Canada Law Journal.

VOL. XXXII. OCTOBER 20, 1896. NO. 16.

Our readers will have seen the report of the Canadian Bar Association, which appeared as an appendix to our last issue. This report will be found valuable for future reference, in view of the importance which the movement is rapidly assuming. We are informed that encouraging progress has been made, and we are aware that a very large number of leading men throughout the Dominion, who had not previously joined, have now become members, and are aiding in every way the success of the undertaking. At the next meeting of the Council of the Association a programme will be arranged for the next general meeting, the date of which we will inform our readers as soon as it is fixed.

Recent events remind us of our Queen's unrivalled reign, both as to its duration and the glory of the Empire therein, and bring to our namesake in England some thoughts as to the number of legal changes which have occurred during the last sixty years. "When Her Majesty ascended the throne Lord Cottenham was Lord Chancellor, Campbell was Attorney-General, and Rolfe was Solicitor-General; Abinger was Chief Baron of the Exchequor, Parke, Bolland, Alderson, and Gurney were the barons, and their judgments were being recorded by reporters so antiquated (as they now seem) as Meeson and Welsby, who had not then started the third volume of their voluminous reports. Lord Denman, whose son has just passed away at a good old age, was Chief Justice of the Queen's Bench; Littledale, Patteson, Williams and Coleridge (the father of the late Lord Chief Justice of England) were the other judges, and the reports of Adolphus and Ellis were in full swing. In the Common Pleas, Tindal was Chief Justice, Park, Bosanquet,

Vaughan and Coltman were the justices, and Bingham was there exercising the energy and patience which produced the numerous volumes of his reports. Lord Blackburn, Sir George Jessel, and the late Lord Coleridge were unknown, Erle had worn a silk gown but three years, and Cockburn had not been appointed a Q.C., and was far from the zenith of his career."

It has been suggested that the County Court system in England, which corresponds largely with the Division Courts of Ontario, should be made a branch of the High Court. The *Law Journal* (England) takes exception to the proposition, as it would involve considerable increase in the remuneration of County Court judges; inasmuch as "it would be ridiculous to suppose that lawyers of the necessary standing and capacity would undertake the performance of the duties of High Court judges for a salary of £1,500 a year," and suggests that an increase of at least £1,000 would be as little as could reasonably be given, which would make a further expenditure on judges' salaries of about £50,000. Even the smaller sum would make to water the mouths of our County Court judges. But however that may be no sufficient reason appears to have been given for making the change proposed.

The amount of salaries paid to County Court judges in England, we may observe, is about one-fifth of that paid to the judges of the High Court. In Ontario the proportion is about one-third to one-half; so that relatively the judges of the County Courts in Ontario are far better paid than the judges of the High Court, as the $5,000 paid to English County Court judges is double the average salaries paid to our County Court judges. The moral of this seems to be that judicial salaries ought to be raised all along the line, and particularly those of the judges of the High Court and Court of Appeal.

CERTIORARI, ITS USES AND DESIGN.

From time immemorial the certiorari has been understood to be a prerogative writ, issuing out of the Crown side of the Court, to remove all such proceedings of justices of the peace, and other subordinate tribunals or persons, as evince a judicial complexion, to the end that the Court may enquire into and be *certified* of their origin, or of the action which had marked their inception, progress or final consummation.

The effectiveness of the writ as the medium for bringing into play the supervisory faculty of the Court is not confined to a scrutiny of matters pertaining to the administration of justice. Its instrumentality may, with equal right, be sought to elucidate the tenor and impugn the correctness of transactions of a vast body of officials—individual and corporate—discharging civil functions merely.

Whilst occupied with this aspect of its purview, it should be observed that the writ, so far as our own country is concerned, has been shorn of its supremacy in the case of by-laws and resolutions of municipal councils, by force of the specific enactment in that behalf of the Municipal Act to which we have long had to conform. The province of this ancient safeguard against error and abuse in the exercise of power by functionaries of the class just denoted, no less than by conservators of the peace (leaving out of the reckoning altogether the particular instance cited), cannot, it is feared, be hopefully predicated, nor can its range be accurately gauged.

The propriety of recourse to its agency for the impeaching, in a summary manner, of, *e.g.*, a resolution of License Commissioners, was, if not expressly repudiated, by no means feebly disputed in *McGill* v. *License Commissioners of Brantford*, 21 O. R. 665, a judgment that tends greatly to disturb the impression borrowed from old-world learning of the universality of the writ's corrective power over inferior bodies.

Returning to the theory of the purport and scope of the certiorari, it is not difficult to detect a settled resolve in the bench, for generations back, to esteem and uphold it as a creation designed, above all things, to incalculably subserve the

well-being of the subject. Undeterred by seeming obstacles in the way of its being permitted to inure to the subject's benefit, the judges have been found affirming with tiresome iteration, the principle that—where want of jurisdiction appears—no statutory expression whatsoever is to be construed either to abridge its operation, or hamper its grant.

Even a direction that the lower tribunal "shall hear and determine" will be abortive to prevent its issue, any such planned infringement upon the suitor's privilege being pronounced to be without efficacy beyond the realm of matters of fact. In England, *Ex parte Bradlaugh*, 3 Q.B.D. 509, most pointedly illustrates this doctrine, while to accord with it, there is presented a solid array of cases in our own reports.

Howbeit, with us, this time-worn conception of the availability of the writ in a particular case, notwithstanding its apparently effectual denial by statute, has been almost, if not wholly, deprived of force, as the result of a consistent, and no less intelligible, group of recent decisions. It has lately, indeed, come to be regarded as an axiom that any serviceable ground for bespeaking the writ will suffice to obtain it, apart altogether from the consideration that a party's otherwise unassailable title to it might be to suffer statutory invasion. Now-a-days, an application which invites the Court to undertake a weighing of the evidence, furnishes the only occasion where the rejection of the suppliant's prayer is, for no single moment, enshrouded in doubt.

The writ will not, of course, be denied, should no adequate and legitimate case of complicity be made out before the magistrate: *Ex parte Ransley*, 3 D. & R. 572. Realizing as well as bequeathing an index of the quality and strength of the testimony needed to sustain a conviction, this judgment here has pre-eminent value. Upon this prosecution the defendant had been charged with knowingly harboring, keeping and concealing some vessels containing spirits. Upon a search made of his premises, a good-sized jar of liquor was discovered. The defendant himself was not present during the overhauling of the place, but his wife was; and two men were noticed to retire from the room with precipitancy, upon

the arrival of the officers. The Chief Justice said, in giving judgment, "The evidence is too slight to found a conviction. There is, no doubt, abundant grounds of suspicion, but we cannot say that this is a clear and satisfactory ground to convict." Bailey, J., "There must be some clear and satisfactory evidence that defendant knowingly harbored the liquor."

Should some element or circumstance requisite to jurisdiction fail to be disclosed, as, for example, in a prosecution under a by-law, where there has been an omission to offer strict proof thereof, the writ will also be conceded: *Reg.* v. *Dowslay*, 19 O.R. 622.

Latterly the Courts here have appeared more economic with the award of the certiorari than in England; but this may be accounted for by the fact that the business of resisting attacks upon summary proceedings, instituted on behalf of any department of the Government—a category which comprises a great proportion of the number that find their way to Osgoode Hall—has been entrusted to a permanent counsel, who has felt it to be his duty to combat more strenuously the initial application than was the usage formerly.

There are points of comparison between the practice governing the petition for the writ here, and that prevailing in England, which it may be of practical advantage to consider. There, the motion, if made during the sittings, comes before the Divisional Court, or, during vacation, before a judge, and consists of an application, in the one case, for a rule nisi, and in the other, for a summons to show cause. A distinction is conferred, in view of special circumstances, to permit of its going ex parte, or upon the return of the rule, to make the order to quash absolute in the first instance.

Keeping in view the series of exacting attendances to which an applicant here must submit before he reaches the bourne of ultimate aspiration—argument upon the application to make absolute his rule nisi to quash—one incontinently yields to the belief that our procedure is not only unduly burdensome, but imposes an ordeal quite out of keeping with the genius of the time: that some intelligent and discreet lopping of the fungus would not be amiss. There is a further

provision of the English law, as rational as it is liberal, which it would be equally the part of wisdom and expediency to engraft upon our too cast-iron system—the investing of the Court, where cause has been shown to the rule to show cause, of an option to direct that the order to quash should be made absolute, without insisting upon the (from a defendant's point of view) vexatious attendant of a recognizance.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

We continue the cases from the July reports.

ADULTERATION—SALE OF FOODS AND DRUGS ACT, 1875 (38 & 39 VICT., C. 63) SEC. 9—(R. S. C., C. 107, SEC. 15)—SALE OF ARTICLE OF FOOD IN ALTERED STATE—DISCLOSURE OF ALTERATION—MENS REA.

Spiers v. *Bennett*, (1896) 2 Q.B. 65, was a case stated by a magistrate. The appellants were charged with selling milk contrary to the Food and Drugs Act, 1875, which provides that "no person shall with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding £20." The facts of the case were that the appellants were refreshment contractors, and had entered into a contract with a dairy company for the supply of milk, the dairy company warranting the purity of the milk to be supplied. Milk was delivered under the contract at a refreshment room of the appellants, in a can from which a portion was emptied into a churn; but it was so poured that a greater proportion of the cream remained in the can than went into the churn—but it did not appear that this was done designedly. There was no evidence of any testing of the contents of the milk in the can, nor of

stirring or mixing together its constituent elements, save in so far as that was effected by working the churn. The milk was sold to the respondent from the churn from which it was drawn by means of a tap, which was so constructed as to keep the milk and cream properly mixed together, so that all the milk drawn off should be of about the same quality. The glass in which the milk was served was engraved with the words, "Not guaranteed as new, or pure milk, or with all its cream—see notices," and on the counter was a printed notice to the effect that all milk sold by the appellants was purchased by them under a warranty of its purity and genuine quality; that they took all possible precautions to ensure its supply to their customers in proper condition, but were unable to guarantee it as new, pure, or with all its cream, and did not therefore sell it as such. The milk in question was found on analysis to be deficient 17 per cent. of cream. Lord Russell, C.J., and Wills, J., were of the opinion that even if the facts showed that there had been an abstraction of the cream within the meaning of the Act, yet that the notice on the glass and the printed notice on the counter were a sufficient notice of the alteration, and the conviction of the appellants was therefore quashed.

