Canada Law Journal.

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It may perhaps be useful to remind the profession that owing to there having been two sessions of the Legislative Assembly of Ontario during the regnal year 62 Victoria, and some of the Acts in both sessions bearing the same number, it will be necessary in order to avoid confusion in citation to distinguish the chapter cited either by prefixing "Sess. 1" or "Sess. 2" as the case may be, or, "Statute 1" or "Statute 2," which is the more ancient way of making the distinction. For, although the various chapters are colloquially spoken of as if they were separate statutes, it would seem that in law all the Acts passed in any one session are, properly speaking, but one statute: see Stephen's Coms. 12th ed. p. 67 n.

The English Workmen's Compensation Act of 1897, which is supposed to be an improvement on the former Act, seems somewhat difficult of construction, and to be fruitful of litigation. The English Law Times of 20th May, 1899, observes that the English Court of Appeal was occupied 4 days in hearing appeals in cases under the Act, and in all nine cases were disposed of. This is a pretty good crop of cases under one Act. It would of course be very much in the interest of the profession that the English Act should be adopted in Ontario, it may however be open to doubt whether it would be equally beneficial for the class the Legislature intends to benefit by this species of legislation. Mr. Beven in his second edition of the English Act says, "the pleasing theory that the Act was to give an easy and ready mode of compensation for the wounded soldiers of industry must now plainly be abandoned. Experience shows that the Act and the procedure under it are replete with technicalities, and professional assistance is next to essential in elucidating them."

The Act was passed as "a sop to Cerberus," and that it is a failure is hardly to be wondered at, as it is evidently the work of an amateur legislator with an inadequate grasp of his subject.

THE DIVISIONAL COURTS—ONTARIO.

By the Ontario Judicature s. 70 it is provided that "Every Divisional Court of the High Court shall be composed of three judges, unless from illness or other unavoidable cause a third judge cannot be obtained, in which case it may be composed of two members, provided that in case of divided opinion upon any matter argued, the same shall, at the election of either party, be re-argued before a court of three members."

By a strange fatality it has happened that in the majority of the sittings of the Divisional Court which have been held during the present year only two judges have sat. During the year 1898 we believe the Divisional Court sat somewhere about 67 days, and of these sittings we believe it will be found that on about 42 days three judges sat, and on 25 days only two judges sat. During the present year there have, we believe, been about 73 days' sittings, but, on about 40 days only two judges sat. This has been due, no doubt in a large measure, but not entirely, to some of the judges being compelled to absent themselves in order to attend election trials, and as no one can expect judges to be in two places at once, the absence of judges from the Divisional Courts on that account must perforce be excused. But there seems to be a defect in the judicial machinery when some means cannot be found for complying with the obvious intention of the legislature that the normal number of judges in a Divisional Court shall be three, and that two shall be the exception. The result during the past months of this year has been that two has been the normal number, and three the exception. We draw attention to this matter because we believe it is the cause of inflicting grave injustice on suitors. In the first place great delay is occasioned in bringing cases to a hearing, as it is well known that cases have had to stand from court to court, owing to counsel objecting to proceed before two judges. And in the next place, where cases are heard before a two judge court, it involves the suitor in the possible expense of two arguments in case the court differs, or a possibility of having to submit to an adverse decision, whereas, if the court had been fully constituted, he might have been successful. Take for instance the recent cases, of *Denier* v. *Marks* and *Earle* v. *Marks*, where appeals were had from orders refusing security for costs. The actions were brought against the defendant, who was resident abroad, by the plaintiffs, who were

strolling players having no fixed place of abode in Ontario or anywhere else. The Master in Chambers ordered the plaintiffs to give security for costs. The Chief Justice of the Queen's Bench reversed the order on the ground that a foreign defendant is not entitled to the benefit of the Rule enabling a defendant to obtain security. The Divisional Court (Meredith C.J.C.P and Rose J.) held that the reason given by the Chief Justice of the Queen's Bench for reversing the Master in Chambers' order was untenable, but the Chief Justice of the Common Pleas nevertheless upheld the order appealed from on the ground that the plaintiffs were not "ordinarily resident out of Ontario" because they were not ordinarily resident anywhere. Rose J. concurred in dismissing the appeal, but practically dissented from the view of the Chief Justice of the Common Pleas, that the plaintiffs were not "ordinarily resident out of Ontario," but he added "while I concur, I, to use a phrase found elsewhere, do so grudgingly and because a dissent would be of little value to the parties, and might be found not only valueless but very burdensome." In other words, if he had dissented the case would have had to be reargued and a large amount of costs would have to be incurred in obtaining a decision which the defendant would probably have got in the first instance had the court been fully constituted. Could any suitor be expected to feel that his case had been properly disposed of under such circumstances? We think not.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

ADMINISTRATION—TRUST FUND—DECEASED TRUSTEE.

In the goods of Ratcliffe (1899) P. 110, was an application by the cestui que trust of a trust fund for a grant for administration limited to the trust fund. The trustee had died in 1890 leaving a will which had been duly proved by his executrix, who had since died leaving a will which had also been proved, and the executrix of the last mentioned will had died intestate, her next of kin were now the personal representatives of the deceased trustee, and having

been notified consented to the application. The grant of administration limited to the trust fund was made by Barnes, J.

SUBROGATION—DEBENTURES—OVERDRAFT TO PAY INTEREST—BANKER AND CUSTOMER.

In re Wrexham M. & C. Q. Ry. Co. (1899) 1 Ch. 440, the Court of Appeal (Lindley, M.R. and Rigby and Williams, L.JJ.) have affirmed the decisions of Romer, J. (1898) 2 Ch. 663 (noted ante p. 181) and (1889) 1 Ch. 205 (noted ante p. 269) holding that there was no right on the part of the bank to stand in the place of the creditors to whom they had paid interest, or to contend that their claims had not in fact been paid; the Court of Appeal holds that the bank may have a right of action to recover the overdraft from the company to the extent to which it had been applied in paying debts of the company, notwithstanding that the company was exceeding its borrowing powers in obtaining such advance; but that that right does not depend upon the doctrine of subrogation, although it has been in some cases used to account for the decisions, as according to the Court of Appeal it is really based on an equitable view of the case and by the consideration that although the borrowing powers of the company may have been exceeded yet its actual liabilities have not been thereby increased.

PARTIES—PLAINTIFFS—ACTION ON BEHALF OF A CLASS OF THE PUBLIC—RULES 131, 289 (ONT. RULES 200; ONT. J.A. S. 57 (5))—PRACTICE.

Ellis v. *Bedford* (1899) 1 Ch. 494, was an action brought by the plaintiffs (six in number) who sued on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs within the meaning of a certain Act for the regulation of a market held on property owned by the defendant, to enforce certain preferential rights to stands in the market, alleged by the plaintiffs to have been given by the Act to the class of growers above referred to. It was contended by the defendant that the plaintiffs could not join as they were suing in two capacities, one personal and the other representative. As to the first each plaintiff had each a separate and distinct cause of action, and as to the second the plaintiffs had no right to represent all the other classes of growers and holders of stalls, and under *Stroud* v. *Lawson* (1898) 2 Q.B. 44 (noted ante vol. 34, p. 648) actions of this kind could not be combined in one

Romer, J. was of opinion that the plaintiffs could not join, and gave the plaintiffs liberty to elect which of them should continue the action and amend accordingly, the majority of the Court of Appeal (Lindley, M.R. and Rigby, L.J.), however, disagreed with this view and thought that the plaintiffs might join as there was a bona fide question as to the construction of the Act, and that the plaintiffs had an interest in common and could maintain the action on behalf of themselves and the other growers, from which Williams, L.J. dissented. He however agreed with the rest of the Court that the Attorney General also should be added as a defendant to represent the rest of the public interested in disputing the plaintiff's alleged preferential rights in the market.

INFANT—GUARDIAN OF PERSON—MOTHER MARRYING AGAIN—STEPFATHER OF DIFFERENT RELIGION FROM INFANT—GUARDIANSHIP OF INFANTS ACT, 1886, (49 & 50 VICT. C. 27) S. 2—(R.S.O. C. 168, S. 14)—DISCRETION OF COURT.

