Canada Law Journal.

VOL. XXXVIII. JULY, 1902. NOS. 13 AND 14.

It is semi-officially announced that the revision of the Dominion Statutes is about to be proceeded with, and that the following commissioners have been appointed, viz.:—Sir Henry Strong, who retires from the Supreme Court to become chairman of the Commission; Mr. E. L. Newcombe, the Deputy Minister of Justice; Mr. Augustus Power, the chief clerk of the Department of Justice; and Mr. E. R. Cameron, the Registrar of the Supreme Court. We understand that others are to be added. The matter is so important that we trust the very best men will be selected. In this connection the names of the Law Clerks of the two Houses, Mr. Creighton and Mr. McCord, naturally suggest themselves as eminently suitable inasmuch as their duties necessarily give them special knowledge of statute law and the drafting of statutes. It is now sixteen years since the Statutes of Canada were revised and consolidated, and it will be two more years before the present revision can be completed. Since 1886 an immense amount of statutory law has accumulated making it very difficult for a lawyer, to say nothing of a layman, to ascertain what the existing law is.

BASE-BALL AND THE BENCH.

The Supreme Court of Pennsylvania, notwithstanding the backwardness of the season, was able to supply us with long vacation literature in advance. On the 21st of April, in the case of the *Philadelphia Ball Club* v. *Lajoie*, it not only enlarged the application of the rule as to injunctions to restrain breaches of contracts for personal services by holding that those of a base-ball player may be "of such a unique character, and display such a special knowledge, skill and ability as render them of peculiar value to employer, and difficult of substitution," thus justifying the intervention of equity; but it also indulges in a panegyric upon the excellent professional status of the player defendant in the case. After commenting upon the kudos accorded to the defendant in the judgment of the court of first instance, it proceeds: "We think that, in thus stating it, he [the trial judge] puts it very

mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. He has been for several years in the service of the plaintiff club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club, and his own work is peculiarly meritorious as an integral part of the team work (sic), *which is so essential*(!) In addition to these features which render his services of peculiar and special value to the plaintiff, and not easily replaced, Lajoie is well known and has great reputation among the patrons of the sport for ability, and was thus a most attractive drawing card for the public. He may not be the sun in the base-ball firmament, but he is certainly a bright particular star." Surely this is a voice from "the bleachers,"—a voice that is most clamorous when the dog-star rages, and intellectual brilliancy pales its insignificant fires before the dazzling lustre of the "diamond!"

When one's nerves recover from the shock of perusing this naive bit of forensic literature it is well to note that in the *American Base-ball and Athletic Exhibition Co.* v. *Harper*, the Circuit Court of St. Louis, in May last, refused an application for an injunction in a precisely similar case, and expressly disagreed with the opinion expressed by the Supreme Court of Pennsylvania in the *Lajoie case*. Moreover, it is to be observed that the English courts have very jealously guarded the extension of the doctrine of *Lumley* v. *Wagner* as to restraining breaches of negative stipulations in contracts for personal services.

A CHAPTER ON "SCISSORS."

When a solicitor is called on to advise a client, as to recovering a claim such as was in question in *McCormick Harvesting Machine Co.* v. *Warnica*, 3 O.L.R. 427, he will have to say to his client something to the following effect:—"This will prove a very costly affair if you wish to recover the claim by process of law, and will probably in the end involve you in more costs than the whole amount at stake, because, according to the decisions of the High Court of Justice, the claim is not within the jurisdiction of the Division Court and must be sued in the County Court as you may see from

the case of *Kreutziger* v. *Brox*, 32 Ont. R. 418; *Knisey* v. *Roche*, 8 P.R. 515, which is the view also adopted by the Court of Appeal in *McDermid* v. *McDermid*, 15 App. R. 287. If I were to enter a suit for you in the Division Court the defendant would apply to any one of the judges of the Chancery Division who would probably grant a prohibition against proceeding with the suit in that court. On the other hand if you brought a suit in the County Court you could only obtain Division Court costs, and besides you would have to pay the defendant's extra costs on the County Court scale. And if the County Court judge were to give you County Court costs the defendant would only have to appeal to the High Court of Justice and get his appeal heard before the King's Bench Division judges and they would reverse the decision: *McCormick Harvesting Machine Co.* v. *Warnica*, 3 O.L.R. 427. In short one part of the High Court of Justice says the law is one way and the other part of it says it is the other way. You may therefore be said to be 'between the devil and the deep sea.' Whichever course you may take one part of the High Court will be sure to tell you you are wrong and make you pay a lot of costs as a penalty."

The bewildered client may also be told something further: "It is true the Judicature Act, s. 81, was intended to prevent this judicial conflict of opinion in the same Court, but where one branch of the Court has laid down the law in one way, it is obviously more important that their particular opinion should be reiterated rather than that the question should be referred, as the statute contemplates, to a higher tribunal. It is somewhat like the case of the lady who determined to have the last word, and who, as she sank beneath the waves, still held up her hand and worked her fingers to indicate by dumb show the word 'scissors.' This condition of things is, you will readily see, very edifying and instructive to the public, and gives a high opinion of law and judges. It is, however, costly, and on the whole I would advise you to present the defendant with the amount of his indebtedness rather than attempt to recover it by process of law."

The Australian correspondent of The English *Law Times* announces that the days of chivalry are over in that Commonwealth. This he concludes from the fact that a young gentleman

recently recovered against a girl who had jilted him $750 for damages for breach of promise of marriage, and this by the verdict of a jury of his countrymen in Sidney. It is obvious that it is dangerous for girls to trifle with the feelings of the supposed sterner sex. A new era has evidently dawned, and men are at last going to get their "rights."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

SOLICITOR RETAINED BY CORPORATION — SEALING OF RETAINER AFTER PERFORMANCE OF WORK.

In *Brooks* v. *Torquay* (1902) 1 K.B. 601, a municipal corporation by resolution not under seal retained the plaintiffs, a firm of solicitors, to represent them in proceedings which were being taken having for their object the inclusion of their district in adjoining municipalities. After the work was done the resolution was sealed with the corporate seal and a copy delivered to the plaintiffs. The proceedings resulted in the district being included in the adjoining municipalities, and the corporation dissolved, under a confirmatory statute the debts and liabilities of the dissolved corporation were to be assumed and paid by the defendants, and the question was whether the claim of the plaintiffs was a debt of the dissolved corporation. Walton, J., held that it was, and that the sealing of the retainer though after the performance of the work created an obligation binding on the corporation, and that no new consideration was necessary to render it obligatory.

PRACTICE—ACTION—TORT—CONTRACT — AGREEMENT FOR LEASE — REMOVAL OF FIXTURES BY LANDLORD AFTER AGREEMENT TO LEASE.

Sachs v. *Henderson* (1902) 1 K.B. 612, was an action brought by the plaintiff against the defendant to recover damages for the removal of fixtures from certain premises which the defendant had

agreed to lease to the plaintiff, the removal having taken place without the plaintiff's knowledge after the agreement, and before he was put into possession. The plaintiff recovered £20 damages and in order to determine the scale of costs to which the plaintiff was entitled, it was necessary to determine whether the plaintiff's action was founded on contract or tort. The Court of Appeal (Collins, M.R. and Romer, L.J.) held that the action was founded on tort. Collins, M.R., admits that it is difficult to say whether a particular thing is a wrong or a breach of contract and that the distinction between tort and contract is not a logical one, but he is clear that a breach of duty arising out of a contract may be a wrong. The following is the distinction he draws between contract and tort. "If the claim of the plaintiff had been set out at large pointing to some particular stipulation in the contract, which stipulation had been broken, the action would be founded on contract, but where it is only necessary to refer to the contract to establish a relationship between the parties and the claim goes on to aver a breach of duty arising out of that relationship the action is one of tort."

NEGLIGENCE — INTERVENING ACT OF THIRD PARTY—EFFECTIVE CAUSE OF DAMAGE.

McDowall v. *Great Western Ry. Co.* (1902) 1 K.B. 618, was an action to recover damages occasioned by a vehicle being negligently allowed to run down an incline across a highway upon which the plaintiff was lawfully passing. The facts were that the defendants' servants shunted some cars on to a siding which was on the incline. The siding had a catch-point which would prevent the cars if set loose from running down the incline, but for the convenience of their shunting operations they did not place the cars beyond the catch-point, but screwed down the brakes and left them in a position where they would not have caused damage if not interfered with. Some boys trespassing on the siding released the brakes of the car which caused the injury. The defendants were aware that boys were in the habit of trespassing on the siding and meddling with the cars placed upon it, and took no steps to prevent their so doing. Under these circumstances Kennedy, J., held that the defendants were liable to the plaintiff in damages for the injury sustained by him.

PRACTICE—COSTS—POWER TO ORDER SUCCESSFUL PARTY TO PAY COSTS.

Andrew v. *Grove* (1902) 1 K.B. 625, was an appeal on the question of costs. The action was commenced in the High Court and remitted to a County Court for trial. The judge of the County Court dismissed the action, but did not believe the defendant's evidence and thought he had perpetrated a swindle and ordered him to pay the plaintiff's costs of the action. The Act (51 & 52 Vict., c. 43, s. 113) which related to the judge's discretion as to costs is as follows: "All the costs of any action or matter in the Court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter." Lord Alverstone, C.J., and Darling and Channell, JJ., were of opinion that the Act gave no power to order a successful defendant to pay costs, except such costs as might be caused by the defendant's misconduct in the action, and that an appeal from such a disposition of costs is an appeal on the merits. The same principle would seem to be applicable in the exercise of the discretion conferred by Ont. Rule 1130.

