THE

Canada Law Journal.

VOL. XXX. APRIL 16, 1894. No. 7.

NOT as a matter of news, but of interest, we note that Sir Charles Russell, the Attorney-General of England, has been appointed a Lord of Appeal in the House of Lords, in place of Lord Bowen. This appointment will, doubtless, meet with general favour. A very competent authority has expressed an opinion that Sir Charles Russell is the greatest advocate who has appeared in England in this generation; at least, it may safely be affirmed that he is the greatest of his day. He was originally, we understand, a solicitor at Belfast, in religion a Roman Catholic, a typical Irishman, good-hearted and generous, with great force of character and masterful ways; the latter has, perhaps, prevented his being very popular with the profession of which he is such an ornament. Like many of his countrymen, he has a passion for horse racing, and is as well known on the turf as in the courts of law.

THE attention of the profession in the United States has been recently directed to the subject of land transfer reform by an address of the president of the Maine State Bar Association at its meeting, held last February, at Portland. He deals with the difficulties attending the present system, which, he says, often places on record not only what tends to sustain the title, but also many things which tend to defeat it, stereotyping complications and perpetuating technical defects which become more difficult to remove with the lapse of time. In view of these uncertainties, it is not strange, he remarks, that "Title insurance companies" should have sprung up in the larger cities in the United States, which attempt to protect purchasers against loss from some of the sources indicated; the existence of these insur-

ance companies being an admission of the gravity of the situation, and the seriousness of the evil to be removed. He then refers to the main features of the Torrens system, which, he says, offers great advantages over the cumbersome and necessarily expensive mode of registration at present in use in the United States. The conclusion he draws is very favourable to the former.

MRS. MYRA BRADWELL, whose recent death is mourned, especially in Chicago, was a very remarkable woman. This death removes one who (to quote the words of the Illinois State Bar Association) was "the first woman made an honourable member of that association, and one of the worthy pioneers in the great movement of the age to give to women equal rights before the law and equal opportunities to enter all appropriate fields of useful activity." She studied law under the tutelage of her husband, and, in 1868, established the *Chicago Legal News*, the first weekly law periodical in the west, and, so far as we know, the only legal journal edited by any woman in the world; whilst her business ability, sagacity, and enterprise soon built up one of the most flourishing printing and publishing houses in the west. In 1869, having passed a highly creditable examination, she applied for admission to the Bar, which, however, was refused. Twenty-two years afterwards, however, the Supreme Court of Illinois, upon their own motion, directed a license to practise law to be issued to her, and in March, 1892, she was also, upon motion of the Attorney-General, admitted to practise before the Supreme Court of the United States. Mrs. Bradwell did not confine herself to law and business, but was a most useful citizen in a number of ways, and, last, but not least, was "a gentle and noiseless woman, her tenderness and refinement making the firmness of her character all the more effective, a most devoted wife and mother, her home being ideal in its love and harmony."

THE English legal journals contain interesting obituary notices of the late Sir James Stephen, who died on the 11th ult. at the comparatively early age (for English judges) of 65. He was called to the Bar in 1854. In 1869 he went to India to succeed Sir Henry Maine as legal member of the Council of the

Governor-General of India. He returned in 1872, and at the request of Lord Coleridge, then Attorney-General, drafted a bill codifying the law of evidence, and subsequently prepared a bill for the codification of criminal law, which, however, was not introduced. His literary labours were immense, embracing all sorts of subjects, which were treated in a masterly manner. In 1879 he was appointed to the Bench, resigning, however, in 1891, in consequence of some statements made regarding his health. Our namesake in England thus speaks of the life and work of this distinguished man:—"The death of Sir James Stephen, with its prelude of long illness and deep pathos, has removed from our midst a great jurist. His reputation lies in his books rather than in his record as a judge, for, considering his learning and powers of research, the number of important judgments with which his name is connected in the Reports is small. It was as an author rather than as an advocate that he made his mark at the Bar; it was as a jurist rather than as a judge that he acquired his wide reputation during the twelve years he occupied a seat on the Bench. If he had a principle to expound, and its history to trace, his intellectual powers shone brilliantly, but whenever he had to deal with technical details he appeared ponderous and unhappy. To be at his best he required a theme. To this extent, therefore, there was some truth in the saying that he was a philosopher among lawyers and a lawyer among philosophers. Nevertheless, he was almost an ideal judge in criminal cases, having a remarkably keen sense of the relevancy of evidence, a firm grasp of facts, and a power of weighing the evidence with an impartiality which could never be questioned. What he lacked was a lightness of touch. It has been truly remarked that he dealt with every question with the tremendous precision of a Nasmyth hammer. The preponderating quality of his career was strength. His mental capacity, indeed, was in harmony with his physical. On some occasions, however, he allowed his own indifference to fatigue to impose upon others a strain which their inferior capacity found it very difficult to bear. He has been known to begin work on a circuit at five o'clock on one morning and continue trying cases in a crowded court until three o'clock in the next. Next to its strength, the main feature of his career was the breadth of its interests and the variety of its labours. His reputation as a philosophic writer

was alone sufficient to make his name well known to the public. His labours in India have an enduring place in the annals of that country, and his attainments as a jurist were higher than those of any of his contemporaries. During the latter part of his active life all his contributions to literature were written on the table on which Carlyle wrote most of his books, and which the famous philosopher, whose friendship Sir James Stephen enjoyed, bequeathed to him."

THE JURISDICTION OF THE COUNTY COURTS.

The suitor in the County Court, or rather his solicitor, is often in a quandary—"between the devil and the deep sea," as it were; for this court has, on either hand, a neighbour very jealous of his rights, keen to see that no sort of work is improperly imposed upon him, and at the same time as keen to take care that he shall not be deprived of what properly belongs to him.

The boundary line, on one side, at least, of this court is something like that we occasionally come across in an old Crown grant—so many degrees on such a course, so many chains "more or less to a certain swamp." The swamp was plain enough and easy to be found when the surveyor laid out the lot, but after a lapse of half a century or so the swamp has disappeared, having given place to a plowed field. So when the draughtsman of the Act which first defined the jurisdiction of the County Court in its present shape laid out his work, he had no doubt a clear conception of what he meant, and what was intended to be laid down. Many shiftings, however, of the boundary fence on either side of this County Court lot, both this way and that, have, to some extent, rendered cloudy and indistinct the proper line it should stand on, making it necessary to apply to the guardian of the "High Court" lot as to where *he* thinks it ought to be, and, if he differs from his neighbour as to where their line fence should stand, his opinion must prevail. This, of course, is as it should be; for, when a question as to boundary comes up, that neighbour's jurisdiction is, of course, ousted.

Leaving metaphor, let us come to facts, and the first fact is that there is not that certainty on this question of jurisdiction that is desirable. The statute (R.S.O., c. 47) lays down just what sort of actions may *not* be tried in a County Court, and then those that may be so tried.

With the first class we do not at present intend to deal, beyond making two remarks, one of which is that though section 18 of the County Court Act says that the said court shall not have cognizance of any action in which the title to land is brought in question (subject, however, to the provisions of section 20), yet section 27 prohibits also a case where the title "to any annual or other rent, duty, or other custom or thing relating to or issuing out of lands or tenements," is brought in question—the one question being involved in the other.

The other remark is that to the prohibited cases mentioned in section 18 must be added that referred to in section 26, namely, an action by or against a judge or junior judge of a County Court in his own county, and this, not even if there should be a second judge in the county who might try the other judge's case. A brother judge in any adjoining county may, however, try such a case in his court.

The clauses about which there so often arises a doubt are one and two of section 19 defining the jurisdiction, and these are the ones we have now to consider.

A short retrospect *in limine* as to the constitution of the court and the gradual enlargement of its jurisdiction may prove useful when considering the applicability of the law then in force to the decided cases.

By 34 Geo. III., cap. 3, was established a court for the cognizance of small causes in every district, to be called the District Court.

The Court of King's Bench (established by cap. 2 of the same session) having concurrent jurisdiction, it was found that suits were constantly brought in that court which were of the proper competence of the District Courts, and, therefore, at a later period an Act was passed (58 Geo. III., cap. 4) that in such cases, unless a certificate was granted, only District Court costs should be taxed by the plaintiff, and giving the defendant the right of setting off the extra costs incurred by him.

