lessee, on or before the expiration of the first year of the lease, and, in the same manner, for the remaining number of years that the lease had to run, it was enacted that, in case any such annual payment in advance should not be made, notice of such default should forthwith be sent by the Commissioner, by registered letter, mailed to the post office address of the lessee or lessess, and, if the rent was not paid within 30 days after the posting of such notice, the lease should become forfeited at the expiration of said period of 30 days, and applications for the areas declared forfeited might be made at the Mines Office at 10 o'clock of the morning of the next day.

By s. 10 of the same Act it was enacted that the Commissioner should not be required to send notice of default of payment unless, previously to such default, the lessee should have given written notice to the Commissioner of his post office address.

The evidence in the present case showed that the name and address of the relator were registered in the Mines Office, and that he paid rent under the agreement on June 1st, 1891, April 26th, 1892, and May 17th, 1893.

On May 22nd, 1894, the Commissioner of Mines, treating the lease as forfeited for non-payment of rental, granted a prospecting license to the defendant T.

On June 9th, 1894, the relator tendered to the Commissioner the rental in advance for the year 1894-1895, claiming that the current year of his lease had not at that time expired.

Held, following the *Attorney-General* v. *Sheraton*, 28 N.S., that the rental was not in arrears at the time of the forfeiture, the statute applying the payment of rental to the year next ensuing after the date of the rental agreement, and not to the current year, and there being therefore a payment in the hands of the Commissioner irrespective of the amount tendered for the year as to which the lessee was supposed to be in default.

Per GRAHAM, Eq. J.—1. That under a proper construction of the rental clause there was not to be an ipso facto forfeiture of the lease, on non-payment of rent, but, under the provision of the Acts of 1892, c. 1, ss. 66-69, there should have been a proceeding and judgment of forfeiture.

2. That the case was distinguishable from *Attorney-General* v. *Sheraton*, by reason of the provisions of the Acts of 1890, c. 19, s. 2 (Con. Acts of 1892, c. 18, sub-sec. *c*.), whereby so long as the rent was paid in advance the areas were not subject to forfeiture for non-working.

3. Distinguishing sub-secs. *a* and *c* (Acts of 1889, c. 23, s. 1), that it was not to be assumed, because the legislature provided for forfeiture without proceedings in the case of future leases (sub-sec. *a*), that they intended there should be forfeiture without proceedings in the case of leases already in existence, and as to which rental agreements had been entered into (sub-sec. *c*).

4. That, as leases granted under sub-sec. *c*, contained a clause providing for forfeiture in case the required work was not performed, they must be dealt

with on that basis. The leases in such case being distinguishable from leases subsequently issued, as to which the forfeiture was to be for non-payment of the rental money in advance.

5. That the Court should favor a construction against exparte Acts.

6. That there should be actual or constructive notice of the forfeiture.

7. That as there was something to try as to the posting of the letter containing the notice of default, there should be, for this reason, something like a judgment of forfeiture.

The Acts of 1889, c. 23, s. 8, provided that the "preceding section" of this Act should come into force two months after the date of the passage the Act.

Held, that the words "preceding section" must be read in the plural, "preceding sections," all of the sections referring to the same subject matter.

The name of the relator being shown to have been entered in the only register kept in the mines office for that purpose from June, 1893, to August, 1895,

Held, 1. That strong and legal evidence would be required to overcome the effect of such a public record.

2. That as to the question whether relator had or had not registered his name and address, as required by the Act, a search shown for letters and their production would be relevant proof.

3. That it was not to be inferred from the fact that an application was made by someone on June 5th, 1894, for registration of relator's name and address, that there had not been a previous registration.

4. That the words of the receipts for rental must be controlled by the construction to be placed upon the words of the statute, and that where the words of the receipts and such construction were inconsistent, the former must be rejected.

5. That as to the correct date of the lease, regard must be had to the duplicate copy preserved among the records of the office.