MISCHIEVOUS ANIMAL — SCIENTER—EVIDENCE—DOG—NEGLIGENCE.

Osborne v. *Chocqueel*, (1896) 2 Q.B. 109. was an action for damages for injury sustained by the plaintiff by reason of his having been bitten by the defendant's bull dog. The doctrine that a dog is entitled to one bite before his master can be made responsible for his acts receives a further exemplification in the present case. The only evidence offered of any previous misconduct on the dog's part was that whilst in the possession of a former owner, it had in company with another dog chased and worried a goat. The County Court judge who tried the case upon this evidence held that the dog was ferocious to the defendant's knowledge, and he gave judgment for the plaintiff—but on the appeal of the defendant Lord Russell, C.J., and Wills, J., reversed the judgment and dismissed the action. Lord Russell, C.J., although not agree-

ing that the law is quite reasonable on this point, yet concludes that "it is impossible, looking at the long series of cases extending over many years, in which the doctrine of scienter has been applied and acted upon, to arrive at any other conclusion than that, in actions for injury sustained by man through the bite of a dog, the scienter which it is necessary to show is that the dog had a ferocious disposition towards mankind—that he had bitten or attempted to bite mankind."

ADMINISTRATION—INTESTATES ESTATE OF VALUE OF £500—GRANT TO EXECUTOR OF WIDOW WHO HAD NOT TAKEN ADMINISTRATION—INTESTATES ESTATES ACT, 1890 (53 & 54 VICT., C. 29), SEC. 1—(58 VICT., C. 21 O.)

In *In the goods of Bryant*, (1896) P. 159, a man died intestate, his estate being under £500. He left a widow but no issue, and under the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29) the widow was entitled to the whole of the estate (see 58 Vict., c. 21 O.). She died without having taken out administration, but leaving a will. Her executor now applied for administration to the husband's estate, which was granted.

PRACTICE—SOLICITOR AND CLIENT—COSTS—TAXATION—TAXING ONE OF SEVERAL BILLS—ORDER OF COURSE FOR TAXATION.

In re Ward, (1896) 2 Ch. 31, establishes an exception to the general rule that where a solicitor delivers several bills of costs, it is not open to the client to tax one of them without taxing the others also. In this case the solicitor had delivered seven bills of costs relating to seven different matters which, amounted in the aggregate to £261 15s. The solicitor acknowledged the receipt of £160 on account, and claimed a balance of £101 15s. due to him. The clients paid him a further sum of £50 on account of the balance, he giving a written undertaking to return any sum that might be found due on a taxation of his bills. The next day the solicitor wrote to the clients accepting the £50 in full of the balance due, and of all claims against them, and asked them to treat the £50 as the balance due on the cash account. The clients were dissatisfied with one of the bills, which was for £172 18s., and obtained an order of course to tax it. Their new solicitor

after this wrote to the solicitor saying that all the other bills were agreed to, and paid, so that this was the only bill outstanding. The solicitor moved to discharge the order for irregularity. It was contended on his behalf that the bills were in substance one bill, and that it was not open to the client to obtain an order of course for the taxation of part of a bill: *In re Byrch*, 8 Beav. 124; *In re Johnson*, 37 Ch. D. 433; *In re Law*, 21 Beav. 481; *In re Worrell*, 22 Beav. 634 and *Re Yelts*, 33 Beav. 412, were relied on; but North, J., held that as the solicitor admitted there was nothing due to him and it was a simple question whether or not he had been overpaid, the order was regular; though he conceded that it would have been irregular, if anything could have been found due to the solicitor, to obtain an order of course containing a direction than on the taxation of one bill all the clients' documents should be given up to them. His decision was affirmed by the Court of Appeal (Lindley, Lopes and Kay, L.JJ.,) who proceeded on the ground that there were seven bills and not one, and that after the letter written by the new solicitor, none of the other bills could be taxed.

DESIGN—REGISTRATION—NOVELTY.

In *Re Clarke's Design*, (1896) 2 Ch. 38, the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) disagreed with North, J., and held that a design for an electric lamp shade, which differed only from shades previously used for gas lamps, in the omission of a chimney, had no such novelty or originality in the design as to entitle it to registration under the Patents, Designs and Trades Marks Acts.

TRADE MARK—TRADE NAME—NON-DESCRIPTIVE TRADE MARK—"YORKSHIRE RELISH"—USE OF NAME FOR SIMILAR ARTICLE—MISLEADING ORDINARY BUYER—INJUNCTION.

In *Powell* v. *Birmingham Vinegar Brewing Co.*, (1896) 2 Ch. 54, the plaintiff succeeded in vindicating his right to the exclusive use of the name of "Yorkshire Relish" for a certain sauce manufactured by him, and to restrain the defendants from applying the same name to a sauce manufactured by them. The trade of the plaintiff was large and profitable,

as may be judged from the fact that during the thirty years preceding 1894 he had spent £400,000 in advertising, and in the year 1895 had sold six million bottles. For thirty-five years he had been engaged in the manufacture of the sauce from a secret recipe, which was sold in bottles impressed with the name "Yorkshire Relish." Some years ago he had registered the words "Yorkshire Relish" as a trade mark, but after litigation with the defendants it had been expunged from the register—see *In re Powell's Trade Mark* (1893) 2 Ch. 388, (1894) A.C. 8. The defendants had not discovered the plaintiff's secret, but were making and selling under the name of "Yorkshire Relish," and in bottles similar to the plaintiff's, a sauce similar to the plaintiff's, at a lower price. The defendants printed their own names on their labels, and there were certain other differences between their labels and wrappers and those of the plaintiff; but the evidence established that the defendants' sauce was liable to be, and had been, mistaken by ordinary buyers for that of the plaintiff's. Stirling, J., granted an injunction restraining the defendants from selling their sauce as "Yorkshire Relish" without better distinguishing it from the sauce made and sold by the plaintiff, and his decision was affirmed by the Court of Appeal (Lindley, Kay and Smith, L.JJ.,) following *Reddaway* v. *Banham*, 1896, A.C. 190, noted ante p. 578.

COMPANY—FLOATING SECURITY—SET OFF—LIQUIDATED DEMAND—HYPOTHECATION OF ASSETS OF COMPANY—MANAGING DIRECTOR, POWERS OF—PRESUMPTION OF REGULARITY.

In *Biggerstaff* v. *Rowat's Wharf*, (1896) 2 Ch. 93, Harvey & Co. bought from a joint stock company, and paid for, 7000 barrels at 3s. 6d. each. The company failed to deliver part of these, and one of the questions was whether the claim of Harvey and Co. in respect of the short delivery could be set off against a debt for rent due from them to the company. The question was complicated by the fact that all the company's assets were hypothecated as a floating security for debentures, of which Harvey & Co. had notice when they made their contract, and it was contended that as against the debenture holders as assignees of the rent, the set-off could not

be set up. But the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) differing from North, J., held that it is of the essence of a floating security that it allows the company to carry on business in its ordinary way until a receiver is appointed—and therefore as there was a total failure of consideration as to the money paid for the barrels not delivered, Harvey & Co. were entitled to sue for so much of the price as money had and received to their use, and were entitled to set off this amount as against the debt due by them to the company for rent. Another point in the case turned upon the powers of a managing director to bind a company. It appeared that before the appointment of a receiver Harvey & Co. had pressed the company for payment of their claim for short delivery of the barrels, and at a meeting between them and the three directors of the company it was proposed, but not finally settled, that the company should issue debentures to Harvey & Co. by way of security, and should hypothecate various debts due and owing to the company. This meeting was adjourned to the following day when only two directors were present (three being a quorum), but the managing director was one of those present. At this meeting Harvey & Co. advanced to the company money to pay wages, and the managing director gave them a letter signed by him on behalf of the board, by which in consideration of Harvey & Co. finding cash for payment of wages and barrels, he agreed to execute a deed in conjunction with the board of directors, creating and issuing to them the remainder of an issue of debenture stock, and he also gave them orders, signed by him as managing director, addressed to debtors of the company, informing them that the debts owing by them were hypothecated by Harvey & Co. By the articles the directors were authorized to appoint a managing director, and to delegate to him such of the powers of the board as they thought fit; and it was not disputed that the board had power to hypothecate. There was, however, no minute showing the appointment of the managing director, or what powers had been delegated to him. The Court of Appeal also differed from North, J., on this branch of the case, and held that the securities given to Harvey & Co., as

above mentioned, were valid, the Court of Appeal being unanimous that it was immaterial whether the managing director had been formally appointed or not, and that it sufficed that he acted, and was recognized as such; and that it was sufficient for any person dealing bona fide with him, that he might have had the powers he assumed to exercise, and that such persons were entitled to presume that all things necessary to confer on him those powers had been rightly done.

SOLICITOR AND CLIENT—COSTS—TAXATION—DELIVERY OF BILL—RETAINER OF COSTS—PAYMENT—SOLICITORS' ACT, 1843 (6 & 7 VICT. C. 73) SECS. 37, 41—(R.S.O. C. 147, SECS. 34, 46.)

In re Baylis, (1896) 2 Ch. 107, was an application for the delivery and taxation of a solicitor's bill. The client had, while an undergraduate, employed the solicitor to negotiate loans for him, and the solicitor had continued to do business of this kind for him from 1881 to 1894. From time to time, as loans were procured, a cash account was rendered, the costs "as agreed" and a commission were deducted, and the balance paid over to the client, who signed a receipt at the foot of the account. No bills of costs were ever delivered. The application was resisted on the ground that what had taken place amounted to payment within the meaning of the Solicitors' Act, 1843, secs. 37, 41 (see R.S.O. c. 147, secs. 34, 46), but Chitty, J., and the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) were of the opinion that the retainer of the costs out of the moneys of the client was not payment within the Act, and that the subsequent delivery of the bills under an order of the Court would not make the retainer a payment so as to preclude taxation.

