Canada Law Journal.

VOL. XXXIII. AUGUST 15, 1897. NO. 14.

Readers of the English Reports may be interested to know that where they see the new name, Lord Ludlow, reference is to him who was until recently known as Lord Justice Lopes.

It has recently been held by Mr. Justice Kennedy at the Liverpool Assizes, that a woman who has obtained a separation from her husband under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, can maintain an action of libel against her husband.

The authorities at the Law Institution in England seem to be setting the pace pretty fast for the students, so much so that tw[illegible]hs of the candidates dropped out of the race at the preliminary e[illegible]ination. At the examination in April last the percentage o[illegible]es was nearly fifty per cent., whilst the percentage of failures at the Bar final examinations was even greater.

One of our exchanges, whilst welcoming any endeavour to improve the educational status of the profession, doubts whether these examinations really are after all the best test. So far as Ontario is concerned we are expending a very large sum on our elaborate system of legal education; and there is much need of care that the expenditure should be judicious, especially so when the money has to come from the members of a profession, the majority of whom (largely owing to business being stolen from them by unlicensed practitioners) are at their wits end to pay even their fees, and receive no protection worth mentioning in return. This educational expenditure is, however, legitimate and only one of the absorbents of the present tax upon Ontario practitioners. There are others much less meritorious which might be referred to. The subject would seem to invite discussion.

CANADIAN BAR ASSOCIATION.

The Canadian Bar Association again comes before the profession in connection with its second annual meeting to be held at Halifax on the last day of this month. The meeting will last for two or three days, and will be of much interest to the Bar of the Dominion. It is expected and hoped that there will be a large attendance from the western, as there is sure to be from the Maritime provinces. In these days of federation it is not surprising that many of the best men in various parts of the Dominion are taking more than a passing interest in the Association.

The subject of the uniformity of those branches of law which are within the purview of the Dominion legislature, is of the greatest importance to this country, and those who see things only from a limited and provincial point of view do not grasp either the needs of this Dominion, or forecast the future in this regard. Every attempt that leads up to uniformity in every branch of commercial law should be carefully fostered, and the Canadian Bar Association will be an important factor in this direction. The American Bar Association commands the sympathy and support of the very best men in the United States, and the constititutional position there places them at a great disadvantage as compared with Canada; and yet there are those here who take no interest in, and even throw cold water on a similar movement in this country: one which should receive their support and encouragement, rather than the reverse.

We have heard of several valuable papers that are to be read by eminent members of the Bar from various Provinces, which we should be glad to see followed by discussion by those present who might be able to throw light on the subject. This was not done last year, but would, we venture to suggest, be a valuable and not uncommon innovation.

A pleasanter summer trip could not well be had than to the capital of Nova Scotia. Those who go will find a pleasant cool spot, and be treated with old-fashioned

courtesy and hospitality. Favorable arrangements have been made with the railways by which return rates are reduced to one and-a-third fare, or possibly less.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

EASEMENT—RIGHT OF WAY—GRANT OF RIGHT OF WAY TO TENANT FROM YEAR TO YEAR, WHO SUBSEQUENTLY ACQUIRES FEE—COVENANT WITH YEARLY TENANT, "HIS HEIR AND ASSIGNS"—GRANT IN GROSS.

Rymer v. *McIlroy*, (1897) 1 Ch. 528, turns on a short point of real property law. A grant and covenant was made to and with a tenant from year to year, and "his heirs and assigns," giving him, his heirs and assigns a right of way over certain lands of the grantors. Subsequently the grantee acquired the fee simple, and the defendant claimed under him as assignee, and the question was whether he was entitled to the benefit of the easement. On the part of the plaintiff it was contended that the easement was granted only in respect of the estate then held by the grantee as tenant from year to year, and that it would be void as to any future acquired estate as being a grant in gross, and that the use of the words "heirs and assigns" could not extend the effect of the grant beyond the existence of the estate to which the grantee was entitled at the time of the grant, and that as that estate became merged on his acquiring the fee, the right to the easement then came to an end. Byrne, J., who tried the action, however, was of opinion that the grant was good and enured to the benefit of the grantee and his heirs and assigns, so long as they had any estate in the dominant tenement.

INNKEEPER, RIGHT OF, TO NOTIFY GUEST TO LEAVE—GUEST AT INN, RIGHT OF, TO REMAIN—TRAVELLER, GUEST AT INN WHEN HE CEASES TO BE.

Lamond v. *Richard* (1867), 1 Q.B. 541, would almost appear to be unique. The plaintiff had originally been a guest at the defendants' hotel. She was a lady in good position, and

came to the hotel as a traveller in 1895, and continued to reside until 1896. It would seem from the report that she was subject to some mental hallucination, and the defendant thought it desirable that she should leave, and he requested her to do so, which she declined; taking advantage of her absence one day he packed up her effects and refused her admittance on her return, and the present action was brought to recover damages for the alleged wrongful refusal to receive the plaintiff. Wright and Bruce, JJ., were of opinion that the action did not lie, on the ground that the common law obligation on an innkeeper to receive and lodge a guest only applies to such guests as are bona fide travellers, and the plaintiff had ceased to be a traveller; and this decision was approved by the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.).

BANKER—CROSSED CHEQUE—RECEIPT OF PAYMENT OF CROSSED CHEQUE FOR CUSTOMER—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., c. 61), s. 82—(53 VICT. c. 33, s. 81, D.).

In *Clarke* v. *London and County Banking Co.* (1897), 1 Q.B. 552, the effect of s. 82 of the Bills of Exchange Act, from which 53 Vict., c. 33, s. 81, D. is derived, is discussed. The English practice of crossing cheques, though adopted in the Dominion Bills of Exchange Act, does not appear to have been very widely practised thus far, perhaps because its advantages both to banks and their customers is not generally understood. Of its benefit to banks this case is an illustration. Section 82 of the English Act provides that a banker receiving payment of a crossed cheque for a customer who has no title to it, shall incur no liability to the true owner by reason only of having received payment. In the present case the customers' account was overdrawn, and the amount was placed to his credit, and it was attempted by the true owner to charge the bank with the money for that reason, but the Court, (Cave and Lawrence, JJ.,) held that the section was a complete protection, and it was immaterial that the effect of putting the money to the customers' credit had the effect of paying off the overdraft to his account.

PRINCIPAL AND AGENT—AGENT, LIABILITY OF—WARRANT OF AUTHORITY OF AGENT—CROWN, SERVANT OF, CONTRACT BY.

In *Dunn* v. *Macdonald*, (1897) 1 Q.B. 555, the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) affirms the decision of Charles, J. (1897) 1 Q.B. 401 (noted ante p. 350).

EXECUTION—INTERPLEADER—SALE OF GOODS IN INTERPLEADER PROCEEDINGS—PURCHASER, TITLE OF—(ONT. RULES, 1151, 1557).

In *Goodlock* v. *Cousins*, (1897) 1 Q.B. 559, the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) affirms the decision of Wills and Wright, JJ., noted ante p. 347. Goods were seized in execution and claimed by the present plaintiff; interpleader proceedings were instituted and the goods were sold, not under an order as stated in our former note, but by virtue of a statute, in consequence of the claimant failing to give security. After the sale the execution creditor admitted the present plaintiff's title to the goods. This action was against the purchaser at the sale, and was held not to be maintainable.

BUILDING CONTRACT—LIQUIDATED DAMAGES—PENALTIES FOR DELAY—EXTRAS.

Dodd v. *Churton*, (1897) 1 Q.B. 562, turns upon the proper construction of a building contract providing for the payment of liquidated damages for delay in completing the contract. In the course of the work extra work was ordered to be done which necessarily delayed the completion of the work under the contract, and the question was whether this had the effect of relieving the contractor from the stipulation as to damages. The County Court Judge before whom the action was tried decided this question affirmatively, and on appeal to a Divisional Court (Wills and Wright, JJ.) the Court was divided; an appeal was then had to the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), and that Court upheld the County Court Judge's decision, the contractor not having in any way bound himself to complete the work according to the contract, notwithstanding the delay occasioned by the extra work.

CRIMINAL LAW—PRACTICE WRIT OF ERROR—FELONY—PRISONER'S ATTENDANCE IN COURT ON ARGUMENT OF WRIT OF ERROR DISPENSED WITH.

In *Richards* v. *The Queen*, (1897) 1 Q.B. 574, Cave and Wills JJ. dispensed with the personal attendance of a prisoner in Court on the argument of a writ of error in a case of felony; the prisoner being in custody.

LICENSING ACT—CONSTABLE, POWER OF, TO ENTER LICENSED PREMISES—LICENSING ACT 1874, (37 & 38 VICT. C. 49) S. 16—(R.S.O. C. 194, S. 130.)

Duncan v. *Dowling*, (1897) 1 Q.B. 575 was an appeal from a conviction of the defendant under the Licensing Act of 1874, s. 16, (see R.S.O. c. 194, s. 131) for refusing admission to a police constable on licensed premises kept by the defendant. The facts were that a room of the defendant's house was let to a secret society which was holding its meeting therein, and to which the constable was refused admission by the "tiler," whose duty, according to the rules of the society, was to refuse admission to all persons unable to give the sign. Cave and Lawrance, JJ., ordered the conviction to be quashed, holding that a constable has no right to enter licensed premises unless he has some reasonable ground for believing that some violation of the law is taking, or is about to take place, and no such ground was shown to exist, the mere fact that the sounds of music and singing were coming from the room being held to constitute no such ground.

GAMING—PLACE USED FOR BETTING—INCLOSURE ON RACECOURSE—BETTING BY BOOKMAKER IN VARIOUS PARTS OF INCLOSURE—"BETTING WITH PERSONS RESORTING THERETO"—BETTING ACT 1853 (16 & 17 VICT., C. 119), SS. 1, 3—(CR. CODE, S. 197).