PRACTICE—COSTS—APPEAL—OFFICIAL REFEREE—DISCRETION AS TO COSTS—LEAVE TO APPEAL—JUD. ACT S. 49—(ONT. JUD. ACT S. 72)—ORDER XXXVI. R. 55b—ORDER LXV. R. 1—(ONT. RULES 648, 1130).

In *Minister* v. *Apperly* (1902) 1 K.B. 643, a Divisional Court (Lord Alverstone, C.J. and Darling and Channell, JJ.,) has decided that where a case is referred to an official referee for trial without any direction as to the costs they are in his discretion, and under the Jud. Act s. 49, (Ont. Jud. Act s. 72), no appeal will lie from his disposition thereof without his leave.

CRIMINAL LAW—OFFENCE—BREACH OF ACT PROHIBITING BUILDING BEYOND A CERTAIN LINE—CHANGE OF OWNERSHIP—CONTINUANCE OF BUILDING AFTER NOTICE.

Blackpool v. *Johnson* (1902) 1 K.B. 646, was a case stated by justices. The defendants were charged with having committed a breach of an Act of Parliament prohibiting the erection of a house beyond the main wall of the house on either side of it without the consent of the municipality; and the Act provided that "Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice" from the municipal authorities.

The house in question had been erected by a builder in contravention of the Act, and was subsequently purchased by the defendant who was served with written notice that it was erected contrary to the Act, but the defendant maintained the house in the same condition as it was when he bought it. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) held this to be no offence under the Act, and is an instance of the strictness with which Acts creating penal offences are construed.

STATUTE—CONSTRUCTION—BREAD, SALE OF, BY WEIGHT.

Cox v. *Bleines* (1902) 1 K.B. 670, may be briefly noticed. By a statute bakers in the City of London are required to sell all bread by weight and any baker selling bread otherwise than by weight is liable to a penalty. The defendant was asked by a purchaser for a half-quartern loaf, and he served him with a loaf and two rolls for which he charged 2d. The loaf and rolls were in the purchaser's presence placed in scales on which was already a 2lb. weight. The beam of the scales did not move, and the weight of the bread was not ascertained. On being taken away and weighed it was found 5ozs. short of 2lbs. On a case stated by justices, a Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ., held that the defendant had been guilty of an offence against the Act, that a sale by weight means a sale by the true weight of the bread sold, and not merely putting it in the scales.

ACTION ON JUDGMENT—LIMITATIONS, STATUTE OF—PART PAYMENT.

Taylor v. *Hollard* (1902) 1 K.B. 676, was an action on a judgment recovered by the plaintiff in England against the defendant in 1884. After the recovery of the judgment, which was for £15,000, an action was brought upon it in the late South African Republic of the Transvaal and the South African Court retried the case on its merits and gave judgment for about £9,600, which was recovered from the defendant under execution, and the present action was brought to recover the balance of the original judgment. The action was barred by the Statutes of Limitations unless the payment recovered under the South African judgment could be deemed a part payment of the original judgment. Jelf, J., who tried the action, held that the payment made under the South African judgment was a payment of that judgment and not a payment on account of the original judgment and that no

promise to pay the balance of the original judgment could be inferred from that payment. He was also of opinion that the plaintiff had elected to take the South African judgment as a satisfaction of the original judgment, and had thereby lost the right to sue for the balance of it.

INNKEEPER—OBLIGATION TO LODGE TRAVELLER - SHELTER AND ACCOMMODATION FOR THE NIGHT—DEMAND OF TRAVELLER TO PASS NIGHT IN PUBLIC ROOM OF INN.

Browne v. *Brandt* (1902) 1 K.B. 696, was an action brought to test the question whether an innkeeper whose bedrooms were all occupied, was under any obligation to receive and accommodate travellers, who requested to be allowed to pass the night in the coffee-room. A County Court judge held the defendant was under no such obligation, and a Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) affirmed his decision.

LANDLORD AND TENANT—LEASE—COVENANT TO PAY—"IMPOSITIONS CHARGED OR IMPOSED IN RESPECT OF THE PREMISES"—ORDER FROM SANITARY AUTHORITY TO ABATE NUISANCE.

Foulger v. *Arding* (1902) 1 K.B. 700, was an action by a lessor against his lessee on a covenant in the lease whereby the lessee covenanted to pay and discharge "All impositions charged or imposed upon or in respect of the premises" during the term. The lessor had been served by the sanitary authority with notice to abate a nuisance on the premises caused by a privy by removing it and erecting a water closet in accordance with the by-laws. The lessor performed the work and now sued the lessee to recover the cost of so doing. The Divisional Court held that the lessee was not liable (1901) 2 K.B. 151, (noted ante vol. 37, p. 683), but the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) unanimously reversed the decision, although admitting that the authorities on the point are in an unsatisfactory condition, as manifested by the two cases of *Tidswell* v. *Whitworth*, L.R. 2 C.P. 326, and *Thompson* v *Lapworth*, L.R. 3 C.P. 149, which represent two divergent streams of authorities on the subject.

BANKRUPTCY—CHOSE IN ACTION—MORTGAGE—PRIORITIES.

In re Wallis (1902) 1 K.B. 719, although a bankruptcy case, deserves a passing notice: A bankrupt prior to his bankruptcy, had made a good equitable mortgage of a chose in action but the

mortgagee had neglected to give notice to the debtor, and it was held by Wright, J., that the trustee in bankruptcy could not by first giving notice of the receiving order acquire priority over the equitable mortgage because the trustee takes the interest of the bankrupt subject to all equities subsisting against him. The same doctrine would apply to an assignee for creditors under R.S.O. c. 147.

MASTER AND SERVANT—COACHMAN—FORAGE SUPPLIED BY DIRECTION OF COACHMAN—MASTER, LIABILITY OF, FOR DEBT CONTRACTED BY SERVANT.

In *Wright* v. *Glyn* (1902) 1 K.B. 745, the defendant had employed a coachman upon the terms that he should at his own expense supply the necessary forage required for the defendant's horses. The coachman ordered forage of the plaintiff 's testator, who without any communication with the defendant furnished it as required from time to time, and it was consumed by the defendant's horses. The coachman was duly paid the amount agreed on, but having neglected to pay for the forage so ordered, his master the defendant was sued therefor. Grantham, J., who tried the action, held that he was liable and gave judgment for the plaintiff, but the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) reversed his decision, holding that a coachman has no implied authority to pledge his master's credit.

WILL—CONSTRUCTION—"REST OF MY MONEY."

In the goods of Bramley (1902) P. 106, it became necessary for the purpose of determining who was entitled to a grant of administration with the will annexed to place a construction on the will. The testator, whose estate consisted of about £1000 of money and £152 of insurance, clothing, and other personal effects, by his will left a specific legacy of £100 to his brother, and gave "the rest of my money" to six persons named. No executor being named the six persons agreed that one of their number should take a grant of adminstration. The application was opposed by those interested in an intestacy, but Jeune, P.P.D., held that the words "rest of my money" included all the residue of the estate, and made the grant as asked.

VENDOR AND PURCHASER—ALTERATION IN DEED IN CHAIN OF TITLE—MISDESCRIPTION OF ONE OF GRANTEES.

In re Howgate & Osborn (1902) 1 Ch. 451, was an application under the Vendors and Purchasers Act. The abstract of title delivered to the purchaser commenced with a mortgage to three persons of whom the third was described as "William" G. It appeared from the original deed that the name William had been erased and the names "Edward Thomas G." substituted after execution, but it was not known by whom the alteration had been made. It was proved that the person described as "William G." was really intended to be Edward Thomas G. and that the mistake was due to inadvertence. The purchaser contended that this was a material alteration which rendered the deed void. Kekewich, J., however decided that the alteration was immaterial, on the ground that the deed took effect from the moment of its execution and that the deed was then a conveyance to two persons and a non-existent person, or it was a deed to two persons and a person who was misdescribed. He thought the latter was the case and that the misdescription was made out and that the deed had therefore always been a deed to the two persons and Edward Thomas G., and that notwithstanding the physical alteration in the deed that was still its effect. That in one sense there was an alteration, but in another there was none.

WILL—CONSTRUCTION—"NEXT OF KIN" OF DOMICILED FOREIGNER—HALF BLOOD—FOREIGN LAW.

In re Fergusson's Will (1902) 1 Ch. 483, is a case of construction of a will. The testator a domiciled Englishman bequeathed a legacy to a German domiciled in Germany with a direction that in the event of the death of the legatee in the testator's lifetime, which event happened, the legacy was not to lapse but to be divided amongst the "next of kin" of the legatee. According to the law of Germany a nephew or niece is entitled to the exclusion of brothers and sisters of the half blood, and the question was whether the English or German law was to govern the construction of the words "next of kin." Byrne, J., held that the English law governed and that a sister of the half blood was therefore entitled, to the exclusion of nephews and nieces.

FUND IN COURT BELONGING TO FRENCH SUBJECT—CONFLICT OF LAWS—FRENCH LAWS RESTRICTING PRODIGALS DEALING WITH THEIR PROPERTY—"PRODIGAL"—"CONSEIL JUDICAIRE"—STATUS—PAYMENT OUT—CODE NAPOLEON S. 513.