COMPANY—CONTRIBUTORY — WINDING UP—UNDERWRITING LETTER—ACCEPTANCE OF OFFER.

In re Hemp Y. & C. Company, (1896) 2 Ch. 121. One Hindley applied to be removed from the list of contributories. The circumstances of the case were a little peculiar. A newly formed company issued a prospectus inviting subscriptions for shares which stated that the list would open on 20th June and close on 22nd June. On the 17th June, Hindley wrote

and delivered to the promoters of the company a letter agreeing that upon the public issue of the shares he would in consideration of a percentage subscribe for 400 shares. If the whole issue were *bona fide* subscribed for by the public, no shares were to be allotted to him. The letter also contained authority to the promoters in the event of Hindley not applying for shares, to apply for them in his name and an authority to direct the directors to allot them to him, and it was also stipulated in the letter "this engagement is binding on me for two months." The shares were accordingly offered to the public on 20th, 21st and 22nd June, but very few applications were made, and on 1st July, when the public subscription list was closed, the promoters signed a memorandum at the foot of Hindley's letter accepting his offer. The letter with the memorandum and an application by the promoters in Hindley's name, were on the same day sent to the company and the shares were allotted to Hindley and his name placed on the register of shareholders. Hindley knew of this and paid the company the allotment money in respect of the shares, received his certificates, and on two occasions voted by proxy in respect of the shares, but it did not appear that he knew or made any inquiry as to the exact date when his offer had been accepted. His name was still on the register when the company went into liquidation. In the course of the winding up proceedings Hindley having discovered that his offer had not been accepted until 1st July, after the public subscription list had been closed, claimed that it had not been accepted in time, and that he was not in fact a shareholder and should be removed from the list of contributories. Williams, J., was of opinion that the acceptance was too late, and that Hindley was entitled to succeed; but the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) unanimously reversed his decision, holding that the acceptance of the offer at any time within the two months was sufficient: and that the fact that Hindley knew of the allotment, and paid the allotment money, and voted in respect of the shares, and had made no objection to being on the register for a year and three quarters, precluded him from now objecting that he was not a shareholder.

PROMISSORY NOTE—"ON DEMAND"—GIFT OF NOTE WITHOUT INDORSEMENT—NUDUM PACTUM—RENUNCIATION—"ACCEPTOR" "MAKER"—BILLS OF EXCHANGE ACT, 1882—(45 & 46 VICT. C. 61), S S. 62 (1), 89—(53 VICT. C. 33 D. SECS. 61, 88.)

Edwards v. *Walters*, (1896) 2 Ch. 157, is an interesting case arising out of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), from which the Dominion Act, 53 Vict. c. 33, is adapted. The holder of a promissory note, payable on demand and dated in 1865, in 1891 made a gift of it to his niece, who was one of the devisees of the maker of the note. Interest had been paid on the note by her and another devisee of the maker, from 1878 to 1889; and when the gift was made there was no consideration therefor, and the note was not indorsed. The donor having died without making any further claim, his administratrix brought the present action against the devisees of the real estate of the deceased maker of the note, to recover the amount of the note against the real estate of the deceased devised to them. The Court of Appeal (Lindley, Lopes and Kay, L.JJ.), agreed with Kekewich, J., that notwithstanding the alleged gift of the note to one of the defendants, the plaintiff was entitled to succeed. Lindley, L.J., said "the gift of the note to Mrs. Evans is unquestionably strong evidence of an intention to forgive the debt, but unfortunately the note was not indorsed by the payee. Mrs. Evans could not, therefore, sue on it in her own name, nor was there any consideration for the transaction, or consideration to support an agreement not to sue. There is in fact nothing except an intention not carried out. Such an incomplete transaction does not amount to a gift of the debt, nor to an equitable release of it." The case, therefore, resolved itself into a question whether or not the alleged renunciation was sufficient under the Bills of Exchange Act, and whether the delivery up of the note to a devisee of the maker was a delivery to the "acceptor" within the meaning of section 62 (53 Vict. c. 33, sec. 61, D.), and on this point all the judges were agreed that it was not; and while conceding that the delivery of the note either to the maker or his personal representative would have satisfied the statute, they were clear that the delivery of the note to a devisee of the maker

could not operate as a discharge of it. The note being payable on demand, was held to be at maturity as soon as made, without any previous demand, and the renunciation not being in writing and there being no delivery up to satisfy the statute, the plaintiff was held entitled to judgment.

POWER OF APPOINTMENT—POWER TO APPOINT TO WIFE—EXERCISE OF POWER—APPOINTMENT BY HUSBAND TO HIS THEN WIFE—SUBSEQUENT APPOINTMENT TO A SECOND WIFE.

In re Hancock, Malcom v. *Burford-Hancock*, (1896) 2 Ch. 173. Under a post nuptial settlement a husband had power to appoint a fund, after the determination of his own interest therein, amongst his children, subject to a proviso empowering him by deed or will to appoint one-fourth of the income to "his wife" for her life. The husband appointed one-fourth of the income in favor of his then wife, and subject thereto, if the same should take effect, he appointed the fund among his two daughters (who were adults), and his son (who was a minor), in equal thirds, reserving as to his son a power of revocation, which he subsequently exercised by irrevocably appointing one-third of the fund to such son absolutely. The wife in whose favor the apponment was made died, and the husband married again, and on his second marriage he purported by law irrevocably to appoint one-fourth of the income in the fund to his second wife during her life. The trustees of the settlement having applied to the Court for the determination of the question whether the appointment in favor of the second wife was valid, Kekewich, J., held that it was not, and that the appointment in favor of the children being subject only to the appointment in favor of the first wife, it could not be overridden by any subsequent appointment in favor of another wife, and this decision was upheld by the Court of Appeal, who agreed that the appointment in favor of the children and the first wife exhausted the power.

COVENANT TO PAY SIX MONTHS AFTER DEATH—TIME CERTAIN—INTEREST—3 & 4 W. 4, C. 42, SEC. 28—(ONT. JUD. ACT (58 VICT., C. 12), SEC. 119 (1).)

In re Horner, Tooks v. *Horner*, (1896) 2 Ch. 188. The question at issue was whether interest was payable in respect of money which the covenantor covenanted to be paid by his executors

or administrators six months after his decease. Chitty, J., held that the money was payable "at a certain time" within 3 & 4 W. 4, 42, sec. 28, (58 Vict. c. 12, sec. 119 (1) Ont.), and bore interest from the date it became due. He says at p. 91: "Death is not a contingent event—it is a certainty which must happen to all; and so many days after death is a time certain for the purposes of the statute."

MORTGAGE BY DEPOSIT—LEGAL ESTATE—CONFLICTING EQUITIES—PRIORITY—TRUST FOR SALE—BREACH OF TRUST—TRUSTEE AND CESTUI QUE TRUST—RECEIPT IN BODY OF DEED—FRAUD—NOTICE—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT. C. 41) SECS. 2 (VIII.). 54 (1.), 55 (1)—(R.S.O. C. 100, SECS. 1 (7), 5.)

Lloyd's Bank v. *Bullock*, (1896) 2 Ch. 192, is one of those cases which, under the system of registration of deeds which prevails in Ontario, could not arise here, and yet it affords light on the doctrine of notice, and the rule of equity that where the equities are equal the law must prevail. Like most of such cases the fraud of a solicitor created the difficulty. In 1887 one Hood having mortgaged the land in question to a building society, died devising the property to Newbrook, in trust for sale. Cartwright, the fraudulent solicitor, acted both for the society and also for Hood, and after the latter's death he obtained the mortgage with a statutory receipt for the mortgage money indorsed thereon from the society, on the pretence that notice had been given to pay it off, and he also obtained possession of the title deeds. The money owing to the society was never paid off, and at this time Newbrook was unaware of the existence of the mortgage. He shortly afterwards agreed to sell the property to Cartwright, who was then in good repute and supposed to be well off. and by a deed dated December 29, 1892, which recited the trust for sale in Hood's will, Newbrook, in consideration of £700 by the deed acknowledged to be received, conveyed the property to Cartwright in fee. The purchase money was never in fact paid. The conveyance and title deeds, except the mortgage of 1887 and statutory receipt, were subsequently deposited with the plaintiffs by way of equitable mortgage as security for £650. In 1893 Cartwright was adjudicated bankrupt, and his frauds were discovered. The plaintiffs now claimed to

enforce their security as against the building society, and Newbrook and his cestui que trust; and Chitty, J., held that the building society were entitled to show that their mortgage had never in fact been paid off, and that this mortgage and receipt had been delivered as an escrow, and that the money never having been paid, the legal estate was still in the society, and that consequently the society were entitled to priority over the plaintiffs. But as regarded Newbrook he held that his conveyance was not void, as against the plaintiff, because he had authority to deal with the property, and in the absence of express notice the plaintiffs were entitled to rely on the receipt in the body of the deed (see R.S.O. c. 100 secs. 1 (7), 5), and consequently they had priority over both Newbrook and his cestui que trust.

TENANT FOR LIFE AND REMAINDERMAN—REVERSION—CONVERSION—APPORTIONMENT BETWEEN CAPITAL AND INCOME—DISCRETIONARY POWERS OF SALE.

In re Pitcairn, Brandreth v. *Colvin*, (1896) 2 Ch. 199. A testator being entitled inter alia to a reversionary interest expectant on the death of his mother, by his will bequeathed all his property to trustees upon trust for his mother for her life, with remainder to other persons, and he gave to his trustees, if and when they should consider it expedient, full power to sell and dispose of all or any part of his estate. The trustees did not convert the reversionary interest in the lifetime of the mother, and the question now raised was whether or not the mother's personal representatives were entitled to any part of the proceeds of the sale of the reversionary interest, and North, J., held that the discretionary power of sale excluded the application of the rule laid down in *Howe* v. *Earl of Dartmouth*, 7 Ves. 137a, and that they were not entitled. It appears from a foot note that an appeal was entered from this decision, but that the case was subsequently compromised.

PRACTICE—ACTION FOR RECOVERY OF LAND—JOINDER OF CAUSES OF ACTION—WAIVER OF IRREGULARITY—ORD. XVIII, R. 2; ORD. LXX R. 2; (ONT. RULES 311, 443).