Between the passing of the Act 34 Geo. III. and the Consolidating Act (to be presently mentioned) several amending Acts were passed, namely, 37 Geo. III., cap. 6; 38 Geo. III., cap. 3; 51 Geo. III., cap. 6; and 59 Geo. III., cap. 9, which may be consulted by the curious.

By 2 Geo. IV., cap. 2 (second session), all previous Acts

respecting the District Courts were consolidated. By this Act these courts were constituted courts of record, and were empowered to hold plea in matters of contract from forty shillings to fifteen pounds; and, where the amount was liquidated or ascertained either by the act of the parties or the nature of the transaction, up to forty pounds; also in torts to personal chattels, when damages to be recovered did not exceed fifteen pounds, and suits on bail bonds in the District Courts to any amount.

By 4 William IV., cap. 7, these courts were given jurisdiction in replevin where the value of the goods did not exceed fifteen pounds.

The next Act of any importance was 8 Vict., cap. 13. By s. 5 the limit "*from* forty shillings" was repealed, and the jurisdiction was increased to £25 in cases of debt, covenant, or contract; to £50 in cases of contract or debt on the common counts where the amount was ascertained by the signature of the defendant, and also in matters of tort relating to personal chattels, where the damages did not exceed £20, and where title to land was not brought in question.

This Act in one way reduced the jurisdiction; for, though by 2 Geo. IV. a plaintift could go as high as £40 where the amount was "liquidated or ascertained either by the act of the parties or the nature of the transaction," yet by 8 Vict. it required the "signature of the defendant" to go beyond £25.

By 12 Vict., cap. 66, it was provided that, though the total of all the counts exceeded the jurisdiction, yet if the damages laid at the conclusion of the declaration did not exceed the jurisdiction no demurrer should be allowed.

By 13 & 14 Vict., cap. 52, jurisdiction was given up to £50 in cases of debt, contract, or covenant, and to £100 where the amount was ascertained by the signature of the defendant (still nothing about the "act of the parties"), and in tort relating to personal chattels, where the damages claimed did not exceed £30, etc.

By 16 Vict., cap. 119, equity jurisdiction up to a certain amount was conferred on the County Courts, but it was not favourably received, and was afterwards repealed by 32 Vict., cap. 6.

By 19 & 20 Vict., cap. 90, jurisdiction was given in all "personal actions" up to £50, and in "all causes or suits relating to debt, covenant, or contract, where the amount is liquidated or

ascertained by the act of the parties or the signature of the defendant," up to £100. And this is the extent of the jurisdiction, at law, at least, that now obtains; as to equitable jurisdiction, we shall have something to say later on.

But while the jurisdiction, in the direction of the higher courts, thus gradually extended, it must not be forgotten that the jurisdiction of the Division Courts, in the other direction, encroached upon the County Courts almost to the same extent. But just as the Superior Courts have always concurrent jurisdiction with the courts below them, so the County Courts have concurrent jurisdiction with the Division Courts—the result, in either case, from selection of the wrong form, being only a question of costs.

It must be remembered that certain causes of action, such as those, or most of those, excepted from the Division Courts' jurisdiction by section 69 of the Division Courts Act, belong of right to the County Court, and will carry the costs of that court, no matter how small may be the amount involved.

Now, to go back, what is a "personal action"? One, we are told, "brought for the specific recovery of goods and chattels, or for damages, or other redress; for breach of contract, or other injuries of whatever description; the specific recovery of land, tenements, or other hereditaments only excepted"; and, again, one which "concerns contracts both sealed and unsealed, and offences or trespasses; the former are called *ex contractu*: they are, debt, promises, covenant, accounts, detinue, revivor, and *scire facias*; the latter are *ex delicto*, as case, trover, replevin, and trespass, *vi et armis*; or, more shortly, from the Roman law, those "which are brought against him who, either from contract or injury, is obliged to give or allow something."

The old common law maxim was, to use the vulgar tongue, that "a personal action dies with the person." This, however, is not so now; for by 49 Vict., cap. 16 (R.S.O., c. 110), it was enacted that "the executors or administrators of any deceased person may maintain an action for all torts or injuries to the person, or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease."

In re M'Gugan v. *M'Gugan*, 21 O.R. 289, Armour, C.J., says "the term personal action is a term signifying, as used in this statute (R.S.O., c. 47, s. 19), a common law action."

It will be borne in mind that in the Consolidating Act (2 Geo. IV., c. 2) nothing is said about *personal* actions, the only use of that word being when it speaks of "matters of tort to personal chattels." The same may be said of 8 Vict., cap. 13, and 13 & 14 Vict., cap. 52, in neither of which is there any mention of "personal" actions. That word is first found in 19 & 20 Vict., cap. 90, where jurisdiction is given in "all personal actions" up to £50.

It must be noticed, however, that in the interval between 13 & 14 Vict. and 19 & 20 Vict. the Act conferring equitable jurisdiction (16 Vict., cap. 119) was passed. Now, if previous to this last Act the words "personal action" had been used in any County Court Act, it might well be argued that such words did not give any equitable jurisdiction, in view of 16 Vict., passed specially to give such jurisdiction.

After the passing of this Act we find for the first time (19 & 20 Vict., c. 90) jurisdiction given to these courts in "personal actions," and not simply in "debt, covenant, and contract," as theretofore. If, then, any wider jurisdiction was conferred by the use of the words "personal actions," instead of those previously used, it will be obvious that the subsequent repeal of the Equity Jurisdiction Act did not thereby take away such extended jurisdiction, if any.

We have dwelt at some length on this point, because it seems rather difficult to get an authoritative decision as to what sort of actions are included in the term "personal." Take, for instance, the late case of *Whidden* v. *Jackson* (18 A. R. 439), where the oldest and most experienced member of the court, the Chief Justice, held a contrary view to the other judges. To this case we shall refer later on.

We have many cases where it is decided whether a certain kind of action is a "personal" action or not, but we have none laying down all that is intended by such a term. It would, no doubt, be almost impossible to do this in a general way with any reasonable accuracy, and judges, wisely perhaps, reserve their opinions till called upon to give them in each particular case as it arises.

"After this "personal" difficulty, the next that arises is as to the extent, if any, of the equitable jurisdiction—not powers—of these courts. Going back to the Administration of Justice Act (36 Vict., c. 8), we find section 2 to read: "Any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiffs right to recover may be an equitable one only."

By section 9: "In case it appears to a court of common law, or a judge thereof, that any equitable question raised in an action or other proceeding at law cannot be dealt with by a court of law, so as to do complete justice between the parties . . . the court or judge may order the action or proceeding to be transferred to the Court of Chancery," etc., and section 15 says, "When any action is transferred under section 9 . . . from a County Court," etc.

Tracing out this Act, we find the above three sections, 2. 9, and 15, appearing in the Administration of Justice Act (R. ., 1877, c. 49) as sections 4, 23, and 30, respectively, with a few unimportant changes.

Section 4 of that Act appears to have been superseded by the Ontario Judicature Act, 1881 (44 Vict., cap. 5), as appears by R.S.O., 1887, but, we would submit, only as far as regards the Superior Courts, the powers of the abolished "Court of Chancery" being by that Act conferred also on the Common Law Divisions of the High Court. The section itself is not specifically repealed, and the Judicature Act repeals only "any enactment inconsistent with this Act," which section 4, as far as it affects County Courts, does not appear to be; and as section 23 (above referred to) is reproduced in the present County Courts Act (R.S.O., 1887, c. 47, s. 38 (1)), we may fairly assume that it refers to a case where the County Court is exercising the jurisdiction given it by section 4.

Of course, this difficulty then meets us: Section 30, above referred to, appears again in section 39 of the present County Courts Act, where it closes with these words: " . . . actions which before the passing of the Ontario Judicature Act, 1881, and the Law Reform Act, 1868, might have been brought under the equity jurisdiction of the County Court."