In re Selot (1902) 1 Ch. 488. In this case a Frenchman entitled to a fund in court applied for payment out, the application was opposed by his "conseil judicaire" appointed under the law of France to restrain the disposition of his property without their consent, the applicant having, under the Code Napoleon, been declared to be a "prodigal" and restrained by a court of competent jurisdiction from receiving, alienating, or disposing of his property without the consent of his conseil judicaire. Farwell, J, decided that the applicant was entitled to have the fund paid out to him notwithstanding the opposition of his conseil judicaire, he being of opinion that the effect of the order of the French court was not to change the status of the applicant but merely to affect and modify it, and that he had no discretion to refuse to pay out money in court to which an applicant sui juris is entitled.

BILL OF EXCHANGE — NOTICE OF DISHONOUR — SAME PERSON ACTING AS SECRETARY TO HOLDER AND DRAWER OF BILL—PRESUMPTION OF NOTICE.

In re Fenwick (1902) 1 Ch. 507, was a proceeding in a winding up matter. The facts are briefly as follows, there were three companies A., B. and C. having business relations with each other. The A. Co. had a claim against the C. Co. which it threatened to enforce, whereupon it was agreed that the B. Co. should purchase from the A. Co. a bill of exchange drawn by them on the C. Co. for the amount of the claim payable seven days after sight. The bill was accordingly drawn, accepted by the C. Co. and purchased by the B. Co. One Higgins was the secretary of all three companies. He knew as secretary of B. Co. that the bill was dishonoured, but he said that it was in contemplation of all parties that the A. Co. was not to be liable on the bill, and he never actually notified the A. Co. the drawers, of the non-payment. The A. Co. having gone into liquidation the B. Co. claimed to prove as creditors for a balance remaining due on the bill, which claim was resisted by the liquidator of the A. Co. on the ground of want of notice to the A. Co. of dishonour, and the question was whether the notice to Higgins was under the circumstances notice to the A. Co. Buckley, J., held that it was not, because Higgins knew

th .act of dishonour under circumstances which did not make it .s duty to communicate the fact to the A. Co.

STATUTE OF LIMITATIONS—ACTION TO RECOVER LAND—MARRIED WOMAN—CLAIM BY HUSBAND IN RIGHT OF WIFE—PERSON UNDER DISABILITY—REAL PROPERTY LIMITATION ACT (37 & 38 VICT., C. 57), S. 5—(R.S.O. C. 133, S. 43).

Hounsell v. *Dunning* (1902) 1 Ch. 512, was an action for the recovery of land. The facts were somewhat peculiar:—One Henry Ball died intestate entitled to the copyhold land in question, which by the custom of the manor devolved on his widow, who survived him. He also left a son and two daughters. The widow died on January 7, 1870, leaving by her will to her daughters "the share of her late husband's estate" that she took or was entitled to on his decease; she also gave them pecuniary legacies which she declared she gave them in lieu of the copyhold estate which descended to her son on the death of her husband—and she appointed the husband of one of the daughters her executor. It was assumed on her death that the son was entitled to the copyhold estate and the executor received the rents on his behalf and accounted to him for them on his coming of age in 1878 when the title deeds were handed to him and he thereafter continued in possession until his death in 1890, having devised all his real estate to the defendants. On 25th September, 1900, it having been discovered that on Henry Ball's death the lands in question had in fact devolved on his widow and not on his son, it was claimed that they passed under her will to the daughters, and the present action was brought by the executor and his wife claiming to be entitled under the will to a moiety of the land. The defendants set up the statute of limitations, and Joyce, J., held that even if the land did in fact pass under the will, which he considered was not the case, the plaintiffs were nevertheless barred on the ground that the action was not brought within thirty years from January 7, 1870, when the plaintiffs' right first accrued, as required by 37 & 38 Vict., c. 57, s. 5, (see R.S.O. c. 133, s. 43). In Ontario, we may remark, coverture is not one of the disabilities to which s. 43 applies, and in a case like this a married woman would only be entitled to ten years within which to bring her action, as regards both property to which the Married Woman's Property Act applies, and property to which she is entitled and to which that Act does not apply. It would also seem she may be barred during coverture: see *Hicks* v. *Williams*, 15 Ont. 228.

COMPANY—SHARES—TRANSFER—NOTICE OF ADVERSE TITLE—REGISTRATION—PRIORITY.

Ireland v. *Hart* (1902) 1 Ch. 522, was a contest between a transferee of shares and the true owner, which turns upon the effect of notice of the adverse title, after tender of the transfer for registration but before registration was effected. The shares in question belonged to the plaintiff but were standing in the name of her husband, who by way of mortgage to secure an advance made to him by the defendant executed a transfer in blank. The money not having been repaid the defendant filled up the transfer in his own name and on 23rd November, 1901, left the transfer together with the share certificate with the company for registration. On 26th November the managing director had a conversation with the plaintiff's husband who informed him that the defendant was not entitled to have the shares registered in his own name and requested him to defer registration. On 27th November a directors' meeting was held when the managing director stated what had occurred, nothing was done and the transfer was not registered; on the same day the present action was commenced, and Joyce, J., held that as until registration the transferee had not acquired a legal title to the shares, the plaintiff's prior equity was entitled to prevail.

EXECUTORS—SALE OF SHARES—AGREEMENT BY VENDORS OF SHARES TO VOTE FOR PARTICULAR PERSON AS DIRECTOR—ULTRA VIRES—INJUNCTION.

In *Greenwell* v. *Porter* (1902) 1 Ch. 530, the defendants as executors sold some of certain shares belonging to their testator's estate and as part of the bargain agreed that they would vote for and not against a certain person as director of the company. They having expressed their intention of opposing the election of this person as director, Eady, J., granted an interim injunction against them, on the director in question undertaking to resign after the trial if required by the court so to do. The learned judge expresses the opinion that such a contract was not ultra vires of the defendants as executors.

MARRIED WOMAN — RESTRAINT ON ANTICIPATION — RULE AGAINST PERPETUITIES.

In re Fearneley's Trusts (1902) 1 Ch. 543, was a decision by Eady, J., that where a will imposes by a general clause a restraint

against anticipation upon all the shares bequeathed to daughters of the testator's children, such restraint is good as to the shares of those granddaughters born in the testator's lifetime, but under the rule against perpetuities is null and void as to the shares of such of the granddaughters as are afterwards born.

COMPANY—REDUCTION OF CAPITAL—ILLEGALITY—ISSUE OF CAPITAL STOCK AT DISCOUNT.

In re Development Co. (1902) 1 Ch. 547. A scheme was formulated whereby it was proposed that certain preferred £1 shares in a joint stock company were to be surrendered to the company to be cancelled, and as a consideration therefor 100 ordinary £1 shares were to be issued to each of the holders of the deferred shares for every £1 deferred share surrendered. Eady, J., held that the scheme was wholly illegal and could not be sanctioned by the court, as it was tantamount to a scheme to issue shares at a discount of 99 per cent. without any consideration to the company.

POWER—EXECUTION OF POWER BY WILL OF MARRIED WOMAN—ADMINISTRATOR WITH WILL ANNEXED.

In re Peacock, Kelcey v. *Harrison* (1902) 1 Ch. 552, decides (Eady, J.) that where a married woman having a general testamentary power of appointment, executed the power, in favour of the executors of her will, and the executors died and administration with the will annexed was granted, in such a case the administrator is entitled to receive the appointed fund and give a valid discharge therefor though the testatrix died before the Married Woman's Property Act of 1882 came into force.

WILL—TESTAMENTARY EXERCISE OF POWER—IMPLIED REVOCATION OF WILL BY SUBSEQUENT WILL.

In *Kent* v. *Kent* (1902) P. 108, a testator having a testamentary power of appointment made a will reciting the power and purporting to exercise it, he subsequently made another will by which he purported to "devise, bequeath and appoint" all his real and personal estate, and the question at issue was whether this second will amounted to a revocation of the first, there being no express revocation clause in it. Jeune, P.P.D., held that the word "appoint" in the second will was a sufficient execution of the power and it amounted to an implied revocation of the first will, and that the latter must consequently be excluded from probate.

Correspondence.

GIVE THE K.C.'s A CHANCE.

To the Editor CANADA LAW JOURNAL:

With about a sixth of the population of England, Canada boasts about twice as many of His Majesty's Counsel learned in the law, and it is becoming obvious to the few of us who thus far have escaped being struck by the lightning of the Royal prerogative that we may not hope under present conditions that our immunity will last forever. Many of the gentlemen who have been hit by the fickle fluid have been no greater offenders than the rest of us. Those eighteen upon whom the tower of Siloam fell and slew them, were not, we are told, sinners above all men that dwelt in Jerusalem.

In England the distinction of King's Counsel has historical, professional and personal significance. Here, it is not too much to say, it has none of these things. Speaking in his Official Report to Council in 1896, concerning Sir Charles Tupper's famous list of 173 Queen's Counsel (some of whom, by the way, it was said had never sinned by ever even appearing in Court), Sir Oliver Mowat, the then Minister of Justice, said:—"An examination of the list shews that the selection of names was not made on the basis of professional or personal merit. On the contrary, there are names on the list of gentlemen in regard to whom there would be no pretence or suggestion 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 Court over other barristers, and obviously there is great injustice in the bestowal of the honour 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."