In *Hawke* v. *Dunn* (1897), 1 Q.B. 579, a heavy blow has been struck against the English gambling fraternity who have been accustomed to use the betting ring at race courses as a place for bookmaking. The inclosure in question was within the race course which was itself inclosed. Admittance was gained by payment of 1s. for entrance to the course, and £1 for entrance to the inclosure. The defendant, accompanied by his clerk, was admitted within the inclosure during a race meeting, and moved about from place to place within the inclosure, shouting the odds against the horses

about to run and inviting persons to bet, and betting with them. The backer was required in each case to pay the money for which he backed the horse to the defendant, and received in return a ticket bearing the names of the defendant and of the odds laid. If the horse won the defendant paid back to the backer his stake, and the odds won. If it lost the defendant retained the stake. The defendant had no control over the management of the inclosure. On a case stated by justices, the Court (Hawkins, Cave, Wills, Wright and Kennedy, JJ.), were unanimous that the inclosure was "a place" within the meaning of the Betting Act, 1853, which forbids "a house, office, room or other place" being opened, or kept or used by the owner, or any person using the same, for the purpose of betting with persons resorting thereto (see Cr. Code, s. 197), and of s. 3 of the Act, which imposes a punishment on persons using any "house, room, office or other place for the purpose of betting. It was contended that the doctrine of ejusdem generis applied to the construction of this Act, and that the words "other place" in the Act in question could not apply to an open inclosure, but must be one of the like character, as a house, room or office; but in answer to that argument Hawkins, J., who delivered the judgment of the Court, said "this rule of construction must be controlled by another equally general one, that Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed"; and came to the conclusion from the wording of the Act and a careful review of the authorities that the doctrine did not apply in the present case. It would seem, however, that betting under such circumstances in Canada, on the race course of an incorporated association, would not be an offence under the Cr. Code: see s. 204, s.s. 2.

McInaney v. *Hildreth*, (1897) 1 Q.B. 600, turns upon a somewhat similar question. In this case the question was whether a vacant plot of land, surrounded by buildings and hoardings, and occasionally used for shows, and known as "The Pit Heap," and to which on the day in question the public had

free access, was "a place" within the above-mentioned Act. The defendant on the day of a race meeting came on "The Pit Heap" and stationed himself at a point on it with his back against a hoarding where he remained about three hours making bets, of which he made entries in his betting book. The justices before whom the defendant was prosecuted held that the place where the defendant stood was a place used by him for the purpose of betting with persons resorting thereto, within the meaning of the Act and convicted, and the same court as decided in *Hawke* v. *Dunn*, *supra*, upheld the conviction. Since the above note was written we see by the newspapers that *Hawke* v. *Dunn* has been reversed in the House of Lords.

BANKRUPTCY—VOLUNTARY CONVEYANCE TO MAKE GOOD BREACHES OF TRUST—REVOCABLE MANDATE—FRAUDULENT PREFERENCE—EVIDENCE.

In *New Prance and Garrard's Trustee* v. *Hunting*, (1897) 1 Q.B. 607 the plaintiff, a trustee in bankruptcy, sought to set aside a deed of lands made by the bankrupt two days before his bankruptcy, on the ground of its being a fraudulent preference. The bankrupt was a solicitor, and the deed in question was made by him voluntarily to a trustee, charging certain lands of the bankrupt with the payment of £4,200 to make good divers breaches of trust which he had committed in respect of certain scheduled trust estates of which he was sole or joint trustee. The deed was made without any pressure, and was not communicated to any of the beneficiaries. It was contended that it was a mere revocable mandate, which was revoked by the bankruptcy, and if not, it was at all events, preferential conveyance. Williams, J., upheld the conveyance against both objections. As to the first, he held that the effect of the deed was to create the relation of trustee and cestui que trust between the grantee named in the deed and the several beneficiaries, and was irrevocable. He also held that cestuis que trust who had suffered from the bankrupt's breaches of trust were not creditors within the meaning of the clause of the Bankrupt Act which prohibits preferential transfers, and that the conveyance being made for the purpose of repairing a wrong committed by the bankrupt was not within

the Statute against fraudulent preferences. A point of practice was incidentally determined in the progress of the case. The bankrupt had been examined in bankruptcy, and he was made a party defendant to the present action as a trustee of the trust estates. The plaintiff proposed to read the bankrupt's examination in evidence without calling him as a witness, but the learned judge ruled that although what a trustee says or does in the exercise of his duty is evidence against his beneficiaries, yet what he says or does in other respects is not evidence. The examination was therefor held to be inadmissible as evidence against any of the other defendants.

MANDAMUS, ACTION FOR—STATUTORY REMEDY.

In *Peebles* v. *Oswaldtwistle* (1897), 1 Q.B., pp. 384-625, the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), reversed the decision of Charles, J., granting a mandamus to compel the defendants (a municipal authority) to construct a sewer; being of opinion that that remedy was not open to the plaintiff, as a statutory remedy had been provided for such breach of duty, which it was incumbent on the plaintiff to pursue.

PROBATE—LIMITED ADMINISTRATION—GRANT TO STRANGER—IMMEDIATE GRANT NECESSARY.

In the Goods of Suarez (1897), P. 82, the next of kin of an intestate, were at the time of his death resident in Bolivia, where it took six weeks to communicate with them by telegram and four months by letter. This Court being satisfied that an immediate grant of administration was necessary for the preservation of the personal estate, made a general grant to a member of a firm of accountants with whom the books of the intestate's firm had been placed, upon justifying security being given, but such grant was limited until such time as the next of kin should apply for a full grant.

CONTEMPT OF COURT—INJUNCTION, BREACH OF—AIDING AND ABETTING BREACH OF INJUNCTION—COMMITTAL—INTERFERING WITH COURSE OF JUSTICE.

Seaward v. *Paterson* (1897), 1 Ch. 545, is an instance of the danger a person incurs, even though not a party to an action, who connives at a breach of an injunction of which he has

notice. In this case an injunction had been granted to restrain the defendant from committing a breach of a covenant contained in a lease, whereby defendant had bound himself not to use, or permit to be used, certain premises let to him, in such a way as to be an annoyance to the plaintiff or his tenants. It was proved that the defendant had used the demised premises for the purpose of boxing exhibitions, which caused a serious nuisance to the plaintiffs' other tenants. Murray, one of the persons against whom the motion to commit was made, was present at the trial of the action, and informed by the defendant of the judgment when given; and he afterwards actively assisted the defendant in committing a breach of the injunction. North, J., held that he was liable to be committed for breach of the injunction on the same ground that a servant or agent of the party enjoined is liable. The Court of Appeal, though affirming the committal of Murray, put their judgment, not on the ground of his having been guilty of a breach of the injunction, but on the ground that as he had been actively assisting in the breach of an injunction of which he had notice, he was guilty of a contempt of Court in interfering with, or obstructing the course of justice.

NUISANCE—VACANT LAND—DEPOSIT OF FILTH ON VACANT LAND BY THIRD PARTIES—COMMON LAW DUTY OF LAND OWNER—INJUNCTION.

Attorney General v. *Tod Heatly* (1897) 1 Ch. 560, is a case which shows that the owner of land owes duties to the public, which, if neglected, may be enforced by process of law. Among these duties is one which requires him not only to refrain from making his premises a nuisance to his neighbours, but also to prevent strangers from so doing. The defendant in this case was the owner of a vacant piece of land in London. He had surrounded it by a hoarding, but people threw filth and refuse over, and broke up the hoarding so that the land became in such a condition as to constitute a continuing public nuisance, and the action was brought to compel the defendant to abate the nuisance, the vestry of the parish being the relators. The action was tried before Kekewich, J.,

who dismissed the action, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.,) were unanimous that there was a common law duty on the owner of land to prevent that land from becoming a public nuisance, and the judgment of Kekewich, J., was reversed, and the plaintiff declared entitled to an injunction against the owner as prayed.

COMPANY — SHAREHOLDER — UNDERWRITING LETTER—OFFER—ACCEPTANCE OFFER—AUTHORITY TO APPLY FOR SHARES—ESTOPPEL—PRINCIPAL AND AGENT.

In re Consort Deep Level Gold Mines (1897), 1 Ch. 575. This was an application under the Companies Act, 1862, s. 35, to rectify the register of shareholders of a joint stock company, by striking out the name of the applicant from the register of shareholders. The application turned on the effect of an underwriting letter sent by the applicant to the Mines company, offering to subscribe or procure subscribers on or before 21st September for 10,000 shares, "or such less number as may be accepted by you" in the Consort Company, which the Mines Co. was promoting, "and in the event of my failing to comply with the terms herein stated I authorize you as my agent, on my behalf, and in my name, to apply for the number of shares (full or reduced as the case may be) guaranteed by me as above." A memorandum of acceptance was signed by the Secretary of the Mines Co. at the foot of the letter, but no notice of acceptance was ever sent to the applicant. The Consort Company having been registered, the Mines Company without any notice to the applicant, applied for 9,000 shares on his behalf, which were allotted to him and registered in his name. North, J., refused the application, on the ground that the applicant was estopped, as against the Consort Co., from disputing the authority of the Mines Co. to apply for shares in his name, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.), reversed his decision, holding that the letter did not constitute a binding contract on the applicant until accepted by the Mines Co., and notice of the acceptance given to him, and that the right of the Mines Co. to apply for shares in his name did not arise until he had been informed by that company of the number

of shares for which they accepted his offer, and he had failed to apply himself for that number, and that he was not estopped as against the Consort Co. from disputing the authority of the Mines Co. to apply for shares in his name. The Court of Appeal were of opinion that the doctrine of estoppel had no application, on the ground that it was apparent on the face of the underwriting letter that the Mines Co. were not to have any authority to apply for shares in the applicant's name until he had notice of the acceptance of his offer, and had failed to comply with its terms, and that the applicant had in no way done anything to lead the Consort Co. to believe that those conditions had been complied with by the Mines Co.