It was by the latter of these two Acts (32 Vict., cap. 6) that the equity jurisdiction of the County Courts (conferred by 16 Vict., cap. 119) was repealed, and, if they never had thereafter

any equity jurisdiction, why refer to ... having any prior to the Judicature Act (44 Vict., cap. 5) passed twelve years subsequently? The difficulty we referred to is, that it seems to be assumed by section 39 of the County Courts Act that any equitable jurisdiction that existed before the Judicature Act exists no longer.

(*To be continued.*)

CURRENT ENGLISH CASES.

The Law Reports for March comprise (1894) 1 Q.B., pp. 269-532; (1894) P., pp. 57-107; (1894) 1 Ch., pp. 229-449; and (1894) A.C., pp. 1-71.

PRINCIPAL AND SURETY—AGENT EXCEEDING AUTHORITY—PAYMENT TO AGENT BY CHEQUE—ACCEPTANCE OF CHEQUE BY AGENT WITHOUT AUTHORITY.

Pape v. *Westacott*, (1894) 1 Q.B. 272, is the first case to be considered, and the short point in it was whether an agent of a landlord, who had been entrusted by his principal with a license to the tenant to assign his lease, with instructions not to deliver it up without first being paid the last quarter's rent, was justified in delivering it up on receiving a cheque for the rent, payment of which had been refused. The Court of Appeal (Lindley, Smith, and Davey, L.JJ.) affirmed the judgment of the Divisional Court (Charles and Williams, JJ.), holding that the agent was not justified in accepting the cheque, and was liable for the quarter's rent which the landlord had lost by his so doing, notwithstanding the fact that the agent had reason to believe that the cheque would be duly honoured. This case is not, however, by any means an authority for the proposition that an agent employed to collect money is in all cases liable if he take a cheque in lieu of cash. The circumstances here were peculiar, the agent being entrusted with a document, the delivery up of which was conditioned on his obtaining payment; its delivery without payment enabled another tenant to go into possession, as against whom the plaintiff could not distrain, and, the former tenant being insolvent, the landlord had lost his rent through the defendant's act; hence his liability.

STATUTE OF FRAUDS (29 CAR. II., C. 3), S. 4—GUARANTY OR INDEMNITY—ORAL AGREEMENT TO SHARE COMMISSION AND LOSSES ON STOCK EXCHANGE TRANSACTIONS.

Sutton v. *Grey*, (1894) 1 Q.B. 285, is an illustration of the difficulty which sometimes arises in determining whether a contract is one of guaranty or indemnity. In this case the plaintiffs and defendant had made an oral agreement whereby the defendant was to introduce clients to the plaintiffs (who were stockbrokers), on the understanding that all commissions earned on transactions for clients so introduced should be divided between the plaintiffs and the defendant, and that, in the event of any loss, the defendant would share it equally with the plaintiffs. The action was to recover half the loss the plaintiffs had sustained in transactions for a client whom the defendant had introduced. The defendant endeavoured to escape liability on the ground that the contract was one to answer for the debt, default, or miscarriage of another, and was void under the Statute of Frauds, s. 4, because it was not in writing. The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) agreed with Bowen, L.J., who tried the action, that the contract was not one of guaranty, but one of indemnity. While admitting the difficulty of drawing the line between the two kinds of contract, the Court of Appeal was of opinion that the test by which they are to be distinguished is furnished by the case of *Coutourier* v. *Hastie*, 8 Ex. 40, and is "whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise" (*per* Lopes, L.J., p. 290). Applying this test to the promise in question, the fact that the transaction which resulted in the loss was entered into for the mutual benefit of both plaintiffs and defendant, and was, in fact, merely a mode of regulating the terms of the defendant's employment, was held to make the case one of indemnity, and therefore not within the statute, although in the result the defendant might, in fact, have to answer for the default of another.

ADULTERATION—CERTIFICATE OF ANALYSIS, FORM OF—SALE OF FOODS AND DRUGS ACT, 1875 (38 & 39 VICT., C. 63), SS. 6, 18—(R.S.C., C. 107, SS. 6, 11).

In *Bakewell* v. *Davis*, (1894) 1 Q.B. 296, a Divisional Court (Charles and Wright, JJ.) determined that the certificate of an analyst, under The Sale of Foods and Drugs Act, 1875, of the

result of his analysis, need not set out the constituent parts of the sample analyzed, where the case is not one of adulteration, but one of abstraction, and it is sufficient if it state the "result" of the analysis, and also that the introduction of observations, amounting to an expression of opinion of the analyst, as to the effect of the abstraction which he finds to have taken place, does not vitiate the certificate.

ADULTERATION—ADDITION OF INGREDIENT INJURIOUS TO HEALTH—BAKING POWDER NOT AN ARTICLE OF FOOD—SALE OF FOOD AND DRUGS ACT, 1875 (38 & 39 VICT., C. 63), S. 3 (R.S.C., C. 107, S. 2, S-S. 1 (*a*), S-S. 6; 53 VICT., C. 26, S. 1 (D.)).

In *James* v. *Jones*, (1894) 1 Q.B. 304, it became necessary to determine whether baking powder of which alum, an ingredient injurious to health, was a component was an article of "food" within The Sale of Foods and Drugs Act, 1875. (See R.S.C., c. 107, s. 2, as amended by 53 Vict., c. 26, s. 1 (D.)). A Divisional Court (Hawkins and Lawrance, JJ.) held that it was not an article of food, and, therefore, that its sale was not an offence within the Act, and that the time for determining its character was the time of sale, and that an article did not become an article of food within the Act although sold with the intention that it should afterwards be mixed with other ingredients which were articles of food, and the conviction of the defendant for selling such baking powder was quashed.

MUNICIPALITY—HIGHWAY, NON-REPAIR OF—NUISANCE—COVER OF SEWER MANHOLE.

Thompson v. *Brighton*, (1894) 1 Q.B. 332, is a case on the same lines as *Picton* v. *Geldert*, (1893) A.C. 524 (noted *ante* vol. 29, p. 740). The plaintiff was riding on a highway which was under the defendants' control, and his horse stumbled over the manhole of a sewer (also under the defendants' control), which projected above the level of the road, and thereby the plaintiff's horse was injured. The action was to recover damages for the injury thus sustained. It appeared that the cover of the manhole was in good order, and had been properly placed originally, but that the defect had arisen by reason of the wearing away of the road around it, and the neglect of the defendants to repair it. Under these circumstances, the Court of Appeal (Lindley, Smith,

and Davey, L.JJ.) held that the municipality was not liable, overruling *Kent* v. *Worthing*, 10 Q.B.D. 118. We may observe that, under The Consolidated Municipal Act (55 Vict., c. 42 (O.)), s. 53, an express liability to repair highways is imposed on the municipality, subject to the exception mentioned in s-s. 2, and therefore, as regards cases arising under that Act, neither this case nor that of *Pictou* v. *Geldert* would exonerate the municipality from liability.

CRIMINAL LAW—EMBEZZLEMENT—"CLERK OR SERVANT"—DIRECTOR OF COMPANY—24 & 25 VICT., C. 96, S. 68—(CRIMINAL CODE, S. 319 (*a*)).

In *The Queen* v. *Stuart*, (1894) 1 Q.B. 310, a case was reserved by a chairman of Quarter Sessions on the simple point whether a director of a company who had been employed as a servant to collect moneys for the company was liable to be convicted of embezzlement as a "clerk or servant" of the company under 24 & 25 Vict., c. 96, s. 68 (Cr. Code, s. 319 (*a*)). Lord Coleridge, C.J., and Mathew, Grantham, Lawrance, and Collins, JJ., were unanimous that he could, and the conviction of the prisoner was accordingly affirmed.

RAILWAY—COMPENSATION—DAMAGE FROM WORKING RAILWAY.

Attorney-General v. *Metropolitan Railway*, (1894) 1 Q.B. 384, was an action to recover compensation from a railway company under the following circumstances: The defendants, under their statutory powers, constructed an underground railway; for the purpose of their railway, they acquired a piece of land, in which they opened a shaft for ventilating their line. The plaintiff became lessee of a house adjoining this piece of land, and afterwards the defendants enlarged their air shaft, in consequence of which larger quantities of smoke, steam, and foul air issued therefrom, to the increased discomfort of the occupants of the plaintiff's house. For this increase of nuisance the plaintiff claimed compensation, but the Court of Appeal (Lindley, Smith, and Davey, L.JJ.) decided that neither on the ground of nuisance, nor yet under the Railway Act, was the plaintiff entitled to succeed, as the injury complained of arose from the working of a railway, which the defendants had a right to carry on under their statutory powers, and that but for this the mere alteration in the shaft would have caused no damage.