In re X (1899) 1 Ch. 526, considers the effect of the Guardianship of Infants Act, 1886, (49 & 50 Vict. c. 27). The facts of the case were as follows: The father of the infant, who was dead, had by his will appointed his own father and the infant's mother, during widowhood, joint guardians of the infant, and had directed that on the death of either, the survivor of them should be the sole guardian. The paternal grandfather of the infant had died, and his mother had remarried a gentleman who was a Roman Catholic, the mother and infant were Protestants. The infant, by his paternal grandmother as next friend, under these circumstances, applied that an uncle by marriage should be appointed his guardian jointly with his mother. Kekewich, J. granted the application, but on appeal by the mother from this order the Court of Appeal (Lindley, M.R. and Rigby and Williams, L.JJ.) were of opinion that the Act above referred to (see R.S.O. c. 168, s. 14) had made an important change in the law relating to the guardianship of infants, and that now the infant's interest alone is to be considered, and that the mere fact of the stepfather professing a different religion from that of the infant afforded no ground for interfering with, or associating any other person with the mother of the infant as his guardian, the order of Kekewich, J. was therefore reversed, and the application for the appointment of another guardian dismissed.

WILL—FEE-SIMPLE CONDITIONAL—POSSIBILITY OF REVERTER—WILLS ACT, 1837, (1 VICT. C. 26) S. 3—(R.S.O. C. 1[illegible] S. 10.)

Pemberton v. *Barnes* (1899) 1 Ch. 544, deals with a very simple question under the Wills Act, 1837 (1 Vict. c. 26, s. 3)—see R.S.O., c. 108, s. 10. The point was simply whether the possibility of reverter on failure of a fee-simple conditional is "a right of entry for condition broken" within the meaning of the section so as to be devisable thereunder. North, J. came to the conclusion that it was. In the course of his judgment he remarks, "That is also stated in the late Mr. Challis's valuable book on Real Property, (2nd ed. p. 201) and it is a subject upon which his opinion has deservedly great weight."

COMPANY—VOTING—ARTICLES OF ASSOCIATION EVIDENCE.

Wall v. *London & Northern Assets Corp.* (1899) 1 Ch. 550, was an action brought to restrain a company from acting on certain resolutions passed at a meeting of shareholders. The plaintiff sought to impeach the resolutions in question on the ground that votes had been improperly received. The articles of association provided that votes tendered at a meeting and not disallowed at a meeting or an adjournment thereof should be valid for all purposes. —North, J. held that in the absence of fraud or bad faith this provision validated the votes objected to. The plaintiff's application for an interlocutory injunction was therefore refused.

WILL—CONSTRUCTION—CHARGE OF REAL ESTATE WITH DEBTS AND LEGACIES—DIVISEES IN TRUST—LEGAL ESTATE, VESTING OF—IMPLIED POWER OF SALE—LAW OF PROPERTY AMENDMENT ACT, 1859 (22 & 23 VICT. C. 35) S. 14.—(R.S. O., C. 129 S. 16).

In re Adams & Perry's Contract (1899) 1 Ch. 554. This was an application under the Vendors' and Purchasers' Act for the purpose of determining whether there was an implied power of sale under 22 & 23 Vict. c. 35, s. 14, from which R.S.O. c. 129, s. 16 is taken. A testator by his will, dated in 1868, appointed his wife sole executrix and directed payment of his debts without saying by whom, and after bequeathing certain pecuniary legacies, he gave the residue of his real and personal to two other persons on trust as to his realty to pay to his wife or permit her to receive the rents and profits thereof for life, and after her death to pay to his niece or permit her to receive the rents and profits thereof for her life; and after declaring certain trusts with regard to the personalty, he

directed his trustees, after the death of the survivor of his wife and niece, to pay two pecuniary legacies, and, after payment thereof, to stand possessed of his real estate and the residue of his personalty upon certain other trusts. The trustees assumed to sell the real estate and the question was whether they had power to do so under the Act above referred to. Stirling, J. came to the conclusion that the debts and immediate legacies and also the future legacies were charged upon the real estate, basing this part of his decision on *Greville* v. *Browne* (1859) 7 H.L.C. 689; also that the charge of the debts and immediate legacies being unaccompanied by any direction to the trustees to pay them, did not vest the legal estate in the land in them; also that the form of the gift to the widow in the absence of any trust for her separate use, vested the legal estate in her for life, the purposes of the will not requiring that it should vest in the trustees during her lifetime and consequently that the testator had not devised the real estate for his whole interest therein, and therefore the trustees had no power of sale under s. 14. (See R.S.O. c. 129, s. 16.)

POWER OF APPOINTMENT— WILL — CONSTRUCTION — INTENTION TO EXERCISE POWER.

In re Milner, Bray v. *Milner* (1899) 1 Ch. 563, discusses the question whether a special power of appointment had been duly executed.—The testatrix who was entitled to a special power of appointment of a life interest in certain lands in favour of her husband, by her will, dated in 1882, gave legacies to persons not objects of the power out of her separate estate or out of her estate and effects over which she had any disposing power, and then proceeded, "I give, bequeath and appoint all the residue of my estate and effects, whatsoever and wheresoever, unto my husband absolutely." The testatrix had no other testamentary power of appointment. She died in 1883 leaving her husband surviving. Stirling, J. held that the use of the word "appoint" in the residuary bequest in favour of the husband indicated an intention on the part of the testatrix to execute the power, and that it was well executed by the will.

TRUSTEE—POWER TO INVEST ON PERSONAL SECURITY—LOAN TO TENANT FOR LIFE —BREACH OF TRUST.

In re Laing's Settlement, Laing v. *Radcliffe* (1899) 1 Ch. 593, was an application by the plaintiff, a tenant for life, under a settle-

ment, for authority to trustees to lend the whole or any part of the trust funds to the plaintiff. The settlement empowered the trustees to lend the trust funds on personal security, the persons entitled in remainder were some of the plaintiff's grandchildren, one of whom was directed to be served. Evidence was given to show that the proposed loan would be of immediate advantage to the grandchildren. The principal difficulty in the way arose from a passage in Lewin on Trusts, 10th ed., p. 335, where it is stated on the authority of *Keays* v. *Lane*, Ir. R. 3 Eq. 1, that "trustees having a power, with the consent of the tenant for life, to lend on personal security, cannot lend on personal security to the tenant for life himself." Kekewich, J. was of opinion that this was not well founded and not borne out by the authority cited; and he held that if the trustees were reasonably assured that the money would be repaid when required under the settlement, that they might properly lend the fund to the tenant for life.

SALE BY COURT—PURCHASER FOR VALUE WITHOUT NOTICE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881, (44 & 45 VICT. C. 41) S. 70—(ONT. JUD. ACT, S. 58 (11).)

Jones v. *Barnett* (1899) 1 Ch. 611, is an important decision bearing on the effect of the Conveyancing and Law of Property Act, 1881, s. 70, from which Ont. Jud. Act. s. 58 (11) is derived. The facts were briefly as follows: Judgment was recovered in 1895 in an action of *Barnett* v. *Jones* against one Isaac Jones.—Isaac Jones was entitled to a reversionary interest in certain land under the will of one John Williams. This interest Isaac Jones in 1894 had in good faith for valuable consideration assigned to Mary Jones as nominee of Phillip Jones, to whom Isaac Jones was indebted. In ignorance of this transfer, the plaintiff Barnett obtained the appointment of a receiver, by way of equitable execution, of Isaac Jones' reversionary interest, and subsequently obtained an order for its sale and it was thereunder sold, and Barnett, who had obtained leave to bid, became the purchaser, and a person was appointed to convey the interest of Isaac Jones and a conveyance was subsequently executed. The tenant for life died in 1897 and Barnett took possession and obtained delivery of the title deeds from the executors of the will of John Williams. Neither Barnett nor his solicitor had any notice of the prior transfer to Mary Jones. The action was brought by Mary Jones to recover possession, and the

defendant relied on the section above referred to. But Romer, J. was of opinion that that section has not the effect of giving a purchaser a title to any interest which the Court did not intend to sell, —and had not the effect of binding the interests of persons who were not parties to, nor intended to be bound by, the proceedings in which the sale in question takes place. This decision, it will be seen, therefore, very materially limits the effect of Ont. Jud. Act, s. 58 (11), and, notwithstanding that section, it will be necessary for any purchaser under an order or judgment to satisfy himself that those bound or intended to be bound by the proceedings had in fact a good title to the property sold, for if the title be in fact outstanding in parties not parties to, or bound by the proceedings, the above section will not enable a purchaser to get over the defect.

