THE

Canada Law Journal.

VOL. XXXI. OCTOBER 16, 1895. No. 15

THE question whether a third person who purchases property subject to a mortgage, and covenants with the mortgagor to pay it off, can, in the absence of any contract with the mortgagee, be held to be personally liable to the mortgagee for the mortgage debt, was discussed in a former number of this journal by our learned friend, Mr. A. C. Galt. We see the same point has been up for the consideration of the Court of Appeal in *Canada Landed and National Investment Co.* v. *Shaver*, 22 A.R. 377, and that court has decided the point adversely to the contention of Mr. Galt's article. In doing so it has, undoubtedly, followed the current of decision, both in this Province and in England; the single case in which the contrary doctrine found favour, *In re Crozier, Parker* v. *Glover*, 24 Gr. 537, failing to command the approval of the Court of Appeal.

We think the weakness of the argument of our valued contributor lay in the fact that he failed adequately to discriminate between the privity of contract and the privity of estate. There is, undoubtedly, a privity of estate between the assignee of the equity of redemption and the mortgagee, which has the effect of giving to the assignee all those rights, in reference to the mortgaged lands, which the mortgagor enjoyed prior to the assignment; but the liability under the covenant is a personal one, founded altogether on contract, and nothing but a privity of contract will enable the mortgagee to enforce it against any one.

Where a mortgage is given to secure a sum of money which is not a debt, or in the nature of a debt, due by the mortgagor, in the absence of a covenant, but for R.S.O., c. 102, s. 5, not

even the mortgagor could be made personally liable for its payment. This shows that the personal liability to pay a sum of money secured by a mortgage on lands is not a necessary incident of the character of mortgagor, but rests purely in contract; and, if there can be no contract, express or implied, established, there is no personal liability.

Mr. Galt's paper was a bold and ingenious attempt to establish that the law ought to be the other way; but we cannot say that we are disappointed at finding that the most recent deliverance of the court on this question adheres to what had been, previously, the established rule.

SECTION 4 of The Landlord and Tenant Act, 1895, is one deserving of the careful attention of the profession. It may mean a great deal, or very little; but, until it has received judicial construction, it is one of those pieces of legislation which may be found to have all the delightful qualities of an infernal machine, whereby its victim is suddenly knocked into smithereens before he well realizes what is the matter with him. With the blandness and apparent innocence of a heathen Chinee, it seems, by a few simple words, to overturn the whole law of landlord and tenant.

It enacts that "the relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent. And nothing in this Act shall affect any pending litigation."

Who can tell what may be found to be the legal effect of such words? Do they mean, as some have suggested, that the whole common law of landlord and tenant is subverted, and that all those legal incidents which the common law annexes to that relationship are virtually abolished, including, among other things, the right of landlords to distrain and of tenants to remove fixtures; and as to the duration of the tenancy in case of overholding tenants, and the right as to notices to quit, etc., and that all such rights on the one hand and on the other must, henceforth, be the subject of express or implied contract? If

so, a very extraordinary result will have been accomplished by this brief sentence, and one which neither in the interest of landlords or tenants was demanded, nor is likely to prove of any real benefit to either of them, but rather the reverse, inasmuch as until the effect of this section is determined judicially it may have the effect either of increasing the expense of leases by the introduction of a multitude of stipulations, which under the former law were, without any stipulation, an ordinary and necessary part of the relationship of landlord and tenant, or, where those precautions are neglected, it may result in both landlords and tenants finding themselves deprived of rights which they had previously and confidently assumed they still enjoyed, but which, for want of an express or implied contract that they should still continue to enjoy them, they may find they are not entitled to.

On the other hand, it may turn out that the effect of the section is not quite so revolutionary, and that the real purpose and object of it is to be found in the concluding clause, and that it is merely meant to enable assignors of leases and others, having no reversion, to distrain. We are inclined to think that this is the proper construction of the section, and that, notwithstanding its provisions, the right of landlords to distrain as of yore is not intended to be interfered with, but rather extended to cases where before the Act a distress could not be made, owing to the technical rule that in order to entitle a landlord to distrain the rent must be incident to a reversion; but until the exact effect of the section has been determined it is necessary for the profession to be on its guard.

SUPREME COURT CHANGES.

The resignation of Mr. Justice Fournier marks an epoch, as he has been a member of the Supreme Court for twenty years, and it was he who, as Minister of Justice, brought before Parliament the bill which established that court.

Mr. Fournier was called to the Bar of Quebec in 1846, was elected to Parliament in 1870, and appointed Minister of Inland Revenue, afterwards becoming Minister of Justice in the Mackenzie Administration.

He is succeeded by Mr. Désiré Girouard, Q.C., D.C.L., M.P. for Jacques Cartier, who was born on the 7th July, 1836. Mr. Girouard occupied a prominent place at the Quebec Bar, to which he was called in 1860. Always a man of great industry, he has contributed liberally to the literature, both legal and lay, of his own Province. Whilst still a student, he wrote a small work on bills and notes, which was well received by the profession and the mercantile community. In 1868 he published a work on the "Law of Marriage." Twenty-five years ago, we published in this journal some articles of much ability and great research from the industrious pen of Mr. Girouard, which subsequently appeared with many others in *La Revue Critique*, a journal edited by him and others of the best members of the Quebec Bar. This journal was commenced in connection with the judicial crisis in Lower Canada in 1873-4, the members of the Montreal Bar having refused to appear any longer before their Court of Appeal, which court, however, being reconstituted in 1874, the short-lived journal was allowed to drop.

After several unsuccessful efforts, Mr. Girouard was elected in 1878 as member for Jacques Cartier in the Dominion Parliament, and has since then occupied a prominent position in politics. He will, we venture to think, make a valuable addition to the Supreme Court, and, as an old friend of this journal, we congratulate him on his appointment.

We notice that our contemporary, *The Western Law Times*, seems to indicate that the recent appointment is due, not so much to Mr. Girouard's eminence as a jurist, as to the fact that it was thought necessary to appoint a representative of the Province of Quebec. We presume that so long as Quebec has its own peculiar laws, there must be its two representatives required by the Supreme CourtAct, and, whilst we cannot but deplore that all the Provinces of Dominion are not under the one system of laws, we fail to see how this can be avoided.

The writer of the article referred to goes on to say that if Quebec is entitled to two members of the court, Western Canada is at least entitled to one. We entirely dissent from this proposition. Without discussing the merits of the very able judge suggested as representative from Manitoba, there can be no question that the very best available men should be selected from the English-speaking Provinces, without any reference

whatever to territorial representation. This miserable political necessity of appointing men to the Bench because they represent some sect or section has been, and ever will be, disastrous to the best interests of the Dominion. Surely our highest court should be the strongest of all our courts, and should command the greatest confidence. May we be forgiven for venturing to suggest that the opinion of the profession is that though the Supreme Court contains much valuable judicial material, it is not the strongest, does not command the greatest confidence, and is in many respects most disappointing and unsatisfactory. With such a man as Sir William Buell Richards at the head of it, it did largely command confidence; but he, with his big heart, strong hand, and sound, clear, practical, and well-balanced mind, has passed away, and nowadays everything about this court has an atmosphere of uncertainty, irritation, and disquiet which makes it anything but a pleasant place to attempt the argument of a point of law.