VENDOR AND PURCHASER—CONVEYANCE—LIGHT—IMPLIED GRANT—DEROGATING FROM GRANT—"CONTRARY INTENTION"—CONVEYANCING AND LAW OF PROPERTY ACT, (44 & 45 VICT. C. 41) S. 6, S.S. 2, 4—(R.S.O. C. 100 S. 12).

Broomfield v. *Williams* (1897) 1 Ch. 602 is a case deserving the careful attention of conveyancers. In this case the defendant being the owner of two plots of land, sold one of them on which a house was erected to the plaintiff, and subsequently built on the other plot which adjoined that sold to the plaintiff, and which was referred to in the plaintiff's deed as "building land," a house so near to the plaintiff's house as to obstruct the access of light to his windows. The object of the action is not clearly stated in the report, probably due to the fact that it was brought to trial without pleadings; but it would seem to have been either for an injunction or for damages. Kekewich, J., dismissed the action, being of opinion that the plaintiff had no cause of action, notwithstanding there had been a serious interference with the access of light to the plaintiff's windows. The Court of Appeal (Lindley, Smith and Rigby, L.JJ.) took a different view of the matter, and held that under the Conveyancing Act. 1881, (44 & 45 Vict. c. 41) s. 6, (see R.S.O. c. 150 s. 12) the lights as they were enjoyed at the time of the conveyance passed to the plaintiff, except so far as it could be shown that at the time of the purchase the plaintiff knew and understood that

his rights were to be limited, and that the reference to the adjoining lot as building land did not show any "contrary intention"; and that the building of the defendant was therefore a derogation from his grant, and constituted a good cause of action by the plaintiff, but inasmuch as the plaintiff admitted that he knew defendant intended to build, and would have been satisfied if the defendant's house had been set back to a certain distance, an inquiry was directed to ascertain the damages sustained by the plaintiff by reason of the obstruction of light to his windows occasioned by the defendant's house not being so set back, and for payment of such damages by the defendant with costs. It may be observed that the law as laid down in the above case, would prevail in Ontario, and that R.S.O. c. 111, s. 36, although preventing the acquisition of an easement of light by prescription, does not in any way prevent its acquisition by grant.

COMPANY—WINDING UP—MISFEASANCE BY OFFICER OF COMPANY—AUDITOR—OFFICER OF COMPANY—COMPANIES' WINDING-UP ACT, 1890, (53 & 54 VICT. C. 63) S. 10.—(R.S.C. C. 129, S. 83).

In re Western Counties B. & M. Co. (1897) 1 Ch. 616, was a proceeding in a winding-up matter, to compel certain persons who had performed the work of auditors of the company, to make good losses sustained through their misfeasance. The persons in question had never actually been appointed auditors of the company, but at the request of the directors of the company they had audited the accounts of the company, and prepared a balance sheet which they knew would be submitted to the shareholders, and on the faith of which a dividend was subsequently declared. This balance sheet was claimed to be false, and summary proceedings were taken by the liquidator against the persons who had thus acted as auditors, as "officers" of the company guilty of misfeasance, under the Winding-up Act, 1890 (53 & 54 Vict. c. 63) s. 10 (see R.S.C. c. 129, s. 83), which proceedings the alleged auditors sought to have stayed on the ground that they were not "officers" of the company within the meaning of the Act. Stirling, J., held that they were de facto auditors, and as such "officers" of the company, and refused the application, but

the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) were of the contrary opinion and thought that an auditor might or might not be an "officer" of a company, and prima facie he is not; but if he is appointed to the office of auditor to the company and acts as such, then he is an "officer" within the meaning of s. 10, and liable to be proceeded against summarily for misfeasance in his duty as auditor, and no irregularity in his appointment would avail him as a defence, But inasmuch as the word "auditor" does not occur in the officers enumerated in s. 10 (and see R.S.C. c. 129, s. 83) the performance of auditor's work by a person who never has been appointed to the office of auditor of the company does not make that person an "officer" so as to render him liable under that section, and the appellants in this case having done auditors' work under such circumstances, they were held not to be liable to be proceeded against under s. 10, and the appeal was accordingly allowed.

LESSOR AND LESSEE—COVENANT BY LESSOR TO PAY ALL WATER RATES IMPOSED OR ASSESSED UPON THE PREMISES—WATER SUPPLIED FOR TRADE.

In re Floyd, Floyd v. *Lyons* (1897), 1 Ch. 633, it was held by the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) that where a lessor had covenanted with his lessee to pay "all water rates imposed or assessed on the premises" such covenant did not extend to, or include the charges made for water supplied for the purposes of the trade of the lessees. The decision turns somewhat on the effect of the statutes regulating the company by which the water was supplied, and which empowered the company to charge a percentage on the water supplied for domestic purposes, but left the supply of water for trade purposes to be matter of bargain between the company and consumer, the charge therefor not being regulated in any way by reference to the premises.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] [May 1.

MANUFACTURERS' INS. CO. *v.* PUDSEY.

Accident insurance—Renewal of policy—Payment of premium—Promissory note—Agent's authority—Finding of jury.

A policy issued by the Manufacturers' Accident Insurance Co. in favour of Pudsey contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect until the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent.

Pudsey having been killed in a railway accident payment on the policy was refused on the ground that it had expired and had not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested Pudsey to renew, and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium, after being paid the remainder in cash. He also swore that the agent gave Pudsey a paper purporting to be a receipt, and gave secondary evidence of its contents. The agent's evidence was, that while the note was taken for a portion of the premium, it was agreed between him and Pudsey that there was to be no insurance until it was paid, and that he gave no renewal receipt, and was paid no cash. Some four years before this, the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid, but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium; and that the paper given to Pudsey by the agent, as sworn to by Pudsey's father, was the ordinary renewal receipt of the company.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract, and had been entrusted with the renewal receipt, Pudsey might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it, and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the Court according to the practice in Nova Scotia.

Held, further, that there was evidence upon which to hold that the transaction amounted to payment of the premium, and it was to be assumed that the act was within the scope of the agent's employment. The fact that the agent was disobeying instructions did not prevent the inference, though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession, except one produced at the trial, as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained, and were not taken by surprise.

Appeal dismissed with costs.

Wallace Nesbitt, for the appellant.

W. A. B. Ritchie, Q.C., for the respondent.

Exchequer Court.] [May 1.

THE QUEEN *v.* CANADA SUGAR REFINING CO.

Revenue Customs duties—Importation of goods—Time of importation—Tariff Act—Construction—Retrospective Legislation—R.S.C. c. 32—57 & 58 Vict. c. 33 (D)—58 & 59 Vict. c. 23 (D).

By s. 4 of the Customs Tariff Act, 1894, (57 & 58 Vict. ch. 33) duties shall be levied on certain specified goods "when such goods are imported into Canada." By R.S.C. ch. 32, s. 150 (the Customs Act) the importation of goods "shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported," and by s. 25 the master of a vessel entering any port of Canada must report in writing to the collector or proper officer the particulars of his ship and cargo, and the portion to be landed at that port, etc., s. 31 provides that duties shall not be collected at a port where goods are entered but not landed.

Held, that the importation under s. 150 is not completed at the first port of entry of the vessel if the goods are not landed there, but only at the arrival at her port of final destination. Therefore when a vessel containing sugar entered North Sydney in April, 1895, and reported under s. 25, and then proceeded to Montreal where she arrived on May 4th, and landed her cargo, the sugar was liable to duty under an Act which came into force on May 3rd.

Held, further, that the duties attached, notwithstanding said Act, did not receive the royal assent until July, 1895, it containing a provision that it should be held to have come into force on May 3rd.

Appeal allowed with costs.

Fitzpatrick, Q.C., Solicitor-General, and *Newcombe*, Q.C., Deputy Minister of Justice, for the appellant.

Osler, Q.C., and *Gormully*, Q.C., for the respondent.

Ontario.] [May 1.

JAMESON *v.* LONDON AND CANADIAN LOAN COMPANY.

Mortgage—Leasehold premises—Terms of mortgage—Assignment or sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreement therein, the leased property by description, and "all and singular the engines and boilers which now are, or shall at any time hereinafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged, or intended so to be, and form part of the term "hereby granted and mortgaged"; the habendum of the mortgage was "To have and to hold unto the said mortgagee, their successors and assigns for the residue yet to come and unexpired for the term of years created by the said lease less one day thereof, and all renewal, etc.

Held, reversing the judgment of the Court of Appeal, that the premises of the said mortgage above referred to, contained an express assignment of the whole term and the habendum, if intended to reserve a portion to the mortgagor was repugnant to the said premises and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital describing the lease as one for a term of twenty-one years.

Held, further, that the habendum did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term, is insufficient to give the instrument the character of a sub-lease.

Appeal allowed with costs.

Armour, Q.C., and *Irving*, for appellant.

Arnoldi, Q.C., for respondents.

Ontario.] [May 1.

CONSUMER'S GAS CO. *v.* TORONTO.

Assessment and taxation—Exemptions—Real property—Chattels—Fixtures—Gas pipes—Highways—Title to portion of highway—Legislative grant of soil in highway—11 Vict., c. 14 (Can.)—55 Vict., c. 48 (O.)—Ontario Assessment Act, 1892.

Gas pipes laid under the streets of a city which are the property of a private corporation are real estate within the meaning of the Ontario Assessment Act of 1892, and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of the Act.

The appellant was incorporated by 11 Vict., c. 14, by the first clause of which power was conferred "to purchase, take and hold lands, tenements and other real property for the purposes of the said company, and for the erection and construction and convenient use of the gas works" of the company and

further power was conferred by the thirteenth clause, "to break, dig and trench so much and so many of the streets, squares and public places of the said city of Toronto as may at any time be necessary for laying down the mains and pipes to conduct the gas from the works of the said company to the consumers thereof, or for taking up, renewing, altering or repairing the same when the said company shall deem it expedient."