ESTOPPEL—RES JUDICATA—WILL, VALIDITY OF—PROBATE ACTION.

In *Beardsley* v. *Beardsley* (1899) 1 Q.B. 746 it was held by Bruce and Ridley, JJ., that where an heir at law is made a party defendant to a probate action to establish a will, though not cited to appear as heir-at-law, he is bound by the judgment of the probate Court establishing the will, and is estopped thereafter from disputing its validity in respect of real estate affected by it.

INSURANCE—CONCEALMENT OF MATERIAL FACTS—UBERRIMA FIDES—GUARANTEE OF SOLVENCY.

In *Seaton* v. *Heath* (1899) 1 Q.B. 782 the plaintiff sought to recover on a policy of insurance in the nature of a guarantee of the solvency of a surety for a certain sum of money payable by a third party to the plaintiff. The circumstances of the case were as follows: The plaintiff advanced by way of loan to one Barwell £12,375 in cash, taking from him a promissory note for £15,000, which included not only the cash advanced but also interest thereon at about 40 per cent., and she also obtained the guarantee of one Hunt for the repayment of the £15,000. Being desirous of further securing herself from loss, she employed a Mr. Lion to effect a policy of insurance guaranteeing the solvency of Hunt. Lion applied to the defendants and other underwriters, and informed them that Hunt was a man of wealth and that the money was being advanced by a friend, but no information was given to the defendants of the extraordinary rate of interest which was being charged. The defendants, before executing the policy, made some

inquiry of a banker with regard to Hunt's position, and received information from him on the subject, on the faith of which, as the jury found, the defendants acted, but that they also acted on an implied representation that the transaction was not one of exceptional risk. About three months after the policy, Hunt became bankrupt. Bigham, J., who tried the action, gave judgment for the plaintiff; but on a motion to the Court of Appeal (Smith, Collins and Romer, L.JJ.) a new trial was ordered, because whether the non-disclosure of the circumstances of the transaction to the defendants was material or not to the risk, was a question of fact which the jury must determine; but the case is important as containing a strong expression of opinion by Romer, L.J., that a contract of the kind in question, where the guaranty is obtained by the creditor himself, and not by the debtor, is one like a contract for marine, life or fire insurance, in which the party who induces the contract is bound to exercise uberrima fides, although such may not be necessary on the part of the creditor where the guarantor is induced to enter into the contract not by the creditor, but by his debtor; and in that learned judge's opinion the contract sought to be enforced in this action was one which required uberrima fides on the part of the insured.

GAMING AND WAGERING—"DIFFERENCES"—"COVER" SYSTEM—OPTION—GAMBLING TRANSACTION—"GAMING OR WAGERING"—GAMING ACT, 1845 (8 & 9 VICT., C. 109), S. 18—(CR. CODE, S. 201).

In re Gieve (1899) 1 Q.B. 794 was an appeal by a trustee in bankruptcy against a decision of Wright, J., allowing proof of a claim by a creditor in respect of certain stock and share transactions between himself and the bankrupt, and the question was whether the transaction in question were gambling or wagering transactions, and, as such, void under the Gaming Act, 1845 (8 and 9 Vict., c. 109), s. 18 (see Cr. Code, s. 201). The bankrupt had carried on business as a dealer in stocks and shares, and Moss, the creditor, had had dealings with him on the "cover" system. Moss's claim consisted of the differences in the market price of certain stocks sold by the bankrupt to Moss at the day named for delivery, and the price for which the sale was made. The trustee was of opinion that the transaction was a gambling one and disallowed the claim; but on appeal being had to Wright, J., he allowed it on the ground that the evidence was not sufficient

to establish that the transaction was not intended by the parties to be a real one, but only a bargain for differences. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) overruled Wright, J., on the ground that the "sold note," which was as follows: "I beg to advise having sold you 20 Canadas—Cover, 1⅞; price, 50⅛; plus ⅛th, if stock is taken up," etc., was not really a contract of sale of the stock. The words "plus ⅛th, if stock is taken up," indicating, in the opinion of the Court of Appeal, that the buyer need not take up the stock unless he chose, but that, if he did, he was to pay the extra ⅛th; this, coupled with other conditions indorsed on the note, the Court of Appeal held, made it clear that the contract was really a bargain for differences, with an option to the buyer to pay ⅛th more, when the contract was to be a real one for the purchase and delivery of the stock. It was therefore held to be a contract "by way of gaming and wagering" within the meaning of the Gaming Act, 1845, s. 18, and the claim was disallowed.

Correspondence.

INSOLVENCY LEGISLATION.

To the Editors of the Canada Law Journal:

SIRS,—In your issue of March 15th you advocate the passing of an Insolvency Act by the Federal Parliament, and you invite discussion on the subject. I thank you for the opportunity of expressing my opinion, which is entirely opposed to the passing of such an Act. The Insolvent Act of 1875 was largely based on the English Act, it was in force five years, and in that short period it proved itself a signal failure and was repealed. Surely this in itself is sufficient reason for Parliament declining to try another similar experiment within twenty years. The conditions in Canada have not changed materially in that time, and there were no peculiar provisions in that Act which were responsible for its failure. The argument for such an Act, applicable only to traders, is an alleged essential difference in the basis of credit in commercial and non-commercial transactions. I deny the

difference. Credit is as common between the trader and the non-trader and between the non-trader and the non-trader as it is between the trader and the trader; its basis in all cases is good-faith and estimated ability to pay; it is evidenced by the same instruments; it is as essential for the carrying on of non-commercial as commercial transactions. The farmer, the laborer, the artizan, the fisherman, the miner, the professional man, and the printer are all using their credit equally with the trader and essentially on the same basis. You refer to the engrafting of the law merchant on the common law as a recognition of a difference in the basis of credit between commercial and non-commercial transactions. On the contrary, the grafting of the law merchant on the common law was a denial by the Courts of any such difference and a recognition that what had been the custom of merchants among themselves was equally applicable to those who were not merchants. Had the Courts enforced the custom of merchants among merchants only, then, surely, there would be a recognition of a difference, but the enforcing of the custom of merchants among those who were not merchants was as surely a denial of such difference. It was a recognition by the Courts of the customs which had grown up among merchants in the conduct of their business, not simply as law in relation to transactions between merchants, but as common law equally applicable to all. It was an assimilation of law based on the essential similarity of commercial and non-commercial transactions.

All classes under an insolvency law as proposed, except the trader, are required to pay their debts in full under penalty of the law, but the trader is enabled to liquidate his debts without paying them. Why the trader who owes the farmer should not be required to pay his debts in full while the farmer who owes the trader is required to pay his debt in full, is something requiring more than a rhetorical explanation. I submit that such a law is inherently unjust; it is class legislation of the worst kind. The application of the Insolvency Acts is not based on the character of the transaction whether commercial or non-commercial, but on the occupation of the insolvent, and this shows in a striking manner that these Acts are not founded on any difference in the basis of credit between certain kinds of transactions, but on the class to which the insolvent belongs. The real intention of insolvency legislation is to enable the creditor to realize on the assets of the

debtor of a certain class, and to enable the debtor of that class, when he has handed over his assets, to shed his debts and begin anew. If that is proper in the case of the trader, it is equally desirable in the case of the artizan or the farmer.

It has been proposed in certain quarters to make the law applicable only between traders. While this would remove one of the most striking injustices of the Act, it would not destroy its character as class legislation which is its worst feature. It would even then be giving one class in the community an undue advantage over the other classes. Apart from the class character of such legislation, I believe that it tends to demoralize the community. The individual who goes into business knowing that the policy of the law is to protect him if, through incompetency, lack of capital, over competition or hard times, he fails, cannot be expected to retain the same moral incentive to pay his debts in full as if the law recognized his obligation to do so. Not only is the debtor affected by this, but others as well. The positive law now requires a man to pay his debts in full. The discharge clauses of an insolvency Act are simply an evasive repeal of this law under certain conditions, and the moral effect of the positive law, under all other conditions, is weakened thereby.