In *Hunt* v. *Worsfold*, (1896) 2 Ch. 224, the plaintiff claimed a declaration that an alleged mortgage of land created no charge

upon it, and he claimed possession of the land. In the alternative he claimed an account of what was due on the mortgage and redemption. The defendant moved to stay proceedings on the ground that the causes of action had been joined without leave, as required by Ord. xviii, r. 2 (Ont. Rule 311). North, J., refused the application, holding that the plaintiff was entitled without leave to ask for possession in either alternative of the mortgage being held valid, or invalid; but he held that the defendant was not too late in taking the objection after appearance of the later cases of *Wilmott* v. *Freehold*, 57 L. T. 552, and *Smurthwaite* v. *Hannay*, (1894) A. C. 494 having practically overruled *Mulckern* v. *Doerks*, 53 L. J. Q. B. 526.

SOLICITOR AND CLIENT—DELIVERY OF ACCOUNT FOLLOWED BY DELIVERY OF BILL OF ITEMS—TAXATION—COSTS OF TAXATION.

In *Re Hellard*, (1896) 2 Ch. 229, solicitors rendered to a third party a memorandum of their charges which he was liable to pay, and which they fixed at £7 11s.; and subsequently, in pursuance of a demand for particulars, they sent a bill of items amounting to £10 10s. 8d., and adding at the foot, "say £7 11s." The third party obtained an order for taxation, and the bill was allowed at £7 11s. The third party thereupon claimed to be entitled to the costs of taxation, but North, J., held that the bill actually taxed was the bill of £7 11s., which was all that was claimed as due, and that the solicitors were therefore entitled to the costs of the taxation.

DIVIDEND—APPORTIONMENT—TENANT FOR LIFE AND REMAINDERMAN—APPORTIONMENT ACT, 1870 (33 & 34 VICT. c. 35) SECS. 2, 3, 4, 5.—(R.S.O. c. 143, SECS. 1 (3) 2, 3, 4.)

In *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241, after the death of a tenant for life certain stock in a public company in which he had a life interest was sold "cum dividend," and a dividend which had been partly earned during the lifetime of the tenant for life was received by the purchaser. The personal representatives of the deceased tenant for life claimed that a part of the purchase money equal to the proportion of the dividend earned in the lifetime of the tenant for life should be paid to them. Stirling J., held that they had no right under

the Apportionment Act, 1870 (see R.S.O. c. 143, s. 2) to be paid anything out of the purchase money in respect of the dividend, but inasmuch as by the trusts of the stock in question the trustees were directed after the death of the tenant for life to transfer the stock to the beneficiaries, he was of opinion that if this had been carried out the trustees ought to have so transferred the stock as to protect the claims of the tenant for life's personal representatives, and they might thus directly, or through the trustees, have obtained payment of a proportionate part of the dividend, and therefore that their claim was valid.

SOLICITOR AND CLIENT—COSTS—TAXATION—ITEMS BARRED BY STATUTE OF LIMITATIONS—SUBMISSION TO PAY WHAT IS DUE.

In re Margetts, (1896) 2 Ch. 263. It was held here by Kekewich, J., that where a client obtains an order to tax his solicitor's bill, some of the items of which are barred by the Statute of Limitations, such items are taxable, and by virtue of the submission which the client makes on taking the common order for taxation to pay what may be found due, he in effect waives the statute, and that if he wish to rely on it as a defence, he must obtain a special order.

The Law reports for August comprise: (1896) 2 Q.B., pp. 113-160; (1896) P., pp. 153-209; (1896) 2 Ch., pp. 277-450; and (1896) A. C., pp. 273-380:

PRACTICE—JOINDER OF PLAINTIFFS HAVING SEPARATE CAUSES OF ACTION—(ONT. RULE 300).

Carter v. *Rigby*, (1896) 2 Q.B. 113, although a decision under the County Court Rules, is nevertheless useful as a guide to the construction of Ont. Rule 300. The action was brought in the County Court under the Employers' Liability Act, and Lord Campbell's Act. By the flooding of the mine of the defendants fifty miners who were in their employment were drowned; and their respective representatives joined as plaintiffs in the present action, asking damages in respect of their deaths alleged to have been caused through the defendants' negligence. Ord. iii. r. 1 of the County Court

is similar in terms to Ont. Rule 300, and it was held by Lord Russell, C.J., that it did not warrant the joinder of the plaintiffs, and that another Rule of the County Court, which appeared to assume that an action could be so framed, did not have the effect of enlarging the operation of Ord. iii. r. 1, and with this the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) agreed. Lord Russell's remarks on p. 117 respecting inconsistent Rules, seems to apply to the apparent inconsistency between Ont. Rules 245 and 711.

PRACTICE—DISCOVERY—LIBEL—CIRCULATION OF NEWSPAPER

In *Whittaker* v. *Scarborough Post*, (1896) 2 Q. B. 148, the Court of Appeal have definitely overruled *Parnell* v. *Walter*, 24 Q. B. 441. The action was for libel against a newspaper company, and the plaintiff sought to compel the defendants to state precisely the number of copies of the newspaper containing the alleged libel which were issued. The defendants had answered that a considerable number had been issued. Collins, J., conceiving himself to be bound by *Parnell* v. *Walter*, had held that this was not sufficient; but the Court of Appeal (Lord Esher, M.R., Kay and Smith, L.JJ.), were of opinion that it was, in the case of any well known and important newspaper, and that *Parnell* v. *Walter* had been wrongly decided.

PRACTICE—DEATH OF PLAINTIFF—SURVIVAL OF CAUSE OF ACTION—ACTION TO ENFORCE STATUTORY DUTY.

In *Peebles* v. *Oswaldtwistle Council*, (1896) 2 Q.B. 159, the action had been brought by the plaintiff for a mandamus to compel the defendants, a municipal council, to construct a sewer pursuant to a statutory duty imposed on them. Pending the action, the plaintiff died, and his executors obtained an order to continue the proceedings, from which the defendants appealed on the ground that the cause of action did not survive. The Court of Appeal (Lord Esher, M.R., and Smith, L.J.) dismissed the appeal, being of opinion that the right to enforce a statutory duty does survive.

PRACTICE—MORTGAGE—ATTORNMENT BY MORTGAGOR—POWER TO ENTER AND DETERMINE TENANCY—TENANCY OF WILL—ACTION FOR POSSESSION BY MORTGAGOR—ORD. III. r. 6 (F.) ORD. XIV. (Ont. RULES 245, 739).

Kemp v. *Lester*, (1896) 2 Q.B. 162, was an action by a mortgagee against his mortgagor to recover possession of the mortgaged property. The mortgagor had attorned as tenant from year to year to the mortgagee at a yearly rent, and the mortgage deed also contained a provision that the mortgagee might at any time without notice enter upon and take possession of the premises and determine the tenancy created by the attornment. The rent was in arrear and the mortgagee brought action to recover possession and indorsed his writ under Ord. iii. r. 6 (F), (Ont. Rule 24 5) and applied for judgment under Ord. xiv (Ont. Rule 739), The motion for judgment was resisted on the ground that the tenancy was determined by forfeiture, and therefore the writ could not be specially indorsed, because the defendant was not "a tenant whose term has expired, or been duly determined by notice to quit," but Cave, J., granted the motion, and his decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.), on the ground that the plaintiff's right to possession did not depend on forfeiture, but on the express proviso enabling him to enter without notice, and which practically made the mortgagee a tenant at will.

CRIMINAL LAW—EVIDENCE · INDECENT ASSAULT—PARTICULARS OF COMPLAINT MADE BY PROSECUTRIX.

The Queen v. *Lillyman*, (1896) 2 Q.B. 167, was a prosecution for an indecent assault upon a female in which a question was reserved by Hawkins, J., at the trial, as to how far evidence is admissible of a complaint made by the prosecutrix shortly after the commission of the alleged assault. The judgment of the Court (Lord Russell, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.) was delivered by Hawkins, J., and it was adjudged that in prosecutions for rape and kindred offences, evidence of the making of a complaint by the prosecutrix, and the particulars of the complaint, so far as it related to the prisoner, is admissible, not as proof of the facts, but as tending to support the credibility of the prosecutrix, and as negativing consent on her part.

LANDLORD AND TENANT—LEASE—COVENANT NOT TO ASSIGN WITHOUT LICENSE—LICENSE NOT TO BE UNREASONABLY WITHHELD.

Bates v. *Donaldson*, (1896) 2 Q.B. 241, was an action by a lessor to recover possession upon an alleged forfeiture of the term, by reason of the lessee having assigned without license, contrary to a covenant in that behalf. The lease provided that the license to assign was not to be "unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee." It appeared that the plaintiff had refused a license simply because he desired to recover possession of the premises, but was prepared to give the lessee the same price he was to get from the proposed assignee, but had in no way bound himself to do so. Mathew, J., who tried the action, held that the license to assign had, under the circumstances, been unreasonably withheld, and his decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.), and the action was therefore dismissed.

INSURANCE—POLICY—ACCIDENT—NERVOUS SHOCK ARISING FROM FRIGHT.

In *Pugh* v. *The London and Brighton Ry.*, (1896) 2 Q.B. 248, the plaintiff was a signal man in the employment of the defendants and had entered into a contract of insurance with the defendants, whereby they agreed to pay him a weekly allowance in case of his becoming incapacitated by reason of accident sustained in the fair and ordinary discharge of his duty, however caused. While in the discharge of his duty the plaintiff endeavored to prevent an accident to a train by signalling to the driver of the engine, and the excitement and fright produced by the apparently impending danger to the train, produced a nervous shock which incapacitated the plaintiff, and the question was whether this was an accident within the meaning of the policy. The jury found that the plaintiff was incapacitated by reason of an accident sustained in the discharge of his duty, and Cave, J., who tried the action, gave judgment for the plaintiff, and this was upheld by the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.).

PROBATE—ADMINISTRATION—WILL IN PURSUANCE OF POWER—FOREIGN DOMICILE OF TESTATRIX.