Held, that these enactments operated as a legislative grant to the company of so much of the land of the said streets, squares and public places of the city, and below the surface, as it might be found necessary to be taken and held for the purposes of the company, and for the convenient use of the gasworks, and when the openings are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.

That the proper method of assessment of the pipes so laid and fixed in the soil of the streets and public places in a city ought to be, as in the case of real estate and land generally and separately in the respective wards of the city in which they may be actually laid.

Appeal dismissed with costs.

McCarthy, Q.C., and *Miller*, Q.C., for the appellant.

Robinson, Q.C., and *Fullerton*, Q.C., for the respondent.

Ontario.] [May 1.

MAY *v.* LOGIE.

Will—Sheriff's deed—Evidence—Proof of heirship—Rejection of evidence New trial—Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs at law of the testator, and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay, and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father, which was not established, and the Court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and that as there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the appeal should be dismissed.

Appeal dismissed with costs.

Donovan, for the appellant.

Shepley, Q.C., for the respondent.

Ontario.] [May 1

ROGERS *v.* TORONTO PUBLIC SCHOOL BOARD.

Negligence—Unsafe premises—Risk voluntarily incurred.

An employee of a company which had contracted to deliver coal to the defendant went voluntarily to inspect the place where the coal was to be put on the evening preceeding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal bins. He did not apply to the defendant or the caretaker in charge of the premises before making his visit.

Held, that in thus voluntarily visiting the premises for his own purposes, and without notice to the occupants, he assumed all risks of danger from the condition of the premises, and could not recover damages.

Appeal dismissed with costs.

McCarthy, Q.C., for the appellant.

Robinson, Q.C., and *Hodgins* for the respondents.

Province of Ontario.

COURT OF APPEAL.

2nd Division.] [June 11.

BARBER *v.* MCCUAIG.

Mortgage—Sale of equity of redemption—Transfer to mortgagee of covenant to indemnify—Principal and surety.

A mortgagor of lands sold the equity of redemption, taking a covenant from the purchaser to pay off the mortgage, which covenant he assigned to the mortgagee. Afterwards the latter, without the knowledge of the mortgagor, took a transfer from the said purchaser of certain covenants of indemnity against the same mortgage given to him by sub-purchasers, and in consideration thereof agreed to exhaust her remedies against the sub-purchasers, before proceeding against him.

Held, that the transfer to the mortgagee by the mortgagor of the first purchaser's covenant to indemnify against the mortgage, did not put him, the mortgagor, in the position of a surety only, or affect his liability to the mortgagee on his own covenant in the mortgage.

If the agreement between the mortgagee and the first purchaser had prejudiced the mortgagor by postponing the remedy of the latter on the first purchaser's covenant to indemnify, that was a matter of damages merely.

W. H. Irving for the plaintiff, appellant.

Aylesworth, Q.C., for the defendant.

2nd Division.] [June 21.

BRIGGS *v.* WILSON.

Husband and wife—Separate property—Trustee—Statute of Limitations.

In 1875, land, the separate property of a married woman, was sold, and the husband took the proceeds, which he converted to his own use.

Held, that the husband was trustee for his wife of the proceeds, and she could sue now for the same, notwithstanding the lapse of time, the Statute of Limitations not applying : 54 Vict. c. 19, s. 13, O.

Mills, for the defendant, appellants.

Maclaren, Q.C., for the plaintiff.

2nd Division.] [June 24.

IRWIN *v.* TORONTO GENERAL TRUSTS CO.

Executor and administrator—Administrator with the will annexed—Right to compromise dower.

Held, (BOYD, C., FERGUSON, J., MEREDITH, J.) that the administrators with the will annexed of the estate of a deceased person have no power to compromise his widow's claim of dower, and in respect to an alleged money indebtedness, by assigning to her in fee lands part of the estate.

The right of dower did not devolve on them at all.

G. G. S. Lindsey, for the plaintiff.

T. W. Howard, for the Toronto General Trusts Co.

D. A. Skeans, for the doweress.

From STREET, J.] [June 24.

FRASER *v.* RYAN.

Promissory note—Contract—Rescission—Deposit—Forfeiture.

The plaintiff on the 18th February, 1895, agreed to sell to the defendant a timber limit for $115,000, payable $500 in cash, $500 in ten days, secured by a promissory note, and the balance in thirty days. The $500 cash was paid and the note given, but it was not paid at maturity, nor was the $114,000 paid when due. On the 2nd May, 1895, the plaintiff wrote to the defendant rescinding the contract on account of the non-payment of the purchase money. The defendant afterwards paid $100 on the $500 note, and gave a new note for $400. In an action brought upon the new note, the defendant contended that, although he had forfeited the $500 paid in cash, he should not forfeit the second $500, and that it was in the same position as the $114,000, and could not be recovered after the recission of the contract.

Held (BOYD, C., FERGUSON, J., ROBERTSON, J.), that the contract had been ended by the mutual action of the parties, and the law left them where they had put themselves. Whatever money had passed from one to the other could not be recovered, nor could the note be recovered from the hands of the vendor, nor could he sue upon it to recover the amount of it from the purchaser. The contract was at an end, and all rights thereunder and remedies

thereon ended therewith, except that damages for the breach of it might be sought by the vendor. The doctrine applicable to "deposits" did not apply to this subsequent payment, which was not part of the deposit.

Judgment of STREET, J., reversed.

Haverson, for the appellant.

McCarthy, Q.C., for the plaintiff.

From FERGUSON, J.] [June 30.

HALL *v.* STISTED SCHOOL TRUSTEES.

Public Schools—Guardian—"Boarding-out" agreement—54 Vict. c. 55, s. 40, s.s. 3 (O.)

The custodian of a child under a "boarding-out" agreement to clothe, maintain, and educate him, is not his guardian within the meaning of s.s. 3 of s. 40 of the Public Schools Act, 54 Vict. c. 55, O., and the trustees of the school section within which the custodian resides need not provide school accommodation for the child.

Judgment of FERGUSON, J., 28 O.R. 127, affirmed

Coatsworth and *Hodgins*, for the appellant.

Shepley, Q.C., for the respondents.

From ROBERTSON, J.] [June 30.

MCLEOD *v.* NOBLE.

Appeal—Interim injunction—Contempt—Practice—Ex parte motion—Parliamentary elections—Recount—Jurisdiction of High Court.

Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie; BURTON, C. J. O., dissenting.

A Judge of the High Court has no jurisdiction to restrain by injunction a County Court Judge and Returning Officer from holding a recount of the ballots cast at an election for the House of Commons; BURTON, C. J. O., expressing no opinion on this point.

Where an injunction is applied for ex parte, counsel who appear and desire to be heard in opposition to the application should be heard.

Judgment of ROBERTSON, J., reversed.

W. Macdonald, and *R. A. Grant*, for the appellant.

Aylesworth, Q.C., for the respondent.

From STREET, J.] [June 30.

IN RE CENTRAL BANK OF CANADA.

Winding-up Act—Payment out of Court—Right of Receiver-General to compel payment—Court funds—Payment to person not entitled—Jurisdiction of Court to compel repayment—R.S.C., c. 129, ss. 40, 41, 55 & 56 Vict., c. 28, s. 2 (D.)

Where the liquidators of an insolvent bank have passed their final accounts and have paid into Court the balance in their hands, and that balance

is by inadvertence paid out of Court to a person not entitled to it, the Receiver-General has such an interest in the fund that he may, even before three years from the time of payment in have expired, apply to the Court for an order for repayment into Court of the fund.

The Court has also inherent jurisdiction to compel the repayment into Court of moneys improperly obtained out of Court.

Judgment of STREET, J., reversed.

Moss, Q.C., and *Hodgins*, for the appellant.

S. H. Blake, Q.C., and *W. R. Smyth*, for the respondents, the executors of the Hogaboom estate.

George S. Holmested, liquidator in person.

From DIVISIONAL COURT.] [June 30.

IRVINE *v.* MACAULAY.

Limitation of actions—Vendor and purchaser—Purchaser in possession—Implied trust—Tenant at will—R.S.O., c. 111, s. 5, sub-secs. 7, 8.

Sub-sec. 8 of s. 5, R.S.O., c. 111, applies to the case of an implied trust, and a purchaser in possession with the assent of his vendor, is therefore not a tenant at will within the meaning of sub-sec. 7 of that section.

Judgment of a Divisional Court (MEREDITH, C.J., ROSE, J., MACMAHON, J.), 28 O.R. 92, affirmed.

Shepley, Q.C., and *Delaney*, for the appellants.

Clute, Q.C., for the respondents.

From Divisional Court.] [June 30.

BOURNE *v.* O'DONOHUE.

Judgment by default—Setting aside—Discretion—Terms—Defence—Merits—Rule 796.

Under Rule 796 the Court has a discretion to set aside any judgment by default upon proper terms. Where such judgment is a final one, the Court is not in a position to exercise a discretion, unless the defendant shows at least some such plausible defence as he would have to show on resisting a motion for judgment under Rule 739. The Court will not try the defence so asserted, but affidavits may be received, or the defendant may be cross-examined upon his own, for the purpose of enabling the Court to determine how far there is a bona fide defence of the nature of that set up; and, a fortiori, his application may be met by documents under his own hand, not explained or answered, showing that such defence is non-existent.

Order of a Divisional Court affirmed.

Meek, for the appellant.

Masten, for the respondents.

Moss, J. A.] [July 9.

IN RE GRANGER AND BLACK.

Children Protection Acts—Right of appeal to General Sessions—Prohibition —56 Vict. c. 45, O., 58 Vict. c. 52, O.

Held, on motion for prohibition, that no appeal lies from an order made by a Judge under sub-sec. 13 et seq. of 56 Vict. c. 45, O., as amended by 58 Vict. c. 52, O., being Acts for the prevention of cruelty to, and the better protection of children; and that the chairman and members of the General Sessions of the Peace have no jurisdiction to entertain such an appeal under the provisions of R.S.O. 1887, c. 74, s. 4, or sub-sec. 879 et seq. of the Criminal Code, 1892.