The indirect but immediate effect of an insolvency law is to work an extension of credit among the class of traders that invoke the aid of such a law, but I do not see how it can be effective in extending credit among the class of traders who do not require its aid to free them from their obligations. The extension of credit among the former, we might call it the diffusion of credit, is surely not to be desired. That credit should be increased to the trader who has a working capital is desirable, but that the proposed trader, who has little or no capital to risk, should be brought into competition with the former is manifestly unfair. Beyond all this, such legislation results in heavy expenses, both legal and otherwise, which have to be borne not by the debtor but by the creditor class, which consists of both the trading and non-trading classes. The fees incidental to the legal practice which would spring up in insolvency matters would be considerable, but I doubt if they would in the end compensate for the loss of legal fees resulting from the injury done to legitimate business.

There is now practically a pro rata distribution of the estates of debtors throughout the Dominion without the red-tape and expense

of an insolvency law, and the fact that the procedure in the different provinces varies is of very little moment, as the main practical result is obtained at less expense.

While the subject of insolvency legislation is a proper one for the consideration of the "mercantile classes" and the profession, in the interest of both of which the law might be supposed to operate, it certainly is a subject of much more serious consideration for the non-mercantile classes against whose interest, without any supposition, such legislation would militate.

Morden, Man. A. McLEOD.

REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

Practice.] WALKER *v.* GURNEY-TILDEN CO. [June 2.

Appeal—Order of Divisional Court—Question of costs arising in Chambers—Leave to appeal—Solicitor—Lien—Settlement—Fruits of litigation.

An appeal does not lie to the Court of Appeal, unless by special leave, from an order of a Divisional Court made upon appeal from an order in Chambers enforcing a solicitor's lien for costs.

Leave to appeal from the decision of a Divisional Court, 18 P.R. 274 refused, that decision appearing to be in accordance with well-established practice.

Washington, for plaintiff's solicitors. *Shepley*, Q.C., for defendants.

Practice.] REGINA *v.* REID. [June 2.

Appeal—Order of Divisional Court quashing conviction — Constitutional question — Certificate of Attorney-General — R.S.O. c. 91, s. 3 — Inadvertence—Quashing appeal—Costs.

The Attorney-General certified his opinion, pursuant to s. 3. of R.S.O. c. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the

British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently in consequence of an authentic copy of the reasons for the judgment of the court below not having been brought before him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a qui tam action.

A. E. O'Meara, for appellant. *Du Vernet*, for defendant. *J. R. Cartwright*, Q.C., for Attorney-General.

Practice.] ELGIE *v.* BUTT. [June 2.

Costs—Set-off—Interlocutory costs—Solicitor's lien—Rule 1165—Judgment—Order for set-off—Necessity for.

The costs of a motion, and appeals following, to discharge the defendant out of custody under an order for arrest before judgment, are properly interlocutory costs, though partly incurred after judgment; and where such costs are awarded to the defendant, they ought to be set off against the judgment which the plaintiff has obtained against the defendant in the action, and which the defendant is unable to pay. As against such a set-off, the defendant's solicitor has no lien on the costs which the plaintiff has been ordered to pay, and such costs may be ordered to be set off or deducted, as provided in Rule 1165. In this case the order allowing the defendant costs was not made until after judgment, and therefore an application to the court for a direction to set off was necessary; had the order been made before judgment, the taxing officer would have made the deduction.

J. H. Moss, for plaintiff. *W. M. Douglas*, for defendant.

HIGH COURT OF JUSTICE.

Street, J.] DYER *v.* EVANS. [April 5.

Division Courts—Jurisdiction of—Prohibition.

After the recovery of judgment in a Division Court against the primary debtor and garnishee, but before the payment of the amount recovered, the debtor made an assignment for the benefit of creditors, whereupon an application was made by the garnishee to the Judge for an order discharging the debt, which was refused.

Held, that the matter being one within the jurisdiction of the Division

Court Judge, his decision in the matter would not be interfered with, and an order for prohibition was refused.

J. A. Robinson, for primary debtor. *Macbeth*, for primary creditor.

Street, J.] FLOER *v.* MICHIGAN CENTRAL RAILWAY CO. [April 21.

Jury—Failure to agree—Right of judge to dismiss action.

Rule 780 which provides that "if the jury disagree and find no verdict, the judge at or after the trial may, notwithstanding, dismiss the action," does not empower the judge in every case of disagreement to determine it himself, but only where he is of the opinion that he should have withdrawn the case from the jury.

Anglin, for plaintiff. *D. W. Saunders*, for defendant.

Boyd, C., Ferguson, J., Robertson, J.] [May 2.

REGINA *v.* APPELBE.

By-law—"Transient traders"—Occupation of premises—Invalidity of—Quashing conviction.

A by-law provided that "No person not entered upon the Assessment Roll of the City of W. * * * or who may be entered for the first time in the said Assessment Roll * * * and who at the time of commencing business * * has not resided continuously in said city * * at least three months, shall commence business * * for the sale of goods or merchandise * * until such person has paid to * * the sum of * * by way of license."

Held, that the statute under which it was framed, R.S.O.C. 223, s. 583, s-ss. 30, 31 relates to transient traders *who occupy premises* in a municipality, and that clause (*b*) of s-s. 31 defining the term "transient traders" does not modify the practice as to the occupation of the premises, and that this by-law is defective and invalid as it is directed merely against persons not entered upon the assessment roll, and who have resided continuously for three months in the municipality, and is quite silent as to these persons being in occupation of premises, and a conviction made thereunder was quashed.

Aylesworth, Q. C., for defendant. *W. M. Douglas*, for prosecutor.

Boyd, C., Ferguson, J., Robertson, J.] [May 3.

RANDALL *v.* ATKINSON.

Evidence—Death of witness before cross-examination—Admissibility—Longhand taking—Signing—Stenographic taking—Effect of.

When the old manner of taking evidence was that witnesses' answers

were taken down in writing, read over for the purpose of correction or explanation and signed, the deposition was incomplete until signed, and could not be looked at as evidentiary, but under the modern system of stenographic examination, the spoken word of the witness becomes the written word of the record and is complete as it progresses – nothing is needed to authenticate it as far as the witness is concerned—at every stage of progress it is evidence as far as it goes, and where an examination in chief is not concluded when the witness dies it will be received in evidence, but with less credit than is given to evidence adduced to rebut it. Judgment of ROSE, J., reported ante p. 173, affirmed.

W. M. Douglas, for the appeal. *Wallace Nesbitt*, contra.

Street, J.] SHEARD *v.* HORAN. [May 25.

Damages—Warranty of title—Sale of machine—Contemplated profits from use of.

The defendant company in 1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under s. 6 of 51 V., c. 19, now s. 3 of R.S.O., c. 149. A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. After the plaintiff had used it for nearly four years, during which the original purchaser had made some small payments on account, the defendant's company seized it in the plaintiff's possession under the terms of the contract.

Held, that the plaintiff was entitled to recover from his vendor upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale. *The Argentine*, 14 App. Cas. 519; *Cory* v. *Thomas Iron Works Co.*, L.R. 3 Q.B. 181; and *Mullett* v. *Mason*, L.R. 1 C.P. 559, followed.

Birnie, for plaintiff. *Shepley*, Q.C., for defendant company. *W. A. J. Bell*, for the other defendants.

Street, J.] TELFER *v.* BROWN. [May 25.

Principal and agent—Business carried on in the name of agent—Lease of premises to agent—Surrender—New lease to agent and others—Notice to landlord—Liability—Injunction—Parties—Declaration of right—Damages—Depreciation of stock—Depriving principal of value of term.

One of the defendants was in 1893 employed by the plaintiffs as the

manager of a shop which they supplied with goods; his brother, another defendant, was soon afterwards employed in the same shop under him, and both continued for five or six years to sell the plaintiffs' goods for them in the shop as hired clerks, and in no other capacity. At the time the arrangement was first made, a lease of the shop for three years was obtained from the third defendant in the name of the first defendant, the manager of the shop; and although the lease was never formally renewed, the possession remained unchanged as long as the brothers remained in the plaintiffs' employment. The business was carried on in the name of the first defendant, the manager, and he held the lease of the shop for the plaintiffs, his employers. In December, 1898, a fire occurred in the shop, and the buildings and stock were damaged, and shortly afterwards the two brothers and another brother obtained a new lease of the shop from the landlord, the third defendant, at an increased rental. This was at first kept secret from the plaintiffs, for whom the brothers continued to sell the damaged stock in the same shop; but in January, 1899, the remainder of the stock was moved to others premises pending repairs, and the manager gave notice of his intention to leave the plaintiffs' employment. The brothers having declined a business offer made by the plaintiffs, they were dismissed from the plaintiffs' employment, and told that they must not do their business upon the premises in question, as the plaintiffs claimed them. At the commencement of this action, and while it was pending, the three brothers, the lessees, were in possession of the shop, carrying on business in it in their own names.