In the Goods of Huber, (1896) P. 209. Jeune, P.P.D., granted administration with the will annexed, although the will was executed abroad and was invalid according to the law of the domicile of the testatrix, but was made in pursuance of a power of appointment, and was in valid English form. Some conflict of opinion appears to have existed as to whether in such a case a will, though executed in pursuance of a power, must not be also a valid will according to the domicile of the testator, but the learned President conceived himself bound by *Re Alexander*, 29 L.J. P. & M. 93.

COMPANY—WINDING UP—MISFEASANCE—AUDITOR, DUTY OF—STOCK TAKING—WINDING UP ACT, 1890 (53 & 54 VICT. C. 63) S. 10—(R.S.C. C. 129, S. 83)

In *Re Kingston Cotton Mill Co.*, (1896) 2 Ch. 279, the auditors appealed from the decision of Williams, J. (1896, 1 Ch. 331), noted ante p. 313, and the Court of Appeal (Lindley, Lopes and Kay, L.JJ.), reversed it, being of opinion that the auditors were justified in relying on the certificates of the manager, as to the stock taking, and were not bound to check his certificates, in the absence of anything to raise suspicion that he was not acting honestly. Their Lordships consider that an auditor is not bound to be suspicious where there are no circumstances to warrant it, and that he is only bound to exercise reasonable care and skill.

INJUNCTION—RESTRICTIVE COVENANTS, ENFORCING—ACQUIESCENCE—ALTERATION OF CHARACTER OF ESTATE SUBJECT TO RESTRICTIVE COVENANT.

In *Knight* v. *Simmonds*, (1896) 2 Ch. 294, the Court of Appeal (Lindley, Lopes and Kay, L.JJ.), have affirmed the decision of Romer, J. (1896), 1 Ch. 653, noted ante p. 469, their lordships agreeing with him that the evidence of the alleged acquiescence of the plaintiffs in the breach of the covenants was insufficient to disentitle them to relief. Lindley, L.J., points out (p. 297) that restrictive covenants do not run with the land, and that where equitable relief is claimed by way of specific performance or injunction to enforce such covenants, equitable, as distinguished from legal, defences,

have to be considered, and that in such cases laches or acquiescence, or a departure from the scheme which the covenants were intended to effectuate, may afford a defence.

COMPANY—PREFERENCE SHARES—DIVIDEND.

Staples v. *Eastman Photographic Materials Co.*, (1896) 2 Ch. 303, concerns the right of the holders of preference shares in a joint stock company to be paid dividends so as to make good the deficiencies of former years. By the articles of association of the company in question it was provided that holders of preference shares were to be entitled out of the net profits of each year to a preference dividend of ten per cent. on the amount paid up thereon; and after the payment of such preferential dividend the holders of ordinary shares were to be entitled to a dividend of ten per cent. on the amount paid on such shares; subject as aforesaid, the preference and ordinary shares were to rank equally for dividend. The profits having been insufficient in some years for the payment of ten per cent. on the preference shares, the question at issue was whether such deficiency could be made good out of the profits of subsequent years, before payment of dividends on ordinary shares. Chitty, J., determined that the preference shareholders were entitled to have any deficiency in the dividends of former years, where they fell below ten per cent., made good, before the ordinary shareholders were entitled to any dividends; but the Court of Appeal (Lindley, Lopes and Kay. L.JJ.) came to the opposite conclusion, being of opinion that as the articles provided that the dividends were to be paid "out of the profits of each year," the preference shareholders were precluded from getting the deficiency of one year's dividends made good out of the profits of other years.

WILL—CONSTRUCTION—"LEGAL DISABILITY"—DISABILITY CREATED BY DONEE HIMSELF—GIFT OVER.

In *Re Carew, Carew* v. *Carew*, (1896) 2 Ch. 311, the Court of Appeal (Lindley, Lopes and Kay, L.JJ) have affirmed the decision of Stirling, J., (1896) 1 Ch. 527, noted ante p. 400, holding that the charge created by the legatee and his bankruptcy on his own application were not "a legal disability" which would cause the gift over in favor of his wife and children to take effect.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

TORONTO ADMIRALTY DISTRICT.

SIDLEY *v.* THE SHIP "DOMINION,"

AND

SIDLEY *v.* THE SHIP "ARCTIC."

Maritime law—Costs— Disposition of, on sale of vessel.

Held, as to the disposition of the costs where the proceeds of the sale were insufficient to pay the maritime liens and costs, that the costs of the action must be disposed of as follows :

1. Costs of sale to be a first charge on the proceeds.
2. Party and party costs of both co-owners to be taxed, and the plaintiff (or defendant as the case may be) to pay to the other the difference between one moiety of the total amount of said party and party costs and his own party and party costs.

[TORONTO, Aug. 26. McDougall, Loc. J.

The former was an action for master's wages, disbursements, and for an account, and the latter an action for an account as co-owner.

Mulvey, for plaintiff.

Kyles, for defendant, Peters.

A. C. Macdonell, for mortgagee.

MCDOUGALL, Local Judge :—As the result of the trial of these two actions, tried together by consent, and both being actions in rem, between co-owners, one of them including a claim of the plaintiff (though part owner) for wages and disbursements as master of "The Dominion," I have found upon the taking of the accounts a balance in favor of the plaintiff for $956.93.

Both vessels have been sold under the direction of the Court and the gross proceeds of both vessels was $1,400 only. Deducting the costs of sale, there will not be a sufficient balance of the proceeds in Court to satisfy the plaintiff's claim, apart from any question of costs.

There is no reason why the rule as to the incidence of costs in partnership actions adopted by the courts of law should not apply to actions between co-owners in the Admiralty Court. That rule appears to be, where there are assets, to direct the payment of the costs of taking the partnership accounts out of the partnership assets.

Where there is a deficiency of assets the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant. The Court of Admiralty has power to make an order that the costs of a proceeding shall be paid personally by the owners ; at least, that is the rule in damage actions : *The Dundee*, Holmes 1, Haggard 109 ; *The John Dunn*, Place 1, 1 William Robinson 159 ; *The Volant*, William Robinson 390 ; *Ex parte*

Rayne, 1 Q. B. 982. I cannot see any reason for not following this practice in actions for an account between co-owners.

I make the following order as to the disposition of the proceeds of the sale of these two vessels :

1. The costs of the sale of the "Arctic" will be paid out of the proceeds of that vessel, so far as the proceeds will allow. I understand that in the case of that ship the sale did not produce sufficient funds to pay these costs in full.

2. In the case of the "Dominion" the costs of the sale shall be first paid out of the proceeds.

3. The claim of the plaintiff, as far as the proceeds will allow, he producing a voucher of payment to Magann of the sum of $363.79, which sum forms part of his claim as awarded him. In this case, too, I believe after paying the costs of the sale there will not remain sufficient funds to pay the plaintiff's claim in full.

4. The total amount of the party and party costs of both the co-owners (there are only two parties in each action) shall be taxed, and the plaintiff, Sidley, or Peters, the other co-owner, as the case may be, must pay to the said Peters, or the plaintiff Sidley, the difference between one moiety of the total amount of the party and party costs, and his own party and party costs : *Austin* v. *Jackson*, 11 Chy. Div. 942 ; *Hamer* v. *Giles*, 11 Chy. Div. 942 ; *Potter* v. *Jackson*, 13 Chy. Div. 845.

The only remaining question is as to the costs of the intervening mortgagee Magann. As the claim of the plaintiff for wages and disbursements absorbs the whole fund, Magann's mortgage only covering thirty-two shares, the plaintiff is entitled to be paid in priority to the mortgage.

I dismiss the claim of the mortgagee intervening, against the res or proceeds, without costs.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE QUEEN *v.* THE SHIP "BEATRICE."

Behring Sea Award Act, 1894—Improper seizure of sealing vessel—Damages for unlawful arrest and detention awarded against the Crown—Interest.

Where a sealing vessel had been wrongfully seized by an American revenue boat claiming to act under the provisions of the Behring Sea Award Act, 1894, and then handed over to British authorities, who detained the vessel for a long period of time and caused her cargo of seal-skins to be sold, it was held that the Crown was liable in damages for such seizure and detention and conversion, and was also liable to pay interest at the rate of six per cent. upon the ascertained amount of such damages from the date of the closing of the sealing season in the course of which the vessel had been seized.

[VICTORIA, July 28, DAVIE, C.J.

This was an assessment of damages arising out of the seizure of the sealing schooner "Beatrice" by the United States revenue steamer "Rush," on the 20th August, 1895. Upon the trial of the action for condemnation of the ship for alleged infraction of the Behring Sea Award Act, 1894, it was dismissed on the ground that the seizure was unlawful, and a reference was directed as to the damages sustained by the owners of the "Beatrice" on account of her unlawful arrest and detention. (See 5 Ex. R. 9).

C. E. Pooley, Q.C., for Crown.

A. E. McPhillips, for the ship.

DAVIE, C.J., Local Judge: The arrest took place on 20th August, 1895, in lat. 54.54 north, and long. 168.31 west, whilst the vessel was engaged in seal fishing. She had then caught 202 seals, having an outfit of six boats and two canoes, and a crew of 18 white men, but no Indians. She had been fishing since the 2nd of August, and under instructions to the master, given by the owner, would probably have continued fishing until the end of the season, which is shown to be the 20th September, several of the vessels having continued until that date, making good catches up to the last day; for instance the "Walter Rich" caught 72 skins on the 9th September, and 36 on the 18th; the "Ainoko" 137 on the 9th September, 36 on the 17th, and 54 on the 19th; the "Florence M. Smith" took 69 on the 20th September. These vessels were all sealing in Behring Sea the same as the "Beatrice," and although they had more boats and more men than the "Beatrice," it is useful to refer to their catches as showing that it would have probably been profitable for the "Beatrice" to have continued sealing up to the last day. There were some forty vessels, including the "Beatrice," sailing out of Victoria, engaged in sealing that year, and Mr. Godson, whose duty it was under the Paris award to keep a record of the industry, informs us that the average catch per schooner was 897.95, or of about 70 to each boat or canoe.

It has been contended on the part of the Crown that in assessing damages I should proceed upon the average catch per boat, but I think this would afford hardly a fair estimate for the "Beatrice."