Delamere, Q.C., for David Granger.

H. M. Mowat, for the magistrates and the Reverend J. R. Black.

HIGH COURT OF JUSTICE.

MACMAHON, J.] [June 18.

BELL *v.* OTTAWA TRUST AND DEPOSIT CO.

Administration—Deficiency of assets—Valuing securities—"Indirectly or secondarily liable"—59 Vict., c. 22, s. 1, O.

Where a member of a firm joins as an individual maker in a note of his firm, he is not "only indirectly or secondarily liable" to the holder in respect thereto, within the meaning of 59 Vict., c. 22, s. 1, and an administration of his estate, and deficiency of assets, the holder is not obliged to value the liability of the firm before ranking.

J. Travers Lewis, for the Union Bank, appellants.

O'Gara, Q.C., and *G. F. Henderson*, for different creditors.

Moss, J.A.] [June 21.

DRYDEN *v.* SMITH.

Discovery—Affidavit of documents — Cross-examination — Examination on pending motion—Appointment—Residence of party.

Where a plaintiff is so situated that he may for some purposes be deemed to have more than one residence within the jurisdiction, and in the writ of summons he designates one of these places as the place where he resides, that place is to be considered his place of residence for the purposes of the action; and an appointment for his examination in another county is irregular.

Rule 512, providing that the deponent in every affidavit on production shall be subject to cross-examination, having been rescinded by Rule 1337, it is not competent for a party to obtain, in effect, a cross-examination of such a deponent upon his affidavit by the indirect means of examining him under Rule 578 for the purpose of using his evidence upon a motion for a better affidavit.

Holman, for the plaintiff.

R. McKay, for the defendant.

MOSS, J.A.] [June 21.

DRYDEN *v.* SMITH (No. 2)

Pleading—Defamation—Defences—Fair comment—Privilege—Mitigation of damages—Confusion—Embarrassment.

The plaintiff should not be driven to spell out the defences set up in an action. He is entitled to have them set forth in such manner as will enable him, upon reading them, to form a fairly correct judgment as to their scope and meaning, and as to what is intended to be relied upon under them. And while the defendant in an action of defamation ought not to be shut out from setting up any matter which he may properly plead, either in bar or by way of mitigation of damages, he should so arrange the paragraphs of his statement of defence as to group the separate defences of privilege and fair comment, and the matters alleged in mitigation under their appropriate heads.

Holman, for the plaintiff.

R. McKay, for the defendant.

MOSS, J. A.] [June 26.

DALE *v.* WESTON LODGE, I.O.F.

Costs—Scale of—Jurisdiction of taxing officer to determine—Rule 1174.

An appeal by the plaintiff from the taxation of her costs of the action by the junior taxing officer at Toronto.

The action was tried in the usual way before Meredith, J., without a jury, and judgment given for the plaintiff, the amount of which was reduced on appeal to the Court of Appeal, the result being that the defendants were adjudged liable to pay to the plaintiff $40 for funeral benefits and $250 for widow's benefits, and also to pay the plaintiff her costs of the action, to be taxed.

Upon taxation the officer ruled that the plaintiff was only entitled to costs on the County Court scale.

The plaintiff contended that the taxing officer had no jurisdiction to determine the scale, for it was not a case in which judgment was being entered without trial or the decision of a Court or Judge, or order as to costs, and so Rule 1174 did not apply.

Held, that there having been a trial, and the plaintiff having thereat been awarded her costs of the action, Rule 1174 gave no jurisdiction to the taxing officer to deal with the scale of costs.

Brown v. *Hose*, 14 P.R. 3, distinguished.

Andrews v. *City of London*, 12 P.R. 44, applied and followed.

McGarvey v. *Town of Strathroy*, 11 P.R. at p. 59, referred to.

Appeal allowed without costs.

Masten, for the plaintiff.

F. C. Cooke, for the defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [March 9.

THE QUEEN *v.* WALSH.

N. S. Liquor License Act of 1895, c. 2, s. 56—Conviction by Stipendiary Magistrate—Court will not entertain objection on certiorari as to fact, though erroneously found, which he was competent to try.

Defendant was convicted by the Stipendiary Magistrate for the Town of Dartmouth for unlawfully selling liquor by retail without license, contrary to the provisions of the Liquor License Act of 1895, c. 2, s. 56, and an order was obtained from a Judge at Chambers removing the conviction into this Court. The magistrate having jurisdiction to try and decide the question whether the defendant sold liquor in the town without license, and there being no objection to his competency, or to his jurisdiction over the subject matter, and no objection that there was any want of any essential preliminary jurisdiction,

Held, that the Court could not entertain an objection that the magistrate erroneously found a fact which, though essential to the validity of his order, he was competent to try.

The Queen v. *McDonald*, 19 N.S.R. 336, reversed.

Drysdale, Q.C., for plaintiff.

C. S. Harrington, Q.C., for defendant.

Full Court.] [March 9.

KNAUTH *v.* STERN.

Appeal—Notice to dismiss—Affidavits—Need not be filed before Motion—Effect as to postponement of motion where not filed in time to afford notice to opposity party—Costs.

An order was granted at Chambers directing defendant to give security for costs of his appeal, and staying the hearing of the appeal until such security should be given. The cause was entered for argument, but was not proceeded with, and notice to dismiss the appeal was given on the 16th for the 19th December at 10 o'clock a.m. The affidavits were filed on the 17th before 11 a.m.

Held, that the notice to dismiss was in accordance with the practice.

Held, also, that there is no practice or rule requiring the affidavits to be filed before the hearing of the motion, the only effect, where they are not filed in time, being to work a postponement.

When the order to give security was made, plaintiff's solicitor was informed that defendant would not go on with the appeal, and by the terms of the order, the appeal could not be heard until ten days, at least, after security had been given.

Held, that under these circumstances plaintiff was not entitled to costs of the appeal, but only to costs of the application to dismiss.

Whitman, for plaintiff.

Drysdale, Q.C., for defendant.

Full Court.] [March 9.

RE ESTATE OF CAROLINE FRASER.

Words "last dwelt"—Held equivalent to "last resided"—Probate Act, R.S. (5th series), c. 100. s. 2—Executor—Ordered to pay costs personally.

The Probate Act, R.S. (5th series), c. 100, s. 2, provides that the judge of probate for the county or district where the deceased last dwelt shall have power to grant letters testamentary, etc.

Held, that the words "last dwelt" are equivalent to "last resided" and mean the fixed abode of the deceased in contradistinction to a mere temporary locality of existence.

The judge of probate for the County of Halifax revoked letters testamentary granted by him on the ground that it had been made to appear that the deceased "last dwelt" in the County of Colchester and not in the County of Halifax.

Held, that he had power to do so.

Held, also, that the executor, who appealed, should be ordered to pay the costs of the appeal personally, it appearing that the grant of probate by the judge of the County of Colchester would be equally available to him, and that his appeal was unnecessary.

W. F. MacCoy, Q.C., for appellant.

F. A. Laurence, Q.C., for respondent.

Full Court.] [Mar.

CHUBBOCK *v.* MURRAY.

Will—Construction of word "Proceeds," read as meaning "Income"—Gift clauses as absolute held cut down to life estate.

Testator directed his estate to be converted into cash and divided into two equal parts, of which one was to be invested and the "proceeds" paid to his daughter A. M. from time to time. On the death of A. M. the executors were directed to take such steps as were necessary to secure to her children, free from others' control, their mother's "interest" in the estate, and for that purpose to pay to them share and share alike the money invested, or to give them the proceeds as might best serve the interests of said children. In the event of the death of A. M. before the trusts became dischargeable, the executors were to take steps to secure her interest to her children, in both instances free from others' control.

Held, as against A. M., who claimed that under the provisions of the will she took an absolute estate, that the expression "proceeds" should be read as "income," the direction to invest and pay the proceeds as the same accrued conveying that idea.

Held, also, that words showing that on the death of A. M. the children were to have the corpus secured to them, were sufficient to cut down the gift to A. M. to a life estate.

R. L. Borden, Q.C., for appellant.

F. H. Bell, for respondent.

Full Court.] [March 9.

LEWIS *v.* D'ENTREMONT.

Novation — Facts establishing — Defendants held relieved from further liability.

In an action by plaintiff against defendants the latter relied upon an alleged agreement by which plaintiff was to accept C. as his debtor in the substitution for defendants. Plaintiff denied the agreement set up, but admitted that C. told him he would pay him $365 for defendants, and that on the day on which the money was to be paid he went to C.'s shop, and received from him goods to the amount of $325.30. The evidence showed further that C., who was indebted to defendants settled his account with them by undertaking to pay plaintiff the sum of $365, and giving his promissory note for the balance. Also that plaintiff in his account with defendants charged them with the sum of $373.51, and credited them with "Amount to be paid by L. J. C. $365"; and with the balance of $8.51 cash.

Held, that there was complete evidence of a novation, by which C. was substituted for defendants, and the latter were relieved of all further liability to plaintiff.

R. E. Harris, Q.C., for appellant.

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

FULL COURT.] [March 9.

SLAUENWHITE *v.* ARCHIBALD.

Married woman doing separate business—Right to recover against sheriff for goods taken under execution against husband—Costs.

Plaintiff, a married woman, carried on business apart from her husband, with her husband's consent, on premises occupied by her under a lease to herself. The defendant sheriff, under an execution against the husband, levied upon a piece of machinery on the premises, and upon a number of saws purchased for use, and used in connection with the machine. The trial judge found that the machine levied upon was the property of the husband, but there was uncontradicted evidence that the saws were the property of the wife, having been purchased by her personally for use in connection with the business.

Held, that the plaintiff was entitled to recover for the value of the saws, plaintiff to have costs of the cause and of the issues in relation to the saws; defendant to have costs of the pleadings and the trial of the other issues, and the costs to be set off.