The difficulty of getting the best men to leave their own homes and lucrative incomes is sufficiently great (and, so far, has been an impossibility), without introducing, or rather emphasizing, the pernicious practice of appointing men simply as representatives of a community, a class, or a creed.

THE LAW OF SET-OFF IN WINDING-UP CASES.

Owing to the very limited right of set-off allowed by the English Companies Act of 1862, the English courts have held that the equitable doctrine of the bankruptcy law, that cross accounts should be adjusted by set-off, had not been incorporated into the provisions of their Winding-up Act.

The only provision in that Act recognizing set-off is contained in the 101st section, which defines the power of the court to order payment of the debts due by a contributory to the company. And it adds that "in making such order, when the company is not limited, the court may allow to such contributory, by way of set-off, any moneys due to him, or the estate which he represents, from the company, on any independent dealing, or contract, with the company; but not any moneys due to him as a member of the company, in respect of any dividend, or profit. Provided that, when all the creditors of the company, whether limited or unlimited, are paid in full, any moneys due, on any

account whatever, to any contributory from the company, may be allowed to him by way of set-off against any subsequent call or calls."

In dealing with the question of set-off under that section, in *Grissell's Case*, L.R. 1 Ch. 528, Lord Chelmsford said:

"The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor, to which the law of set-off applies. Taking the Act as a whole, the call payable by a contributory is to come into the assets of the company, to be applied, with the other assets, in payment of debts; to allow a set-off against the call would be contrary to the whole scope of the Act."

And Sir G. Jessel, M.R., in the later case of *Re Whitehouse & Co.*, 9 Ch.D., at p. 599, observed:

"If, therefore, you want a set-off at all, you must show some provision in the Act itself giving the right of set-off, because, in principle, there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due. The two debts are not applicable to the same purposes, and could not properly be made the subject of set-off."

These decisions show that the ordinary liability of a contributory, when enforced under the English Winding-up Act, is that of a debtor, not to the company, but to the creditors of the company, and that his debt becomes part of a trust fund for such creditors, and that any debt owing by the company to the contributory (other than those mentioned in the section) is not a liability for which the creditors can be held liable but only the company. And, if the provisions of the Canadian Winding-up Act respecting set-off were identical with the English Act, the rule laid down by the Judicial Committee of the Privy Council in *Trimble* v. *Hill*, 5 App. Cases 342, would make the decisions of the English Court of Appeal binding upon the courts in Canada.

But our Act has two clauses as to set-off which are not in its English original. One of these is the 57th section, which is a re-enactment of the 107th section of the Insolvent Act, 1875, and is similar to the clauses as to set-off found in the Insolvent Acts, 1865 (s. 24) and 1869 (s. 124), and reads as follows:

"The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up, in the same manner and to the same extent as if the business of the company were not being wound up under this Act."

The other clause is the 73rd, which has been taken from the 135th section of the Insolvent Act of 1873, and which excludes from the application of the set-off debts acquired by a contributory who knows, or has probable cause for believing, that the company is unable to meet its engagements, or that the act was done in contemplation of insolvency for the purpose of enabling a contributory to claim a set-off. And by section 16 of the Act of 1889 this clause is made applicable to all debtors to the company.

These clauses of the Canadian Act were construed by the Supreme Court in *Maritime Bank* v. *Troop*, 16 S.C.R. 456, where it was held that, as against calls made by the court on a contributory pursuant to the provisions of the Winding-up Act, such contributory could not set off a debt due to him by the insolvent company prior to the commencement of the winding up.

The intention of the Legislature in excluding under section 73 the right of set-off in the special cases there legislated against brings up a canon of statutory construction which provides that what is excepted would otherwise be included in the general words of the statute, and it shows that set-off is to be allowed in other cases.

The Supreme Court having declared that the English rule which makes the fund created by calls made by the court pursuant to the provisions of the Winding-up Act "a trust for creditors," some reasonable interpretation must be given to the words "debts due or accruing due to the company at the commencement of the winding up."

The case of *Maritime Bank* v. *Troop* came up by way of appeal from New Brunswick, and is reported in 27 N.B. 295. Mr. Justice King, whose judgment in the court below was approved of by the Supreme Court (16 S.C.R. 456), in giving a dissenting judgment, remarked that the expression used in the Act did not include debts which became or accrued due by operation of the winding up; and he called attention to the fact that, in the case

before them, "there was then no call which had been made by the directors remaining unpaid."

In the Supreme Court Mr. Justice Patterson added a cautionary observation (p. 471): "I say nothing of calls for capital which may have been made, but not paid before the winding up. It may be open to question whether they are not covered by section 57, and so taken out of the English rule, which classes them with calls made under the direction of the court."

In *Ings* v. *Bank of Prince Edward Island*, 11 S.C.R. 265, the appellant, being a debtor on a note held by the insolvent bank, had, before the passing of the Winding-up Act, purchased a draft drawn by the said bank, which he claimed to set off against his liability on the note, and he was held so entitled.

The doctrine of set-off is applied by the courts of equity according to the general principles of equity where there are cross debts or demands which come within the definition of "mutual debts." And such set-off may be allowed where there are independent debts, and where the nature of the transactions would lead to the presumption that there were mutual credits, but not where the debts have accrued according to different rights.

It would, therefore, seem reasonable that—where a contributory was liable to the company on calls made by the directors or payable under his contract, and in respect of which he was a debtor prior to the commencement of the winding up of the company, and was also entitled to a claim or debt owing to him by, and as a creditor of, such company, and which, if the company were not in liquidation, he would be entitled to set off against his liability in respect of such calls—the right of set-off should be considered as preserved to him in the winding up by the provisions of the 57th section of the Act above quoted.

T. H.

CURRENT ENGLISH CASES.

COMPANY—DIRECTORS—TRANSFER OF SHARES, POWER TO REFUSE TO REGISTER.

In re Coalport China Co., (1895) 2 Ch. 404, one of the articles of the company provided, among other things, that the directors should have power to refuse to register transfers of shares, among other cases, "where the directors are of opinion that the proposed transferee is not a desirable person to admit

to membership." The directors had, in pursuance of this power, resolved to refuse to register a transfer, but without giving any reason. There was no evidence of any want of *bona fides* on their part, and it was held by the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.) that the refusal could not be successfully questioned, and the decision of Kekewich, J., to the contrary, was reversed.

MARRIED WOMAN—REVERSION—UNACKNOWLEDGED DEED—ELECTION.

In *Harle* v. *Jarman*, (1895) 2 Ch. 419; 13 R. Aug. 140, a married woman had, by a separation deed made in 1875, which was not acknowledged, covenanted to release when discovert a reversionary life interest in real and personal estate. The same deed provided for payment to her of an annuity which she had received. On her husband's death, the persons beneficially entitled to the release claimed that the wife should execute the release; but North, J., held that as to the land the covenant was void for want of acknowledgment, and that as to her reversionary interest in the personal estate she had no power to bind it by deed made during coverture, and that her acceptance of the annuity did not amount to an election to confirm the deed. But see now R.S.O., c. 132, s. 8; c. 134, s. 3.