6. That the recital in the rental agreement, describing the lease by a number and by a date that was erroneous, must be rejected as falsa demonstratio, and would not work an estoppel.

7. That it was not open to defendants to set up such an estoppel, supposing it to exist as between the relator and the Commissioner.

8. That it was not open to the defendants to attack the lease on the ground that it was made for one year longer than the statute permitted; that, in such case, the lease would not be void, but only voidable at the instance of the Crown.

9. That defendants were not entitled, on the hearing of the appeal, to take the point that the Attorney-General, who granted the fiat under which the action was brought, was opposed to the amendment made on the trial, which enabled the point as to the date of the lease to be raised.

Per MEAGHER, J., that the principle that there cannot be a forfeiture until after demand of payment of rent applicable to rights arising out of leases or contracts between private individuals, is not applicable to rights created by statutory provisions.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] [Feb. 1.

IMPERIAL LOAN COMPANY *v.* CLEMENT.

Mortgage—Lease by mortgagee to mortgagor—Landlord and tenant—Excessive rent—Appeal, grounds of.

Appeal from the County Court of Brandon. This was an action for damages brought by the plaintiffs against a sheriff for seizure and sale of the goods of one Coulter under an execution in his hands, and refusing to acknowledge the plaintiff's claim for rent, due under a lease by Coulter from them, to an amount exceeding the value of the goods.

Coulter was in arrear under two mortgages to the plaintiffs, and in May, 1895, signed a lease of the mortgaged premises, agreeing to pay a rental of $700 for a term ending on the first of November of the same year. This rent was made payable in advance on the 1st day of January, 1895, and was shown to be about three times the rental value of the property for one year. Besides this fact, there were other circumstances tending to show that the lease had been procured by the manager of the plaintiffs with the view to prevent the execution creditors of Coulter getting anything out of his crops for that year, and that it was not really expected or intended that Coulter should pay the whole of the rent mentioned in the lease in the manner provided for.

Held, following *Hobbs* v. *Ontario Loan & Debenture Co.*, 18 S.C.R. 483, that the lease relied upon by the plaintiffs could not be deemed to have been intended as a real, bona fide one, and that the relation of landlord and tenant was not validly created thereby so as to affect third parties.

Held, also, that appellants must be confined to the grounds stated in their præcipe to set the case down for appeal under s. 319, sub-sec. 2, of the County Courts Act, as amended by 59 Vict., c. 3, s. 2, and could not be allowed to urge any other grounds without consent or leave of the Court or a Judge.

Judgment of the County Court dismissing the plaintiff's action, affirmed with costs.

Clark, for plaintiffs.

Culver, Q.C., for defendant.

Full Court.] [Feb. 1.

IMPERIAL LOAN CO. *v.* CLEMENT; RE MURRAY.

Mortgage—Lease from mortgagee to mortgagor—Landlord and tenant—Excessive rent.

This was another appeal from the County Court of Brandon in which the facts were similar to those in the preceding case, except that the lease relied on bore date 21st December, 1894, and purported to let the land until 1st November, 1895, at a rental of $705, payable 1st January, 1895, and that evidence was given that the plaintiff had insisted on the lease being signed on pain of eviction and sale of the property, and there was no evidence that the plaintiffs had notice of Murray's financial difficulties.

Held, KILLAM, J., dissenting, that the lease must be held to be void against execution creditors on account of the excessive amount fixed for rent, and that there was not enough in the other circumstances to distinguish the case from the Coulter one.

Per KILLAM, J.: The circumstances show that the plaintiffs bona fide intended to make a lease, and Murray to accept the position of tenant at the rental named, and the lease should be held to be valid.

Appeal dismissed with costs.

Clark, for plaintiffs.

Culver, QC., for defendant.

Full Court.] [Feb. 1.

KIRCH[illegible]OFFER *v.* CLEMENT.