UNSOUND MEAT—GUILTY KNOWLEDGE—R.S.O., c. 205, s. 99.

In *Blaker* v. *Tillstone*, (1894) 1 Q.B. 345, the defendant was convicted of having on his premises unsound meat, but there was no evidence that he knew that it was unsound, and the case was reserved by the justices on the point whether a guilty knowledge was essential. Lord Coleridge, C.J., and Day, J., were of opinion that it was not, and opposed the conviction. (See R.S.O., c. 205, s. 99, s-s. 2.)

CRIMINAL LAW—THEFT—PRODUCTION OF ALLEGED STOLEN PROPERTY BY PURCHASER UNDER DUCES TECUM—DETENTION OF PROPERTY FOR PURPOSE OF TRIAL IN FOREIGN STATE.

The Queen v. *Lushington*, (1894) 1 Q.B. 420, was an application to quash a magistrate's order for the detention of property alleged to have been stolen, produced before him under a *duces tecum* by the applicant, who claimed to be a purchaser. The magistrate had committed the accused to prison to await extradition to France, and orally directed a constable to take charge of the property in order that it might be produced at the trial in France, and it was this direction which it was sought to quash. Wright and Kennedy, JJ., held that the magistrate was *functus officio* as soon as he committed the prisoner, and that his direction as to the care of the property was extra-judicial, and therefore they had no jurisdiction to interfere; but even if they had jurisdiction, they considered the applicant was not entitled to any relief, as his possessory title (if any) to the goods had been lawfully divested when they passed out of his possession under the subpœna *duces tecum*. Wright, J., suggested that the applicant's proper remedy was to bring an action against the person in whose custody the goods were, and claim an injunction against parting with them until the trial.

PRACTICE—SPECIALLY INDORSED WRIT—ACTION ON CHEQUE—AFFIDAVIT FOR JUDGMENT UNDER ORD. XIV., R. 1 (ONT. RULE 739).

May v. *Chidley*, (1894) 1 Q.B. 451, was an application for judgment on a specially indorsed writ under Ord. xiv., r. 1 (Ont. Rule 739). The action was brought on a cheque, and the indorsement alleged notice of dishonour to the drawer, but the

affidavit of the plaintiff verifying his claim, in general terms, alleged that the defendant was justly and truly indebted, and that there was no defence to the action; and Wills and Lawrance, JJ., held that this was sufficient, although it did not expressly allege that notice of dishonour had been given to the drawer.

PRACTICE—DEATH OF PLAINTIFF AFTER JUDGMENT—EQUITABLE EXECUTION—PARTIES ENTITLED TO EXECUTION—ORD. XLII., RR. 8, 23—ONT. RULES 858, 886, 622.

In *Norburn* v. *Norburn*, (1894) 1 Q.B. 448, a sole plaintiff died after judgment. Her personal representatives, without reviving the suit, made an application under Ord. xlii., r. 23 (Ont. Rule 886), for the appointment of a receiver of certain interests the defendant was entitled to under a will, and for an injunction to restrain the defendant from dealing with such interests; but the motion was refused, Wills and Grantham, JJ., holding that the appointment of a receiver by way of equitable execution was not execution within the meaning of that Rule. The proper procedure in such a case would appear to be for the representatives, first, to obtain an order to continue the proceedings in their name (see Ont. Rule 622), and then move, as until the order to continue proceedings is issued they have no *locus standi*.

HUSBAND AND WIFE—CONTRACT IN CONSIDERATION OF MARRIAGE—PROMISE TO DEVISE LAND TO INTENDED WIFE—BREACH OF CONTRACT—RIGHT OF ACTION—DAMAGES, MEASURE OF—DECLARATORY JUDGMENT.

Synge v. *Synge*, (1894) 1 Q.B. 466, was an action by a wife against her husband, founded on an ante-nuptial contract made by the defendant, in consideration of marriage, to leave by will to the intended wife certain lands and premises for her life. The husband had put it out of his power to perform the promise by conveying the land in question to third persons. Mathew, J., who tried the action, gave judgment for the defendant on the ground that the facts proved did not amount to a contract, but the Court of Appeal (which, so far as the report indicates, was on this occasion composed only of Kay, L.J.) came to the conclusion that a valid contract had been proved, and that the plaintiff, as soon as the defendant parted with the property so as to prevent his carrying out his contract, had an immediate right of action for the breach, according to the well-known cases of

Hochester v. *De la Tour*, 2 E. & B. 678; and *Frost* v. *Knight*, L.R. 7, Ex. 111, and an enquiry was directed as to damages, the measure of which was declared to be the value of the plaintiff's possible life estate in the property in question which she would be entitled to in the event of her surviving her husband. The plaintiff did not press for relief as against the land itself, though, had she done so, Kay, L.J., was of opinion that the court might have made a declaratory judgment in her favour. Such a judgment, it would seem, might be enforced after the death of the husband, as against volunteers, or even purchasers for value with notice, claiming under him.

PROBATE—UNATTESTED TESTAMENTARY DOCUMENTS—WILL, INCORPORATION OF OTHER DOCUMENTS BY REFERENCE.

In re Garnett, (1894) P. 90, an application was made for probate of certain documents referred to in a duly attested paper. This paper was in the following terms: "The enclosed papers Nos. 1, 2, 3, 4, 5, 6, were signed by Robert Garnett, the testator, in the joint presence of us, who thereupon signed our names in his and each others' presence." The witnesses, however, testified that the documents Nos. 1 to 6 referred to in the memorandum, and which were found sealed up with it on the testator's death, were not, in fact, signed by him in their presence, nor did they see the testator sign anything but the paper above set out, but the testator, at the time of its execution, told them his will was in the drawer of the table at which he was sitting. Barnes, J., held that the documents were not sufficiently incorporated in the attested paper, and that as it was, without the others, inoperative, probate of all the documents was refused.

PROBATE—MISDESCRIPTION OF EXECUTOR—MISNOMER—EXTRINSIC EVIDENCE TO CORRECT MISNOMER.

In re Chappell, (1894) P. 98, a testator had appointed "Robert Taylor, of Waverley Hill, in the parish of Bilton, bootmaker," his executor. There was, in fact, no one of that name living at Waverley Hill, but there was a "James Alfred Taylor," a bootmaker, living there, and one Robert Bilton Taylor, his brother, also a bootmaker, lived at Harrham, in the same parish; and it was held by Sir F. Jeune that extrinsic evidence was admissible

to show that James Alfred Taylor was a friend of the testator, and that the testator had little acquaintance with Robert Bilton Taylor; and having considered such evidence, he directed probate to issue to James Alfred Taylor. He was, however, of opinion that the declarations of the testator as to the person intended were not admissible.

TRUSTEE—BREACH OF TRUST—IMPROPER INVESTMENT—STATUTE OF LIMITATIONS —IMPOUNDING INTEREST OF BENEFICIARY—TRUSTEE ACT, 1888 (51 & 52 VICT., C. 59), SS. 4, 5, 6, 8—(54 VICT., C. 19 (O.), SS. 9-14).