In all seriousness, is it not time that the legal profession got down to things real and quit amusing itself with tawdry imitations of a distinction that never had and never can have any meaning in Canada. There are no such artificial distinctions in the other professions and none in the legal profession in the United States.

JUNIOR.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N. B.] GRIMMER *v.* COUNTY OF GLOUCESTER. [May 15.

Municipal bond—Form—Statute authorizing—Construction.

An Act of the New Brunswick legislature authorized the county council of Gloucester county to appoint almshouse commissioners for the Parish of Bathurst in said county who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality was empowered to issue bonds to be wholly chargeable on said parish, under its corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed and headed as follows: "Alms House Bond—Parish of Bathurst." It went on to state that "This certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer . . . pursuant to an Act of Assembly (the above mentioned Act) . . ." In an action by G. on said bond:—

Held, reversing the judgment of the Supreme Court of New Brunswick, that notwithstanding the above declaration that the parish was the debtor, the county of Gloucester was liable to pay the amount due on the bond. Appeal allowed with costs.

Currey, K.C., for appellant. *Teed*, K.C., for respondent.

B. C.] UNION S. S. Co. *v.* DRYSDALE. [May 15.

Shipping—Bill of lading—Limitation of time to sue—Damage from unseaworthiness.

On a shipment of goods by steamer the bill of lading provided that all claims for damages to or loss of the same must be presented within one month from its date after which the same should be completely barred.

Held, reversing the judgment appealed from, 8 B C. Rep. 228, MILLS, J., dissenting, that this limitation applied to a claim for damage caused by unseaworthiness of the steamer. Appeal allowed with costs.

Davis, K.C., for appellant. *Sir C. H. Tupper*, K.C., for respondent.

B. C.] COLLOM *v.* MANLEY. [May 15.

Mining law—Location of claim—Approximate bearing—Misstatement—Minerals in place.

Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other.

A prospector in locating and recording his location line between No. 1 and No. 2 as running in an easterly direction, whereas it was nearly due north does not comply with the statute requiring him to state the approximate compass bearing and his location is void. *Coplen* v. *Callaghan*, 30 Can. S.C.R. 555, followed.

Before a prospector can locate a claim he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient.

Judgment of the Supreme Court of British Columbia 8 B.C. Rep. 153, reversed. Appeal allowed with costs.

Marshall, K.C., and *Macdonald*, K.C., for appellant. *Galliher*, for respondent.

B. C.] CLEARY *v.* BOSCOWITZ. [May 15.

Mining law—Location—Certificate of work—Evidence to impugn.

A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent and can only be impugned by the Crown. *Coplen* v. *Callaghan*, 30 S.C.R. 555, and *Collom* v. *Manley*, 32 S.C.R., followed. C. believing that the statutory work had not been done on mining claims, and that they were, therefore, vacant, located and recorded them under new names as his own and brought an action claiming an adverse right thereto.

Held, affirming the judgment of the Supreme Court of British Columbia, 8 B.C. Rep. 225, that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial. Appeal dismissed with costs.

J. A. Russell, for appellant. *Davis*, K.C., for respondent.

Ex. C.] [May 15.

BOSTON RUBBER SHOE CO. *v.* BOSTON RUBBER CO. OF MONTREAL.

Trade-mark—Infringement—Use of corporate name—Fraud and deceit—Evidence.

Since 1885, the plaintiff, incorporated in Massachusetts, has done business in the United States of America and Canada as a manufacturer and dealer in india-rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of its manufactures marked with the impression of its corporate name registered as its trade-

mark, known as "Bostons," which had acquired a favourable reputation. The defendant was incorporated in Canada in 1896 by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods, on one grade of which was impressed its corporate name, these goods being referred to in its price lists, catalogues and advertisements as "Bostons" and the company's name frequently mentioned therein as "Boston Rubber Company." In an action to restrain the defendant from continuing to use such impressed trade-mark or any other similar mark on such goods as an infringement of the plaintiff's registered trade-mark,

Held, reversing the judgment appealed from, 7 Ex. C.R. 187, that under the circumstances the use by the defendant of its corporate name in the manner described on goods of its own manufacture similar to those manufactured by the plaintiff was a fraudulent infringement of the plaintiff's registered trade-mark and calculated to deceive the public, and so, in bad faith, to obtain sales of its own goods as if they were plaintiff's manufacture, and consequently, that the plaintiff was entitled to an injunction restraining the defendant from so using its corporate name as a mark upon such goods manufactured by it in Canada. Appeal allowed with costs.

R. V. Sinclair, for appellant. *Beique*, K.C., and *McGonn*, K.C., for respondent.

B.C.] BRIGGS *v.* NEWSWANDER. [May 15.

Contract—Mining claim—Agreement for sale—Construction—Enhanced value.

By an agreement in writing signed by both parties B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement N. promised and agreed that a company should be immediately formed and that B. should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed.

Held, reversing the judgment of the Supreme Court of British Columbia that the dual agreement above mentioned was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a reconveyance of his interest in the claims and an account of monies received or that should have been received from the working thereof in the meantime. Appeal allowed with costs.

Travers Lewis, for appellant. *Davis*, K.C. for respondent.

Que.] MUTUAL LIFE ASS. CO. *v.* GIGUÈRE. [May 15.

Life insurance—Delivery of policy—Payment of premium—Evidence.

The production from the custody of representatives of the insured of a policy of life insurance, raises a prima facie presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional.

The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and, in the provinces of Quebec in commercial matters, such evidence is admissible under the provisions of article 1233 of the Civil Code. Appeal allowed with costs.

Garrow, K.C., and *Lane*, for appellant. *Chase-Casgrain*, K.C., and *Alex. Taschereau*, for respondent.

EXCHEQUER COURT.

Burbidge, J.] GRIFFIN *v.* TORONTO RAILWAY COMPANY. [April 21.

Patent of invention—Infringement—Improvements in truing up car wheels—Combination—Invention—Utility.

The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiff's abrading shoe, however, was the first in which these two features were combined, or used together.

Held, that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels, and that the invention was useful.

J. G. Ridout, for plaintiff. *W. Cassels, K.C.*, for defendant, Power.

Province of Ontario.

COURT OF APPEAL.

From Street, J.] [June 28.

HOPKINS *v.* HAMILTON ELECTRIC LIGHT CO.

Electric light company—Works—Vibration—Nuisance—Injury to adjoining property—Injunction—Damages—Powers of company—Alienation of land—Private Act of incorporation.

Judgment of STREET, J., 2 O.L.R. 240; 37 C.L.J. 666, affirmed.

Lynch-Staunton, K.C., and *Osborne*, for defendants. *D'Arcy Tate*, for plaintiff.

From Lount, J.] [June 28.

TOWNSHIP OF GLOUCESTER *v.* CANADA ATLANTIC R.W. CO.

Way — Road allowance — Obstruction — Railways — Fences — Municipal corporations—Railway committee.

An appeal by the defendants from the judgment of LOUNT, J., reported 3 O.L.R. 85, was argued before OSLER, MACLENNAN, MOSS, and GARROW, JJ.A., on May 6, and on June 28 was dismissed, the court agreeing with the reasons for judgment reported below.

Chrysler, K.C., for appellants. *G. F. Henderson*, for respondents.

From Rose, J.] CUSHEN *v.* CITY OF HAMILTON. [June 28.

Payment—Recovery back—Illegal license fee.

A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed by summary prosecution. The plaintiff after some demur took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:—

Held, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees, having been paid under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back.

Judgment of ROSE, J., reversed.

MacKelcan, K.C., and *J. L. Counsell*, for the appellants. *Riddell*, K.C., and *J. G. Gauld*, for the respondent.

Osler, J.A.] [June 30.

IN RE PRINCE EDWARD PROVINCIAL ELECTION.

WILLIAMS *v.* CURRIE.

Parliamentary election—Recount—Ballot papers—Absence of candidates' numbers.

Recount of votes cast at a provincial election.

Held, that the candidate's number mentioned in s. 69 (3) of the Ontario Election Act, R.S.O. 1897, c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidates' numbers were left on the counterfoil, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected.

S. W. Burns, and *Eric N. Armour*, for Williams. *Widdifield*, for Currie.

Maclennan, J.A.] [July 2.

IN RE NORTH GREY PROVINCIAL ELECTION.

BOYD *v.* MCKAY.

Parliamentary election—Recount—Jurisdiction of Junior County Court Judge—Ballots—Irregular marking.

A Junior Judge of a County Court has jurisdiction under the Ontario Election Act, R.S.O. 1897, c. 9, ss. 124-131, to recount votes.

Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by the County Court Judge on a recount, in consequence of each being marked with a cross in the divisions of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot after the count by the deputy returning officer.

A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first.

But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected.

A ballot marked for one candidate and having the name of that candidate written on the back, was rejected.

Ballots having, instead of a cross, a perpendicular line, a horizontal line, a straight slanting line, were rejected.

A ballot properly marked, but having on the back words written by the deputy returning officer, was allowed.

Ballots marked by placing the cross on the back were rejected. Several tremulous connected marks in one division. Ballot allowed.

A strongly marked cross in one division, and a thin faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Ballot allowed.

A distinct cross, and in the same division, in one case a slight, irregular pencil marking, and in another case a series of slight, cloudy, formless pencil markings. Ballots allowed.

A mark consisting of two lines lying very close to each other, both distinctly visible in one division. Ballot allowed, as there was evidence of an intention to make a cross.