In the first place, Mr. Godson's average includes the catch of the "Beatrice," which had only just commenced sealing when seized, as also of the "E. B. Marvin," which was seized on the 2nd September when she had caught only 376 seals. These seizures, therefore, reduce the average which would otherwise be shown. Moreover, many of the other vessels had quit sealing before the 20th September, whereas the "Beatrice" was provisioned to and had instructions to continue until the 20th. The catches are shown to have been heavier after the 20th August than they were before that date. Some of the vessels took as high as one hundred and more to the boat; the "Borealis," a vessel of only thirty-seven tons register, with twenty-one white men and six boats, taking as high as 123 seals to the boat.

The seizure in this case having been established as wrongful, the plaintiff is entitled to substantial damages, the criterion of which is the whole injury which he has sustained thereby. In *The Consett*, L.R. 5 P.D., 232, where a charter party was lost in consequence of detention caused by a collision in which the defendant was to blame, the measure of damages was held to extend to the loss of the charter. The plaintiff's case here stands upon at least as high a footing as the *Consett*. Here I think I am bound to allow such an amount as would represent the loss of an ordinary and fair catch if the voyage had been extended until 20th September: *The Argentino*, L.R. 14 App. Cas. 519. I think that ninety seals to the boat would have been an ordinary and fair catch for the "Beatrice" to have made: as the "Borealis" with only three

more men took 123 seals, it is not unreasonable to presume that the "Beatrice" wonld have taken at least ninety. This, for eight boats, including canoes, would make 720 seals, or 518 more than were taken.

The evidence shows that the agents for the "Beatrice," R. Ward & Co., who were also the agents for several of the other schooners, sold all their catches at Victoria, and realized $10.25 per skin, including the 202 caught by the "Beatrice" before she was seized. I think the same price must be allowed the "Beatrice" for her estimated additional catch of 518 seals, or $5,309.50. From this has to be deducted $4 per skin, which it was proved would amply cover all expenses of the lay to which the sealers would have been entitled, as well as all wages. There will also be deducted $74 for the tinned goods and two barrels of beef, which would probably have been consumed had the "Beatrice" completed her voyage, but which Mr. Doering had restored to him after the vessel was released. The remainder of the provisions were mildewed, eaten by rats and spoiled whilst the vessel was under arrest. There can be no deduction in respect of these. These deductions leave a balance of $3,163.50 in favor of Mr. Doering, for which sum, together with interest at the rate of six per cent. per annum from the 20th of September, he is entitled to judgment against Her Majesty with costs.

Province of Ontario.

COURT OF APPEAL.

From MEREDITH, C.J.] [June 30.

FLEMING *v.* LONDON AND LANCASHIRE LIFE ASSURANCE CO.

Insurance—Life insurance—Premium notes—Discount thereof—Non-payment.

To cover the first premiums upon two policies of assurance the assured gave to the company's agent his promissory note and the promissory note of his brother payable to the agent's order. Each policy contained a provision that in the event of non-payment of a note given for a premium the policy should become void. The agent discounted the notes with his own bankers, and in his return to the company treated the premiums as paid, and the company took from him his own note in their favor to cover the balance due by him, which included other premiums. The notes given by the assured and his brother to the agent were not paid, and after their maturity and dishonor the assured died.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that what took place between the company and the agent was not equivalent to payment of the premiums, and that, there being no misapplication by the agent or misleading of the assured, his representatives could not recover.

Per OSLER, and MACLENNAN, JJ.A., that by discounting the notes the agent received payment of the premiums, as between himself and the company, and the subsequent non-payment of the notes was entirely a matter between the agent and the makers.

In the result the judgment of MEREDITH, C.J., in favor of the assured's representatives, was affirmed.

Robinson, Q.C., and *W. Nesbitt*, for the appellants.

Osler, Q.C., and *J. R. Roaf*, for the respondents.

From STREET, J.] [June 30.

NIAGARA DISTRICT FRUIT GROWERS' CO. *v.* WALKER.

Principal and surety—Guarantee bond—Non-disclosure.

An agent was engaged by the plaintiffs from year to year for four years to sell fruit on their behalf on commission, one of the terms of the engagement being that all moneys received by him on behalf of the plaintiffs should be paid in from day to day to their credit in a named bank. The agent made default in this respect, and a large balance was due by him to the plaintiffs at the end of each of the first three years, and the plaintiffs at the end of each year took his note for the amount due, payable in the next year. In each year he gave a bond to the plaintiffs to secure the faithful performance of his duties and the prompt payment of moneys received. The defendants were the sureties in the bond given in the fourth and previous years, and entered into the contract of suretyship without making any enquiries from the plaintiffs. This action was brought against them to recover the balance due.

Held, reversing the judgment of STREET, J., that the plaintiffs should have informed the sureties of the previous defaults, and not having done so could not enforce the bond.

Armour, Q.C., and *W. S. McBrayne*, for the appellants.

Moss, Q.C., and *G. W. Meyer*, for the respondents.

From ARMOUR, C.J.] [June 30.

GREEN *v.* MCLEOD.

Evidence—Corroboration—Executors and administrators—Action by administratrix.

The "material evidence" in corroboration, required by the Evidence Act, R.S.O., ch. 61, in an action by or against the heirs, executors, administrators, or assigns, of a deceased person, may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness' statement.

In an action by an administratrix to recover moneys alleged to have been received on behalf of the deceased, the defendant's statement that the moneys in question were paid in due course to the deceased, is sufficiently corroborated by showing that the deceased, a close, careful, intelligent man, who lived over a year after the transactions in question, and during that time saw and conversed with many persons, made no complaint of the non-receipt of the money.

Judgment of ARMOUR, C.J., affirmed.

Aylesworth, Q.C., and *Ball*, Q.C., for the appellant.

Osler, Q.C., and *W. T. McMullen*, for the respondent.

HIGH COURT OF JUSTICE.

BOYD, C., FERGUSON, J., ROBERTSON, J. [June 24.

BANK OF TORONTO *v.* KEILTY.

Summary judgment—Rule 739—Defence—Disclosure of facts—Appeal—Judge in Chambers—Divisional Court.

In answer to a motion by the plaintiffs for summary judgment under Rule 739, in an action upon a promissory note made by the defendant in favor of a trading company and indorsed by them to the plaintiffs, whose managers swore that they were the holders thereof in due course for value, the defendant made an affidavit in which he stated that he had never received any consideration for the note; that he made it for the accommodation of the company; that he had heard the local manager of the plaintiffs say that the note was not discounted by them, but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation one, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made; and that an accountant placed by the plaintiffs in charge of the books of the company was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the reasons or grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence in support of the defence attempted to be set up.

Held, that the defendant had not shown satisfactorily that he had a good defence on the merits, nor disclosed such facts as should be deemed sufficient to entitle him to defend.

An order of a Judge-in-Chambers made upon appeal from an order of the Master-in-Chambers, allowing summary judgment under Rule 739 to be entered, is an interlocutory order, but an appeal lies from it to a Divisional Court.

W. R. Riddell, for the plaintiffs.

F. Denton, for the defendant.

Toronto Jury Sittings, FALCONBRIDGE, J. [Sept. 7.

BEATTY *v.* GREGORY.

Mortgage—Covenant—Trustees of church—Personal liability.

Plaintiff conveyed lands to defendants as trustees of the Parkdale Baptist Church, and took a mortgage back from them to secure the purchase money, the mortgagors being, besides their individual descriptions, expressed to be "Trustees under R.S.O., 1887, ch. 237, of the Parkdale Baptist Church," which mortgage contained the usual covenants, and was executed by the defendants individually, with individual seals. There was no corporate seal.

Held, that the defendants were not personally liable.

The words "Trustees," etc., were meant to limit and qualify the character

in which they were to be held answerable, and sufficiently indicated that they did not mean to bind themselves personally. The plaintiff had his remedy against the church, which was a quasi-corporation by virtue of R.S.O., ch. 237.

J. B. Clarke, Q.C., and *Swabey*, for the plaintiff.

Moss, Q.C., and *Urquhart*, for the defendants.

MEREDITH, C.J., ROSE & MACMAHON, JJ. [Sept. 15.

MUNRO *v.* WALLER.

Lessor and lessee—Assignment without leave—Original lessee included in "any person"—R.S.O., ch. 106.

The words "any person or persons" in the long form of the covenant not to assign or sublet without leave in the Act respecting short forms of leases R.S.O., ch. 106, include the original lessee, and where an assignment from the original lessee has been made with consent of the landlord, a re-assignment to the original lessee without the consent is a breach of the covenant.

McCormick v. *Stowell*, 138 Mass. 431, not followed.

Varley v. *Coppard*, L. R. 7 C. P. 505, and *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461, referred to.

Judgment of STREET, J., affirmed.

Urquhart, for the appeal.

Chas. Miller, contra.

MEREDITH, C.J., ROSE, J.] [Sept. 15.

RE MAGANN & BONNER.

Overholding tenant—County judge—Order for possession—Wrongful holding—"Clearly appears"—R.S.O. ch. 144, sec. 2—58 Vict., ch. 13, s. 23 (O.), and 59 Vict., ch. 42, s. 4 (O.)

A County Judge should not act under the Act respecting Overholding Tenants, R.S.O. ch. 144, as amended by 58 Vict., ch. 13, sec. 23 (O.) and 59 Vict., ch. 42, sec. 4 (O.), by ordering the issue of a writ for possession unless it clearly appears that the tenant "wrongfully holds" against the right of the landlord, and that the case clearly comes ender the true intent and meaning of sec. 2 of the Act.

MacGregor, for the appeal.

Worrell, Q.C., contra.

DIVISION COURTS.

FOURTH DIVISION COURT, COUNTY OF KENT.

WOODS, J.J.]

MORRIS *v.* TOWN OF BLENHEIM.

Assessment—Fire tanks not waterworks.

Held, that tanks sunk in the ground and used by the defendant municipality with a fire engine for the purpose of fire protection, are not "water works" under the meaning of sec. 7 (a) of "The Consolidated Assessment Act, 1892," of Ontario, and the amendment of 1895 thereto.

F. Royden Morris, for plaintiff.

R. L. Gosnell, for defendants.

Province of Nova Scotia.

SUPREME COURT.