In re Somerset, Somerset v. *Poulett*, (1894) 1 Ch. 231, was an action brought by *cestuis que trustent* against their trustees for a breach of trust in making an improper investment of the trust fund, and several points arising under the Trustee Act, 1888 (see 54 Vict., c. 19 (O.)), are discussed. One of the plaintiffs in the action was the tenant for life; the others were his children, who were entitled in remainder. The investment attacked was made in 1878 upon the security of a mortgage, the interest on which had been duly paid to the tenant for life down to the year 1890. The investment had been suggested to the trustees by the tenant for life, who desired that as much of the trust fund should be advanced upon the security of the mortgaged property as possible. The trustees, unfortunately, were too ready to yield to the suggestion of the tenant for life. They employed the same solicitors to act for them as acted for the mortgagor. The valuation they procured was obtained on instructions to the valuer, which informed him that all parties desired that as much as possible should be advanced; and upon a valuation of the estate at £42,750, producing a net yearly income of only £1,070, they advanced £34,612, or, as Kekewich, J., found, £8,612 at least more than they ought to have done. Kekewich, J., though finding the trustees liable to make good to the remaindermen the loss occasioned by the improvident investment, nevertheless held that under the Trustee Act, 1888, s. 5 (Ont. Act 54 Vict., c. 19, s. 10), the security was to be deemed a good security for £26,000, and that the trustees were liable only for the excess advanced; and he also held that, under s. 6 (Ont. Act, s. 11), the tenant for life's life estate should be impounded, in ease of the trustees, to make good the loss; and, under s. 8 (Ont. Act, s. 13), that the right of action of the tenant for life first accrued when the investment was

made in 1878, and that the payment of interest on the mortgage down to 1890 did not prevent the running of the statute in favour of the trustees, and that consequently the right of action of the tenant for life was barred. But, on appeal by the tenant for life, the Court of Appeal (Lindley, Smith, and Davey, L.JJ.), although affirming Kekewich's judgment as to the last point, were of opinion on the evidence that the tenant for life had not intended to consent, and had not, in fact, consented, to the trustees committing any breach of trust; but though he was desirous that the loan should be made, he did not intend to, nor did he, in fact, relieve the trustees from the duty of taking due and reasonable care to see that it would be properly made, and it is only where the *cestui que trust* instigates or requests the commission of an act which is of itself a breach of trust that s. 6 (Ont. Act, s. 11) applies. The Court of Appeal, therefore, varied the judgment of Kekewich, J., by declaring the tenant for life still entitled to receive the income of that part of the trust fund which had not been lost.

LIGHT—INJUNCTION—DAMAGES IN LIEU OF INJUNCTION—JURISDICTION—21 & 22 VICT., C. 27, S. 2 (ONT. JUD. ACT, S. 3, S-S. 9).

Martin v. *Price*, (1894) 1 Ch. 276, was an action to restrain an actual and threatened interference by the defendant with the plaintiff's ancient rights. Kekewich, J., on the hearing of the action, although finding the acts complained of were an injury to the plaintiff's rights, yet as he failed to prove that the commercial value of his premises, or the facility of letting them, would be materially affected, he declined to grant a mandatory injunction to pull down the buildings already erected by the defendant, or an injunction to restrain his further building, but in lieu thereof awarded damages both for the actual and possible interference. On appeal, Lindley, L.J., who delivered the judgment of the court (Lindley, Smith, and Davey, L.JJ.), said that it was by no means clear that the court had any jurisdiction to award damages by way of compensation for an injury not yet sustained, but only threatened and intended—Bowen, Fry, and Cotton, L.JJ., having all expressed an opinion to the contrary in *Dreyfus* v. *Peruvian Guano Co.*, 43 Ch.D. 316; but, in any case, the plaintiff having established a legal right, and its material infringement already, and a still further infringement threatened,

was entitled to an injunction to restrain the threatened infringement, and could not be compelled to accept damages in lieu thereof, and the judgment of Kekewich, J., was varied by directing the damages to be confined to the injury sustained by reason of the building actually erected, and awarding an injunction restraining any further erection by the defendant.

WILL—CONSTRUCTION—"DEDUCTION"—MEANING OF.

In re Buckle, Williams v. *Marson*, (1894) 1 Ch. 286, was a case of construction of a will. The testator, by his will, gave several annuities, and directed "all the said annuities to be paid, clear of all deductions whatsoever, *except income tax*." By a codicil, after varying many of the legacies, he directed as follows: "That every legacy, and other interest as well, derivable under my will, as under any codicil thereto, shall be free of legacy duty *and every other deduction*." The question was whether the annuities given by the will were, by virtue of the codicil, to be paid free of income tax. The Court of Appeal (Lindley, Smith, and Davey, L.JJ.), though conceding that income tax is not, ordinarily speaking, a "deduction," yet as the testator had, by his will, plainly intimated that he regarded it as such, the effect of the codicil was to make the annuities payable free from income tax, and the judgment of North, J., to the contrary was reversed.

A PECULIAR case has recently been tried in Missouri. The action was brought by an old negress, an ex-slave, against her master for $5 a month wages as a family domestic for twenty-four years, during which time she claims to have been kept in ignorance of her emancipation. Judgment was given in her favour for $700. There seems to have been an appeal from this decision, but it is not clear, from the reference to the case which we find in the last number of the *American Law Review*, whether or not this judgment has been sustained on appeal, but we trust it may be. The maxim, *ignoratia legis neminem excusat*, should not, we think, be recognized in cases of imposition, misrepresentation, or misplaced confidence, and, as stated by the judge, "her ignorance of her legal rights should not defeat her action for such work and labour brought after she has learned of the fraudulent suppression of the fact of her emancipation."

DIARY FOR APRIL.

1. Sunday.....*1st Sunday after Easter.*
2. Monday.....County Court sits for motions. Surrogate Court sits.
4. Wednesday..New Parliament Buildings at Toronto opened, 1893.
5. Thursday....Canada discovered, 1499.
7. Saturday.....Great fire in Toronto, 1847.
8. Sunday.....*2nd Sunday after Easter.* Hudson Bay Company founded, 1692.
9. Monday.....County Court non-jury sittings in York.
14. Saturday.....Princess Beatrice born, 1857.
15. Sunday.....*3rd Sunday after Easter.* President Lincoln assassinated, 1865.
16. Monday.....Last day for notice for Call.
17. Tuesday.....Hon. Alexander Mackenzie died, 1892.
18. Wednesday..First newspaper in America, 1704.
19. Thursday....Lord Beaconsfield died, 1881.
22. Sunday.....*4th Sunday after Easter.*
23. Monday.....St. George.
24. Tuesday.....Earl Cathcart, Gov.-Gen., 1846.
25. Wednesday...St. Mark.
26. Thursday....Battle of Fish Creek, 1885.
27. Friday .....Toronto captured (Battle of York), 1813.
28. Saturday.....Last day for filing papers for certificate and Call and payment of fees.
29. Sunday.....*Rogation Sunday.*

Reports.

NOVA SCOTIA.

COUNTY COURT, DIGBY.

BALCOLM *v.* PHINNEY.*

Promissory note—Endorsement by person other than payee—Liability to payee.

J. L. P. made two notes in favour of J. A. B., and, before delivering them to the latter, procured E. P. to endorse them. J. A. B. sued E. P. as an endorser, and in the alternative as a guarantor. Amendment having been applied for, the trial judge allowed all amendments necessary to state the facts as proved to be considered as made.

Held, that the defendant was liable as an endorser.

[ANNAPOLIS, Nov. 5th, 1895.

Action on two promissory notes under the circumstances above stated.

SAVARY CO. J.: This is the case of a transaction quite common among people not accustomed to, or not fully comprehending, the law and usage respecting endorsement and the liabilities of endorsers of promissory notes and bills of exchange. James L. Phinney, no doubt, intended to give the defendant's responsibility as endorser to the plaintiff; and no doubt the defendant put his name on the back of the notes made by James L. Phinney directly to the plain-

*[We have been asked by a subscriber in Westminster, British Columbia, to publish in full this judgment, of which a note appeared in a previous issue. We gladly accede to his request, for, though the case is not of recent date, it is thought it may be of use. —ED. C.L.J.]

tiff, fully intending to thereby assume the responsibility of an endorser of the notes to the plaintiff. He could not have put it there with any other intention, whatever his views may have been, or whether he had any definite views, as to the quality or extent of that responsibility.

This intention, however, was not in accordance with the "Law Merchant," by which bills and notes are transmissible by endorsement, the endorser being only liable (and that only under certain conditions) to the endorsee, or to a subsequent holder, in case of an endorsement in blank.

To succeed against the defendant as guarantor would be impossible, in view of the statute which requires a promise to pay the debt of another to be in writing; and, therefore, no evidence of intention or of any oral agreement to be signified by the bald sign manual of the defendant was admissible.

It fell to my lot in my own practice to have two cases of this nature. In one of them I advised the party to endorse his own name "without recourse" on the note above the name of the intended endorser, and then give it to another party altogether to sue. In another, it was not so easy to get a fourth party to allow his name to be used as a plaintiff, and I advised the payee to endorse it in the same way, and then sue as a holder by endorsement, a second endorser merging his character as payee in that of an endorsee.