Held, that the action must be dismissed as against the defendant landlord, as he had, upon the evidence, no such notice of the relations between the parties as to make him liable for having made the new lease.

The conduct of the other two defendants, in obtaining the new lease over the head of their employers during the continuance of their employment, was wrong; but, in the absence from the record of the third partner and lessee, these defendants could not be enjoined from carrying on business in the shop, and to declare them trustees for the plaintiffs of their two-thirds of the term would be of no avail to the plaintiffs. Nor could the plaintiffs recover damages for the depreciation in the value of their stock by reason of their being prevented from continuing their business in the shop in question, after the damage by fire had been made good, for they could have obtained another shop in the neighborhood. The damage was really caused by the defendants leaving their service; but this they had a right to do upon a month's notice, and no damage could be given on that head.

The original tenancy began in April, 1893, and ended in April, 1896. From that time forward it was a yearly tenancy, and the plaintiffs really were the tenants, though the manager was the nominal tenant. When he wrongfully surrendered his tenancy in January, 1899, the plaintiffs were

entitled to hold until April, 1900, because no valid notice could have been given to terminate the tenancy earlier; and he was bound to account to the plaintiffs for the value of the term which he surrendered, or to pay damages for having deprived the plaintiffs of it, which was practically the same thing, the same measure being the difference between the old and new rental for a period of fifteen months.

Dornford v. *Dornford*, 12 Ves. 127, and *Heydon* v. *Castle*, 15 O.R. 257, 261, referred to.

Birnie, for plaintiff. *G. W. Bruce* and *W. T. Allan*, for the other defendants.

Meredith, C.J., Rose, J.] DENIER *v.* MARKS. [June 1.

Security for costs—Residence out of Ontario—"Ordinarily resident," Rule 1198(b)—Discretion.

It is not a ground for refusing to order a plaintiff resident out of the jurisdiction to give security for the defendant's costs that the defendant himself resides out of the jurisdiction.

Rule 1198 provides that security for costs may be ordered, "(*b*) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario."

Held, ROSE, J., dubitante, that these words refer to a person who, under ordinary conditions or circumstances, is habitually present in some country or place out of Ontario; and that a person who has no home, and whose calling causes him to be as much in Ontario as elsewhere, cannot be said to come within this branch of the Rule.

The discretion which the Court has in making or withholding an order for security for costs should be exercised against making an order which would shut the doors of the Court against a plaintiff.

J. F. Moss, for plaintiff. *W. H. Blake*, for defendant.

Armour, C.J., Street, J.] [June 5.

COPELAND BREWING CO. OF TORONTO, *v.* BROOKS.

Summary judgment—Rule 608—Dispute as to amount due—Power to give judgment.

An appeal by the defendant, William A. Brooks, from an order of the Judge of the County Court of Victoria, allowing the plaintiffs to sign final judgment for the amount of their claim in an action for the price of beer sold and delivered. The order was made before appearance, under Rule 608.

J. H. Moss, for appellant, contended that the County Court had no jurisdiction over the cause of action, and also that it was not a proper case for Rule 608.

E. D. Armour, Q.C., and *Steers*, for plaintiffs, contra.

Held, that the judge had no power to order a final judgment, the amount claimed not being in any way liquidated or ascertained, and being disputed by the appellant. The judge might have directed a reference or inquiry to ascertain the amount due, and might have held the motion over and given judgment after the ascertainment of the amount by such inquiry; but he could not give judgment and direct a reference by such judgment to ascertain the amount; that would be putting the cart before the horse. Appeal allowed and order for judgment set aside with costs here and below to the appellant against the plaintiffs in any event.

Boyd, C.] CORRY *v.* LEMOINE. [June 5.

Settlement of action pending reference—Duty of Master—Dispute as to terms of settlement—Finding—Report—Opening up—Costs.

Pending a reference to take accounts, a settlement was made between the parties in the absence of their solicitors, but there was a dispute as to the terms of the settlement. The master gave the parties the alternative, on the suggestion of the plaintiff, either to go on so as to determine whether the settlement did in fact end the matters in litigation, or to go on with the accounts as if there had been no settlement. The defendants, however, refused to take any further part in the proceedings in the master's office. The master found the fact of a settlement, and also that the defendants had agreed to pay the plaintiff's costs as part of the settlement, which the defendants disputed.

Held, on appeal from the master's report that it was competent for him to deal with the question whether there was or was not a settlement, and report according to the result. The course taken by him was according to the proper practice and within the scope of his jurisdiction. The decisions as to staying proceedings, upon summary application in case of a compromise, are not necessarily applicable to a compromise arrived at pending a reference. By Rule 667, in taking accounts the master is to inquire, adjudge, and report as to all matters relating thereto as fully as if the same had been specially referred. The defendants, however, should not be prejudiced by their having withheld before the master any evidence to support the settlement in the terms which they asserted; and therefore the report should be opened up on payment of costs.

F. R. Latchford, for defendant. *W. Wyld*, for plaintiff.

Armour, C.J., Street, J.] [June 6.

McCARRON *v.* METROPOLITAN LIFE INS. CO.

Appeal—County Court—Setting down—Time—Extension—R.S.O., c. 55, s. 57—Rule 353.

Motion by plaintiff to quash the appeal of defendants from a judgment of the County Court of York, upon the ground that it was not set down for argument at the first sittings of a Divisional Court which commenced after the expiration of one month from the judgment complained of, as required by s. 57 of the County Courts Act, R.S.O., c. 55. The County Judge had, upon the ex parte application of the defendants, made an order purporting to extend the time for setting down the appeal, and had refused an application made by the plaintiff to rescind such order.

Hislop, for plaintiff. *F. S. Mearns*, for the defendant, relied on the order of the judge, and also asked the Court, if necessary, to extend the time, under Rule 353.

Held, that the appeal having been set down too late, the Court had no power to hear it, nor had the Court, or the Judge below, power to extend the time, Rule 353 not in terms or by inference applying so as to enable the Court to extend the time limited by the statute. Order made quashing the appeal with costs.

Armour, C.J., Street, J.] SMITH *v.* HAY. [June 7.

Appeal—County Court—Certificate of judge—Absence of—Setting down—Invalidity of—Time—R.S.O., c. 55, ss. 55, 57.

Motion by plaintiff to quash the appeal of defendant from the judgment of the County Court of Stormont, Dundas and Glengarry, on the ground that the appeal was improperly set down, the pleadings and proceedings in the Court below not having been certified by the judge, as required by s. 55 of the County Courts Act, R.S.O., c. 55.

C. H. Cline, for plaintiff. *W. A. D. Lees*, for defendant, asked to be allowed to obtain a certificate from the judge and lodge it nunc pro tunc, and to have the setting down thereupon taken as regular.

Held, that the appeal could not be considered as set down at all, because the proceedings were not certified, as required by s. 55; and as s. 57 required that the appeal should be set down within a particular time, it would be useless to allow the proceedings to be certified now, as the appeal would have to be set down anew, and the time for setting down had now elapsed. Order made quashing the appeal with costs.

MUNICIPAL LAW.

REG. *v.* TORONTO RAILWAY COMPANY.

Street railways—Dominion Railway Act not applicable to Municipal control —Persons in charge of street car.

Defendants were convicted of operating cars in the City of Toronto which had no vestibule protection for conductors as alleged to be required by a City by-law, which provided that all cars were to be provided with "vestibules to protect the motorman and persons in charge of such car from exposure, etc." On appeal to the County Judge from a conviction made by the Police Magistrate,

Held, 1. An electric street railway does not become a Dominion railway or work, and as such removed from the legislation control of a local legislature, by reason of its tracks crossing the tracks of two Dominion railways.

2. A conductor of a street railway company is a "person in charge of a car" within the meaning of the by-law.

[TORONTO, March 28, 1899—McDougall, Co.J.