R. L. Borden, Q.C., and *H. W. C. Boak*, for plaintiff.

W. H. Covert, for defendant.

Full Court.] [March 9.

MCGREGOR *v.* MCKENZIE.

Promissory note—Consideration—Forbearance—Executor—Right to sue.

Defendant gave a promissory note to plaintiff in renewal of a previous note given by him on account of an amount due by defendant's father to J. M., of whom plaintiff was executor. The consideration relied upon in an action brought by plaintiff on the renewal note was forbearance to sue.

Held, that the forbearance need not be expressly proved.

Held, also, that the circumstances were sufficient to warrant a conclusion in the plaintiff's favor.

There was no evidence in regard to the giving of the first note or its terms, but it appeared that the defendant's father was an invalid and confined to his house, that the indebtedness was incurred for goods supplied on the father's account, that the property of the father was bequeathed to defendant, that plaintiff did not sue on the original note, and that defendant renewed the note for a smaller amount, and was allowed six months time for payment.

Held, (MCDONALD, C.J., dissenting), that the facts taken in connection with the giving of the first note, the actual forbearance to sue, and the giving of the six months time for payment of the renewal note constituted a sufficient consideration to enable plaintiff as executor to recover.

Drysdale, Q.C., for appellant.

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

Full Court.] [March 9.

CARTER *v.* THE OVERSEERS OF THE POOR.

Bastard child—Action against overseers for support—Liability where settlement of mother proved—Amendment of clause allowed.

In an action by plaintiff against the defendant overseers for compensation for the support of a bastard child, plaintiff rested his right to recover entirely upon an express promise alleged to have been made by one of the defendants on behalf of himself and the others to pay for the support of the child. The jury found that no such promise was made, and judgment was given accordingly.

On the trial evidence was given and was received without objection, showing that the mother of the child had a settlement in defendants' district.

Held, that under these circumstances defendants were legally liable for the support of the child, and that, the only defence being the absence of an express agreement, plaintiff should be permitted to amend.

Held (per MEAGHER, J., dissenting), that defendants' liability was wholly statutory, and that, in the absence of notice, no contract could be implied.

H. Mellish, in support of appeal.

Drysdale, Q.C., contra.

Full Court.] [March 9.

WOOD *v.* GIBSON.

Easement—Eaves of building overhanging land—Confers no title to surface—Injunction.

The trial judge found that defendant, by a user of more than twenty years had acquired the right to have the eaves of his barn project over the line of plaintiff's land.

Held, that this gave defendant nothing more than an easement, the evidence showing that the land, so far as the surface was concerned, had been throughout in plaintiff's possession, and used by him.

Defendant agreed to plaintiff erecting a building, the eaves of which projected over the eaves of defendant's barn, on conditions agreed to be performed by plaintiff, and which were shown to have been performed.

Held, that this clearly disentitled defendant to an injunction.

Drysdale, Q.C., and *W. M. Christie*, for appellant.

F. T. Congdon, for respondent.

Full Court.] [March 9.

LLOYD *v.* TOWN OF DARTMOUTH.

Municipal corporation—Action for causing overflow of land—Damages—Directions to jury—New trial.

In an action for damages for injury to plaintiff's cultivated land caused by water which was alleged to have been caused to overflow the land by reason of negligent and improper acts on the part of the defendant corporation, the trial judge directed the jury to assess damages, in the event of their finding for plaintiff, (1st) in view of the loss of profits for the year during which plaintiff lost the use of the land, and (2nd) in relation to what it would cost plaintiff to restore his land to the same condition in which it was before the damage was done, as to both of which points the evidence was contradictory.

Held, that the instructions given to the jury were erroneous, and that there must be a new trial.

Held, that plaintiff was entitled to recover the amount of the difference between the value of the property immediately before the injury, and the value as reduced by the injury.

R. L. Borden, Q.C., and *B. Russell*, Q.C., for appellant.

Drysdale, Q.C., and *H. McInnes*, for respondent.

Full Court.] [March 9.

PICTOU IRON FOUNDRY CO. *v.* ARCHIBALD.

Contract—Counterclaim for damages arising from non-fulfilment—Claim for loss of profits—Onus on party claiming to show with reasonable certainty that they would have been earned—Failure of another contractor no excuse.

To an action by the plaintiff company for the price of a smoke stack and boiler constructed for the defendant's steamer, defendant counterclaimed for damages for the non-delivery of the goods at the time agreed, whereby the steamer was prevented from engaging in the business for which she was intended, and from earning profits.

Held, that in order to entitle defendant to recover on his counterclaim it must appear that the profits were reasonably certain to have been realized, and that the onus was upon him to show this.

It appeared that during a portion of the time for which damages was claimed, owing to the failure of another contractor, the steamer was without an engine, and during such time would have been unable to earn profits, even if the plaintiff company had fulfilled its contract.

Held, that this fact was sufficient to disentitle defendant to recover.

R. E. Harris, Q.C., and *C. H. Cahan*, for appellant.

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

Full Court.] [March. 9.

CLATTENBURG *v.* MORINE ET AL.

County Court—Order granted staying proceedings on it appearing that this matter could be more effectively dealt with in the Supreme Court.

Plaintiff conveyed a piece of land to the defendant Morine, (a) in trust to secure payment of a debt, (b) on certain trusts for plaintiff's children. The debt having been paid, and the trusts in favor of the children revoked, plaintiff requested reconveyance of the land, and, on defendant's refusal, obtained a decree for that purpose. After the making of the decree L. Morine, a brother of the defendant Morine, in consideration of $25, obtained an assignment from R. of a judgment recovered in the County Court against plaintiff for the sum of $222.38, and made application to the judge of the Court for leave to issue execution. The judge of the County Court having directed issues to be tried before him, plaintiff applied for a declaration that the purchase of the judgment by L. Morine was made for and in collusion with Morine, a decree entitling plaintiff to have said judgment discharged on payment of the sum of $25, and interest, and an order restraining L. Morine from proceeding further with the application before the judge of the County Court.

It appearing that this Court had power and jurisdiction to deal finally with the questions involved, while only two of the parties were parties to the proceedings before the County Court, and there was some doubt as to the power of that Court to give full and complete relief, and it appearing further that both time and expense would be saved by having the matter dealt with in this Court.

Held, that plaintiff was entitled to an order staying proceedings in the County Court.

Full Court.] [May 8.

HAMILTON, *v.* STEWIACKE, ETC., CO., AND FRASER.

Railway Company—Proceedings against shareholders upon judgment against company—Trial of question of subscription—Prima facie case—Limitation of application of subscription—Quære as to validity of—Costs.

Plaintiffs asked leave to issue execution upon a judgment recovered by them against the defendant company, against F. in respect of a balance due upon certain shares alleged to be held by him in the company.

Held, that the plaintiffs were entitled to have an opportunity of trying the question of fact as to F.'s subscription, as well as the validity of the alleged contract.

In support of the application a stock list was produced with an affidavit of belief that the signature "F" thereto was that of the respondent F.

Held, that it was only necessary for plaintiffs to show a prima facie case, and that this was sufficient.

The respondent's subscription, if effective, limited the application of the subscription money payable by him to the special purpose of constructing what was known as the "Hant's County Branch" of the company's line.

Quære, whether a subscription which so limited the application of the payment was valid.

Held, that the costs of appeal and at Chambers should be reserved to be disposed on upon the trial of the issue, and, if the issue were not brought to trial, then to be the subject of further determination by the Court.

R. E. Harris, Q.C., and *C. H. Cahan*, for plaintiff.

W. B. Ross, Q.C., and *H. McInnes*, for defendants.

Full Court.] [May 8.

IN RE TOWN COUNCIL OF NEW GLASGOW.

Canada Temperance Act—Municipal Council—Held not a "judicial tribunal" to which certiorari will lie—Resolution to pay informer costs and one-half fine held a ministerial act which the Court has no authority to review.

Application was made on behalf of a rate-payer of the town for a writ of certiorari to bring up an order or resolution of the town council that where in any case an information had been laid by any person other than the inspector of licenses, for a violation of the Canada Temperance Act, such person in case of a conviction, should be entitled to the costs, and one-half of the fine collected, etc.

Held, dismissing the application with costs, that the municipal council of the town was not, under the legislation from which it derived its authority, "a judicial tribunal," to which certiorari would lie.

Held, also, that the resolution complained of was not a "judicial matter," but was clearly a ministerial or legislative exercise of the authority and functions of the council which the Court had no authority to review.

H. Mellish, in support of application.

H. McInnes, contra.

Full Court.] [May 8.

HAMILTON, *v.* STEWIACKE, ETC., CO., AND DICKIE.

Railway Company—Proceedings against shareholders to enforce payment of judgment—Service upon company's solicitor held insufficient to bind former officer—Order 40, Rule 44—Word "officer" held to mean existing officer—Order for examination of former officer held wrongly made ex parte—Power of Judge to rescind order made by him.

Plaintiff's having recovered judgment for a large sum of money against the defendant company, obtained a summons for an order for the attendance of the respondent D., a former officer of the company, before a Master of the Court for examination as to debts owing to the company, and whether the company had property or other means of satisfying the judgment. D. was described in the summons as formerly a director and vice-president of the company. There was no personal service upon D., and no actual notice to him of the application, but at the hearing of the application for the order, C., the solicitor for the company, was present, and stated that the summons was served upon him.

Held, that as D. was not at the time a director or officer of the company,

neither the solicitor of the company nor the company represented him in relation to any proceedings taken against the company, and that the service upon the solicitor of the company was therefore insufficient.

Held, further, that D. was not an officer of the company within the meaning of Order 40, Rule 44, and as such, liable to examination under the provisions of the order, the words "officer thereof" meaning an existing officer.

Held, further, that the order for the examination of D. was one that could not legally be made ex parte.

Held, further that the judge by whom the order was made had power to rescind it on application made to him for that purpose, and that such application, in the first instance should be made to him.