Bills of Sale Act, R.S.M., c. 6, s. 4—57 Vict., c. 1, s. 2—Growing crops, mortgage of—Affidavit of bona fides—Forms—Deviation from prescribed forms—Interpretation Act, R.S.M., c. 78, s. 8, sub-sec. (u u)—Action against sheriff—Evidence—Judgment, proof of—Right of action for price of goods when property not passed—Appeal from County Court—Motion to strike out necessary—Q.B. Act, 1895, Rule 168 (b), (d)—Seed grain mortgage.

This was an appeal from the decision of the County Court of Brandon in favor of the plaintiff in an action in which he claimed damages from the defendant (the sheriff of the Western District), for the seizure of the grain grown upon the lands of one Murray, under an execution in his hands.

The plaintiff claimed the grain under a chattel mortgage for the purchase money of seed grain supplied to Murray in the spring of the same year. Murray, being in want of seed at that time, applied to the plaintfff, who gave him an order on a firm of grain dealers for the amount required, and took the mortgage in question, which was completed and registered before Murray actually got the grain. The dealers afterwards supplied the grain to Murray and charged the price to the plaintiff, who paid it.

The affidavit of bona fides attached to the mortgage contained a statement that the mortgage was taken "for seed grain," but did not contain the full statement required by the statute, 57 Vict., c. 1, s. 2, "that the same is taken to secure the purchase price of seed grain."

It was contended at the trial that the evidence showed that the mortgage had not been given as security for the purchase price of seed grain within the meaning of the statute, but only as security for money advanced by plaintiff to Murray for the grain, and was, therefore, wholly void; also that the mortgage was void for want of the full statement required by the Act to be inserted in the affidavit; and the sheriff did not prove the judgment against Murray, on which the execution in his hands had been issued.

Held, TAYLOR, C.J., dissenting, that the chattel mortgage had really been taken to secure the purchase price of seed grain, and was, therefore, good and valid as against the mortgagor, and that no affidavit or registration was necessary to protect the plaintiff's rights as against the mortgagor.

Held, also, unanimously, that in a case like the present where some third party brings an action against the sheriff for seizure of goods under an execu-

tion and establishes a prima facie case of title as against the execution debtor, the sheriff must prove a judgment as well as an execution, *White* v. *Morris*, 11 C.B. 10, 15; Atkinson on Sheriffs, 6th ed., 304, followed. *McLean* v. *Hannon*, 3 S.C.R. 709, and *Crowe* v. *Adams*, 21 S.C.R. 342, distinguished.

Held, also, DUBUC, J., dissenting, that notwithstanding s. 8, sub-sec. (u u) of the interpretation Act, R.S.M., c. 78, the affidavit of the mortgagee did not sufficiently comply with the statute, and that the mortgage would, therefore, not have been sustained as against the defendant representing a creditor if he had given evidence of the judgment.

Per KILLAM, J.: There may be a right of action, and the relation of debtor and creditor may exist for the price of goods, although the property has not passed, if the parties have made an agreement to that effect: *Waterous* v. *Wilson*, 11 M.R., at p. 295.

When an appeal from a County Court is set down for hearing before the Full Court, a motion to strike it out must be made under Rule (b) of the Queen's Bench Act, 1895, within the time there limited, and no objections to the proceedings and steps leading up to the appeal can be entertained at the hearing: Rule 168 (d).

Appeal dismissed with costs.

A. D. Cameron, and *Clark*, for plaintiff.

Culver, Q.C., and *Hull*, for defendant.

Full Court.] [Feb. 2.

BROWN *v.* PEACE—PEACE, CLAIMANT.

Fraudulent conveyance—Husband and wife—Bill of sale—Ante-nuptial settlement.

This was an appeal by the claimant from the decision of the County Court of Winnipeg, in an interpleader issue between the plaintiff and the claimant as to the ownership of certain furniture seized by the sheriff under an execution issued upon a judgment recovered by the plaintiff against the defendant, husband of the claimant, for the price of the furniture in question. The wife claimed the furniture under a bill of sale executed by the husband in her favor two days after the service of the writ in the action against him, when it was admitted that he was in insolvent circumstances.