This was an appeal from the conviction of the defendants, The Toronto Railway Company, made by the Police Magistrate for the City of Toronto for an alleged breach of city by-law No. 3280 entitled a by-law "to provide for the constructing of vestibules for the shelter of motormen and others upon the cars of electric railway companies." The section of the by-law which was claimed to have been disregarded by the defendants reads as follows:—"(2) Every electric railway company operating its railway within the limits of the said city shall not during the month of December of the current year (1894) or during the months of January, February, March, November and December of any year hereafter run or operate or cause or suffer or permit to be operated on its railway or line within the said city any street car unless the same shall be provided with proper and sufficient vestibules to protect the motorman and persons in charge of such car from exposure to cold, snow, rain or sleet while engaged in operating such car." The question in dispute was as to whether the defendants were bound to provide a vestibule for each end of the car and to protect by a vestibule the conductor as well as the motorman.

J. Bicknell, for the appellants. *Fullerton, Q.C.*, contra.

McDOUGALL, Co.J.—The sole question which I [illegible] consider is the construction to be placed upon the by-law and whether its language compels a vestibule to be provided at each end of the car, or, putting the query in another way—does the conductor of a car, whose station when not collecting fares is at the rear end of the car, come within the protection of the by-law under the words "motorman and persons in charge of the car while engaged in operating such car." Apart from the question raised as to the validity of the by-law by reason of the provisions of the Dominion Railway Act it is, I may say, admitted that if a proper construction of the words, "motorman and persons in charge of such car while engaged in operating such car" includes the conductor as well as the motorman, then the conviction must stand, but if it be held otherwise the conviction must be set aside.

First as to the alleged application of the Dominion Railway Act. It is contended that because the Toronto Railway Company crosses with its tracks the tracks of two Dominion railways, the Canadian Pacific and the Grand Trunk, then by force of the provisions of the Dominion Railway Act the Toronto Railway Company becomes a Dominion railway or work removed from the legislative control of the legislature of Ontario and is not governed, to use the words of Cameron, C.J., in *Clegg* v. *G. T.R.*, "by past or prospective legislation in relation thereto by the Provincial Legislature."

I have carefully considered the cases cited by Mr. Bicknell for the defendants in support of this contention commencing with *Clegg* v. *G. T.R.*, 10 O R. 708, and the subsequent cases of *Barbeau* v. *St. Catherines and Niagara Central Railway Co.*, 15 O.R. 586; *Re Toronto, Hamilton &c. R. W. Co. and Kerner*, 28 O.R. 14; *Larsen* v. *Nelson & Fort Sheppard R. W. Co.*, 4 B.C.R. 151; *Washington* v. *G. T.R.*, 24 Ont. Ap. 183; *G. T. R.* v. *Hamilton Radial Railway Company*, 29 O.R. 143; but I venture to think that a careful consideration of the clauses of the Dominion Railway Act and the amendments made thereto since 1888 will lead to the conclusion that this objection is not sustainable. Section 306 of the Dominion Railway Act declares that certain named railways are works for the general advantage of Canada and the section concludes with these words, "and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway or any of them is a work for the general advantage of Canada." Sec. 307 enacts "that every such railway and branch line shall hereafter be subject to the legislative authority of the Parliament of Canada, etc." Upon reading s. 173 of the same Act as it stood originally we find a provision regulating the procedure to be adopted when one railway company desires to affect a crossing of another railway company, namely, by an application to the Railway Committee of the Privy Council for approval. It enacted that "no company shall cross, intersect, join or unite its railways with any other railway without application to the Railway Committee for approval." In 1892 and again in 1893 this clause 173 was repealed and a new section substituted. From the language of the substituted section I think it is clear that the Dominion Parliament conceived that a street railway, an electric railway or tramway did not come within the meaning attached to the word railway in the Dominion Railway Act of 1888. The new section reads in part as follows: "The railway of any company shall not be crossed, intersected, joined or united by or with any other railway nor shall any railway be intersected or crossed (observe the omission of the words joined and united) by any street railway, electric railway or tramway whether constructed under Dominion or Provincial or Municipal authority or otherwise unless . . . . the place and mode of the proposed crossing . . . . is first approved of by the Railway Committee. . . . ."

It is abundantly clear, I take it, that railways of the same class only are contemplated by s. 306. Small local street railways, whether operated

with horses or by electricity and tramways, were not intended to be included amongst the railways mentioned in that section, nor was a mere contact of such local street railway with ordinary railways by crossing the same to subject such local enterprise to the distinction of being declared a work for the general advantage of Canada. The rapid growth of such local enterprises, however, and the frequent necessity in the public interest of allowing them to cross Dominion railways called attention to the propriety of some special legislative provision for regulating such crossing and accordingly s. 173 was re-drafted and its language clearly indicates to my mind that the only interference or control sought to be exercised by the Dominion Parliament over street railways was to regulate the place and plan of any proposed crossing. This conclusion is supported by the expression "whether constructed under Dominion, Provincial or Municipal authority or otherwise." If such a street railway or electric road constructed under Dominion authority was a railway within the meaning of the Dominion Railway Act there was no possible necessity for using such language. It is equally clear that if a street railway or electric railway constructed under provincial or municipal authority was a railway within the meaning of the Dominion Railway Act then s. 306 applied and the very fact of the crossing or the proposed crossing would give the Railway Committee jurisdiction to deal with the matter, and it was entirely unnecessary so to recast the language of s. 173 as to expressly include street railways, electric railways and tramways. Again, if we examine some clauses of the Dominion Railway Act we find many provisions entirely unsuitable and inapplicable to surface or street railways. . . . . The street railway company in nearly all cases derives its franchise under agreement with the various local municipalities through which its tracks extend. But the municipality may undertake the construction of a street railway without any special authority beyond that conferred by the general clauses contained in the Municipal Act. I cannot, therefore, sustain the objection to the validity of the by-law.

Next as to the merits: What is the proper legal construction to be placed on the language of s. 2 of the by-law. Looking at the language of this section, it forbids the operation by the company of any street car unless the same shall be provided with proper and sufficient vestibules, i.e., such car shall be provided with vestibules not a vestibule. What is the mischief to be guarded against?—"the exposure of the motorman and persons in charge of the car while engaged in operating the car to cold, snow, rain or sleet." If the section read "to protect the motorman in charge of the car" its meaning would have been beyond dispute, but some force must be given to the words "and persons in charge of the car" and the evidence shows that each car carries two persons—two servants of the company—a motorman and a conductor, and I think it is amply established by the testimony that the conductor is in charge of the car within the ordinary and common-sense meaning of the expression. He gives all signals to start or stop the car. He collects the fares and regulates and deals with the

passengers. He controls the trolley pole, and his duty is to see that it is in constant contact with the power wire. The motorman corresponds to the engineer of a locomotive. He controls the machinery and applies and shuts off the power which causes the car to move. Like the locomotive engineer he must guard against collision with persons or vehicles but he is not at liberty to start unless he receives the proper signal from conductor. Could it be said upon the ordinary steam railway that the conductor of a train was not in charge of the train? The conductor is just as sensitive to snow, cold, rain and sleet as the motorman and as much within the mischief sought to be provided against as the motorman. It may be true that he is not so constantly exposed to the weather as the motorman, but he is a large portion of his time on the rear platform of his car in all weathers.

It was argued that a vestibule at the rear of the car would interfere seriously with the proper working of the car. That is an argument to be addressed to the City Council, the legislative body responsible for the by-law. The City Council has used language which in my opinion was intended to extend the protection of vestibules to employees operating the street car, and they must be deemed to have fully considered all objections to the construction of vestibules upon the cars. The by-law is to apply to motorman and persons in charge of such car while engaged in operating such car. The word operate means in its intransitive form "to work, to labour, to act, to have agency, to produce any effect." In its transitive form it means "to affect, to produce by agency." Operating in the Imperial Dictionary is defined "acting, exerting agency or power, performing some manual act in surgery." To operate a railway is to conduct the business of the undertaking in all its phases. To operate a car or train of a railway means, so far as that particular car or train is concerned, to conduct or carry on the business of the railway to the extent that such car or train is capable of being employed as part of the whole undertaking. All persons necessarily employed to properly manage its cars or trains are engaged in operating the same on behalf of their employers, the company. The conductor, I have already pointed out, is a person in charge of the car. He operates the car for he directs its movements. He is solely in control of the trolley pole and therefore can at any moment deprive the car of its motive power by detaching the pole from the wire. He is the company's agent to collect the fares from the passengers—the fruits of operating such car. The motorman also takes a part in operating the car for he handles the mechanism which admits or cuts off the electric current, but the electric current which he manipulates reaches him only by way of the trolley pole which is under the control of the conductor. I think it is beyond reasonable doubt therefore that both conductor and motorman are engaged in operating the car.