Remarks of RITCHIE, C.J., in the *Bothwell Case*, 8 S.C.R. 696, referred to.

S. H. Blake K.C., and *W. D. McPherson*, for Boyd. *Watson*, K.C., *W. H. Wright*, and *Grayson Smith*, for McKay.

Maclennan, J.A.] [July 10.

IN RE NORTH GREY PROVINCIAL ELECTION—MCKAY *v.* BOYD.

Parliamentary election—Recount—Appeal—Notice of—Signature—Result of appeal—Majority.

The notice of appeal from the decision of a County Court judge upon a recount of votes under s. 129 (1) of the Election Act, R.S.O. 1897, c. 9, need not be signed by the appellant candidate personally, but may be signed by his solicitor or agent on his behalf.

Where both candidates appeal from the decision of the County Court judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority.

Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to.

Watson, K.C., *W. H. Wright*, and *Grayson Smith*, for McKay. *S. H. Blake*, K.C., *Du Vernet* and *Eric N. Armour* for Boyd.

HIGH COURT OF JUSTICE.

Master in Chambers.] DULMAGE *v.* White. [March 15.

Practice—Venue—Agreement before action.

A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction, it is agreed that the trial will be held only in" (the place where the vendors carried on business).

Held, that this condition was binding, and in an action by the purchaser to recover damages because of the unsatisfactory condition of the article sold an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ.

Swabey, for defendants. *Clute*, for plaintiff.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [May 22.

LLOYD *v.* WALKER.

Assessment—Distress for taxes—"Owner"—Agent for mortgagees in possession—R.S.O. 1897, c. 224, s. 135, sub-s. 3.

Mortgagees in possession entered into an agreement with the plaintiff reciting that they were about to take proceedings to foreclose their mortgage and that the plaintiff had agreed to become the purchaser of the mortgage at a sum equal to the principal, interest and costs, the purchase to be carried out so soon as the vendors should have obtained a final order of foreclosure upon which event and upon payment by the plaintiff of $2000 they would convey the premises to them taking back a mortgage to secure payment of the balance of the purchase money; and in the meantime the plaintiff was to be allowed as their agent to manage the property, receive the rents and make sales subject to their approval and to render accounts to them.

Held, that the plaintiff was not the owner of the premises within s. 135, sub-s. 3 of the Assessment Act and the collector was not authorized to levy the taxes assessed against the property upon the plaintiff's goods.

Semble, per BRITTON, J., that a mortgagee in possession would be an owner whose goods would be liable to seizure and so would one who had an absolute agreement to purchase with the mortgagee, but in this case the plaintiff held only a conditional agreement for the sale of the property and was in the position only as agent for the mortgagee.

J. J. Warren, for plaintiff. *S. B. Woods*, for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [May 23.

BATZOLD *v.* UPPER.

Evidence — Corroboration — "Some other material evidence"—Cestui que trust not party—R.S.O. 1897, c. 73, s. 10.

The material corroborative evidence required by R.S.O. 1897, c. 73, s. 10, in a proceeding by or against the executors of a deceased person may be given by one who is interested as cestui que trust in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it but the evidence could not be withdrawn from their consideration.

Denison, for plaintiff. *Wilson*, for defendant.

Street, J., Britton, J.] DUNN *v.* PRESCOTT. [June 2.

Bailment — Grain elevator — Negligence — Storage—Duty of periodical examination—Fermentation of corn.

The defendants were keepers of an elevator and on April 24, 1897, received from the plaintiff a quantity of corn for storage and stored it in

several large bins. On May 22, 1897, desiring to use one of these bins (No. 49) for another purpose the defendants removed the corn over into another bin, and in so doing discovered it had become heated, whereupon by exposing it to the air they stayed the process of heating and the corn recovered. They also notified the plaintiffs by telegram on discovering the heating in the bin No. 49, but they did not themselves examine the remainder of the corn to see whether it was also becoming heated, nor did the plaintiffs ask them to do so. When on June 3 the corn was run out to be shipped a quantity of it was found to be in an advanced condition of fermentation.

Held, that the defendants had been guilty of negligence under the above circumstances and were liable to the plaintiff for the loss sustained by him.

Henderson, for defendants. *Leech*, K.C., for plaintiff.

Master in Chambers.] WHEELER *v.* CORNWALL. [June 4.

Practice—Third party—Settlement of action.

After a third party had been brought in and the usual directions as to trial given the action was settled as between the plaintiff and the defendants.

Held, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the third party with costs, without prejudice to the right of the defendants to bring an action against the third party.

J. H. Moss, for third party. *Saunders*, for defendants.

Lount, J.] SKILLINGS *v.* ROYAL INSURANCE COMPANY. [June 5.

Insurance—Fire Insurance—Cancellation—Notice of cancellation received after loss.

The insured sent to the company his policy with an endorsed surrender clause executed and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured the letter was delayed in the post office and did not reach the company till the morning after the insured goods had been destroyed by fire.

Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt; and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore that the company were liable for the loss.

Riddell, K.C., and *Fasken*, for plaintiffs. *Robinson*, K.C., and *MacInnes*, for defendants.

Falconbridge, C.J. K.B., Street, J., Britton, J.] [June 12.

DAVIS *v.* HURD.

Costs—Judgment for—Construction of judgment—Action of slander—Plaintiff failing on some slanders alleged, and succeeding on others.

Judgment in an action for slander provided "That the plaintiff do recover against the defendant in respect of the matters set forth in the third and fifth paragraphs of the statement of claim the sum of one dollar and costs to be taxed."

Held, affirming the decision of MEREDITH, C.J., that the Taxing Officer rightly taxed under the judgment of the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the plaintiff only the costs of the issue upon which he succeeded, the latter being set off. *Sparrow* v. *Hill*, 7 Q.B.D. 362, 8 Q.B.D. 479, followed.

Afterwards, June 30th, 1902, per OSLER, J.A., leave to appeal to the Court of Appeal should not be given.

L. McCarthy, for defendant appellant. *C. A. Moss*, for plaintiff.

Britton, J.] IN RE CHAPMAN. [June 17.

Will—Construction—Gift "during natural life"—Absolute interest.

A testator gave $500 to A.S. but limited the disposition of it so that she got for her own use absolutely only the interest upon it. He provided that at her death this $500 was to be given to her eldest son, E.C.S. and that he could use this sum "for his natural life." Then the testator purported to give to his wife all that remained after the $500 was taken out, but he limited her for her own use absolutely to the interest only, and when the capital should be no longer needed to earn interest for his wife he gave it to certain persons named, and in all cases "for their benefit during their natural lives."

Held, that the testator intended to dispose of all his estate and had carried out his intention by a payment over of the $500 after the death of A.S. and by a division of the rest after the death of his wife; and that the sum of $500 was an absolute gift to E.C.S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate.

Maclaren, K.C., for executors of Chapman. *Rowell*, for executor of widow. *Harcourt*, for infants.

Street, J.] MACDONELL *v.* CITY OF TORONTO. [June 25.

Local improvements—Petition for—Sufficiently signed—Exempt property—Value — Land — Buildings—Real property—Municipal Act—Assessment Act.

A petition for local improvements is sufficiently signed under section 668 of the Municipal Act when signed by six out of nine owners to be

benefited, who appear on the assessment roll notwithstanding that the city within which the improvement is to be made also appears as an owner of property on the roll in respect to property which is exempt from taxation; and the value of the buildings as well as the land is properly taken into consideration in ascertaining the requisite one half in value.

Aylesworth, K.C., and *C. A. Moss*, for plaintiff. *Fullerton*, K.C., and *Caswell*, contra.

Street, J.] ALLAN *v.* REVER. [June 26.

Dower—Lease made by deceased husband—Priorities—Assignment of dower—Rights of executor and devisee—Devolution of Estates Act.

A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to persons claiming under leases created by her husband, without her assent, during the coverture. *Stoughton* v. *Leigh*, 1 Taunt. 402, followed.

Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto;

Held, that the conveyance was of no avail; for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act, R.S.O. 1897, c. 127, the whole inheritance of the testator vested.

W. E. Blake, for plaintiffs. *Shaw*, K.C., for defendant.

Street, J.] [June 27.

DOHERTY *v.* MILLERS AND MANUFACTURERS INS. CO.

Fire insurance—Mutual plan—Annual renewal—Proposal for increased premium—Non-acceptance—Condition of payment in advance—Delivery of receipt—Waiver.

On Oct. 31, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of $20,000 upon their property, and on Oct. 31, 1899, a further policy to the amount of $10,000. The policies provided for insurances for the original period of one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." Each of the policies was issued and delivered to the plaintiff without pre-payment of any cash premium, and without the

previous delivery of the premium notes in consideration of which the policies purported to be issued; but the cheques dated Oct. 31st, 1898, for the cash portion of the premium on the $20,000 policy, and Oct. 31st, 1899, for the cash portion of the renewal of that policy and the first premium on the $10,000 policy, were sent on or about their respective dates, along with the required premium notes, to the defendants. On Oct. 27th, 1900, the executive officer of the defendants wrote to the plaintiffs enclosing a receipt for $363.23, being the amount of the cash premium for the renewal of both policies. The letter was on a printed form, stating that a receipt "renewing" the policies was enclosed, and asking the plaintiffs to remit the amount of the cash premium. It also asked for new premium notes, and stated that the old ones were enclosed, as they were. The plaintiffs retained the receipts, but did not send the money or the notes until after Dec. 20th, 1900, when, in answer to a letter of the executive officer, they enclosed the notes duly signed, and stated their willingness to accept a sight draft for the cash renewal, which they afterwards honoured. On Oct. 28th, 1901, the same officer again enclosed renewal receipts in a letter on the same form as above, but the amount of the cash payment was higher, and on Nov. 6th, 1901, the plaintiffs wrote to the defendants calling attention to the increase; the officer answered the next day that the defendants had been obliged to increase the rate; and on the following day the plaintiffs wrote as follows:—"If you cannot do better we will have to accept, but we are going to ask you to reconsider the matter and meet us in this if at all possible. . . . Kindly give this your consideration and let us hear from you." On November 11th the officer wrote to the plaintiffs: "The consulting board carefully considered your risk before making the advance in rate they did, and had no alternative but to do so to procure the re-insurance we required. Trusting this explanation will prove satisfactory to you." No answer was made by the plaintiffs to this.