SOLICITOR AND CLIENT—ORDER FOR TAXATION OBTAINED BY SOLICITOR—ENFORCING PAYMENT OF AMOUNT FOUND DUE ON TAXATION BETWEEN SOLICITOR AND CLIENT.

In re Debenham and Walker, (1895) 2 Ch. 430; 13 R. Aug. 161, is only necessary to be referred to as marking a difference between the practice in England and Ontario. In this case an order for taxation between solicitor and client had been obtained by a solicitor, a balance was found due to him from his client, and he applied for a summary order for payment thereof, but North, J., held that an action must be brought. See, however, Ont. Rules 1226 (*d*) and 1227.

TRUSTEE—BANKING ACCOUNT—APPROPRIATION OF PAYMENTS—RULE IN CLAYTON'S CASE.

In re Stenning, Wood v. *Stenning*, (1895) 2 Ch. 433, was an interlocutory application by a client of a deceased solicitor to obtain payment of money due to her from the balance standing to his credit in a bank under the following circumstances: In

March, 1890, the solicitor received the sum of £593, the proceeds of the sale of a sum of consols belonging to the plaintiff, and paid it in to his private bank account; between that date and the 31st August, 1890, he received certain other moneys for other clients, which he also paid in to the same account. The aggregate of the moneys thus received from the plaintiff and the other clients amounted to £3,042, but on the 11th August, 1890, the balance to the credit of the account was only £1,088. At the solicitor's death £4,443 was standing to his credit, but his estate was insolvent. The plaintiff claimed that the money in the bank account was ear-marked to the extent of her claim, and that she was entitled to payment in full. None of the other clients, whose money had been paid into the same account, made any claim on the fund, but one of them had proved a claim against the estate. North, J., on the facts, came to the conclusion that the plaintiff had really lent the money to the solicitor, and, therefore, had no specific claim on the fund; and his decision of the other point may, therefore, be regarded as an *obiter dictum;* but assuming that the plaintiff did stand in the position of a *cestui que trust*, he held that as between herself and the other *cestuis que trustent* the rule in Clayton's case must apply, and that when the balance was reduced on 31st August, 1890, to £1,088, it must be assumed that her moneys had been first drawn out.

CONTEMPT—ATTACHMENT—PART PAYMENT—GIVING TIME—WAIVER.

In re Fereday, (1895) 2 Ch 437; 13 R. Aug. 169, a writ of attachment had been issued against a solicitor at the instance of clients for contempt in non-payment of £78 which he had been ordered to pay the clients. At the request of the solicitor, the clients agreed to suspend proceedings under the writ for fourteen days on payment of £25 on account. This was done, and, no further payment having been made within the fourteen days, after the expiration of that time he was arrested. He then applied to be discharged, claiming that the acceptance of part payment and giving of time amounted to a waiver of the right to enforce the attachment; but North, J., held that there had been no waiver and dismissed the motion.

WILL—RESIDUARY GIFT—CHARITY—MARSHALLING—INTESTACY — WILL — CONSTRUCTION.

In the case of *Somers-Cocks, Wegg-Prosser* v. *Wegg-Prosser*, 1895) 2 Ch. 449, the construction of a will was in question. The

testatrix thereby bequeathed her personal estate upon trust for sale, and out of the proceeds to pay her debts and testamentary expenses, and then to pay a legacy to her niece; and the residue of her personal estate, save and except such parts thereof as could not by law be appropriated by will to charitable purposes, she bequeathed to a charity. Part of her estate consisted of impure personalty. It was contended on behalf of the charity that the will operated as a direction to marshal the assets in favour of the charity, but Kekewich, J., was of opinion that marshalling in favour of a charity is only to be resorted to in order to give effect to the directions of a will; and that in the present case the express exception from the bequest to the charity, of property which could not by law be appropriated by will thereto, indicated that due effect could be given to the will without marshalling. He therefore held that there was an intestacy as to the impure personalty; but see now 55 Vict., c. 20, s. 4 (O.).

HUSBAND AND WIFE—MARRIAGE CONTRACT—CREDITORS.

In *Birkett* v. *Purdom*, (1895) A.C. 371; 11 R. July 1, a somewhat curious marriage contract was in question, whereby in contemplation of marriage the husband bound himself to pay to his wife an annuity of £1,000, "to be applied by her towards the expenses of my household and establishment, and that during all the days of my life." He secured the annuity upon land, and declared the annuity to be his wife's separate property free of the *jus mariti*. The husband having made a trust deed in favour of creditors, the wife, with the concurrence of her husband, brought the present action to obtain payment of the arrears of the annuity in priority to her husband's creditors, the husband's estate being insufficient to pay his creditors. The Scotch Court of Session dismissed the action, and this decision was affirmed by the House of Lords (Lords Herschell, L.C., and Watson, Ashbourne, Macnaghten, and Shand), their lordships being of opinion that, notwithstanding the provision declaring the annuity to be the wife's separate property, it was really a settlement of the husband's property for his own benefit, and could not prevail as against his creditors.

MUNICIPALITY—ROADS—NON-REPAIR OF HIGHWAY.

In *Municipal Council of Sydney* v. *Bourke*, (1895) A.C. 433; 11 R. July 57, an appeal from New South Wales, the Judicial

Committee of the Privy Council reiterates the opinion expressed in *Pictou* v. *Geldert*, (1893) A.C. 524 (see *ante* vol. 29, p. 740), to the effect that, although a municipality be under a statutory obligation to keep the highways within its limits in repair, yet it is not liable to be sued for damages resulting from its omission to do so in the absence of any statutory provision to that effect. In Ontario there is such a statutory provision: see Municipal Act, 1892, s. 531.

PATENT FOR IMPROVEMENTS IN OLD MACHINE—INFRINGEMENT.

The suit of *Brown* v. *Jackson*, (1895) A.C. 446, was a patent case in which the appeal was brought from the Supreme Court of Ceylon. The action was to restrain the alleged infringement of the plaintiff's patent, which was for improvements to an old and well-known machine. The alleged infringements had the same object as the plaintiff's improvements, but they effected it in a manner not strictly corresponding to the plaintiff's specification; and it was held by the Judicial Committee that the patentee must be limited strictly to the exact terms of his specification, and that there was consequently no infringement.

The Law Reports for September comprise (1895) 2 Q.B., pp. 329-443; (1895) P., pp. 285-300; (1895) 2 Ch., pp. 465-550; and (1895) A.C., pp. 457-541.

RAILWAY COMPANY—PASSENGER'S LUGGAGE—PERSONAL LUGGAGE OF SERVANT—PROPERTY OF MASTER IN SERVANT'S CUSTODY.