It was contended, however, that the bill of sale was valid, because it was given in pursuance of the covenants in an ante-nuptial settlement, executed by the husband prior to the marriage, and nearly two years before the date of the bill of sale.

By this settlement the husband promised, forthwith after the celebration of the marriage, to grant, assure and convey to his then intended wife all household furniture, furnishings and articles of domestic use of which he was then possessed, and that he would within one year purchase such other articles of furniture as his intended wife might desire or require until the total of such goods and chattels should equal in value the sum of $1,500, and within five years would also convey to her real estate of the intrinsic and readily selling value of $5,000, and also within five years would increase his insurance in her favor to make the total sum of $10,000.

The evidence of the husband and wife, however, as to what passed between them prior to the execution of the settlement showed, in the opinion of the Court, that it was entirely voluntary and without consideration and was not stipulated for by the claimant as a condition of the marriage, but was made with the intention of putting all the defendant's property then owned and after acquired beyond the reach of his creditors, of whom the plaintiff was then one, and that the settlement was not a bona fide one.

It appeared also that nothing had been done to carry out the covenants in the marriage settlement until the execution of the bill of sale which the husband gave to his wife, as he admitted, in order to protect her as a creditor, and at a time when he knew that the plaintiff's execution would shortly be issued against him and without any solicitation or pressure from the claiment.

Held, following *Ex parte Kilner*, 13 Ch. D. 248, that the onus of proof was upon the claimant and that she had failed to satisfy the Court that the bill of sale was founded on an agreement made for good consideration, and that even if the ante-nuptial settlement could be said to be valid and binding the bill of sale could not be supported under the circumstances, and that the appeal should be dismissed with costs.

Mercer v. *Peterson*, L.R. 2 Ex. 309, and *Ramsay* v. *Margrett*, (1894) 2 Q.B. 18, distinguished.

Culver, Q.C., and *Hull*, for plaintiff.

Wilson, for claimant.

Province of British Columbia.

ADMIRALTY DISTRICT.

THE QUEEN *v.* THE SHIP "VIVA."

Maritime law—Behring Sea Award Act, 1894—Infraction by foreigner.

The punitive provisions of the Behring Sea Award Act, 1894, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner.

[VICTORIA, Dec. 7, 1896. DRAKE, J.

DRAKE, D.L.J.—The "Viva," a schooner registered at the Port of Victoria, was seized on 24th August, 1896, in latitude 57° 30′ N., longitude 171° 23′ 30″ W., at a point within the prohibited zone, 35 miles from N. W. end of St. Paul's Island. The vessel was boarded by the U. S. S. "Rush" about 6 a.m., at which hour all the boats were aboard and the hunters at their breakfast. The master asked if he might put his boats out, which was refused; the object of making this request is not apparent, unless it was to accentuate the ignorance of the master of being within the prohibited zone.

The official log of the "Viva" shows the capture of 16 seals on the previous day, and the master details the course he had taken between the hour he got his boats on board and the time of his seizure, and says his position was latitude 57° 44′, longitude 173° 20′ 1″ W., and on the previous day latitude 57° 47′, longitude 172° 50′. He kept no ship's log, but laid down on the chart

his position in pencil day by day ; taking those positions as correctly showing his daily change of position, he, on the 24th, was only six miles further west than he was on the 23rd. The real position where he was seized varied from his alleged position on his chart by many miles.