On Nov. 16th, 1901, a fire took place, and damage was done to the property covered by the defendants' policies. Two days afterwards the plaintiffs sent the defendants a cheque for the amount of cash demanded and new premium notes, but the defendants returned them. The defendants reinsured their risk as soon as the premiums became payable, and had not cancelled these reinsurances down to the time of the trial.

Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on Oct. 31st, 1901.

Semble, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for the amount.

Proudfoot, for plaintiffs. *Barwick*, K.C., for defendants.

Britton, J.] RE PETTIT ESTATE. [June 28.

Dower—Election—Gross sum in lieu of—Money in Court—Proceeds of sale of testator's land.

The owner of land died intestate leaving a widow and an infant child. The widow administered and with the consent of the Official Guardian sold and conveyed the land in March, 1899, barring her dower in the deed of grant, and the whole of the purchase money was paid into Court to the joint credit of herself and of the Official Guardian, she reserving her right to elect between receiving the value of her dower and the distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in Court. In September, 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of "any other interest she might have in her husband's undisposed of real estate." She died in April, 1901.

Held, that the administrator of the widow's estate was entitled to receive out of the moneys in Court the value of the widow's dower computed according to the annuity tables.

T. R. Atkinson, for guardians. *M. E. Wells*, for executor. *Du-Vernet*, for administrator. *Harcourt*, for official guardian.

MacMahon, J.] IN RE SNYDER. [July 5.

Life insurance — Beneficiary certificate — Designation of beneficiaries—Indorsement — Will—1 Edw. VII., c. 21, s. 2, sub-s. (7)—Infant children of assured.

A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died; and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder.

Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R.S.O. 1897, c. 203, s. 151, sub-s. (6), by 1 Edw. VII. c. 21, s. 2, sub-s. (7).

Du Vernet, for the executors and adults. *Harcourt*, for the infant children.

Province of New Brunswick.

SUPREME COURT.

Gregory, J.] RE KELLY. [June 12.

Extradition—Assault with intent to murder—Extradition Act, c. 142, R.S.C.—Treaty with United States—Evidence on enquiry before judge.

Where a fugitive offender from the United States is charged with an assault with intent to murder in an information laid under the Extradition Act, c. 142, R.S.C., the evidence must sufficiently establish the existence of the intent.

The prisoner was in custody under a warrant issued by the Chief Justice under the Extradition Act, c. 142, R.S.C., upon an information charging the prisoner with having on April 17 last, in the county of Arrostook, in the State of Maine, assaulted Frank W. Burns with intent then and there feloniously to kill and murder him. At the hearing before Mr. Justice Gregory evidence was given of the assault, and at its conclusion argument was considered upon the question whether the intent to murder was sufficiently made out. The learned judge, having taken time to consider now gave judgment as follows :—

GREGORY, J. :—One of the crimes mentioned in the Extradition Treaty between Great Britain and the United States is "assaulting with intent to murder." The right to have the prisoner extradited depends upon the establishment of the prisoner's intent to murder. The words "feloniously to kill" in the information are surplusage. No matter how serious the assault may be, unless it is accompanied with the intent to murder, the accused is not liable to be extradited. By sec. 9 of the Extradition Act the judge or commissioner before whom the fugitive is brought is directed to hear the case in the same manner as nearly as may be as if the fugitive were brought before a justice of the peace charged with an indictable offence committed in Canada. By sec. 394 of the Criminal Code, after all the witnesses on the part of the prosecution and the accused have been heard, the justice of the peace is directed, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon trial, to discharge him, and by sec. 596 if he thinks that the evidence is sufficient to put the accused on his trial he is to commit him for trial. Doubtless if the prisoner in this case was being examined before a justice of the peace on the offence laid against him, but committed in Canada, he would with propriety be committed for trial for some offence, but I do not think for the offence of assault with intent to murder, for the reason that I can see no evidence upon which any court or jury could hold that the assault was committed with

intent to murder. [His Honour then referred to sec. 11 of the Extradition Act, and proceeded as follows]: Under this section before a judge would be warranted in committing a fugitive it would be necessary that such evidence should be produced as would according to the law of Canada justify the committal of the accused for trial for an extradition crime. It was urged upon me by counsel for the prosecution that it was beyond my duty to consider the evidence of intention on the part of the accused; that I am not authorized to consider any matter of defence that the accused may set up, nor to enter into the question of intent. That, it was said, was a matter for the trial Court. I think it is properly contended that I am not to try the case or consider matters of defence, but if upon the evidence produced by the prosecution there is not sufficient evidence to establish an intention, such intention as is necessary to make an extradition crime, I am bound to discharge the prisoner. Prisoner discharged.

Connell, K.C., for prosecution. *Currey*, K.C., and *Carvell*, for prisoner.

Province of Manitoba.

KING'S BENCH.

Richards, J.] McBEAN *v.* WYLLIE. [May 26.

Nuisance—Right of private individual to prevent infringement of municipal by-law — Construction of building obstructing plaintiff's view — Injunction.

The plaintiff by injunction sought to prevent the completion of a large frame warehouse which the defendant was erecting on ground leased by him from a railway company, being part of their right of way adjoining the garden of a property owned and occupied by plaintiff as a dwelling in the city of Winnipeg. On the other side of the right of way was a strip of land, not owned by either party, sloping down to the Red River. The warehouse was situated directly between plaintiff's house and the river, and would obstruct plaintiff's view of the river. It was being constructed of wood in contravention of the fire limit by-law of the city.

Held, 1. Plaintiff had no right to the unobstructed view of the river.

2. Plaintiff had no right to enforce the fire limit by-law by injunction, as it was a by-law passed for the protection of the general public and providing for a penalty in case of its infringement, and there was no evidence to shew that the risk of fire to the plaintiff's property would be specially increased by the construction of the warehouse. *Atkinson* v. *Newcastle*, 2 Ex. D. p. 441, followed.

The plaintiff further urged that the construction and intended use of the warehouse would create a nuisance to her which she was entitled to have prevented by an injunction, and gave some evidence as to the use by tramps and others of the vacant ground on the side of the warehouse next her property, causing unpleasant smells, but it was not shewn that defendant was lessee or occupant of that vacant ground.

Held, that there was not sufficient evidence to entitle the plaintiff to an injunction on the ground of nuisance.

Bonnar, for plaintiff. *Macdonald*, K.C., and *Haggart*, K.C., for defendant.

Full Court.] DAVIDSON *v.* STUART. [May 31.

Lord Campbell's Act—R.S.M., c. 26, ss. 2, 3—Compensation in respect of death—Measure of damages—Reasonable expectation of pecuniary benefit from continuance of life—Motion against verdict of jury—King's Bench Act, Rules 639, 640, 642.

Application to have verdict of jury in action brought under the Act respecting compensation to families of persons killed by accident, R.S.M., c. 26, in favour of plaintiff for $1,500 damages set aside and the action dismissed, or a nonsuit, or a verdict for defendants entered, or for a new trial. The plaintiffs were the parents and sisters of the deceased who was killed by an electric shock whilst working in electric light works owned and operated by defendants, and in consequence, as it was alleged, of defects in the appliances supplied by the defendants at the works. The application was based on several grounds, but the only point decided was that relating to the evidence to shew that the plaintiffs had suffered such damages by reason of the death as the statute permits the recovery of. The deceased, who was the only son of the rector of a small parish near Montreal with an income of about $600 a year, had been given a college education and had returned home when about 21 years old. For a time he remained at home earning nothing. Then he spent some time in the insurance business in Vermont. Then, on account of his father's illness, he went home, but soon left for Manitoba in search of occupation. There, after working at several things for about three years, he was employed by the defendants to manage their electric works at a salary of $115 a month, out of which he had to pay $45 a month to an engineer, and sometimes to hire other assistance. He had been thus employed about three months when he met his death. The parents were getting old and were in failing health, and it was not shewn whether they had or had not any means beyond the income of $600 a year. The deceased contributed nothing to the support of the family during all the time he was in Manitoba; but, according to the father's evidence, he had been a great help to him when at home and had assisted him in many ways in his parish work and in matters of business,

and was a "noble, faithful son, efficient in every way, steady and industrious," and an affectionate son and brother.

Held, that there was nothing in all this to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased, and that the verdict of the jury should be set aside and a new trial ordered. *Sykes* v. *North Eastern Railway Co.*, 44 L.J.C.P. 191, and *Mason* v. *Bertram*, 18 O.R. 1, followed. *Franklin* v. *South Eastern Ry. Co.*, 3 H. & N. 211; *Dalton* v. *South Eastern Ry. Co.*, 4 C.B.N.S. 296; *Hetherington* v. *North Eastern Ry. Co.*, 9 Q.B.D. 160; and *Blackley* v. *Toronto Ry. Co.*, 27 A.R. 44*n*, distinguished.