Meux v. *Great Eastern Ry. Co.*, (1895) 2 Q.B. 387, was an action against a railway company to recover damages for the loss of the plaintiff's property. The property in question consisted of the livery of the plaintiff's servant, which was in the custody of the servant, and formed part of his personal luggage while travelling as a passenger on the defendants' railway, and which had been destroyed owing to an act of misfeasance of the defendants' porter. The defendants sought to escape liability to the plaintiff on the ground that the contract made by the defendants was a personal contract with the plaintiff's servant, who alone had a right to sue; and that the plaintiff could not recover because the goods were not lawfully on the defendants' premises, and Mathew, J., dismissed the action on these grounds; but the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) held

that, although the plaintiff was not entitled to recover for breach of contract, she nevertheless had a right of action in tort. The goods were lawfully on the premises of the defendants, having been brought there and accepted by the defendants as part of the servant's luggage, and the injury having occurred through an act of misfeasance, and not a mere nonfeasance, the defendants were directly liable therefor to the plaintiff, notwithstanding the defendants' contract was with the servant.

LANDLORD AND TENANT—LEASE OF FURNISHED HOUSE—IMPLIED CONDITION OF FITNESS FOR HABITATION.

In the case of *Sarson* v. *Roberts*, (1895) 2 Q.B. 395, the plaintiff leased furnished apartments in the defendant's house; subsequently, and while the plaintiff was in occupation, the defendant's grandchild, who was living in the same house, fell ill of scarlet fever, and the plaintiff's wife and child were infected and took the fever, and the plaintiff was put to expense for medical attendance and nursing, and he claimed to recover such expenses as damages for breach of an implied contract that the premises would continue fit for habitation. The action was tried before a County Court judge, who gave judgment for the plaintiff; but the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) set aside the verdict and judgment, and dismissed the action on the ground that although according to *Smith* v. *Marrable*, 11 M. & W. 5; and *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336, there is an implied contract that a furnished house is fit for habitation at the commencement of the tenancy, there is no implied contract that it will continue so during the currency of the time.

LANDLORD AND TENANT—DISTRESS—WAIVER OF RIGHT OF RE-ENTRY—ACTION TO RECOVER POSSESSION—C.L.P. ACT, 1852 (15 & 16 VICT., C. 76), S. 210—(R.S.O., C. 143, S. 17).

Thomas v. *Lulham*, (1895) 2 Q.B. 400, was an action by a landlord to recover possession of the demised premises for non-payment of rent, under C.L.P. Act, 1852 (15 & 16 Vict., c. 76), s. 210 (see R.S.O., c. 143, s. 17). The defendant contended that the plaintiff, having distrained for the rent in arrear, had thereby waived his right to recover possession under the C.L.P. Act, notwithstanding that the plaintiff had failed to realize the full amount due by the distress, and there still re-

mained half a year's rent in arrear. Mathew, J., so held, but the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) reversed his decision, holding that the distress did not operate as a waiver of the right to proceed under the statute to recover possession.

EVIDENCE—LANDLORD AND TENANT—BILL OF EXCHANGE GIVEN FOR RENT—DISTRESS—SUSPENSION OF RIGHT TO DISTRAIN.

The question in *Palmer* v. *Bramley*, (1895) 2. Q.B. 405, was one of evidence. The action was in replevin by the tenant against the landlord. The plaintiff, in order to show that the defendant had suspended his right to distrain the goods in question, proved that he had accepted a bill of exchange for the rent in arrear, which was still current when the distress was made. The County judge who tried the case held that according to *Davis* v. *Gyde*, 2 A. & E 623, the acceptance of the bill was no waiver of the right to distrain, and he therefore withdrew the case from the jury, and gave judgment for the defendant. The Divisional Court (Wright and Kennedy, JJ.) directed a new trial, being of opinion that *Davis* v. *Gyde* was not an authority, that an agreement to suspend the right of distress might not be inferred from the acceptance of a bill of exchange; and the Court of Appeal (Kay and Smith, L.JJ.) were of the same opinion, and their lordships point out that *Davis* v. *Gyde* was a decision on a demurrer to a plea which alleged a bill had been given for the rent, but did not aver that it had been taken in satisfaction, or with the intention of suspending the right to distrain, and was, therefore, no authority for saying that the giving of the bill was no evidence of an agreement to suspend the right of distress, had such an agreement been averred.

SHIP—SEAMAN—CONTRACT OF SERVICE—INCREASE OF DANGER—RIGHT TO WAGES.

In *O'Neil* v. *Armstrong*, (1895) 2 Q.B. 418, the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) have unanimously affirmed the decision of the Divisional Court, (1895) 2 Q.B. 70 (noted *ante* p. 473).

COPYRIGHT—MUSICAL COMPOSITION—"DRAMATIC PIECE"—NOTICE OF COPYRIGHT.

In the case of *Fuller* v. *The Blackpool Gardens Co.*, (1895) 2 Q.B. 429, one or two points of interest under the English Copyright Act of 1833 (3 & 4 W. 4, c. 15) are determined. It was

held by the Court of Appeal (Lord Esher, M.R., and Smith and Kay, L.JJ.) that a musical composition, in order to be a dramatic piece within the meaning of that Act, must have the characteristics of a dramatic piece, and whether it has such characteristics is a question of fact which must be determined by the nature of the composition itself. A song that does not require for its representation either dramatic effects or scenery is not a dramatic piece, though intended to be sung in appropriate costume on the stage of music halls. The well-known ditty of "Daisy Bell" was, therefore, determined not to be a dramatic piece within the meaning of the Act. It was also determined that, in order to secure the copyright of a musical composition, it is necessary that every copy published should bear the notice that the right of publication is reserved, as required by the Act of 1882.

PROBATE — ADMINISTRATION WITH WILL ANNEXED — BODILY INCAPACITY OF EXECUTOR.

In *The Goods of Ponsonby*, (1895) P. 287; 11 R. Sept. 49, the executor named in a will being seriously ill, and not in a condition to be served with a citation to accept or refuse probate, Jeune, P.P.D., granted letters of administration, with the will annexed, to the residuary legatee, for the use and benefit of the executor until his recovery.

PROBATE — ADMINISTRATION WITH THE WILL ANNEXED — LEGACY TO ROMAN CATHOLIC CONVENT.

In *The Goods of McAuliffe*, (1895) P. 290; 11 R. Sept. 46, the testatrix in this case had bequeathed her residuary estate, of the value of £456, to one Catherine Headon, "to be disposed of as she shall think fit at her discretion for the benefit of" a certain Roman Catholic convent. The executor named in the will and Catherine Headon had predeceased the testatrix, and the superior of the convent applied for administration with the will annexed, as residuary legatee, and the question was whether it was necessary, first, to apply to the Chancery Division for a scheme for the application of the money. Jeune, P.P.D., held, under the circumstances, that it was not, and he, being satisfied by evidence as to the permanence of the convent in question and the fitness of the superior to apply the money, made the grant to her as residuary legatee.

STATUTE OF LIMITATIONS—PARTNERSHIP ACCOUNTS—CONCEALED FRAUD.