R. E. Harris, Q.C., and *C. H. Cahan*, for plaintiff.

W. B. Ross, Q.C., and *H. McInnes*, for defendant.

Full Court.] [May 8.

FARRELL *v.* CARIBOO GOLD MINING CO.

Trading corporation—Power to borrow money on mortgage—Payment of bonus—Amount affected by speculative character of security.

At a meeting of the defendant company a report was received and adopted, authorizing the directors to execute a mortgage to parties who had agreed to advance the sum of $30,000, to enable the company to acquire certain mining property which they desired to purchase, and to include in such mortgage bonuses amounting in all to $10,000.

Held, dismissing with costs the appeal of plaintiff, one of the shareholders, who objected to the transaction, that the company was a trading corporation, and, as such, had power to borrow money and to mortgage, and that as long as the terms upon which the money was borrowed and the mortgage given, were not illegal there could be no objection to paying a bonus for the accommodation obtained.

Held also, that, considering the speculative character of the property and the sum advanced, the amount of the bonus was not exhorbitant.

J. M. Chisholm, for plaintiff.

Drysdale, Q.C., for defendant.

Full Court.] [May 8.

CLAIRMENTE *v.* PRINCE.

Jury—Right to where cause is not exclusively of an equitable nature—R.S. (5th series), c. 104, s. 120—Amending Act as to notice held to enlarge right—Acts of 1888, c. 6—Costs.

Under R.S. (5th series), c. 104, s. 20, the right of either party to a cause to a jury is subject to rules of Court, and by O. 34, R. 2 it is provided that causes of an equitable nature are to be tried by a judge without a jury, unless it is otherwise ordered.

Held, in a case coming within the latter class, that the defendant was not entitled, by giving a jury notice, to prevent the trial of the cause before a judge at chambers, or in term.

Held, further, that the defendant could not be deprived of his right to a jury where the cause was not exclusively one of an equitable nature, but embraced both common law rights and claims to equitable relief, but the judge at the trial could submit the equitable issues to the jury, or reserve them for future consideratian.

Held, further, that the amendment made by Acts of 1889, c. 6, allowing the jury notice to be given "at least twenty days before the first day of the term or sittings of the said Court, at which said issue is to be tried, etc., was meant to enlarge the right, and not to restrict it to the first sittings of the Court, at which it could be tried.

Held, further, that as the question was raised for the first time, and as plaintiff had reasonable ground for insisting upon going to trial before a judge, there should be no costs.

R. E. Harris, Q.C., for plaintiff.

Drysdale, Q.C., and *McInnes*, for defendants.

Full Court.] [May 8.

MULCAHY *v.* ARCHIBALD.

Fraudulent scheme to defeat and delay creditors will be set aside, where intent is established, notwithstanding existence of considcration—Replevin against sheriff for goods taken under execution.

W., while on a trading voyage, purchased a quantity of fish from B., and gave him in payment a draft on B. & Co., of Halifax. W., on his arrival at Halifax, neglected to pay the draft, and made use of the proceeds of the sale of the fish for other purposes, B. brought an action, and W., being threatened with execution, made a verbal arrangement with plaintiff, to whom he was indebted, to take over his stock of goods and business, and the vessels in which the business was carried on, which were already in plaintiff's name, and to employ W. to carry on the business as her agent, paying him wages therefor. With the goods so transferred to plaintiff, W. proceeded upon another voyage, and acquired other fish, which were taken by the defendant sheriff under execution at the suit of B. Plaintiff brought replevin.

Held, reversing with costs the judgment of the trial judge in plaintiff's favor, that the evidence showing a fraudulent purpose on the part of the plaintiff and W. to defeat and delay creditors, the transaction was bad and could not stand, notwithstanding the existence of an indebtedness from W. to plaintiff.

Per TOWNSEND, J. (obiter) that replevin will lie against a sheriff for goods taken under execution.

Drysdale, Q.C., for appellant.

R. E. Harris, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] [April 27.

PRESCOTT *v.* GARLAND.

Promissory note or agreement.

Held, that the following instrument was not a promissory note, and could be sued on only as an agreement :

"On the first day of August, 1896, for value received, I promise to pay to C. D. Prescott or order $16, payable at the office of W. A. Trueman, here, with 7 per cent. interest from date until paid. Should I sell or otherwise dispose of my land or personal property, then this note to become due and payable forthwith. This note is given as security for part-payment for price on B. S. Nickle harness, and as expressly agreed title of same shall remain in G. D. Prescott until note is paid, and that said harness in the meantime is only on hire until paid for. On any default of payment to go as rent. You may retake posession of property without process of law, and sell it to pay unpaid balance, whether due or not, but taking and selling of said property shall not relieve me of my liability for any balance on purchase price still unpaid after last sale.—Stephen Garland."

The following cases were cited :

Dominion Bank v. *Wiggins*, 21 A. R. 275 ; *McIntyre* v. *Crossley*, (1896) Appeals, 457 ; *Hartness* v. *Russell*, 118 U. S., 663 ; *Chicago Ry. Co.* v. *Merchants National Bank*, 136 U. S., 268 ; *Heryford* v. *Davies*, 102 U. S., 235.

Held, also, that a Justice of the Peace or Parish Court Commissioner had no jurisdiction to try an action on the agreement.

M. G. Teed, for defendant.

Pugsley, Q.C., *A. W. MacRae* and *W. A. Trueman*, for plaintiff.

Full Court.] [April 27.

BROCK *v.* FORSTER.

Notice by mortgagee to lessee of mortgagor—Whether an adoption of the lease under s. 15, c. 83, Con. Stat.

A party after mortgaging his lands made a lease of the premises for a term of years to the defendant. Subsequently the mortgagees through their agents gave notice to the defendant to pay rent to them in the following terms :

"On behalf of the Misses Maria and Louise E. Street, the mortgagees of the Far Marsh, formerly a part of the estate of the late Wm. J. Gilbert, we beg to notify you as lessee that all rent payable by you under your lease must be paid at our office as agents, and not elsewhere."

The mortgagor conveyed his equity of redemption to the plaintiff, and the mortgagees subsequently countermanded the above notice. The plaintiff afterwards brought the present action to recover rent, and the defendant relied upon the aforementioned notice as an adoption by the mortgagees of his lease under above statute, by virtue of which he had become tenant of the said mortgagees.

Held, on demurrer, that the notice was not a notice within the terms of the said section and did not constitute the defendant the tenant of the mortgagees.

W. H. Trueman, for plaintiff.

M. G. Teed, for defendant.

Full Court.] [June 2.

EX PARTE THOS. GALLAGHER.

Canada Temperance Act—Qui tam action against magistrate at suit of defendant's father not sufficient ground for bias.

Held, on an application for a rule nisi for a certiorari to remove a conviction under the C. T. A., that the fact that a qui tam action was pending against the magistrate who made the conviction at the suit of the defendant's father for a penalty for not making the returns required by the C. T. A. of convictions entered by him under the Act, was not a sufficient ground of bias to take away his jurisdiction in a case against the son. Rule refused.

M. G. Teed, for applicant.

Full Court.] [June 2.

EX PARTE HANNAH GALLAGHER.

Qui tam action against magistrate at suit of defendant's husband sufficient ground for bias.

The Court granted a rule in the case of a conviction against this applicant (the wife of the party at whose suit the qui tam action was pending against the magistrate) on the ground of bias in the magistrate because of the said action pending at the suit of the husband.

M. G. Teed, for applicant.

BARKER, J.
In Equity. [July 10.

MITCHELL *v.* KINNEAR.

Mortgagor and mortgagee—Power of sale—Sale by mortgagee to himself—Subsequent valid sale—Surplus—Interest on surplus and rents—Costs

A mortgagee, his power of sale on default having arisen, sold the mortgaged premises, on January 25, 1888, ostensibly to a third person, in reality to himself. On February 8, following, he sold a portion of the premises to C. for $1,200, $333.73 in excess of the amount due on the mortgage. He continued in possession of the remaining part, and received $300 rent therefor. In a special case submitted to the Court:

Held, that the sale by the mortgagee to himself was abortive, and that he was a mortgagee in possession, and should account to the mortgagor for the surplus received from the second sale, together with the rent, with interest on both amounts at six per cent.

Held, also, that the mortgagor should have cost of case.

M. G. Teed, for the plaintiffs.

Powell, Q.C., for the defendants.

TUCK, C.J.
In Equity.

[July 28.

SMITH *v.* CONSOLIDATED ELECTRIC CO.

Practice—Affidavit by agent residing abroad—Application for cross-examination before the Court.

This was an application by the defendants for the oral examination before the Court of a witness residing in Boston who had sworn to the contents of the petition in the suit as the agent of the plaintiff petitioners. In support of the application it was contended that the refusal of the witness to attend would be a contempt for which the petition could be ordered off file, and that there was therefore jurisdiction to make the order.

Held, that the Court could not compel the attendance of the witness, and that a commission should issue for his examination.

H. H. McLean, for the plaintiffs.

Pugsley, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.]

[May 6.

AITKEN *v.* DOHERTY.

Appeal from County Court—Jurisdiction—Amount in question.

The plaintiff sued for $200 damages in a County Court for the alleged wrongful and malicious seizure of three cattle which had been impounded by defendants. The value of the cattle was less than $50, according to the finding of the County Court Judge, who entered a verdict for defendants.

Section 315 of the County Courts' Act as amended by 59 Vict. c. 3, s. 2, provides for an appeal to a single Judge of the Queen's Bench, where the amount in question, or the value of the goods in question, does not exceed $50, and to the full court when such amount or value exceeds $50.

Plaintiff appealed to the full court.

Held, that as it appeared that in any view of the case, the amount which could have been properly recovered by the plaintiff would not exceed $50, his appeal should have been to a single judge, and that it should be struck out with costs.

G. A. Elliot, for plaintiff.

O'Reilly and *Phippen*, for defendants.

Full Court.]

[June 5.

HALEY *v.* MCARTHUR.