The master states that he got an observation on the 16th and none since, except an imperfect one on the 22nd, which shows his position so greatly different from what he calculated it was that he did not rely on it—what it was is not entered anywhere. There are no entries to show whether his dead reckoning was reasonably calculated ; neither course of vessel, direction or force of wind are entered. His chronometer was slow. The master by some manœuvres, difficult to follow, satisfied his own mind that on the 24th day of July his chronometer was two minutes slow, and was losing two seconds a day, and he allowed for this error when he obtained a sight for longitude on the 14th August. When the vessel arrived at Ounalaska on the 26th day of August, his chronometer was found 12 minutes and 11 seconds slow, and it was shown by Lieutenant Daniels that if he had obtained an observation for longitude with the chronometer as it was, he must have been more than 100 miles to the east of his position as laid down on his chart. How this sudden change in his chronometer arose is not explained further than stating that it took a jump occasionally. The evidence as to sealing in the zone is proved by the captain. He, on the 23rd, was only 6¼ miles from his position on the 24th, when he was seized, which was 35 miles only from the N. W. end of St. Paul's Island, and he captured 16 seals on that day. They therefore were captured in the prohibited waters, as he was at least 19 miles inside the limit.

The defence set up is that by Article 1 of the 1st schedule the Act only applies to British subjects, and there was no proof that the master of the "Viva" was a British subject, and by s. 1, sub-sec. 2, it is declared to be a misdemeanor if any person commits, procures, aids or abets any contravention of the Act, therefore it was necessary before a vessel could be condemned that it must be shown that a British subject was employing the ship.

If the master was proceeded against for a misdemeanor it would be neeessary to prove that he was subject to the penal clauses of the Act, but the contravention being once established, the vessel employed being a British ship, becomes liable to forfeiture. If every man employed on the vessel was a foreigner it would not relieve the liability of the ship, once a breach was proved.

The defendant further claims exemption on the ground of want of proof of any intention on the master's part to contravene the Act. A man's intention is judged by his acts, and when once a vessel is found within the prohibited zone taking or having taken seals, then the master has to satisfy the Court that he took all reasonable precautions to avoid any breach of the regulations.

Did the "Viva" do so? According to the master he had no observations from the 16th August ; he kept no ship's log showing the weather, wind and courses ; his supposed position is marked only from day to day in pencil on his chart, and he sealed on the 16th, 22nd and 23rd of August without knowing where he really was. This can hardly be considered as taking all reason-

able precautions. He apparently never attempted to establish his position by lunar observations or other modes known to navigators. It cannot, therefore, be said that he took reasonable precautions.

It has been argued that the masters of the vessels engaged in sealing cannot be expected to be scientific navigators, and to be able to ascertain their position with accuracy. This is no doubt true, but when owners entrust valuable property to men without the necessary qualifications the responsibility is theirs, and if they choose to run this risk they cannot relieve themselves by pleading want of knowledge in their servants.

I therefore adjudge the "Viva" and her equipment to be forfeited, and allow her the same relief on payment of £400 and costs within thirty days.

Davie, Pooley & Luxton, for the Crown.

Bodwell & Irving, for the ship.

SUPREME COURT.

DRAKE, J.] [Jan. 31.

CANADIAN PACIFIC R. CO. *v.* PARKE AND PINCHARD.

Reasonable use of legal right detrimental to others.

The defendants were by right of pre-emption owners of Lot 561, Group 1., Kamloops Division of Yale District. They recorded 300 inches of water and used it in irrigating their fields. Without irrigation the farm of the defendants was worthless, owing to the arid character of the soil and the height at which it was situated. The railway runs along the east bank of the Thompson River contiguous to the land of the defendants. The defendants irrigated land on a high bench above the railway. The soil was of a porous quality, consisting of gravel underlying a slight deposit of sandy loam, and below the gravel was a bed of silt. At a point on the banks of the Thompson, above and below the plaintiff's line, a large slide was formed by water percolating through the soil and causing the earth to slip. This slide was continually moving towards the river, forcing the rails out of position.

The jury found that the substantial cause of the injury done to the plaintiffs' railway was the water brought on to the lands by the defendants for irrigation purposes; and on that finding, the plaintiffs moved for judgment, asking that the defendants be restrained from further damaging the plaintiffs' line by irrigating the lands in question.

Held, that the Legislature in authorizing the bringing of water on the lands for agricultural purposes must be taken to have contemplated the mischief which might arise from a reasonable use of such power, and to have condoned it: *National Telephone Company* v. *Baker* (1893), 2 Ch. 186.