Betjemmann v. *Betjemmann*, (1895) 2 Ch. 474, was an action for an account brought by the personal representative of a deceased partner against the surviving partner. A partnership had originally existed between a father and his two sons, John and George, from 1856 to 1886, in which year the father died, and thenceforward the business was carred on by the sons, without taking any accounts, or winding up the old partnership, or coming to any settlement. John died in 1893, and his personal representative brought the present action against George for an account of the partnership since the father's death in 1886. George claimed by way of cross relief to have the accounts taken from 1856, on the ground that he had recently discovered that John had during his father's lifetime fraudulently drawn more than his share from the partnership funds, and that the fraud was concealed from his co-partners. The plaintiff set up the Statute of Limitations as a bar to the taking of the account prior to 1886, and Wright, J., held it to be an answer, and he also held that, even if there had been a concealed fraud, the defendant might by ordinary diligence have discovered it sooner, and, therefore, he could not avoid the statute on that ground. The Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.), however, disagreed with this view of the law, and held that, although the first partnership terminated on the death of the father, the Statute of Limitations was no bar to the taking of the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement; and the fact that George might, by ordinary diligence, have sooner discovered the fraud of John was held in this case to be no answer to the statute, because a partner is entitled to rely on the good faith of his co-partners: following *Rawlins* v. *Wickham*, 3 D.G. & J. 304.

WILL—CONSTRUCTION—"ISSUE LIVING"—CHILD EN VENTRE SA MERE.

In re Burrows, Cleghorn v. *Burrows*, (1895) 2 Ch. 497; 13 R. Sept. 117, was a simple question in the construction of a will, whereby land was devised to the plaintiff "absolutely" in case she has issue living at the death of the testator's wife, and, if not, then over. The fact was that, at the death of the testator's wife, the plaintiff had no children born, but she was then *enceinte*, and the

following day was delivered of a living child. The question was whether this unborn child could be considered as "issue living" at the death of the testator's wife. Chitty, J., had no difficulty in deciding that question in the affirmative.

WILL—CHARITY—POWER TO APPOINT FOR "SOME CHARITABLE PURPOSE"—ANTI-VIVISECTION SOCIETY.

In the case of *Foveaux, Cross* v. *London Anti-Vivisection Society*, (1895) 2 Ch. 501, it became necessary to determine whether a society for the suppression of vivisection is a "charity" within the legal meaning of the term. The case arose in this way: A lady having power to appoint a fund in favour of charity made an appointment of it in favour of an anti-vivisection society, and the question was whether this was a valid execution of the power. Chitty, J., held that the society was a charity in the technical sense, and upheld the gift. The intention of such societies, he holds, is to benefit the community; but whether, if they achieved their object, the community would, in fact, be benefited was a question on which he did not feel called on to express an opinion.

COPYRIGHT—PHOTOGRAPH—"AUTHOR" OF PHOTOGRAPH—PHOTOGRAPH MADE FOR "GOOD AND VALUABLE CONSIDERATION"—FINE ARTS COPYRIGHT ACT, 1862 (25 & 26 VICT., C. 68), SS. 1, 6.

Melville v. *Mirror of Life Co.*, (1895) 2 Ch. 531, was an action for the infringement of the copyright of a photograph. At the request of the plaintiff a well-known athlete, named Crossland, allowed the plaintiff to take a photograph of him. The plaintiff made no charge, but gave Crossland some copies. No agreement was made as to copyright, but it was understood that the plaintiff was to be at liberty to sell copies. When the photograph was taken the plaintiff's son was present and performed the operation, while the plaintiff looked on and merely directed Crossland how to look. The plaintiff was duly registered as the proprietor of the copyright in the picture. The defendants applied to the plaintiff for a copy, and for permission to publish it, but their request was not granted. They then obtained one of the copies given to Crossland and published a copy of that in their newspaper, and for so doing the action was brought. It was contended that the son of the plaintiff was the "author" of the photograph, and not the plaintiff; but Kekewich, J., held

that the father was the "author" within the meaning of the Act, and that the son merely acted as his servant in taking the photograph, and that the father was, consequently, rightly entitled to the copyright. He also held that the photograph was not taken "for or on behalf of Crossland," and, therefore, the proviso of section 1 of the Act (25 & 26 Vict., c. 68) did not apply. He also held that section 6 of the Act precluded Crossland, as well all other persons but the plaintiff, from multiplying copies without the plaintiff's leave.

INTEREST—ERRONEOUS ORDER—MONEY PAID OUT OF COURT BY MISTAKE.

In re Goodenough, Marland v. *Williams*, (1895) 2 Ch. 537; 13 R. Sept. 112, and *In re Duke of Cleveland's Estate*, (1895) 2 Ch. 542, are two cases in which Kekewich J., has determined that the court, in future, in apportioning a fund between capital and income, will only allow interest at the rate of 3 per cent., instead of 4 per cent., as the basis of calculation. In the latter case a sum of money was paid out of court under an erroneous order, and, upon the order being subsequently varied, it was recovered, but without interest, and it was held that the amount so recovered ought not to be treated as between the tenant for life and remainderman as all capital, but that a fair proportion of it ought to be paid to the tenant for life as income, and, in estimating the amount so to be paid, a 3 per cent. basis must be adopted. The fall in the value of money in Ontario seems to call for some reduction in the statute rate here from 6 per cent. to some lower figure.

HIRE AND PURCHASE AGREEMENT—OPTION TO PURCHASE—PROPERTY IN GOODS—BILLS OF SALE ACT.

In *McEntire* v. *Crossley*, (1895) A.C. 457; 11 R. July 24, which was an appeal from the Irish Court of Appeal, the legal effect of a hire and purchase agreement had to be considered by the House of Lords. By the agreement in question the "owners and lessors" of a gas engine agreed to let and the "lessee" agreed to hire the engine at a rent, payable by instalments, amounting, in the aggregate, to £240, and upon payment in full the agreement was to be at an end, and the engine was to become the property of the lessee, but until payment in full it was to remain the sole and absolute property of the lessors. It also

provided that in case of failure to pay any instalment, or if the lessee should become bankrupt, the lessors might elect either to recover the full balance remaining due, or resume possession of the engine and sell it, and, after paying themselves, pay any surplus to the lessee. The lessee, after paying an instalment, became bankrupt. The lessors took no steps to recover the balance due or to sell the engine, which was taken possession of by the trustee in bankruptcy, whereupon the "lessors" applied to the Bankruptcy Court for an order for the delivery of the engine to them. The question turned on whether or not the effect of the agreement was to transfer the property in the engine to the bankrupt. If it did, then the agreement would be void for non-registration under the Bills of Sale Act. Their lordships (Lord Herschell, L.C., and Watson, Ashbourne, and Shand) were unanimously of the opinion that the effect of the agreement was not to vest the property in the engine in the lessee, and that therefore registration of the instrument under the Bills of Sale Act was unnecessary, and they therefore affirmed the order of the Irish court directing the delivery up of the engine to the lessors.

Reviews and Notices of Books.

Negligence in Law, being the second edition of the principles of the law of negligence. By Thomas Beven. Vol. I. London: Stevens & Haynes, 13 Bell Yard. The Boston Book Co., Boston, 1895.

We have received this very valuable work, and will refer to it hereafter.

DIARY FOR OCTOBER.