FULL COURT.] [July 27.

HARRIS *v.* MARSE.

County Court Acts, 1889, ch. 9, secs. 20, 34—Attachment against absent or absconding debtor—Claims exceeding in the aggregate the jurisdiction of the Court—Right to entertain—Effect upon attachment of amendment reducing claim.

By the Acts of 1889, ch. 9, sec. 20, (to amend and consolidate the Acts relating to County Courts) subject to certain exceptions in the preceding section, the jurisdiction of the Court is limited to cases where the debt, damage or relief sought does not exceed $400. But, by sec. 34, in case several claims in the aggregate exceed the jurisdiction, the competence of the Court to dispose of the whole matter in controversy is not affected if each of the several claims is within the jurisdiction.

Plaintiff issued a writ of summons and attachment in the Court against defendant as an absent or absconding debtor, including four separate and distinct causes of action, each of which was within the jurisdiction of the Court, but which aggregated on the whole $630.76.

On a motion to set aside the proceedings on the ground that the amount indorsed on the attachment was beyond the jurisdiction of the Court, plaintiff applied for an amendment striking out three of his causes of action and reducing his claim to $393.71. This was allowed and the motion to set aside the attachment refused.

On appeal,

Held, per RITCHIE, J., GRAHAM, E.J., and MEAGHER and HENRY, JJ., that the Judge had jurisdiction under sec. 34, to entertain the action, although the aggregate amount of the claims exceeded the sum of $400, that plaintiff's proceedings were therefore regular, and the application to set them aside properly refused.

Held, also, per RITCHIE, J., GRAHAM, E.J., and HENRY, J., that the attachment was not dissolved or vitiated by reason of the amendment decreasing the amount of the claim in the writ of summons.

Held, per MEAGHER, J., assuming that the several causes of action could not be enforced in the same suit, they stood in the same position as a good and bad cause of action and were severable, and at plaintiff's election the objection might be removed by amendment.

Held, also, that the writ of attachment could not be made available for any sum beyond that for which judgment could be recovered, but, as it formed part of the process of the Court, could have been amended by the judge, and that this amendment should now be allowed by the Court of Appeal.

W. B. A. Ritchie, Q.C., and *T. R. Robertson*, for plaintiff.

H. Mellish, for defendant.

Province of New Brunswick.

SUPREME COURT.

FULL COURT.] [Trinity Term.

BOGGS *v.* SCOTT.

Case tried without jury—Appeal—Onus of proof.

Though where a cause is tried without a jury it is the duty of the appellate Court on an application for a new trial to disregard the trial judge's finding, if the Court is of opinion that he was wrong, the onus of satisfying the Court that he was wrong and displacing the presumption that he was right, is upon the appellant.

Pugsley, Q.C., for plaintiff.

Carleton, for defendant.

FULL COURT.] [Trinity Term.

HENEY *v* PURTLE.

Conditional sale—Purchase by third party without notice.

The plaintiff, a carriage manufacturer, sold to C., a carriage builder, two wagons, and on the 24th April, 1893, drew at four months. Across the face of the draft at the end the following words were printed: "The express condition of the sale and purchase of the vehicles for which this draft is given is such that the title, ownership, or right of possession does not pass from the said H. (the plaintiff) until this draft and interest is paid in full." C. accepted the draft. It fell due on Aug. 27th, and was not paid. On September 16th following, C. sold one of the wagons to the defendant, who purchased for value and without notice. On November 30th the plaintiff commenced action against C. on the draft, and on January 10th, 1894, recovered judgment by default. This judgment was never satisfied. In March, 1894, the present action was commenced for conversion. At the trial no evidence was given that the sale to C. was upon the condition contained in the draft or that his attention was called to it.

Held, (1) That in the absence of such evidence, the onus of which was on the plaintiff, the plaintiff could not recover.

(2) That if the sale was a conditional one, it was made absolute by the judgment on the draft.

A. A. Stockton, Q.C., for the appellant.

White, Q.C., Solicitor-General, for the respondent.

Province of Manitoba.

SUPREME COURT.

TAYLOR, C.J.] [October 1.

FAIRCHILD *v.* CRAWFORD.

Practice—Execution—Loss of writ.

In this case the writ of execution against goods which had been issued in 1892 and regularly renewed, was lost in transmission to the sheriff after the last renewal, and the plaintiff's attorney applied for the issue of a concurrent writ of execution to replace the lost writ.

The Chief Justice, following *White* v. *Lovejoy*, 3 Johns. 448, and *Douw* v. *Burt*, 1 Wend. 89, there being no English authorities strictly in point, made an order for the issue of a new writ, nunc pro tunc, to bear the same endorsements and evidence of renewal, marked by the proper officer, as the original which had been lost; also that the writ now issued should have the same force and effect as the original writ.

Haney, for plaintiff.

Province of British Columbia.

SUPREME COURT.

BURRARD ELECTION PETITION.

MAXWELL *v.* COWAN.

Dominion election petition—Extending time for filing preliminary objections. —Practice.

In this case the sitting member presented a cross petition against the defeated candidate, seeking to disqualify him on certain grounds mentioned in the petition. The latter was absent when served with the petition, and his agents desiring instructions and certain information, before filing preliminary objections, which they had not been able to obtain in time to comply with sec. 12, applied for further time for filing preliminary objections.

Held 1. That sufficient cause was shown to extend the period of five days within which preliminary objections had to be presented under sec. 12 of the Controverted Elections Act.

2. That the time could be extended after the five days had elapsed.

[VICTORIA, Davie, C.J.

This was an application to extend the time for filing preliminary objections to the cross petition of the sitting member, made after the expiration of the five days within which such objections should be filed under R.S.C. ch. 9, sec. 12.

Aikman, for the application.

Duff and *Macdonell*, contra.

DAVIE, C.J.:—In this case the sitting member, Mr. Maxwell, has presented a petition against Mr. Cowan, the defeated candidate, seeking to disqualify him on certain grounds mentioned in the petition. Mr. Cowan was

absent when served with the petition, and his agents desired instructions and certain information before filing preliminary objections, which they had not been able to obtain in time to comply with sec. 12.

Under these circumstances there seems sufficient cause to extend the period of five days within which preliminary objections have to be presented under sec. 12 of the Controverted Elections Act.

But the question now arises whether the time can be extended after the five days have elapsed. By sec. 64 the court or a judge shall, upon sufficient cause being shown, have power, on the application of any of the parties, to extend from time to time the period limited by the Act for taking any steps or proceedings by such party, but there is no provision that the time may be extended after it has elapsed, and it has been argued against this application that the Court is now without jurisdiction to make the order, as the power to make such an order expired with the five days limited by the Act.

Sec. 124 of the Companies' Act, 1862, gives a power of appeal within the period of three weeks, and says that such period shall not be exceeded unless the Court of Appeals shall extend the time. But in *Banner* v. *Johnston*, L. R. 5 H. L. 157, it was held that the power to extend the time for appealing might be exercised after the three weeks time had elapsed, and in that case the Lord Chancellor says (page 170): "It appears to me that it would be a narrow construction of the Act . . . . and one likewise which it would be impossible to hold in itself a sound construction of the Act, to say that the word 'extend' must be taken to mean that the application must be made before the original time has elapsed, because the time having elapsed, there is nothing remaining to extend."

In *Wheeler* v. *Gibbs*, 3 S.C.R., 374 the same rule was followed. That was an election case where the appellant had not within the three days limited by the 48th section of the Supreme and Exchequer Court Act, given notice of setting down the appeal, and for want of such notice the Supreme Court, when the case came before them, struck the appeal out of the list of appeals. The section there in question enacted that the party appealing should within three days after the appeal was set down, "or within such further time as the judge who tried the petition may allow," give the notice referred to. After the Supreme Court, for want of the notice, had struck the appeal out, and of course long after the three days had elapsed, the judge who had tried the petition made an order extending the three days for giving the notice, and the notice being given and the case set down afresh before the Supreme Court and argued before all the judges, the Court (Taschereau, J., dissenting) upheld the appeal, and the power of the judge below, to extend the time after it had elapsed; Ritchie, C.J., remarking that "The statute not having limited the authority of the judge, his power of extending the time is a general power, to be exercised according to sound discretion, and that so long as there has been no final disposition of the case, whenever that discretion is invoked, the judge has power to extend the time."

These decisions would appear to settle the construction to be placed on secs. 12 and 64 of the Act; but it is necessary to refer to the *Glengarry Election Case*, 14 S.C.R. 484, to which my attention was called by Mr. Duff. In that

case it was held that the time within which the trial of an election petition must be commenced, cannot be extended beyond the six months limited by section 32 of the Act, unless upon application made within the six months.

At first sight this decision might appear to be in conflict with *Wheeler* v. *Gibbs* and *Banner* v. *Johnston*, but Mr. Justice Taschereau, in the *Glengarry* case, points out an obvious distinction. He rested his decision in the latter case upon reasons of public policy, pointed at by the Legislature in limiting the time during which an election petition could be allowed to remain pending, and if I may be permitted to say so, very reasonably considered that the Legislature never could have intended, and in fact that it would be against public policy that an election petition should be permitted to hang for a year, or two, or three, after its presentation or, for that matter, until the expiration of Parliament; that six months was to be the ordinary limit, and whilst for good reasons the Court might during such six months give a reasonable extension of time, yet after the six months, if nothing was done, the petition was dead: *Whistler* v. *Hancock*, L. R. 3 Q.B.D. 83; *Wallis* v. *Hepburn*, ib. p. 84; and there was no power in the Court to revive it, the learned Judge's words being, "The Legislature intended that the state of excitement, agitation and uncertainty in which the controverted election necessarily placed the constituency should not be unduly prolonged." His Lordship held that the general power of extension given by sec. 64 did not apply to sec. 32, which latter section was governed solely by sec. 33, a proper construction of which precluded an application to extend the time, after such time had expired.

But, as pointed out by his lordship, the considerations which governed him in the *Glengarry* case did not arise in *Banner* v. *Johnston*, or *Wheeler* v. *Gibbs*, which were decisions "where the clause under consideration stood in the Act by itself, and unconnected with any other clauses of the Act." In other words, the clause in question in those cases related to mere matters of procedure unconnected with the general policy of the law itself, and in mere matters of procedure, as pointed out in *Banner* v. *Johnston* (page 170), "the Court has all its own orders and rules under its own control."