In the opinion I have formed of the relative positions of conductor and motorman it is unnecessary to invoke the doctrine of ejusdem generis. The word motorman is not followed by any other specific words and itself exhausts the whole class or genus. The general words which follow must

have reference therefore to other persons than motormen and having regard to the object of the by-law must be taken to include the conductor as a person having charge of the car and engaged in operating it.

I would refer to the case of *Dawson* v. *London Street Railway Company*, 18 P.R. 223, wherein an application to examine both the motorman and the conductor of a street car as officers of the street railway company, it was held that they were both officers of the company and examinable for discovery, although in that case it appeared that there was a by-law of the defendant company defining the duties of the conductor and motorman. The evidence given in the present case proves that the duties of the conductor and motorman upon a car of the Toronto Railway Company are similar in all essential respects to the duties defined in the London company's by-laws for the same officers. . . . . I also refer to *Leitch* v. *G. T.R.*, 12 P.R. 541 and in appeal 12 P.R. 671, and again in the Court of Appeal 13 P.R. 369 as defining the position of a conductor on an ordinary railway train. A conductor of a train was considered as a person entrusted with the management of part of the company's business.

The final conclusion I have arrived at therefore is that the meaning and interpretation of the by-law is plain and that the conviction should be affirmed and the present appeal dismissed with costs.

IN THE MATTER OF A COMPLAINT UNDER THE PUBLIC SCHOOLS ACT.

Election of school trustees—Wards—Returning officer—Nomination papers—R.S O., c. 292, s. 60.

A complaint respecting the validity or mode of conducting the election of public school trustees in the town of Cobourg on the 26th Dec., 1898. The Municipal Amendment Act, 1898 (61 Vict. c. 23) which abolishes ward representation in municipal councils of towns under 500 inhabitants, does not affect the procedure for election of school trustees in which the system of election by ballot prevails under the provisions of s. 58 R.S.O., c. 292, and public school trustees are to be elected, as heretofore, by wards, and not by "a general vote."

The powers and duties of a returning officer are purely ministerial and in no sense judicial.

R.S.O., c. 23, s. 128, s-s. 2, does not restrict the returning officer to one hour for receiving nomination papers, but provides for at least one hour being allowed therefor.

Sufficiency of nomination paper under s-s. 1, s. 128, R.S.O. c. 223 considered. *Reg. ex rel. Corbett* v. *Jull*, 5 P.R. 41, approved.

[COBOURG, Feb. 7, 1899—Benson, Co. J.

This was a complaint made under section 60 of The Public Schools Act, respecting the validity or mode of conducting the election of school trustees in the Town of Cobourg, on the 26 Dec., 1898.

Field for complainant. *Holland* for returning officer.

BENSON, Co. J.—Two main questions arise upon this complaint. First, it is contended on the part of the complainant that the election of school trustees should have been by a general vote of the town, and not by a vote

in each ward, as has heretofore been the case; that the effect of the Municipal Amendment Act, 1898, has been to abolish the representation of wards in the school board in towns, such as Cobourg, where a division into wards exists, and where the proceedings under section 58 of "The Public Schools Act" have been taken to require the election of school trustees to be held by ballot on the same day as municipal councillors are elected. This contention is based on the provisions of sub-section (3) of section 58, which directs that in such cases the election shall "be held at the same time and place, and by the same returning officer or officers, and conducted in the same manner as the municipal nominations and election of aldermen or councillors are conducted; and the provisions of the Municipal Act respecting the time for opening and closing the poll, the mode of voting, corrupt or improper practices, vacancies and declarations of office, shall mutatis mutandis apply to the election of public school trustees." I cannot agree with this contention.

The provisions of The Public Schools Act indicate clearly the policy of the Legislature to be that in urban municipalities divided into wards, the representation of the ratepayers shall be by wards; and the same policy is applied to rural public schools. See s. 9, s-s. (2). In the case of urban municipalities, section 55 provides that "For every ward into which any urban municipality is divided there shall be two school trustees;" sub-section (2) speaks of one of the trustees "in each ward" retiring annually, "after which one trustee shall be elected annually for each ward."

In my opinion, all this cannot be held to have been impliedly repealed and abolished by the provisions of The Municipal Amendment Act, 1898, the language of which is confined to the election of the mayor and councillors by a general vote. If such had been the intention of the Legislature it could have been expressed in a very few words. I think the expressions "in the same manner as the municipal nominations and elections . . . are conducted" and "the mode of voting" used in s-s. (3) of s. 58, merely apply to the manner or mode of conducting an election by ballot; and that these provisions are simply for convenience and for the avoiding of the expense of two separate sets of officers and polling places and appliances for taking the vote. They could not have been intended to entirely change the constituency which trustees should represent and the electorate which should appoint them. The strict reading of these words contended for might as well be extended to embrace the qualifications of voters and trustees. It is admitted that in towns where the election by ballot has not been required, and the proceedings are governed by s. 57, the representation is to be by wards. This being so we might have presented, if the Municipal Amendment Act of 1898 is applicable under section 58, the anomaly of ward representation in the school board of one town and its abolition in an adjoining town, merely because the latter had provided for the election of its trustees by ballot. Surely this could never have been intended.

There is no difficulty in carrying out to their fullest extent the provisions of the Public Schools Act with the Municipal Act as it is; and it is a well established canon of construction of statutes that where two Acts can stand and be enforced without repugnancy or inconsistency, and there is no express repealing or changing of the one by the other, both shall be given effect to. I am, therefore, of opinion that the nominations of school trustees were properly asked for by ward representation.

The second question involved is as to whether there was really an election by acclamation of a trustee for the East Ward. It is not necessary to consider the elections for the other wards, because for each of them only one candidate was proposed, or attempted to be proposed, and these candidates, in the view I have taken of the propriety of ward representation, were duly elected by acclamation. For the East Ward, it may be said that technically and according to the strict letter of the law, there was only one candidate (John McCaughey, as he is named in the paper) regularly and properly nominated. Sec. 128 of the Municipal Act requires that the person to fill each office shall be proposed and seconded, and that the nomination shall be in writing, and shall state the full name, place of residence and occupation of the candidate, and shall be signed by the proposer and seconder. To constitute a perfect nomination paper, under these requirements, I think the paper should contain a statement of the office for which the candidate is proposed, in addition to the other matters above mentioned.

The nomination paper of William Barr stated that he was nominated "for the office of School Trustee," not stating for any ward. In other respects it was substantially sufficient. The omission of the ward, according to my view of the law, rendered it uncertain as a nomination paper of a candidate for one of the wards of the town. This, according to the evidence, was not accidental. The proposer thought he should insert the ward; but the seconder was of opinion that wards were abolished, and that the nomination should be for the town and not for a ward, and the proposer accepted this view. The returning officer, after taking time to consider, decided that this nomination paper was irregular, and he rejected it, and declared Mr. McCaughey elected by acclamation. Here, I think, he made a mistake. I do not see that the law invests him with any judicial power. His duties and powers are purely ministerial, and in the face of a contention as to how trustees were to be elected, whether as representing wards or by general vote, I do not think he was authorized to decide the question. That was for the courts.

But apart from this, what I have to consider is whether on the facts as disclosed in the evidence, and about which there is no substantial difference of statement, it can be said that the ratepayers present at the nomination understood that only one candidate was proposed for the office of trustee for the East Ward, and assented to his election by acclamation. The policy and intention of the law is that the fullest opportunity shall be given to the electorate to say who shall represent them in an elective office;

and care must be taken lest by too strict and technical adherence to the letter of the law, its spirit is defeated. In the matter under consideration, I see no reason to think that the returning officer did not sincerely endeavor to discharge his duties faithfully and impartially, but I think he was in some respects under a misapprehension as to them. He evidently thought that as soon as the hour from the time fixed for holding the nomination meeting had elapsed, he was powerless to receive nominations or to allow amendments to nominations which had been made. He says in his evidence that as soon as eleven o'clock came, he stated he would receive no more nominations; and from this the ratepayers present might well understand that the nomination was at an end, and that nothing more could be done.