1. Tuesday.....Supreme Court of Canada sits. Wm. D. Powell, 5th C.J. of Q.B., 1877. Meredith, J., Chy. Div., 1890.
6. Sunday .....*17th Sunday after Trinity.*
7. Monday.....County Court and Surrogate Sittings, except in York. Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Tuesday .....Sir W. B. Richards, C.J.S.C., 1875. R. A. Harrison, 11th C.J. of Q.B., 1875.
9. Wednesday.....De la Barr, Governor, 1682.
11. Friday.....Guy Carleton, Governor, 1774.
12. Saturday.....America discovered, 1492. Battle of Queenston Heights, 1812.
13. Sunday..... W. R. Meredith, C.J. of C.P.D., 1894.
14. Monday.....County Court and Surrogate Sittings in York.
15. Tuesday.....English law introduced into U.C., 1791.
17. Thursday.....Burgoyne's surrender, 1777.
20. Sunday.....*19th Sunday after Trinity.*
21. Monday.....County Court Non-Jury Sittings in York. Call, last day for notice of Michaelmas Term.
23. Wednesday .....Lord Lansdowne, Governor-General, 1883.
24. Thursday.....Sir J. H. Craig, Governor-General, 1807. Battle of Balaclava, 1854.
26. Saturday .....Battle of Chateauguay, 1813.
27. Sunday.....*20th Sunday after Trinity.* C. S. Patterson, J. of S.C., 1888. Jas. Maclennan, J. Court of Appeal, 1888.

Reports.

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

SYMES *v.* "THE CITY OF WINDSOR."

Maritime law—Master's lien for wages and ship's necessaries—Master's authority to bind ship and owner—Priority of lien over mortgage.

[OTTAWA, Sept. 7, 1895.

This was an appeal by the defendants, the Third National Bank of Detroit, and the Peninsular Savings Bank of Detroit, from a decree of the Judge of the Toronto Admiralty District (see judgment of McDougall, Local J., *ante* 266), in favour of the respondent, the master of the ship "The City of Windsor," for part of his claim for disbursements made and liabilities incurred for necessaries on account of the ship, and for damages for wrongful dismissal. There was also a cross-appeal by the respondent in respect of the part of his claim that was disallowed.

O. E. Fleming for the appellants.

J. F. Canniff for the respondent.

BURBIDGE, J.: "The City of Windsor" was a steamer registered at the port of Windsor, in the Province of Ontario. In 1894, during the time that the respondent was master of her, she was employed as a passenger and freight boat between the cities of St. Catharines and Toronto, and was subject to the provisions of

The Inland Waters Seamen's Act (R.S.C., c. 75, s. 2 (*f*)). By an amendment of that Act made on the 1st of April, 1893, it is provided that "the master of any ship subject to the provisions of this Act shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages." (56 Vict., c. 24.)

The appellants, who were mortgagees of the ship, and who in August, 1894, took possession of her and dismissed the master, contend that under the circumstances of this case the master has no maritime lien in respect of any liability incurred by him on account of the ship; that she was registered and employed in the Province of Ontario, and that the owner was at the time domiciled there; that recourse could have been had to him, and that the master had no authority to incur liabilities for necessaries for the ship, or, if he had such authority, that he could not by incurring them create a maritime lien for such necessaries. The owner could not himself so contract for necessaries for the ship as to create any such lien, and it was argued that his agent in a home port was, in this respect, not in any better position. It is clear, of course, that there is no maritime lien for necessaries supplied to a ship, and that the owner has no power to create any such lien. The High Court of Admiralty in England has jurisdiction over any claim for necessaries supplied to any ship elsewhere than at the port to which the ship belongs, unless it is shown to the satisfaction of the court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales (24 Vict., c. 10, s. 5) Imp.

This court has, in a like case, a like jurisdiction where there is no owner or part owner domiciled in Canada (The Colonial Courts of Admiralty Act, 1891, s. 2, s-s. 3 (*a*), Admiralty Rules No. 37 (*b*). But the person supplying such necessaries has no maritime lien on the ship, whether they are ordered by the owner or the master. That, however, is not the question at issue in this case. The question is, Has the master, by virtue of the amendment of The Inland Waters Seamen's Act (56 Vict., c. 24), a lien for disbursements properly made by him, and for liabilities properly incurred by him on account of the ship, and is his claim to be preferred to that of the mortgagee? The language of the statute is that, so far as the case permits, he is to have the same rights, liens, and remedies for such disbursements and liabilities as a seaman has for the recovery of his wages. In the case of a seaman's wages there is such a lien, and it has priority of any claim by the mortgagee. That is not disputed, and there can be no doubt.

I think that the object of the amendment to which I have referred was to give the master of a ship navigating the inland waters of Canada, above the harbour of Quebec, a lien for disbursements made and liabilities incurred by him on account of the ship in the cases in which, prior to the case of *The Sara*, 14 App. Cas. 209, it had been thought that he had such a lien for his disbursements. The amendment is founded upon and follows closely in that respect the first section of The Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46 Imp.). It was passed after a construction had been put upon the latter statute in the case

of *The Castlegate*, 1893, A.C. 38, and should be construed in the same way as that statute. The Act and the cases in the light of which it is to be construed have been very fully and ably discussed by the learned judge of the Toronto Admiralty District; and I content myself with saying that I agree with him in the construction that he has put upon it.

It cannot be doubted, I think, that in such a case as this the master has a maritime lien not only for his wages, but also for disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, that is, for disbursements necessarily made, and for liabilities necessarily incurred by him on account of the ship while acting within the scope of his authority as master. What that authority may be in a particular case will depend upon the facts and circumstances of the case. The general rule, as stated in Maclachlan on Shipping (4 ed., p. 146), is that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity. With reference to sea-going ships the means of communication between the master and the owner, and the latter's opportunities for personal interference and direction, are ordinarily greater in a home port than in a foreign port, and in that way the master's authority is usually larger, and more readily conceded where a ship is in a foreign port. But while it may require stronger circumstances to establish the fact of its being necessary to make the disbursement or incur the liability where the ship is in a home port, the principle in both cases is the same: *Arthur* v. *Barton*, 6 M. & W. 138. In fact, with reference to vessels navigating the inland waters, there is little room for any distinction, and it is not at all clear that any should be made. If "The City of Windsor" had been at Detroit, in the United States, the means of communication between the master and owner would have been the same practically as if she had been at Windsor, where she was registered, and where the owner resided, and much greater than when she was at St. Catharines or Toronto.

That disposes of the principal question of law raised on the appeal. The other questions discussed have reference to the findings of the learned judge with respect to the particular items of the claim that he allowed or disallowed. Of the amount of $1,326.17, for which the respondent had judgment, the sum of $130.00 was allowed for wages and board in lieu of a month's notice on dismissal, and the sum of $7.50 for a disbursement actually made for coal for the use of the vessel. To these two items the appellants do not object. Their objection is to the sums allowed for liabilities incurred by the master. These liabilities were incurred, for the most part, for repairs and for fuel and provisions for the ship. The fuel and provisions had to be procured from day to day to enable the vessel to make her daily trips between St. Catharines and Toronto. The owner had no agent and little or no credit at either city. He had not provided funds to meet the necessary expenditure for such necessaries, and the earnings of the vessel were not sufficient to enable the master to provide them without incurring a personal liability. In the master's incurring the liability there was no attempt to give, and no thought of giving, the persons supplying the goods any priority or advantage over the mortgagees. On the contrary,

the owner appears to have been ready to do what he could to assist or protect the latter, as was right enough, and equally willing apparently to let the master and the tradesmen look out for themselves as best they could. The case is not, in respect of any part of the claim that was allowed, analogous to the case of *The Orienta*, 1894, P.D. 271; 1895, P.D. 54. Of the items allowed, I have had more doubt about those for advertising than I have had about the others. But these questions, both as to the items allowed and those disallowed, are questions of fact, as to which the findings of the learned judge are not to be lightly disturbed.