Similarly, I think that under sec. 12, whether the respondent is to have five or twenty-five days in which to file his preliminary objections is a mere matter of procedure, wholly unconnected with the general policy of the law or any of the other provisions of the Act, and hence comes under the unrestricted power of sec. 64, which allows an extension at all times, provided, I think, in view of the *Glengarry* case, it be not such a delay as would prevent the trial commencing within the six months.

It is true that Mr. Justice Taschereau, at pages 483 and 484 of the *Glengarry* case, remarks upon sec. 12 that "unless he is mistaken it has never been contended that preliminary objections to a petition could be presented after the five days." Possibly not at that time (1888), but here in British Columbia, eight years later, the contention is distinctly urged that the time for presenting such preliminary objections can be extended both before and after such five days, and I am of opinion, for the reasons above given, the contention is well founded.

I therefore order that the time for the respondent to present his preliminary objections to the petition filed against him be extended beyond the period of five days fixed by sec. 12 of the Act, and that he be allowed until Monday, the 21st September, inclusive, to present such preliminary objections. The costs will be costs in the cause.

BOLE, Loc. J.] [September 29.

GOLDEN GATE MINING CO. *v.* GRANITE CREEK MINING CO.

Attachment—Service of notice of motion.

An application was made herein for leave to issue a writ of attachment against the manager of the defendant company, for disobeying an order of Court. On the 8th day of June, 1896, an injunction order was obtained ex parte restraining the defendants, their servants and agents, etc., from committing certain trespasses upon the plaintiffs' mining claim. The defendants moved to dissolve this order, and upon the motion coming on to be heard before Mr. Justice McCreight, the injunction was, with some variations, continued by consent. Subsequent to the amended order, the acts complained of were done.

Held, that service of the notice of motion for writ of attachment need not be personal, but may be made on the solicitor, and that the order need not have the endorsement required under Order 41, Rule 4.

McDonell, for plaintiff.

Senkler, for defendant.

North-West Territories.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

SCOTT, J.] [August 19.

PATTON *v.* ALBERTA RAILWAY & COAL CO.

Notice of appeal—Staying execution—Costs.

Plaintiff had recovered a verdict and judgment against the defendants, and the defendants had served notice of motion to the Court en banc for a rule to show cause why the verdict should not be set aside, and for a non-suit or for judgment for the defendants, or a new trial.

This was an application by the defendants for a stay of execution pending the appeal to the Court en banc, on the grounds that irreparable loss would otherwise result to the defendants, and that the plaintiff was a person of little or no means, and would be unable to repay the amount levied under execution in case the defendants were successful in their appeal.

It was contended by the plaintiff that no notice of motion for a new trial or notice of appeal had been given as required by sec. 512 Jud. Ord., and that in consequence there was no jurisdiction to hear the application.

Held, that the notice given was sufficient to give jurisdiction to hear the application.

It was further contended that no sufficient grounds were disclosed to entitle defendants to a stay of execution, that in any event they were not entitled to a stay of execution for the costs of the trial.

Held, following the suggestion of Brett, M.R., in *Barker* v. *Lavery*, 54 L. J. Q.B. 241, that the fact that a respondent would be unable to repay the amount levied under execution in case the appeal was successful, was a sufficient ground to entitle an appellant to a stay of execution for the amount of the verdict, on giving security for the same, but,

Held, also, following *Merry* v. *Nickalls*, 8 Chy. 205 ; *Morgan* v. *Elford*, 4 Chy. D., p. 388, and *Attorney-General* v. *Emerson*, 24 Q.B.D. 56, that execution for the costs should not be stayed if the Advocate give his undertaking to repay them in case the appellants eventually succeed in the action.

Held, following *Merry* v. *Nickalls*, and *Cooper* v. *Cooper*, 45 L. J. Chy. 667, that the costs of the application should be paid by the defendants to the plaintiff forthwith after taxation.

W. A. Galliher, for the defendants.

C. C. McCaul, Q.C., for the plaintiff.

APPOINTMENT OF QUEEN'S COUNSEL.

As a matter of record we publish the report to Council made by Hon. Oliver Mowat, Minister of Justice, in reference to the wholesale list of the late Government which the Governor-General refused to sanction. This report which has been approved by his Excellency, has also commended itself to the profession as a whole in the various provinces. It reads as follows :

"The undersigned has had under consideration an order in Council dated the 8th July, appointing 173 members of the Bar of Canada Queen's Counsel. These are in addition to 481 appointed since Confederation, of which number 84 were appointed between July, 1867, and November 5th, 1873, and 397 after the 16th of October, 1878. No appointments were made during Mr. Mackenzie's administration. Thus the number appointed previously to the recent order had been enormous, and the addition to it now of 173 more is startling. In England it appears from the law list of 1895 that the total number of Queen's Counsel there at the time of making up the list was only 217, and it appears that the total number appointed for twenty-two years, up to 1895, inclusive, was only 254, while the number of barristers in England exceeds by several times the number in Canada. No commission has yet issued under the recent order, and the undersigned is of opinion that the order should not be acted upon and should be rescinded on account of the excessive number of names, and for additional reasons which he will now mention."

[The report then speaks of the doubt existing as to the respective rights and powers of the Dominion and Provincial Governments as to these appointments, and then states the intention to employ counsel forthwith to argue the case for the Dominion, which was refused by the late Government, and so obtain an authoritative adjudication upon the subject of jurdisdiction.]

"The undersigned respectfully submits that no appointment should be

made until a final decision is obtained on this point. The undersigned is informed that the publication of the names contained in the recent order has created a sensation among members of the profession and others, that the list has been very generally disapproved of, and that the disapproval is shared by some who are named on the list, as well as by gentlemen previously holding the rank of Queen's Counsel and by others. An examination of the list shows that the selection of the names was not made on the basis of professional or personal merit. On the contrary there are names in the list of gentlemen in regard to whom there could be no pretence or supposition of their having any claims on that ground, and on the other hand many gentlemen have been omitted from the list whose professional merits exceed that of many of those named. Queen's Counsel have precedence in the courts over other barristers, and obviously there is great injustice in the bestowal of the honor and precedence upon inferior barristers to the prejudice of those better entitled thereto. Such a wholesale and indiscriminate selection as was recommended to your Excellency is a degradation of the office, and is a grievance as regards the bar generally, instead of being a merited honor to those appointed. The existence of the degree is useful if the jurisdiction to make the appointments is reasonably exercised. In England the appointments are made by the Lord Chancellor, and it is stated in a recent legal publication, that an applicant for the appointment has to communicate by letter to barristers of longer standing than himself (not being Queen's Counsel) his intention to apply, and that before making any appointment the Lord Chancellor submits to the judges the names of the applicants whom he thinks of appointing. If in this country the power of appointing belongs exclusively to your Excellency-in-Council, it will be well to consider hereafter whether some checks may not and should not be devised to confine within proper bounds the recommendations made to the Governor-General. Meanwhile the undersigned respectfully recommends that as a matter of justice to the profession and in the interests of the public, the order which has been made be rescinded, and the consideration of any appointment be deferred until the jurisdiction to make such appointments shall be judicially decided and declared.

O. MOWAT."

FLOTSAM AND JETSAM

It appears from an address delivered at the meeting of the Illinois State Bar Association that there is such a delay in the trial of cases in the Chicago courts as to amount in most cases to an absolute denial of justice. The average of the docket is that cases must stand for two years before they are tried, and this does not include cases which have been ordered to stand over or been postponed for any reason, but have been tried, reached on the calendar. The evils resulting from such a state of things can easily be imagined.

AMERICAN PATRIOTISM.—At the recent annual convention of the Commercial Law League of America, held in Omaha, a vote of thanks was moved for the "royal hospitality" with which the delegates had been received by the citizens of that city, but the chairman had his feelings so jarred by the word "royal" that the objectionable word was struck out, and the word "American" substituted. We quote from the report of the proceedings:

The Chairman (Mr. Florance): I would like to ask Mr. Hamilton, if he has no objection, to change one word which always jars upon me. I prefer "American hospitality" to "royal hospitality."

Mr. Hamilton: I will accept any amendment which makes it more American. What I mean is that we have had a bang-up good time. (Applause and laughter.)

The Chairman: When I suggested the word "American" I used it as synonymous with a bang-up good time. (Laughter.)

The motion of Mr. Hamilton was then carried by a rising vote.

SUNDAY OBSERVANCE.—The question as to the constitutionality of Acts prohibiting barbering on Sunday has recently come before three Courts with different results. The Supreme Court of Missouri, in the case of *State* v. *Granneman*, held invalid an Act making it a misdemeanor for any person to carry on the business of barbering on Sunday, upon the ground that it is in derogation of the constitution prohibiting the passage of local or special laws. The Court, while conceding the power of the legislature to pass a general law, compelling the observance of Sunday as a day of rest, applicable alike to all classes and kinds of labor, denied such power as to one particular kind of labor, holding it to be special legislation prohibited by the organic law. So, also, the Supreme Court of Illinois, in the later case of *Eden* v. *The People*, declared the act of the legislature which provides that it should be unlawful for any one to keep open any barber shop, or carry on the business of shaving, haircutting, or any kind of tonsorial work on Sunday, to be unconstitutional, upon much the same ground as the Missouri Court, viz., that the Act in question was not binding upon all the members of the community. "The Act," says the Court, "affects one class of laborers and one class only. The merchant and his clerks, the restaurant with its employees, the clothing house, the blacksmith, the livery stable, the street car lines, and the people engaged in every other branch of business, are each and all allowed to open their respective places of business on Sunday and transact their ordinary business if they desire, but the barber and he alone is requested to close his place of business. The barber is thus deprived of property without due process of law in direct violation of the constitution of the United States and of this State. Moreover, if the merchant, the butcher, the druggist, and other trades and callings are allowed to open their places of business and carry on their respective avocations seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering may not do the same thing? Why should a discrimination be made against that calling and that alone?"—*Central Law Journal.*