Held, also, that the Court could not, under any of the Rules in the King's Bench Act, 58 & 59 Vict., c. 6, dismiss the action or enter a nonsuit or verdict for defendants in the face of the verdict of the jury. Rules 639, 640 and 642 discussed, and *Connecticut Mutual, etc., Co.* v. *Moore*, 6 A.C. 644; and *British Columbia Towing, etc., Co.* v. *Sewell*, 9 S.C.R. 527, followed.

New trial ordered without costs of former trial. Costs of the application to be costs in the cause to the defendants in any event.

Howell, K.C., and *Hull*, for plaintiffs. *Ewart*, K.C., and *Phippen*, for defendants.

Full Court.] IREDALE *v.* MCINTYRE. [May 31.

Real Property Act, Schedule L, Rule 1—Petition of caveator—Pleading—Statement of objections to validity of tax sales.

The Caveator filed a petition under Sch. L., Rule 1, of "The Real Property Act," 1 & 2 Ed. VII., c. 43, to prevent the caveatee, a tax sale purchaser, from getting a certificate of title applied for by him; and, after setting out the nature of his title by grant from the Crown, alleged that the caveatee claimed title to the same land under certain alleged sales of same for taxes, and that the said tax sales and all proceedings connected therewith, under which the caveatee claimed title were illegal, null and void, and that the caveatee was not at the time of his application the owner of the land.

Held, without deciding whether it is necessary in such a petition to go further than to set forth fully the title of the caveator, that, if the petition refers to the claim of the caveatee and the nature of it at all, it should shew in what particulars the title of the caveatee is defective or invalid, and what facts are relied on to have the tax sales declared void and prima facie to displace the adverse claim of the tax purchaser. Appeal from the order of the Chief Justice discharging the order of the referee for the trial of an issue dismissed with costs.

Wilson, for caveator. *Johnson*, for caveatee.

Full Court.] JONES *v.* GREEN. [May 31.

Contract—Evidence—Signature of agreement procured by misstatement of the contents—Consensus ad idem.

Appeal from the decision of a County Court in favour of defendant in an action for the price of a stacking machine supplied by plaintiffs under the following circumstances:—Defendant negotiated with one Pryde, plaintiffs' agent at Boissevain, for the purchase of the machine and was asked by Pryde to sign an order for it on a form partly printed and partly written. Being in a hurry to catch a train, he asked Pryde if there was anything in the order that would compel him to keep and pay for the machine if it did not work satisfactorily, saying if there was he would not sign it, when Pryde told him he could have ten days' trial of it and could return it to the warehouse in Boissevain within that time if he was not satisfied with it without incurring any liability.

Defendant then signed the order, which was forwarded by plaintiffs, who accepted it and shipped the machine from Carberry, where their head office was situated. The order provided for only one day's trial, and required the defendant to return the machine at his own expense to Carberry if it would not work properly.

There was a printed direction at the top of the order to give the purchaser a duplicate, but none was given to him, and the order was not read over by or to the defendant before it was sent to the plaintiffs. The agent admitted at the trial that he thought at the time that the order provided for a ten days' trial.

Defendant tried the machine several times, and not getting it to work satisfactorily, returned it to the warehouse at Boissevain within ten days, and notified the plaintiffs' agent there.

Held, following *Foster* v. *Mackinnon*, L.R. 4 C.P. 704, and *Murray* v. *Jenkins*, 28 S.C.R. 565, that upon these facts there was no consensus ad idem between the parties and no binding contract entered into between them, and defendant was not estopped by any negligence on his part from setting up this defence.

Held, also, that the evidence to shew that defendant had not intended to sign such a contract as the one he did sign turned out to be was not inadmissible on the ground that it tended to vary a written contract by oral evidence. *Saults* v. *Eaket*, 11 M.R. 597, distinguished.

Pitblado, for plaintiffs. *Munson*, K.C., for defendant.

Full Court.] WHITLA *v.* ROYAL INSURANCE CO. [May 31.

Fire insurance—Condition as to other insurance without consent—Interim receipt—Estoppel.

Appeal by the Manitoba Assurance Co. against the decision in the case against them, noted ante p. 174, and appeal by Whitla against the

decision in his case against the Royal Insurance Co., noted ante p. 218. By consent both appeals were argued together, plaintiffs' counsel stating that they were satisfied with the judgments of the Court below, but were compelled to enter their appeal so as to save their rights in case the appeal of the Manitoba Assurance Co. should be successful. After the argument both appeals were dismissed with costs. *Western Assurance Co.* v. *Doull*, 12 S.C.R. 446; *Commercial Union Assurance Co.* v. *Temple*, 29 S.C.R. 206: and *Western Assurance Co.* v. *Temple*, 31 S.C.R. 373, followed.

Macdonald, K.C., and *Haggart*, K.C., for plaintiffs. *Munson*, K.C., *Hudson*, *Tupper*, K.C., and *Phillips*, for defendants.

NOTE.—It was intended that the reports of the above cases printed at pages 218 and 174 of this volume should have appeared together and in the above order.

Full Court.] DAVIDSON *v.* FRANCIS. [May 31.

Building contract—Architect's certificate—Completion of work to satisfaction of architect—Collusion between proprietor and architect—Substantial fee—Foreman of work.

Plaintiff sued for the balance unpaid of the contract price of the erection of certain buildings for defendant under an agreement, which provided that the plaintiff should execute and complete the work in accordance with the specifications and drawings by a fixed date, and to the satisfaction of an architect named, whose decision was to be final and conclusive, that interim payments should be made as the work progressed, on the certificates of the architect, and that the balance unpaid on the completion of the work should become payable in one month after the architect should have certified thereto. On Jan. 23, 1900, the architect gave plaintiff what purported to be a final certificate, which was in part as follows:—"I hereby certify that Davidson Bros. are entitled to four hundred and sixteen dollars 36 100 in full for above contract and extras less $4.25, which amount may be held back till the items of work in the following list are done."

Then followed the items covered by the $4.25 and this note, "I consider the guarantee in specification will cover any leak in roof."

The guarantee alluded to reads: "It is understood that the contractor, by signing this specification, will guarantee the roof for five years against ordinary wear and tear."

Annexed to and forming part of this certificate was a statement shewing how the $416.36 was arrived at, specifying the total of the contract price, the allowances for extras and the deduction of amounts paid on prior certificates and besides, the following: "Deduction for bad flooring, etc., $50.00." This last item was made up of $47.00 allowed defendant on account of the floor being inferior to the requirements of the contract, and $3.00 because of the use of inferior lumber in the shelving. As to the

floor plaintiff claimed that defendant had agreed to accept this reduction in price and to waive his right to compliance with the contract. This was disputed, but there was no doubt that the plaintiffs had refused to remedy the defects in the shelving in spite of protests from both defendant and the architect, and that there was no waiver as to that. On 6th March, 1901, the architect further certified as follows: "This is to shew that by certificate given by me on the 23rd of January, 1900, I certified that Davidson Bros. were entitled to $416.36, from which the amount of $4.25 was deducted to cover some small items left undone. These have now been attended to, and I therefore certify that Davidson Bros. are entitled to $416.36 in full of contract and extras." At the trial evidence was given to shew that the work in several other respects had not been properly done, and the architect himself admitted that several important matters besides the floor, roof and shelving had been improperly attended to or altogether left undone.

Held, 1. It was a condition precedent to plaintiffs' right of recovery that the work should be completed to the satisfaction of the architect: that the certificates relied on shewed in themselves that the work had not been completed in all respects in accordance with the specifications and failed to shew that the architect was satisfied with the work, and that consequently the plaintiff could not recover. *Conty* v. *Clark*, 44 U.C.R. 222, followed.

2. The plaintiffs were not entitled to recover the amount claimed for the work done as having substantially performed their contract or on account of defendant occupying and using the buildings.

Sherlock v. *Pant*, 26 A.R. 407; *Munro* v. *Butt*, 8 E. & B. 738; *Sumpter* v. *Hedges* (1898) 1 Q.B. 673; and *Brydon* v. *Lutes*, 9 M.R. 468, followed.

Per DUBUC, J. The evidence justified the finding that there had been collusion between the architect and the plaintiffs, resulting in the defendant being defrauded, and therefore the defendant was not bound by the architect's certificates.

Appeal from the verdict of DUBUC, J., dismissed with costs.

E. L. Taylor, for plaintiffs. *Ewart*, K.C., and *A. C. Ewart*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] COVERT *v.* PETTIJOHN. [April 22.

Water record - Validity of - Ditch - Continuation of into United States and back into Canada - C.S.B.C. 1888, c. 66, ss. 39 et seq.

Plaintiff and defendant were owners of adjoining ranches in Yale District both bounded on the south by the International boundary line.