The appeal, and the cross-appeal as well, will be dismissed, and with costs.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Exchequer Court.] [March 11.

THE QUEEN *v.* FILION.

Crown—Negligence of servants or officers—Common employment—Law of Quebec—50 & 51 Vict., c. 16, s. 16 (c).

A petition of right was brought by F. to recover damages for the death of his son, caused by the negligence of servants of the Crown while engaged in repairing the Lachine canal.

Held, affirming the decision of the Exchequer Court, TASCHEREAU, J., dissenting, that the Crown was liable under 50 & 51 Vict., c.16, s. 16 (*c*); and that it was no answer to the petition to say that the injury was caused by a fellow-servant of the deceased, the case being governed by the law of the Province of Quebec, in which the doctrine of common employment has no place.

Appeal dismissed with costs.

Monk, Q.C., and *Coderre* for the appellant.

Hogg, Q.C., for the respondent.

Exchequer Court.] [Oct. 9.

CITY OF QUEBEC *v.* THE QUEEN.

Constitutional law—Dominion Government—Liability to action for tort—Injury to property on public work—Nonfeasance—39 Vict., c. 27 (D.)—R.S.C., c. 40, s. 6—50 & 51 Vict., c. 16 (D.).

By 50 & 51 Vict., c. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine, *inter alia*:

"(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

"(*d*) Every claim against the Crown arising under any law of Canada . . ."

In 1877 the Dominion Government became possessed of the property in the city of Quebec on which the citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the city engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth until, in 1889, a large portion of rock fell from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government.

Held, per TASCHEREAU, GWYNNE, and KING, JJ., affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur *upon* a public work subsection (*c*) of the above Act did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Held, per STRONG, C.J., and FOURNIER, J., that while subsection (*c*) of the Act did not apply to the case, the city was entitled to relief under subsection (*d*); that the words "any claim against the Crown" in that subsection, without the additional words, would include a claim for a tort; that the added words, "arising under any law of Canada," do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada; that this case should be decided according to the law of Quebec regulating the rights and duties of proprietors of land situated on different levels; and that under such law, the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair, and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain; and that independently of the statute the Crown was liable for breach of its duty as owner of the superior heritage.

Appeal dismissed with costs.

Pelletier, Q.C., and *Quinn*, Q.C., for the appellant.

Hogg, Q.C., for the respondent.

Ontario.] [May 6.

TOWN OF TRENTON *v.* DYER AND OTHERS.

Statute—Directory or imperative requirement—Municipal corporation—Collection of taxes—Delivery of roll to collector—55 Vict., c. 48 (O.).

By s. 119 of the Ontario Assessment Act (55 Vict., c. 48) provision is made for the preparation in every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the Treasurer of the Province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." . . .

Held, affirming the decision of the Court of Appeal (21 A. R. 379), that the provision as to delivery of the roll to the collector was imperative, and

its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous sections, as well as to that for provincial taxes.

Appeal dismissed with costs.

Marsh, Q.C., and *Delaney* for the appellant.

Abbott for respondent *Dyer*.

Clute, Q.C., and *O'Rourke* for other respondents.

Quebec.] [May 6.

DIONNE *v.* THE QUEEN.

Pension—Commutation—Transfer or cession—R.S.P.Q., Arts. 690, 693.

D., a retired employee of the Government of Quebec, surrendered his pension to the Government for a lump sum, and afterwards he and his wife brought an action to have it revived and the surrender cancelled. By Art. 690 of R.S.P.Q. "the pension or half pension is neither transferable nor subject to seizure," and by Art. 683 the widow of D. would have been entitled to an allowance equal to one-half of his pension.

Held, reversing the decision of the Court of Review, STRONG, C.J., and SEDGEWICK, J., dissenting, that D., after his retirement, was not a permanent official of the Government of Quebec, and the transaction was not, therefore, a resignation by him of office and a return by the Government, under Art. 688, of the amount contributed by him to the pension fund; that the policy of Arts 685 and 690 is to make the right of a retired official to his pension inalienable even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension, and could maintain proceedings to conserve it; and, therefore, that the surrender of the pension should be cancelled.

Appeal allowed with costs.

Burroughs for the appellants.

Cannon, Q.C., for the respondent.

Quebec.] [May 6.

N. A. GLASS CO. *v.* BARSALOU.

Contract—Construction of—Agreement to discontinue business—Determination of agreement.

B., a manufacturer of glassware, entered into a contract with two companies in the same trade by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace," and the payments to B. should then cease, unless he could show "that said furnace or furnaces, at the time said notice was given, could not have a production of more than one hundred dollars per day."

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to show that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period, and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity, whether it was actually produced or not.

Appeal dismissed with costs.

Martin, Q.C. (Ontario Bar), and *Martin* for appellant.

Beique, Q.C., and *Geoffrion*, Q.C., for respondent.

Quebec.] [May 6.

VILLAGE OF ST. JOACHIM DE LAPOINTE CLAIRE *v.* THE LAPOINTE CLAIRE TURNPIKE ROAD COMPANY.

Statute—Construction of—Retroactive effect of—Municipal corporation—Turnpike road company—Erection of toll-gates—Consent of corporation.

A turnpike road company has been in existence for a number of years in the village of Lapointe Claire, and had erected toll-gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 Vict., c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict., c. 36. After 52 Vict., c. 43, was passed, the company shifted one of its toll-gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of section 2 of 52 Vict., c. 43, made that Act retroactive, and that the shifting of the toll-gate without the consent of the corporation was a violation of said Act.

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms section 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll-gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the possessory rights of the company.

Appeal dismissed with costs.

Geoffrion, Q.C., and *Charbonneau* for the appellant.

St. Pierre, Q.C., for the respondent.

Award of Arbitrators.] [May 6

DOMINION OF CANADA *v* PROVINCES OF ONTARIO AND QUEBEC.

IN RE ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Construction of statute—B.N.A. Act, ss. 112, 114, 115, 116, 118—36 Vict., c. 30 (D.)—47 Vict., c. 4 (D.)—Provincial subsidies—Half-yearly payments—Deduction of interest.