The cases cited in note 3, page 321, of Maclaren's Bills of Exchange Act show that a recovery in either of these cases would be sustained. Here I should have preferred to have seen the name of the payee endorsed above that of the defendant in the manner indicated, but, in the spirit which at present pervades the administration of the law, that "justice may be done," although not "the heavens," but technicalities, "fall," I would have allowed the payee to so endorse the notes during the trial, and thus supply the technical defect—which would amount to a re-forming of the instruments, to make them conform to the clear intent of the parties—just as an endorsement has been erased at the trial, where an endorser has got a note back again from an endorsee, and then brought action. *Mayer* v. *Jadis*, 1 M. & Rob. 247; Digest, p. 1179.

I think, however, that section 56 of the Bills of Exchange Act renders such a course unnecessary, by its provision that any one who signs a bill otherwise, than as drawer or acceptor (*i.e.*, in case of a note, than as payee and first endorser, or maker) incurs the *liability of an endorser* to a "holder in due course." It cannot be contended that a payee for valuable consideration is not a "holder in due course." If he is not, nobody is. Thus, in this case, a principle of the "Law Merchant" is reversed by this statute, and an indorser becomes liable, not to a subsequent, but to an antecedent party.

In construing a statute, we must have regard to the previous state of the law, and, in the Dominion of Canada, the law of all the provinces must be regarded. Before this Act, in the Province of Quebec, a person who wrote his name as the defendant has done here was liable to the payee, as absolute guarantor for the maker, and was, therefore, not entitled to presentment or notice of dishonour; while, in the other provinces, except by the operation I have outlined, he could not be made liable at all.

This section 56 makes the law *uniform* in all the provinces, *limiting* the liability in Quebec, and *enlarging* it in the others. Unless it does that, it is

utterly meaningless. It cannot be intended to abolish the liability of an *aval* in the Province of Quebec altogether, while it must mean something in its application to the whole Dominion.

In regard to the evidence of waiver of presentment and notice, I think the anguage of the defendant testified to by the plaintiff amounts to waiver, and believe it more likely that the defendant, before he became aware of the supposed technical difficulty in the way of recovery, used that language than that the plaintiff fabricated the story. Therefore I find for the plaintiff, on the law, in respect to both notes, and on the facts in dispute in respect to the one, and there will be judgment for the amount of both notes and interest.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [March 3.

COFFEY *v.* SCANE.

Arrest—Order for—Discharge from custody under—Order not set aside—Action for malicious arrest—Reasonable and probable cause—Departure from Ontario—Inference of intent to defraud—Action for imposing on judge by false affidavit—Material facts—Burden of proof—"Absconded," meaning of—Excessive damages—Misdirection.

The plaintiff brought this action for damages for his arrest under an order made in the former action of *Scane* v. *Coffey*, he having been discharged from custody thereunder by an order made therein, affirmed by a Divisional Court; 15 P.R. 112. The plaintiff recovered a verdict for $1,000. Upon motion to set it aside made before a Divisional Court composed of ARMOUR, C.J., and FALCONBRIDGE, J.,

Held, *per* ARMOUR, C.J., that so long as the order for arrest stood, an action for maliciously, and without reasonable and probable cause, arresting the plaintiff could not be maintained.

Erickson v. *Brand*, 14 A.R. 614, distinguished.

(2) Where a creditor shows by affidavit such facts and circumstances as satisfy the judge that there is good and probable cause for believing that his debtor, unless he be forthwith apprehended, is about to quit Ontario, the inference is raised that he is about to do so with intent to defraud his creditors generally, or such creditor in particular; for he is removing his body, which is subject to the jurisdiction of the courts of Ontario, and liable to be taken in execution, beyond the jurisdiction of such courts, and beyond the reach of their process.

Toothe v. *Frederick*, 14 P.R. 287, commented on and not followed.

Robertson v. *Coulton*, 9 P.R. 16, approved and followed.

(3) The fact that the plaintiff, having numerous creditors, including the defendant, in and being a resident of Ontario, left it without paying them, and went to reside permanently in the United States, whether he left openly or secretly, and whether he announced his departure and intentions beforehand or concealed them, and that he came back to Ontario for a temporary purpose, intending to return to the United States, afforded not only reasonable and probable cause for his arrest, but fully justified it.

(4) But if the action were viewed as one for imposing upon the judge by some false statement in the affidavit to hold to bail, and thereby inducing him to grant the order for arrest, the fact falsely suggested or suppressed must be a material one for the judge to consider in granting the order, and the burden lay upon the plaintiff of showing that the judge was imposed upon. But it did not appear that any material fact had been falsely stated or suppressed, and the court should not, in the absence of the judge's own evidence, draw the inference that he understood from the use of the word "absconded" that the plaintiff had gone away secretly, if that were material.

(5) Moreover, the word "absconded" truly described the going away of the plaintiff, whether he went away secretly or openly, and he would properly be described as an absconding debtor.

FALCONBRIDGE, J., adhering to the views expressed in *Scane* v. *Coffey* 15 P.R. 112, was of opinion that the plaintiff had a cause of action, but thought there should be a new trial on the grounds of excessive damages and misdirection, and concurred *pro forma* in the decision of ARMOUR, C.J.

Osler, Q.C., and *M. Houston* for the plaintiff.

M. Wilson, Q.C., for the defendant.

Div'l Court.] [March 3.

ANDERSON *v.* WILSON.

Arrest—Trespass to person—Malicious prosecution—Information—Uttering forged note—Disclosing offence—Warrant—Jurisdiction of justice of the peace.

The defendant laid an information against the plaintiff, charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J.M. in favour of T.A., and I find out the said note to be a forgery." Upon this a warrant was issued reciting the offence in the same words, and the plaintiff was, under it, apprehended and brought before the justice of the peace who issued it, and by him committed for trial by a warrant reciting the offence in like terms. The plaintiff was tried for forging and uttering the note, and was acquitted. He thereupon brought this action for malicious prosecution and trespass to the person.

The Attorney-General refused to grant a fiat for the production of the record, and so the action for malicious prosecution had to be abandoned at the trial, but the plaintiff's counsel took the ground that no offence was charged

in the information, that the warrant was void, and that the defendant was liable as a trespasser for the apprehension of the plaintiff under the void warrant, there being evidence of interference by the defendant in the apprehension.

Held, that the information sufficiently imported that the plaintiff had uttered the forged note, knowing it to be forged, to give the magistrate jurisdiction, and therefore the warrant was not void, and the action for trespass was not maintainable.

Semble, that, if the offence were not sufficiently laid in the information to give the magistrate jurisdiction, and the warrant were void, the action of malicious prosecution would nevertheless lie.

M. G. Cameron for the plaintiff.

Garrow, Q.C., for the defendant.

Div'l Court.] [March 3.

ARTHUR *v.* GRAND TRUNK RAILWAY CO.

Water and watercourses—Diversion of watercourse by railway company—Remedy—Compensation—Arbitration clauses of Railway Act, 51 Vict., c. 29 (D.)—Plan—Riparian proprietors—Infringement of rights—Cause of action—Damages—Permanent injury—Definition of watercourse—Permanent source—Surface water—Misdirection—New trial.

By s. 90 *(h)* of the Railway Act of Canada, 51 Vict., c. 29, a railway company have power to divert any watercourse, subject to the provisions of the Act; but in order to entitle themselves to insist upon the arbitration clauses of the Act, they must, having regard to ss. 123, 144, 145, 146, and 147, show upon their registered plans their intention to do so.

Every proprietor on the banks of a natural stream has the right to use the water, provided he so uses it as not to work any material injury to the rights of other riparian proprietors; but so soon as he uses it in such a way as to diminish the quantity or quality of the water going on to the lower proprietors, or to retard or stop its flow, he exceeds his own rights, and infringes upon theirs, and for every such infringement an action lies.

Sampson v. *Hoddinott*, 1 C.B.N.S. 590, and *Kensit* v. *Great Eastern R.W. Co.*, 27 Ch.D. 122, followed.