Plaintiff's ranch lay to the east of defendant's ranch, west of which the Fourth of July Creek flowed in a southerly direction into the United States. In 1889, the plaintiff obtained a water record for agricultural purposes and under s. 41 of the Land Act then in force constructed a ditch over land which was since purchased by defendant. By an extension of the ditch into the United States the water was turned back into the original stream and from a point below a ditch was run by one Peone, the owner on the American side, and plaintiff by tapping Peone's ditch ran the water back to his ranch on the Canadian side. This diversion around through the United States was caused by an elevation over which it was impossible to run the water. In the County Court, SPINKS, Co. J., dismissed plaintiff's action for damages for interference with the ditch :—

Held, per HUNTER, C.J., and MARTIN, J., on appeal, that the fact that a ditch constructed in intended compliance with s. 41 of the Act runs partly into the United States does not of itself prevent it from being a good ditch within the meaning of the Act.

Held, also, per IRVING, and MARTIN, JJ., applying *Martley* v. *Carson* (1889) 20 S.C.R. 634, that the plaintiff's water record was valid.

Appeal allowed, IRVING, J., dissenting.

S. S. Taylor, K.C., for appellant. *Sir C. H. Tupper*, K.C., for respondent.

Full Court.] WILSON *v.* CANADIAN DEVELOPMENT CO. [April 25.

Carrier—Special contract—Variation of, by bill of lading—Carriage of goods—Owner's risk.

Appeal from judgment pronounced by CRAIG, J., in the Territorial Court of Yukon in favour of the plaintiff for $28,855.85 and costs.

The defendant company as a common carrier in June, 1899, contracted with the plaintiff, a Dawson merchant, to carry for him from Puget Sound and British Columbia ports general merchandise, the rates being according to tariff annexed to contract. Three of the terms of the contract were : "Date of shipment—Throughout season of 1899. Consignees—T. G. Wilson, Dawson City. Quantity—Exclusive contract for season of 1899." Annexed to the contract was the freight tariff, giving the rates to be charged on the different classes of goods "with guaranteed delivery of shipments during the season of 1899." The company decided not to receive after August 20 any more freight with guaranteed delivery during 1899, and so notified one Pitts, a wholesaler of Victoria, of whom the plaintiff was a customer.

Pitts afterwards shipped goods to Dawson consigned to the "Canadian Bank of Commerce, notify T. G. Wilson," and received from the company bills of lading marked with a special condition thus: "This shipment is

made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The company failed to deliver the goods, and Wilson sued for damages caused him by being deprived of the goods :—

Held, by the full Court (reversing CRAIG, J.,) that the goods were not carried under the exclusive contract for the season of 1899, by which the delivery was guaranteed that same season, but that they were carried under the terms of the bills of lading and the company was not liable for the loss.

As the plaintiff's cause of action, if any, would be against the company for refusing to carry under the original contract, a new trial was granted with leave to plaintiff to amend his pleadings. New trial ordered with liberty to plaintiff to amend pleadings.

Bodwell, K.C., and *Duff*, K.C., for appellant. *Peters*, K.C., and *A. G. Smith* (of Yukon Bar), for respondent.

Full Court.] IN RE THE FLORIDA MINING CO. [May 1.

Company—Winding-up—"Just and equitable"—Substratum gone—Shareholder's petition—Contributory—B.C. Companies Winding-up Act, 1898.

An order for compulsory winding-up may be made under sec. 5 of the Companies Winding-up Act, 1898 (Provincial), notwithstanding the winding-up is opposed by the company.

In winding-up proceedings instituted by a shareholder it appeared (1) that shares had been unlawfully issued at a discount and at different percentages of their face value to different purchasers ; (2) that the substratum was gone and that the company was unable to carry on business ; (3) that there was a question as to the liability of the company to the principal shareholder who had always been in practical control of the company :—

Held (affirming IRVING, J., who had made a winding-up order), that it was just and equitable that the company should be wound up.

Taylor, K.C., for appellants. *Davis*, K.C., for respondent.

Commission :—A commission for procuring one willing to lend a certain sum on mortgage is held, in *Caston* v. *Quimby* (Mass.), 52 L.R.A. 785, not to be earned by the production of a person willing to loan that amount, but who insists that the contract shall provide for payment of principal and interest in gold, because of which the offer is not accepted.

Book Reviews.

Law of Interpleader as administered by the English, Irish, American and Australian Courts, with an appendix of Statutes, by Roderick James Maclennan, Barrister-at-Law, of Osgoode Hall. Toronto: The Carswell Co., 1902.

The literature on the subject of interpleader has hitherto been limited. This book is the most complete on the subject up to the present time, and is a very helpful addition to the lawyers' library. The author labours under the disadvantage of being the first to attempt an exhaustive treatment of the subject, and on that account deserves special consideration, and this fact largely disarms criticism. He begins with an interesting historical introduction which is followed by practical chapters dealing with The applicant for relief, The subject matter, Claimants, Independent liability, Procedure, Evidence, Costs, Appeals, etc. The appendix gives the interpleader statutes of Ontario, Nova Scotia, Manitoba, North-West Territories, England, India, Australia (though this is hard to find) and various States of the Union. The chapters have sub-heads in which appropriate cases are referred to. As may be supposed the citation of authorities covers a wide field, embracing pretty well all the countries where the English language is spoken. A collection such as this is an interesting feature of the book.

Succession Duty in Canada, by R. A. Bayley, LL.B., Barrister-at-Law, London, Ont. Toronto: The Carswell Co., 1902.

This is a collection of the Acts in force in various provinces of the Dominion as amended to June 1st, 1901, with notes on the Ontario Act and lists of Canadian, American and English cases, with forms and tables. The Succession Duty Act as originally framed was mainly taken from the New York and Pennsylvania Acts. Various amendments were made in 1896 with the special object of preventing evasion of the law and these sections were based mainly upon English Acts to the same effect The subject is not one of very extended interest to the profession, but those desiring information upon it cannot do better than study Mr. Bayley's useful compendium.

RULES OF COURT.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

(*Passed June 7th, 1902.*)

The Supreme Court of Judicature for Ontario by virtue of the powers conferred upon it by the Criminal Code, 1892, and the amendments thereto, doth make and ordain the following rule of Court:

Rule 1238. The costs of and incidental to proceedings in the Court of Appeal for Ontario and in the High Court of Justice for Ontario, and in any Divisional Court thereof for or in relation to the quashing of convictions or orders, shall be in the discretion of the Court, and the Court shall have power to determine and direct by whom and to what extent the same shall be paid, whether the conviction or order is affirmed or quashed in whole or in part.

The Supreme Court of Judicature for Ontario doth hereby make and ordain the following additional Rules of Court:

Rule 1239. Consolidated Rule 117 is amended by adding to the proceedings and matters which it is thereby provided shall be heard and determined before the Divisional Courts, the following:

Proceedings for or in relation to the quashing of convictions or orders.

Rule 1240. Consolidated Rules 355 and 356 shall not extend or apply to proceedings for or in relation to the quashing of convictions or orders.

Rule 1241. Consolidated Rule 1130 shall apply to the costs of and incidental to proceedings for or in relation to the quashing of convictions or orders whether the conviction or order is affirmed or quashed in whole or in part.

Flotsam and Jetsam.

MEDICAL MURDERS.—A plea for some legal authority for physicians to shorten the lives of patients in certain cases is made occasionally, and sometimes by persons from whom it would not be expected. The newspapers have just been discussing a proposition of this kind which they report to have been advanced by a man who is widely known as professor of law and as a judge. With all due respect to the eminent person to whom such opinions are attributed, it must be said that any proposition of this sort tends toward degeneration and barbarism. No other element more surely indicates the grade which any people has reached in the rise of men from savagery to Christian civilization than does their recognition of the sacredness of human life. Any proposition whatever, no matter from whom it comes, which aims at legalizing, by painless methods or otherwise, the murder of the helpless by those in whose care they are, deserves swift, severe, and unsparing reprobation. The humanitarian purpose of the advocate of such a proposal may be conceded; but the just characterization of the infamous proposition should be none the less merciless.—*U.S. Exchange.*

NOTES FROM ABROAD.

The following to a friend in Toronto is from a gentleman of the fifth Contingent whose remarks as to foreign legal customs are of interest.

I.

BY THE TIBER.

There was a Roman Emperor
Who made his horse a Senator
He wisely said :—" All flesh is grass,
And you, my steed, like Balaam's ass,
To such as tread in evil way
May stand four square and say them neigh."

This steed enjoyed the best of oats,
And for his patron gave his votes ;
But soon, as steeds are wont to do,
Kicked o'er the mace, to clover flew,
Cared not for glory or piastres
Gave up the job for Tiber's pastures.

II.

BY THE NILE.

A legend old was told me, while
I sauntered on the banks of Nile ;
From Pharaoh's wrath and hangman's tie
Did Joseph the chief baker buy ;
With gown and wig disguised, he brought him,
The law of Medes and Persians taught him.

And soon, of County Court the Clerk,
He sat in state from morn till dark ;
But sighed he oft for the loaves and fishes,
The rattle of dinner and Pharoah's gold dishes,
For his dear native banks where the crocodile hid,
As he basked in the shade of the Great Pyramid.

III.

L'ENVOI.

Father Tiber still bounds fair Etruria's plain,
Past the Sphinx rolls the Nile o'er the Khalif's domain ;
Our great Pharoah's a mummy, good Joseph a Saint,
But there ne'er in those lands is now heard a complaint ;—
When the goddess of justice both blind and deaf got,
Wisest judgments were issued by 'feeding the slot' ;
Old Minerva now nods o'er her knitting and tatting,
And Apollo with Juno and Venus is chatting.
Every Court automatic is worked with a crank ;
And ten thousand admits to the Senator's rank.