Here the returning officer, in my opinion, unintentionally erred. I see nothing in the Act to prevent his receiving or allowing the correction of nominations, even after the lapse of one hour, up to the time when he makes his declaration of the candidates nominated and as to whether or not a poll is required. The requirement as to the hour is merely in order that time enough may be given, and that there may be no surprise. It is not stated that no longer delay shall be made. The language of sub-section 4 of section 128 of the Municipal Act, and of sub-section 4 of section 57 of the Public Schools Act, is very different. In these cases it is expressly enacted that the polls shall continue open until five o'clock in the afternoon, and no longer.

In my opinion the returning officer, before making any declaration, should have read the nomination papers aloud, and should have stated his objections to that of William Barr, and should have ascertained from the proposer and seconder whether they desired to amend it, or if they did not, whether any other ratepayers wished to make the nomination. This was not done, and I cannot help thinking that the ratepayers present were misled (unintentionally, as I have before said) by the returning officer's statement that the hour having elapsed he could not receive any more nominations. I cannot say that the ratepayers had as full an opportunity of giving expression to their wishes as they were entitled to; and I am of opinion that it cannot be said that they assented fully and freely to the election of Mr. McCaughey by acclamation. It sufficiently appeared, from the evidence, that if the representation was to be by wards, the nomination of Mr. Barr was intended to be for the East Ward.

In my judgment the election of Mr. McCaughey should be set aside and he should be removed from the office of Public School Trustee for the East Ward of the Town of Cobourg, and a new election should be held and I so order. I do not see that any power is given me as to costs; but in any event I do not think this is a case for costs. The judgment of Mr. Justice John Wilson in the case of *Reg. ex rel. C. i't v. Jull*, 5 P. R. 41 is instructive as to the duties of returning officers and as to what constitutes an election by acclamation.

Province of British Columbia.

SUPREME COURT.

Full Court]. DANIEL *v.* GOLD HILL MINING COMPANY. [Jan. 20.

Company—Assets of—Fraudulent sale by directors—Collusion—Inadequate consideration—Companies Act Amendment Act, 1893—Enabling, not restrictive.

Action in which Richard T. Daniel who sued on behalf of himself and all the shareholders in the Gold Hill Mining Company (Foreign) and others were plaintiffs, and Michael Doneen, E. J. Doneen, et al, and the said Gold Hill Mining Company were defendants, for a declaration that a certain sale of the Gold Hill mine to the defendant E. J. Doneen, was null and void. In July, 1895, the Gold Hill mineral claim situate in the Trail Creek mining division of British Columbia was owned by the defendant Welch, who sold a half interest to the plaintiff Daniel and a quarter interest to the defendant Michael Doneen. In September, 1895, the Company was formed under the laws of the State of Washington; the capital stock was $500,000.00 divided into 500,000 shares of $1.00 each. The Company acquired the Gold Hill mineral claim, the plaintiff Daniel receiving for his interest in the claim 200,000 shares in the Company, and the defendants M. Doneen and Welch receiving 100,000 shares each, and 100,000 shares were put in the treasury for the working of the mine. The treasury stock with the exception of a few hundred shares was sold for about $5,500.00 which was spent in development work, and then the Company was at the end of its resources. The defendant Michael Doneen, one of the directors of the Company, having become responsible to a contractor for $432.00 for work done on the mine, borrowed that sum from his brother, the defendant E. J. Doneen, who held 138,900 shares in the Company, and then the defendants M. Doneen, Welch, Comegys, and Davidson, directors of the Company, sold the mine to E. J. Doneen for $1,250 00. The plaintiff was a director of the Company but did not attend the meeting at which the resolution was passed authorizing the sale—it was a regular monthly meeting and the plaintiff had notice of it but not of the fact that the mine was to be sold. Subsequently the transaction was ratified by a general meeting of the shareholders. The fraud alleged was that the sale was a sham sale and that the stated consideration of $1,250.00 was never in fact paid. At the trial, Drake, J., set aside the sale, finding that it was made at a price so inadequate as to show an intention to benefit the purchaser at the expense of the shareholders. The trial judge

also held that the directors had no power to sell, as the provisions of the Companies Act Amendment Act, 1893, had not been complied with.

Held, on appeal to the Full Court that on the finding of the trial judge the sale should be set aside.

Per IRVING and MARTIN, J.J. The provisions of section 2 of the Companies Act Amendment Act, 1893, respecting the mode of sale of Company's assets are enabling and not restrictive.

Duff, for appellants. *W. J. Taylor*, for respondents.

Full Court, Vancouver.] [May 16.

WILLIAMSON v. BANK OF MONTREAL.

Maritime law—Goods in possession of receiver—Seizure under fi. fa. by sheriff—Jurisdiction of Supreme Court to direct interpleader—Practice.

On 31st December, 1898, R. Williamson & Son commenced an action in rem in the Exchequer Court of Canada, British Columbia Admiralty District, against the ship Manauense, to enforce a mortgage of the ship and her equipment, including two steam launches known as Vera and May. The ship and launches were thereupon arrested by the marshal of the Court of Admiralty, and on 13th January, 1899, an order was made by the Local Judge in Admiralty (McColl, C.J.,) appointing W. A Ward receiver to take possession of the said ship and launches, and on 19th January another order was made for the sale of the ship and launches. On 12th January, 1899, the sheriff for the County of Vancouver seized the launches under a writ of execution dated Jan. 7, 1899, issued in an action in the Supreme Court of British Columbia, in which the Bank of Montreal was plaintiff and T. T. Edwards, the registered owner of the ship, was the defendant; and upon a claim being made by the receiver, the sheriff applied for and obtained from Irving, J., on the 26th January, 1899, an order directing the trial of an interpleader issue in the Supreme Court, in which Williamson & Son should be plaintiffs and the Bank of Montreal defendant. The order provided that the issue to be tried should be whether at the time of the seizure by the sheriff the goods seized were the property of the plaintiffs as against the Bank and that it should be delivered by the plaintiffs within thirty days. On February 25, 1899, an order was made in interpleader proceedings by Irving, J., on the application of the Bank of Montreal restraining the receiver in Admiralty from proceeding with the sale of the launches until the hearing of the interpleader issue. The issue not having been delivered in accordance with the order of Jan. 26, 1899, the defendant (the Bank of Montreal) obtained a judgment barring the receiver from prosecuting any claim against the launches.

Williamson & Son appealed against both the interpleader order and the injunction order, and the appeal was argued before the full court at Vancouver on March 20, 1899.

Held, allowing the appeal, that where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action in rem in the Exchequer Court to enforce a mortgage of the ship such property cannot be seized by a sheriff under a writ of fieri facias issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors.

Semble, that the sheriff, finding the marshal in possession, should have made a return of nulla bona and the execution creditor should then have applied in the Admiralty proceedings to rank as a judgment creditor.

G. A. S. Potts (*Gilmour* with him) for appellants. *Wilson*, Q.C., for respondent.

Killam, J.] DAY *v.* RUTLEDGE. [May 26.

Costs—Practice—Execution after notice of appeal—Sheriff's poundage—Making order of Supreme Court a judgment of the court below.

The judgment in favour of the plaintiff having been affirmed by the full court, his costs were taxed and executions issued and placed in the sheriff's hands, notwithstanding defendant gave notice of his intention to appeal to the Supreme Court. A certificate of the judgment was also registered. Defendant having afterwards paid the amount of the taxed costs into court as part of the security for the appeal, obtained an order setting aside the executions, but reserving the question of the sheriff's fees. On the dismissal of the appeal to the Supreme Court, plaintiff caused the judgment of that court to be entered into the judgment book of this court on a judge's fiat, and applied for an order for payment of the costs of the executions of the certificate of judgment, and of making the order of the Supreme Court a judgment of this court, also for an allowance of poundage to the sheriff on the executions.

Held, 1. Following *Clarke* v. *Creighton*, 14 P.R. 34, that plaintiff was justified under Rule 683 of the Queen's Bench Act, 1895, in issuing the executions and certificate of judgment when he did, and was therefore entitled to costs of same.

2. In view of s. 48 of the Supreme Court Act, R.S.C., c. 135, inasmuch as the order setting aside the executions did not provide for any poundage or reserve the question, and as no money was realized on the executions, no order for poundage should now be made.

3. It is doubtful whether it is necessary to make the judgment of the Supreme Court an order of this court when the appeal is simply dismissed; and at any rate the costs of an application for that purpose should not be given when not so ordered upon the application.

Mulock, Q.C., for plaintiff. *Wilson*, for defendant.