The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm

Held, that it was the fact of the defendants having diverted the watercourse, not the fact of the plaintiff having sustained damage from their doing so, that gave him his cause of action; and the proper mode of estimating the damages was to treat the diversion as permanent, and to consider the effect upon the value of the farm that the permanent abstraction of the water would have.

McGillivray v. *Great Western R.W. Co.*, 25 U.C.R. 69, distinguished.

The alleged watercourse was a gully or depression created by the action of the water. The defendants disputed that any water ran along it, except melted snow from higher land, and rain water after heavy rains, flowing over

the surface merely, and ceasing with the rain that produced it. The plaintiff contended that there was a constant stream of water, having its source in the higher land, and only, if ever, ceasing in the very dry summer weather.

The trial judge read to the jury an extract from the judgment in *Beer* v. *Stroud*, 19 O.R. 10, as follows: "It is not essential that the supply of water should be continuous, and from a perennial, that is, a never-ceasing, living source. It is enough if the flow arises periodically from natural causes, and reaches a plainly defined channel of a permanent character. . . . ." He also told the jury that a channel made by mere surface water and snow is not a watercourse unless there is ordinarily and most frequently a moving body of water flowing through it, and that the principles which are applicable to streams of running water do not extend to the flow of mere surface water spreading over the land.

Held, *per* STREET, J., that, without a permanent source, which, however, need not necessarily be absolutely never-failing, there cannot be a watercourse, and that, as the attention of the jury was not expressly called to the difference in effect between the occasional flow of surface water and the steady flow from a source, and as the passage from the judgment in *Beer* v. *Stroud*, divorced from its context, might have misled the jury, there should be a new trial.

Per ARMOUR, C.J., that what the judge told the jury could not be held to be misdirection without reversing the decision in *Beer* v. *Stroud*, and the objection to the charge was too vague and indefinite.

In the result the motion to set aside the verdict for the plaintiff, awarding him damages for the permanent diversion of the watercourse, was dismissed; but the court ordered that the judgment should not be enforced unless and until the plaintiff delivered to the defendants a release of any further claim in respect of the cause of action and for damages.

Clute, Q.C., and *J. W. Gordon* for the plaintiff.

Osler, Q.C., and *Wallace Nesbitt* for the defendants.

Div'l Court.] [March 3.

MCDONALD *v.* DICKENSON.

Municipal corporation—Rebuilding of culvert—Obstruction in highway—Negligence—Accident—Liability of servants of corporation—Municipal councillors—Officers fulfilling public duty—R.S.O., c. 73—Notice of action—Pathmaster.

Two of the defendants, being members of a township council, were appointed, by resolution of the council, a committee to rebuild a culvert, and they personally superintended the work, and were paid for doing it, but there was no by-law authorizing their appointment or payment. The other defendants were employed by them, and did the work. The plaintiff met with an accident on the highway near the culvert, owing, as she alleged, to the negligence of the defendants in obstructing the road with their building materials, and brought this action for damages for her injuries.

Held, that the defendants were not fulfilling a public duty, and were not entitled to notice of action under R.S.O., c. 73.

Held, also, that that statute is applicable only to officers and persons fulfilling a public duty for anything done by them in the performance of it when it may be properly averred that the act was done maliciously and without reasonable and probable cause, and, therefore, not to actions for negligence in the doing of the act.

Held, lastly, that one of the defendants, who was pathmaster for the beat in which the culvert was situated, did not come within the protection of the statute as pathmaster because he was not employed as such in doing this work, but as a day labourer.

J. A. Robinson and *Tremeear* for the plaintiff.

J. M. Glenn and *James A. McLean* for the defendants Blower, Luton, and Dickenson.

C. F. Maxwell for the defendants, the Tisdales.

Chancery Division.

Div'l Court.] [Feb. 15.

MCMULLEN *v.* VANNATTO ET AL.

Lessor and lessee—Notice of forfeiture—R.S.O., c. 142, s. 11, s-s. 1—Distress after ejectment brought—Effect of.

A notice of forfeiture under R.S.O., c. 142, s. 11, s-s. 1, given in the words: "You have broken the covenants as to cutting timber" in a lease, and claiming compensation.

Held, a sufficient notice.

After action of ejectment, brought for the forfeiture of the lease, the plaintiff (landlord) distrained for, and received, rent subsequently coming due.

Held, that such course did not *per se* set up the former tenancy (which ended on the election to forfeit manifested by the issue of the writ), but might be evidence of a new tenancy on the same terms from year to year—a question proper to be submitted to the jury.

F. E. Hodgins for the plaintiff.

W. R. Riddell for the defendants.

FALCONBRIDGE, J.] [Feb. 13.

SUMMERS *v.* BEARD.

Mechanics' lien—Registration of lien—Time for—Alterations to work subsequent to completion.

Appeal from the certificate of the Master in Ordinary in a mechanics' lien matter.

In this case a lien was claimed for certain steel work done on a building which had been completed by June 30th, 1893, excepting that it being found that certain bolts projected out of the walls too far the sewere required to be cut down, which was done between October 17th and October 25th, 1893. The lien was registered on November 17th, 1893.

Held, upon the authority of *Neill* v. *Carroll*, which is incorrectly reported in 28 Grant 339, that the lien was registered too late, since the time should have been computed from June 30th.

Hoyles, Q.C., for the appellant.

Mulvey, for the claimant, *contra*.

FALCONBRIDGE, J.] [Feb. 21.

WARD *v.* ARCHER.

Fieri facias—Writ against lands—Equitable interest of purchaser under contract—Judgment against assignee of such purchaser—R.S.O., c. 64, s. 25.

Held, on demurrer, that the equitable interest of an assignee from the purchaser of a contract for the sale of lands is exigible under a writ of *fieri facias* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.

Re Prittie v. *Crawford*, 9 C.L.T. 45, declared to have been inadvertently decided or reported.

H. H. Strathy, Q.C., for the demurrer.

Pepler, Q.C., *contra*.

STREET, J.] [March 3.

MCMYLOR *v.* LYNCH ET AL.

Will—Devise—Direction to sell land—Names or descriptions of devisees—Purpose—Trust—Charitable use—Mortmain—Augmentation of particular fund or residuary estate—Interest on legacies—Power of executor—Dower—Election—Costs.

A testator, by his will, provided as follows: "I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto $500, to the Bishop of the Diocese of Hamilton $500, to be applied for the education of young men for the priesthood, and the balance invested by my executor in the proportion of $15 for my wife, Alice Lynch, and $8 for my mother, Mary Lynch.

"At my mother's death I order that her proportion . . . be divided . . . between (five nieces).

"I order and direct that on my wife's death her proportion . . . be divided between (nephews and nieces).

"All the residue of my estate not hereinbefore disposed of I give, devise, and bequeath unto my wife, Alice Lynch."

Held, that as the corporate name of the Archbishop of the Diocese of Toronto in communion with the Church of Rome is "The Roman Catholic Episcopal Corporation of the Diocese of Toronto in Canada," and as the corporate name of the Bishop of Hamilton is "The Roman Catholic Episcopal Corporation of the Diocese of Hamilton in Ontario," and as the bequests were to "The Archbishop of the Diocese of Toronto," and to "The Bishop of the Dio-

cese of Hamilton," the names being essentially different from the corporations they respectively compose and represent, the bequests must be treated as intended for the individuals described in the will; that the bequests were subject to a trust that the money should be applied for the education of young men for the priesthood; that the purpose for which the legacies were given was a charitable use; and the money being derived from the sale of land, the legacies failed.

That the money directed to be applied to these legacies went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

That as the testator directed the land to be sold within three years from his death, the legacies should bear interest from the date when the lands should have been sold.

That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, Alice Lynch, under the general residuary gift to her of all the estate not otherwise disposed of, and the executor had no power to lease, because he had no estate in it.

That the widow was not bound to elect between her dower and the benefits conferred by the will.

And that as the litigation was connected with the provisions of the will relating to the land, the costs should come out of the proceeds of its sale.

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

J. Hoskin, Q.C., for the infants and others in the same interest.

F. A. Anglin for the Archbishop and the Roman Catholic Episcopal Corporation of the Diocese of Toronto, Mary Lynch, and Mary Egan.