Execution—Priority—Sheriff—Execution's Act, R.S.M., c. 53, s. 20.

This was an appeal from the decision of the Judge of the County Court of Brandon in an interpleader issue as to the priority between two writs of execution issued by the plaintiff and defendant against the goods of one Pope

The County Judge had decided that the plaintiff's writ was not in the hands of the sheriff to be executed at the time when the bailiff seized the goods under the defendant's execution on 25th April, 1896.

The plaintiff's execution was received by the sheriff on 17th March, 1894, without any special instructions, none had afterwards been sent to the sheriff in any way, and the writ had been renewed according to the practice; but the evidence showed that there was an agreement or understanding between the plaintiff and Pope, who kept a store at Melita, that the execution was not to be proceeded with until some other execution should be issued against him, and Pope continued to carry on the business and bought other goods from the three firms for whom the plaintiff's judgment had been obtained, and made payments on account, the plaintiff and the creditors whom he represented well knowing the defendant's circumstances. Neither the plaintiff nor his attorney had made any inquiry as to what the sheriff was doing, or required him in any way to proceed.

Held, following *Pringle* v. *Isaac*, 11 Price 445, and *Kempland* v. *MacAulay*, 1 Peake 95, that the decision of the County Court Judge on the evidence was correct, the plaintiff's writ being no longer in the sheriff's hands to be executed, and that the absence of the words "to be executed" from s. 20 of the Executions Act makes no difference in its construction.

Freeman on Executions, s. 206, quoted and approved.

Appeal dismissed with costs.

Howell, Q.C., and *Mathers*, for plaintiff.
Wilson and *Huggard*, for defendant.

BAIN, J.] [June 15.

DOBSON *v.* LEASK.

Security for costs—Property within jurisdiction—Affidavit—Queen's Bench Act, 1895, Rule 500.

The plaintiff being a non-resident, the defendant issued a præcipe order requiring him to furnish security for costs. The plaintiff then moved to rescind the order on affidavit, stating that real estate in Manitoba was vested in him as administrator of one Alexander Leask, and that according to the best of his knowledge, information, and belief, this land was of the value of $3,000, and that it was unencumbered, as he was informed and verily believed.

Held, on appeal from the Referee, that such affidavit was insufficient as evidence of the ownership of real estate within the Province, sufficient in value to meet any possible demand for costs, the statement as to value and incumbrances being only on information and belief, and also that such affidavit, under Rule 500 of the Queen's Bench Act, 1895, should not have been received, as it did not show the deponent's grounds of belief.

Appeal allowed with costs, and order for security restored.

Hough, Q.C., for plaintiff.
Culver, Q.C., for defendant.

Full Court.] [June 15.

REGINA *v.* SAUNDERS.

Criminal law—Evidence—Ballot—Compelling witness to disclose for whom he voted—Dominion Elections' Act, s. 71.

The accused was convicted at the last assizes at Portage la Prairie for ballot box stuffing, chiefly by the evidence of a large number of witnesses who swore that they had marked their ballots for the unsuccessful candidate, the number being greater than the number of marked ballots for such candidate found in the box when opened. The inference was that the accused, who was the Deputy Returning Officer at that particular polling place, had fraudulently substituted other ballots for some of the ballots marked by the witnesses.

A case was reserved for the next sitting of the Full Court as to whether under s. 71 of the Dominion Elections' Act, R.S.C., c. 8, a witness could be required or allowed to state for whom he had voted.

Held, following *Queen* v. *Beardsall*, 1 Q.B.D. 452, that the question should be answered in the affirmative, as purity of elections is of at least equal importance with secrecy of voting, and the section referred to relates only to evidence in a legal proceeding questioning the election.

Held, also, that the evidence objected to should not be ruled out as secondary evidence of the contents of a written document, because under the Act there is no way of identifying the particular ballot marked by any witness.

Conviction affirmed.

Howell, Q.C., for the Crown.

Wilson, for the accused.

KILLAM, J. [June 17.

BERTRAND *v.* CANADIAN RUBBER CO.

Fraudulent preference—Insolvent circumstances—Intent to prefer.

The plaintiff, being the assignee of one Lamonte, under an assignment for the benefit of his creditors, brought this action to set aside a chattel mortgage on Lamonte's stock-in-trade, made in favor of the defendants, on the ground that Lamonte was at the time in insolvent circumstances, and unable to pay his debts in full, and gave the defendants the mortgage as a preference over his other creditors.

At the date of the mortgage, Lamonte, who was a retail merchant, had a surplus upon his valuation of his stock of about $1,000, besides a piece of land valued by him at $750. He was carrying a stock of $9,000 or $10,000, and had a profitable and increasing business. Another creditor, as his claim was about maturing, notified Lamonte that he insisted upon payment; other considerable sums were already overdue, or about maturing, which it was impossible for him to meet at once; and taking all the circumstances into consideration the proper inference was that, even upon the terms of credit on which the sale was eventually made, Lamonte could not at the time of making the mortgage dispose of his assets for sufficient to meet his liabilities.

Held, that he must be deemed to have been then in insolvent circumstances, and, as the giving of the mortgage was entirely at his suggestion, and there was no pressure on the part of the mortgagees, it must be declared that

the mortgage was void as against the plaintiff. *Davidson* v. *Douglas*, 15 Gr. 347, and *Warnock* v. *Kloepfer*, 14 O.P.. 288, followed; the latter qualified to meet the case of a man whose liabilities are not wholly matured, and who could sell his property on terms which will enable him to pay those which have matured, and the others as they mature. Such a man the learned Judge would not deem to be in insolvent circumstances, within the meaning of the Statute.

Ewart, Q.C., and *Phippen*, for plaintiff.

Hough, Q.C., and *Bradshaw*, for defendant.

Full Court.] [July 2.

WALSH *v.* N. W. ELECTRIC COMPANY.

Corporation—Joint stock company—Shares—Issuing shares at a discount—Manitoba Joint Stock Companies' Act, ss. 30 and 33.

Held, reversing TAYLOR, C.J., that under the Manitoba Joint Stock Companies Act, R.S.M., c. 25, ss. 30 and 33, it is competent for the directors of a company to issue shares of its stock at a discount, without the authority of a general meeting of the company provided the issue is bona fide, and the discount is not greater than has been fixed by a resolution passed at a previous general meeting (if any).

This decision, however, applies only as between the company and a shareholder, and has no reference to questions arising between creditors and shareholders, or in case of a winding up.

The difference between our Act and the English Joint Stock Companies Act, under which *Ex parte Daniell*, 22 Beav. 46, was decided, pointed out.

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

Ewart, Q.C., and *Wilson*, for defendant.

Book Reviews.

Law of Guarantees, and of Principal and Surety, by HENRY ANSELM DE COLYAR, of the Middle Temple, barrister-at-law, 1897. Third Edition, London: Butterworth & Co.; Toronto: Canada Law Journal Co., 470 pages.

The work, of which this is a new edition, needs no introduction to Canadian practitioners, with whom it may be truly said to be the standard authority on the subject. The decisions since the last edition twelve years ago have been both numerous and important, and are fully quoted and discussed. The leading United States cases upon questions which have not yet arisen in the English Courts are also included.

Referring to the doctrine enunciated by the leading case of *Rouse* v. *Bradford Banking Co.*, 1894, 2 Ch. 32, that one of two principal debtors, who becomes primarily liable as between himself and his co-debtor, may acquire the rights of a surety as against the creditor by notifying the latter, the learned author points out the hardship of the rule, and advises that the creditor stipulate in the original contract that no debtor shall have the rights of a surety, or alter his position in any way without the creditor's express consent (p. 318).

The Historical Development of Code Pleading in America and England, with special reference to certain of the States of the Union, by CHARLES M. HEPBURN, of the Cincinnati Bar; Cincinnati, W. H. Anderson & Co., 1897.

The subjects treated are: The nature and extent of the code pleading in general use; cause which led to its overthrow at the common law; preliminary movements in England and America for statutory reform; general aspects of the change effected, with a reference to the codes in the United States and in the British Empire. Codes do not flourish in the pure Anglo-Saxon soil, and therefore we hear less of them in England and her colonies than in some other countries. The old common law system is not without its advantages.

Hunt's Law of Fraudulent Conveyances, 2nd Edition, by W. C. PRANCE, B.A., of the Middle Temple, Barrister-at-Law. 1897. London: Butterworth & Co.

This is a short summary of the subject of Fraudulent Conveyances, with notes of the leading cases, and is in excellent form for students' use. A good index is added, and the work throughout is very commendable.

Principles of the Law of Simple Contracts, by CLAUDE C. M. PLUMTREE, of the Middle Temple, Barrister-at-Law. 2nd Edition; 1897. London: Butterworth & Co.; pp. 271.

This book is one intended especially for students, and the author modestly suggests that it may serve as an introduction to Anson and Pollock's works. We can heartily commend it to all students, and feel sure that its aid as a concise summary of the law will be appreciated by solicitors also. The principles are enunciated in the form of rules and sub-rules illustrated by examples from reported cases, and its general arrangement is excellent.

Clarke and Brett's Conveyancing Acts. London, Butterworth & Co., 1897, 4th Edition.

The popularity of a handbook on the Imperial Conveyancing Act and the Trustee Acts is evinced by the publication of this fourth edition covering 300 pages. The Ontario legislation on the same subjects having been largely copied from England, this work is valuable here as collecting the more recent decisions on matters of conveyancing, and the duties and powers of trustees of real estate.

Infallible Logic, by THOMAS D. HAWLEY, of the Chicago Bar: 1897. The Dominion Company, Chicago.

Mr. Hawley claims for his new system much superiority over the systems of logic now commonly in use. The capital letters of the alphabet are used to represent positive terms, the small letters for negative terms, and a square for the "universe of discourse." The method is said to be easy to learn, and to be suitable as well for the beginner as for the advanced logician. The book contains 650 pages, and is gotten up in a manner which does credit to the publishers.