Injunction refused and plaintiffs' action dismissed.

Davis, Q.C., for plaintiff.

Wilson, Q.C., for defendants.

North-West Territories.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

ROULEAU, J., In Chambers. [Feb. 12.

BECKER *v.* RUTHERFORD.

Dismissing action, s. 153, Civil Justice Ordinance—No cause of action disclosed—Abuse of process of Court—Inherent jurisdiction of the Court.

On the 12th of January, 1897, plaintiff issued writ against the widow and four children of R., deceased, alleging by his statement of claim that R. died at Glasgow on the 8th of January, 1897, intestate; that defendants were the widow and next of kin of deceased; that they resided within the jurisdiction of the Court; that R. was indebted to the plaintiff in the sum of $495.00; that deceased left personal property within the jurisdiction of the Court, sufficient to satisfy plaintiff's claim; that defendants were the persons entitled thereto; that no administrator had been appointed, and asking for judgment against defendants for the amount of the plaintiff's claim.

On summons by defendants after appearance, order made declaring that no cause of action was disclosed by the pleadings, that same was vexatious and an abuse of the process of the Court, and under above section of the Ordinance and under the inherent jurisdiction of the Court, action dismissed with costs.

Sifton, for plaintiff.

Muir, Q.C., for defendants.

United States

NOTES OF RECENT DECISIONS.

For the mistakes of a physician or surgeon employed by the master to treat a servant, it is held in *Quinn* v. *Kansas City, M. & B. R. Co.*, 94 Tenn. 714, 28 L.R.A. 552, that the master is not liable if he has not been negligent in selecting the physician.

It is held by the Supreme Court of Michigan in *Frits* v. *The Detroit Citizens' St. Ry. Co.*, reported in 2 Detroit Legal News, 19, that a driver of a vehicle in a public street traversed by a street railway is bound to take notice of the conditions governing the operation of street cars. It is negligent for him to suddenly turn in front of an approaching car, whether the car be coming from the direction in which he is driving or from the rear. Before turning upon the track of a street railway, the driver of a vehicle should look in both directions for an approaching car. Where a collision occurs by the turning so suddenly that the motorman of a car travelling in the same direction is not able to stop his car nor tell in advance that he was about to attempt the crossing, he is guilty of contributory negligence and cannot recover.

Failure of a motorman to notify the public of an approaching car, or by ringing of a gong or bell between the crossings will, not always amount to negligence.

An oral agreement to give a pass to a man and his family for ten years, and stop trains for them, is sustained in *Weatherby, M. W. & N. W. R. Co.* v. *Wood* (Tex.), 28 L.R.A. 526, on the ground that it might be performed within one year in case each member of the family should die, and therefore was saved from the statute of frauds.

The fact that a person made the first assault upon another whom he killed in the course of their quarrel, is held in *People* v. *Button* (Cal.) 28 L. R. A. 591, to be insufficient to defeat his claim of self defence, if before killing the other he had endeavored to avoid further combat.

Tolls from bicycles passing over a turnpike are held collectible in *Geiger* v. *Perkiomen & R. T. Rd.*, 167 Pa. 582, 28 L.R.A. 458, although the provision for collecting tolls for certain carriages "or other vessels of burthen or pleasure" was based upon the number of horses and wheels; and a toll of 1 cent per mile upon a bicycle was regarded as reasonable where sulkies were charged 6 cents for five miles.

Liability for fixing a loaded gun in a building so that it will be discharged on forcing open the front door, and will kill a person attempting to enter, is held in *State* v. *Barr* (Wash.) 29 L.R.A. 154, to be a question of fact or mixed fact and law for the jury. With the case is a note presenting the authorities on the question of liability for killing or injuring trespassers by means of spring guns, traps, or other dangerous instruments.