By section 111 of the B.N.A. Act, Canada is made liable for the debt of each province existing at the union. By section 112, Ontario and Quebec are

jointly liable to Canada for any excess of the debt of the Province of Canada at the union over $62,500,000, and chargeable with 5 per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick, exceeding eight and seven millions respectively; and by section 116, if the debts of those provinces should be less than said amounts, they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly in advance to each province, but the Government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in section 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec;

Held, affirming said award, that the subsidy to the provinces under section 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the B.N.A. Act that interest shall be deducted in advance on the excess of debt under section 118.

By 36 Vict., c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vict., c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last-mentioned Acts had directed that such increase should be allowed from the coming into force of the B.N.A. Act; and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to Jan. 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital, owing to the respective provinces bearing interest at 5 per cent., and payable after July 1st, 1884, as part of the yearly subsidies.

Held, affirming the said award, GWYNNE, J., dissenting, that the last-mentioned Acts did not authorize the Dominion to deduct in advance from the subsidies payable to the provinces half-yearly, but leaves such deduction as it was under the B.N.A. Act.

Ritchie, Q.C., and *Hogg*, Q.C., for the appellant.

Irving, Q.C., and *Moss*, Q.C., for the respondent, the Province of Ontario.

Girouard, Q.C., and *Hall*, Q.C., for the respondent, the Province of Quebec.

Quebec.] [Oct. 8.

BARRINGTON *v.* THE CITY OF MONTREAL.

Appeal—Mandamus—Appeal from Court of Review—Jurisdiction.

B. applied for a mandamus to compel the city of Montreal to carry out the

provisions of one of its by-laws, which was granted by the Superior Court, whose judgment was reversed by the Court of Review, and the petition for mandamus dismissed. B. then instituted an appeal from the latter judgment to the Supreme Court of Canada; and on motion to quash such appeal,

Held, that the case was not within the provisions of 54-55 Vict., c. 25, s. 4, allowing appeals from the Court of Review in certain cases; and the appeal not coming from the Court of Queen's Bench, the court of highest resort in the Province), there was no jurisdiction to entertain it. *Dangon* v *Marquis*, 3 S.C.R. 251, and *McDonald* v. *Abbott*, 3 S.C.R. 278, followed.

Appeal quashed without costs.

Ethier, Q.C., for the motion.

Weir, contra.

ONTARIO.

SUPREME COURT OF JUDICATURE.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

ROSE, J., in Chambers.] [Aug. 31

THE QUEEN *v.* COURSEY.

Public health—Conviction under by-law in schedule—Right to appeal to Quarter Sessions—Prohibition—R.S.O., c. 205.

Held, that where there is a conviction for an offence under the by-law set out in the schedule to R.S.O., c. 205, as distinguished from any of the provisions in the Act itself, an appeal will lie from such conviction to the Quarter Sessions notwithstanding section 112, which has no application.

Shepley, Q.C., for the applicants.

Aylesworth, Q.C., for the defendants.

Master in Chambers.] [Oct. 2.

YOUNG *v.* ERIE & HURON RAILWAY CO.

Particulars—Demand—Compliance—Restriction.

Where a party complies with a demand for particulars of his claim, he will not be restricted at the trial to the particulars given by him, without any order for the purpose.

Masten for the plaintiff.

W. H. Blake for the defendants.

Chancery Division.

MEREDITH, C.J.] [July 16.

TOWNSHIP OF MORRIS *v.* COUNTY OF HURON.

Statutes—Repeal of an Act—Exception—Interpretation Act—Effect of—Consolidated Municipal Act, 1892—55 Vict., c. 42, s. 533 (a); 57 Vict., c. 50, s. 14 (O.).

The saving provisions of s. 14 of 57 Vict., c. 50 (O.), do not operate so as by implication necessarily to exclude the application of the Interpretation Act, R.S.O., c. 1, s. 8, s-s. 43.

Held, that a township corporation which had obtained an award against a county corporation under s. 533 (*a*) of the Consolidated Municipal Act, 1892, for part of the cost of the maintenance of certain bridges, was, notwithstanding the repeal of s. 533 (*a*) by s. 14 of 57 Vict., c. 50 (O.), entitled to recover the same up to the date of the passing of the latter Act.

E. L. Dickenson for the plaintiff.

Garrow, Q.C., for the defendants.

MEREDITH, C.J.] [July 18.

THE TORONTO GENERAL TRUSTS CO. *v.* WILSON ET AL.

Will—Devise—Charitable bequest—Validity of—Discretion of executors.

A testator by his will devised as follows: "I give and bequeath to my executors out of my pure personalty the sum of $10,500, to be paid out by my executors as follows: $3,500 to Wycliffe College, $3,500 to the Bishop of the diocese of Algoma for the support of missions of the said diocese, and the balance, to wit, the sum of $3,500, towards the support of any mission or missions which may be undertaken or established by the Rev. E. F. W., the said Mr. W. having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere."

Held, that the bequest of the latter $3,500 for the support of the missions to be undertaken was valid, but was not a bequest to the Rev. E. F. W., and that the executors had a discretion to apply the corpus of the fund, so far as it was necessary to resort to it, as well as the income, for the support of the missions.

Moss, Q.C., for the plaintiffs.

J. F. Dumble for defendant Wilson.

William Davidson for the infants.

Practice.

MEREDITH, C.J.] [July 17.

SUMMERFELDT *v.* JOHNSTON.

Costs—Taxation—Claim and counterclaim.

Where judgment is given for the plaintiff upon his claim with costs, and for the defendant upon his counterclaim with costs, the amounts to be set off,

the costs should be taxed so as to allow the plaintiff the costs on his claim as though he had wholly succeeded in the suit, and the defendant the costs of the counterclaim as though he had wholly succeeded in the suit.

Day for the plaintiff.

W. H. McFadden for the defendant.

MANITOBA.

COURT OF QUEEN'S BENCH.

TAYLOR, C.J.] [Sept. 26.

WOOD *v.* GILLETT.

Security for costs—Plaintiff resident out of jurisdiction, but owner of real estate within.

Held, that the owner of unincumbered real estate within the Province of sufficient value is a good answer to an application for security for costs.

Caston v. *Scott*, 1 M.R. 117, not followed.

The Chief Justice was of the opinion that he should follow the decision of the English Court of Appeal, rather than that of our own Full Court, as the Judicial Committee of the Privy Council had, in *Trimble* v. *Hill*, 5 App. Cas. 342, laid it down as a rule that a colonial court ought to follow the decision of the Court of Appeal in England, because that is a judgment by which all the courts in England are bound until a contrary determination has been arrived at by the House of Lords.

The order for security which had been taken out on præcipe was discharged without costs.

IN MEMORIAM.

RUDOLF VON GNEIST.

The world owes much to Germany; she reared
Men of Titanic mould when other lands
Bore dwarfs. Crowned in her might to-day she stands
A very queen of States, serene, revered.
And thou, great soul, who late thy bark hast steered
From Earth's low marge to the Elysian sands,
Art not the least in her heroic bands.
Not thine a sword to make thy country feared,
But thine to lend a sapient mind to frame
The fabric of her laws both strong and well—
A prouder meed no patriot could claim!
Thou wert not insular; a love of right
World-wide constrained thee here. Now perfect sight
Reveal thee Justice on her citadel.

CHARLES MORSE.

Ottawa, Canada.