E. Furlong for the Bishop and the Roman Catholic Episcopal Corporation of the Diocese of Hamilton.

C. E. Hewson for Alice Lynch.

Practice.

Q.B. Div'l Court.] [March 3.

HURD *v.* BOSTWICK.

Pleading—Rule 419—Reply—Inconsistency—Refusal of judge to try action—Discretion—Costs—Divisional Court.

By their statement of claim the plaintiffs alleged themselves to be creditors for wages of two of the defendants, and they sought relief against the third defendant only as having obtained certain assets from the other two, either fraudulently or upon a trust to pay the plaintiffs' claims. In their reply, they set up that they were creditors of the third defendant himself, upon the ground that he was really the person who hired them. There was no subsequent pleading.

Held, that the reply was a direct violation of Rule 419, and that the trial judge was within his right in refusing, in his discretion, to try the action until

the issues were properly presented upon the pleadings, and in directing that the costs of the postponement should be borne by them.

No opinion expressed as to whether a Divisional Court had power to review such a ruling.

DuVernet for the plaintiffs.

Shepley, Q.C., for the defendant Bostwick.

MANITOBA.

COURT OF QUEEN'S BENCH.

DUBUC, J.] [March 10.

THE COMMERCIAL BANK OF MANITOBA *v.* ALLAN.

Bills of Exchange Act—Presentment of demand note—Notice of dishonour by service of writ—Discharge of indorser.

This action was brought to recover the amount of several promissory notes. The fourth count was on a note dated 1st November, 1890, made by D. McArthur to the order of defendant, and endorsed by the latter, payable on demand at the Commercial Bank of Manitoba, Winnipeg. The note was presented for payment on 14th October, 1893, the day of the issue of the writ of summons in this cause. Defendant claimed that he had no notice of dishonour, while it was contended on behalf of the plaintiffs that service of the writ of summons with particulars attached was sufficient notice. Bills of Exchange Act, 1890, c. 33, s. 49, s-s. (*e*).

Held, that the writ, with particulars attached, was a sufficient notice of dishonour, as a notice. *Boulton* v. *Welsh*, 3 Bing. N. C. 688; *Grugeon* v. *Smith*, 6 A. & E. 499; *Hedger* v. *Steavenson*, 2. M. & W. 799; and *Paul* v. *Joel*, 4 H. & N. 354, followed.

A further question raised was whether the notice was given too late or not, and whether it should have reached the defendant before action brought. Bills of Exchange Act, s. 49, s-s. 4 and s-s. 5.

Held, that as the defendant received notice of dishonour by the service of the writ on him within an hour or two after presentment of the note for payment, he could not be said to have been prejudiced by delay or otherwise, and in the absence of any authority to the contrary, and in view of the provisions of the statute, which provisions seem to consider the notice of dishonour, in some circumstances at least, as a mere formality, without much importance as to the fact that it may or may not reach the party to whom the notice is to be sent, the defendant must be held to have had sufficient notice of dishonour. The plaintiffs were therefore entitled to recover on the note in question.

A second note, dated 1st November, 1890, commenced thus: "On demand months after date I promise to pay," etc. The note was on a printed form, the words "On demand" and "I" were written, while the other words, "months after date" and "promise to pay," were printed. The note was made "with interest at 10 per cent., payable half yearly on 30th April and 30th October." Defendant contended that the note was not negotiable, because of the uncertainty of the date of payment: *Mahoney* v. *Fitzpatrick*, 133 Mass. 151. It was presented

for payment and protested on 5th July, 1893. Defendant contended that the note was not presented for payment within a reasonable time, as required by s. 85 of Bills of Exchange Act, and that, as indorser, he was therefore discharged.

Held, that the note was clearly a note payable on demand some months after date, viz., two months at least after date. The fact that the interest was payable half yearly did not change the nature of the note. It being made with interest payable half yearly clearly indicated that the parties contemplated and intended that the note was to remain unpaid for a considerable time, and that it might not be paid for years. Such being the intention of the parties as indicated on the face of the note, it could not be said that the presentment was made at such an unreasonable time after the indorsement as to operate as a discharge of defendant's liability on the note.

Verdict for plaintiffs.

Tupper, Q.C., and *Phippen* for plaintiffs.

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

KILLAM, J.] [March 19.

MCWILLIAMS *v.* BAILEY.

Practice—Charging order—Ontario authorities dissented from.

Plaintiff and defendant were in partnership when a bill was filed and a decree made dissolving the partnership. The Master's report found that McWilliams was entitled to the assets of the concern, except as to a trifling amount.

Morrison and Smith, execution creditors of McWilliams, having obtained a stop order on the fund in court, applied for payment out to him. The plaintiff also applied for payment out to him.

Held, that the application of the judgment creditor should be dismissed, with costs to be set off against the judgment debt; the application of the plaintiff to be enlarged a week to enable the judgment creditor to apply for a charging order, or take such other step as he may deem proper; the stop order to continue.

The practice of charging monies in the hands of the Accountant-General of the Court of Chancery, under 1 & 2 Vict., c. 110, and 3 & 4 Vict., c. 82, applies to monies paid into this court on its equity side.

Dawson v. *Moffatt*, 11 O.R. 484, not followed.

Application of judgment creditor dismissed with costs.

J. Martin for plaintiff.

T. G. Mathers for execution creditors.

Full Court.] [March 10.

CLIFFORD *v.* LOGAN.

Bills of Sales Act—Crop mortgages—Priority of execution to mortgage executed after it came in sheriff's hands.

Appeal from the decision of Dubuc, J., reported 4 W.L.T. 152.

Held, that the verdict for the plaintiff should be set aside and a verdict entered for defendant.

A mortgage of a growing crop or a crop to be grown does not come within the provisions of the Bills of Sales Act, R.S.M., c. 10; *Grass* v. *Austin*, 7 A.R. 511.

At most the plaintiff got, under his mortgage, an equitable interest in the crops to be sown; but before he could take possession of the crop, before even it came into existence, there was the writ of execution in the sheriff's hands.

A writ of execution against goods and chattels, at and from the time of its delivery to the sheriff, binds all the goods and chattels, or any interest in all the goods and chattels of the judgment debtor within the bailiwick of the sheriff. It binds, not merely the goods and chattels which the debtor has at the time it is placed in the sheriff's hands, but all the goods and chattels he acquires and has while the writ is current and unsatisfied. When the crop here came into existence, the property in it, the legal title to it, was in the debtor. The mortgage passed no property in the crop, or, at most, a right to it in equity. It gave the plaintiff an equitable right to enter and take the crop, should it come into existence. But the moment it came into existence, the property in it and the legal title to it became bound by the execution. The property must go to the mortgagee, subject to the execution: R.S.M., c. 53, s. 20. The mortgage was not executed until seven months after the sheriff received the writ.

The following cases were referred to: *Clements* v. *Matthews*, 11 Q.B.D. 808; *Hallas* v. *Robinson*, 33 W.R. 426; *Congreve* v. *Evetts*, 10 Ex. 298; *Holroyd* v. *Marshall*, 10 H.L.C. 96; *Leatham* v. *Amor*, 38 L.T.N.S. 785; *Lazarus* v. *Andrade*, 5 C.P.D. 318.

Appeal allowed with costs.

James for plaintiff.

Howell, Q.C., and *D. A. Macdonald* for defendants.

EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 56th section of The Exchequer Court Act (50-51 Vict., c. 16, and 52 Vict., c. 38), it is ordered that the following rules in respect to the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:

(1) Any consent in writing signed by the parties, or their attorneys, may, by permission of the Registrar, be filed, and shall thereupon become an order of Court.

(2) Whenever a claim is referred to the Court by the head of any Department of the Government of Canada, a consent in writing, signed by the parties or their attorneys, that such claim shall be heard without pleadings, may be filed with the Registrar, and shall thereupon become an order of Court.

(3) The Court may, on the application of any party, order that any such claim shall be heard without pleadings.

(4) Every such claim shall be ripe for hearing as soon as such order is taken out.

(5) Rule III. of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:

RULE III.

Special case may be stated for opinion of Court.

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case, the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial.

Dated at Ottawa, this 8th day of February, A.D. 1894.

GEO. W. BURBIDGE,
J.E.C.

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