An hotel-keeper is not liable for a theft by his night clerk, from the hotel safe, of money of a regular boarder who has lived in the house for some months, if ordinary care and diligence were used in employing the clerk, is decided in *Taylor* v. *Downey* (Mich.), 29 L.R.A. 92; and with the case is a note on the liability of a bailee for the wrongful appropriation by his servant of the thing bailed.

A person who has signalled a street car and stands waiting for it when struck by the car, which makes a sudden swing from its proper track to a switch, is held in *Donovan* v. *Hartford Street R. Co.*, 65 Conn. 201, 29 L.R.A. 297, to have no rights as a passenger, although such an accident is held to make a prima facie case of negligence on th part of the street railway company.

Fraud of promoters in procuring a subscription to the stock of a corporation before its organization is held in *St. John's Mfg. Co.* v. *Munger* (Mich.), 29 L.R.A. 63, to be no defence against an assessment on the stock after the subscriber has been united in forming the corporation, but it is held that his remedy was against the wrongdoers.

Book Reviews.

Blackstone's Commentaries, by HON. WM. DRAPER LEWIS, Ph.D. Philadelphia, 1897, Rees, Welsh & Co. (CANADA LAW JOURNAL CO., Canadian agents.)

The February number of this series comprises Book 2 of the original Blackstone text, unabridged and fully annotated. It is of more than ordinary interest to the Canadian reader, as covering the history of the feudal system and the law of real property, the commentary on which was adapted to this province from the same text in 1864 by the late Alexander Leith, Q.C., of Toronto. Although the Canadian work is not referred to, both authors note the inaccuracy of Blackstone's statement (II., 36), that where a man had a right of way, whether public or private, over another's land, and the road was out of repair and impassable, he might lawfully go extra viam upon adjoining lands. Mr. Leith (1st edition, p. 28), quoted authorities to show that the doctrine did not apply at all to private ways, and Dr. Lewis (p. 505), considers that both in England and the United States the entry could not be justified unless the owner of the lands is bound by prescription or grant to repair the way. The latter exception, however, would appear to be dependent wholly on American precedents. Apparently no pains have been spared to make Lewis' Blackstone a thoroughly up-to-date work, and both English and Canadian cases are freely quoted in it.

Law Societies.

THE COUNTY OF YORK LAW ASSOCIATION.

The annual meeting of the County of York Law Association was held at Osgoode Hall on February 18, 1897, at which the Trustees of the Association submitted their eleventh Annual Report.

There are at present 365 members of the Association, and its library at the Toronto Court House contains 3,221 volumes, made up as follows :

Reports	1,925	volumes.
Text books	962	"
Statutes	334	"

284 volumes were added to the Library during the past year, made up as follows :

Reports and periodicals	177	volumes
Text books	86	"
Statutes	21	"

In view of the increased accommodation which will be given in the new Court House, the Trustees directed the attention of the members of the Association and of the County Bar to the fact that they are always ready to receive donations, and would particularly mention Canadian Statutes of any date. An effort is now being made to have more than one set of the Canadian Statutes, and for several years the statutes and reports of all the provinces have been systematically collected. Members must frequently have on their shelves odd legal volumes, "in splendid isolation," which would be of great value in combination with those already possessed by the Association.

The sittings of the Court for the trial of non-jury cases will shortly be held entirely in the Court House, and there will no doubt be a large increase in the membership of the Association which will enable it to maintain its claim of having the best working law library in the province, outside of Osgoode Hall.

The retiring President has presented to the Library a portrait of Mr. J. A. Worrell, Q.C., his predecessor.

The following officers were elected for the ensuing year : Pres., Chas. H. Ritchie, Q.C.; Vice-Pres., W. N. Miller, Q.C.; Treas., Walter Barwick; Sec'y, R. K. Barker; Curator, Angus MacMurchy; Historian, D. B. Read, Q.C.; Board of Trustees : Messrs. Wm. Mortimer Clark, Q.C., Edmund Bristol, R. J. Maclennan, W. D. McPherson, W. E. Middleton, D. Faskin, C. D. Scott.