Canada Law Journal.

VOL. XL. JULY, 1904. NOS. 13 & 14.

The vacancy in the High Court of Justice for Ontario caused by the death of Hon. Mr. Justice Ferguson has been filled by the appointment of Mr. James Magee, K.C., of London, Ontario. The appointment has been well received in the city where he has been practicing for some thirty-seven years, and we may well assume that he will be a useful addition to the Ontario Bench. Mr. Magee was born in Liverpool, and came to this country in 1855, settling in the Canadian County of Middlesex. He was called to the Bar in 1867, and has practiced in London ever since. In February, 1893, he was made a Queen's Counsel and also appointed County Crown Attorney for the above county.

THE BOARD OF RAILWAY COMMISSIONERS.

A noteworthy evidence of the development of modern business life is the Court—for Court it is—which has its headquarters at Ottawa — the newly-formed Board of Railway Commissioners. The work of this Court is most important, and is of much variety, although its jurisdiction concerns only one branch of the great industries of to-day; yet this branch is one which touches a multitude of others.

We doubt not the members of the Court fully realize their responsibility as holding a judicial position charged with very important duties. Whilst having many matters to decide connected with railway and traffic arrangements and conflicting railway interests, they will also have to stand between these gigantic and influential companies and the public, and will see the necessity of protecting the latter, and individuals therein, from the greed and overbearance too often characteristic of rich and powerful corporations. Railway companies have their rights as well as others, but being largely monopolies there is a strong temptation to act without full consideration of what is due to others, and they are transparently alive to their own interests. Presumably, therefore, those who have to deal with them have the greater need of protection.

We doubt if even the Dominion Government, which constituted the Board, has yet realized that it has created a Court of such extended jurisdiction as this Board possesses, and which jurisdiction, if wisely exercised by a tribunal of competent members, will be both a safeguard to the public and a speedy method of settling differences between railway companies, which in the past have been unduly hampered by the cumbrous machinery of the Railway Committee of the Privy Council, now happily defunct. Requiescat in pace.

Should there have been any tendency on the part of this new Court to suppose that it was mainly intended for the protection and advancement of railway interests, that thought must have been short lived, and we do not anticipate complaints on this score. If the Board gains the confidence of the public, as we think it will, it is not unlikely that, in the future, additions will be made to the subjects over which it shall exercise jurisdiction.

As to the Chief Commissioner, we are glad that our confidence previously expressed (ante p. 49) has already been justified. Of the other two members, Mr. Bernier, like the chief, has had several years' practical experience as a member of the old Railway Committee, and this should stand him in good stead. The third member of the Board, Dr. Mills, has already shown himself to be careful, painstaking and energetic, and his opinion on any question not purely one of law—with which he is not expected to be familiar—will be of increasing value. The Board gives promise of being a strong and able Court.

NO JURY TRIALS IN THE PHILIPPINES.

We confess to a good deal of surprise in reading the recent decision in the Supreme Court of the United States to the effect that in the absence of Congressional enactment therefor American citizens in the Philippines have no right to trial by jury in criminal cases. This is contrary to the English doctrine of the transference of the "birthrights of the subject" where new possessions, lacking effective legal institutions, are acquired by conquest; and, with submission, we think it incompatible with the theory of the great expounders of the American constitution touching the rights of citizenship. It is certainly at variance with all Anglo-Saxon traditions.

It appears that the editors of a certain newspaper in Manilla were prosecuted for criminal libel and convicted. The local court having denied their demand for a trial by jury, an appeal was taken on that ground to the Supreme Court of the United States, and the latter tribunal held that as this right had not been expressly granted to the inhabitants of the Philippines by Congressional legislation the court of first instance had ruled correctly on the demand. The majority of the court consisted of Fuller, C.J., and Brewer, Peckham and Holmes, JJ. Mr. Justice Harlan, however, dissented. In the course of his very able dissenting opinion the latter considers that the judgment of the Supreme Court simply amounts to "an amendment of the Constitution by judicial action." He further says: "As for the commission of the crime of murder, a Filipino, subject to the sovereign power of the United States, may be hanged by the authority of the United States. The suggestion that he may not, of right, appeal for his protection to the jury provisions of the constitution is utterly revolting to my mind and can never receive my sanction. The constitution declares expressly that 'the trial of all crimes, except in cases of impeachment, shall be by jury.' It is now adjudged that that provision is not fundamental in respect of ten millions of human beings over whom the United States may exercise full jurisdiction. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: 'The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned*, shall be by jury.' Such a mode of constitution interpretation plays havoc with the old fashioned ideas of the fathers."

Judge Harlan's views commend themselves to our reason. The opinion of the majority of the court in this case if pressed to its logical boundaries would mean that Congress must expressly legislate in behalf of the Filipinos the whole body of rights and remedies comprising the liberty of the subject. Such a conclusion would lead to a juridical *impasse* until Congress could be persuaded that this conclusion was a correct one, and found time to enact a Filipino code with all the necessary infinitude of detail. Again, we ask, if a man may be indicted for a common law offence in the Philippines without Congressional authorization therefor, why in the name of common sense should he be denied a fundamental common law method of trial upon such indictment?

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—SHARE CERTIFICATE—SEAL OF COMPANY—FORGERY OF DIRECTORS' SIGNATURES—PRINCIPAL AND AGENT—SCOPE OF EMPLOYMENT.

Ruben v. *Great Fingall Consolidated* (1904) 1 K.B. 650, was an action brought by the plaintiff to compel the defendant company to register the plaintiffs as holders of certain shares of the defendant company, of which the plaintiffs had obtained from the defendants' secretary a certificate of ownership under the seal of the company. The defence was that the certificate, although admittedly under the company's seal, had been issued by the secretary fraudulently for his own purposes, and that the signatures of two directors attached thereto were forgeries. The plaintiffs had advanced to the secretary, who claimed to be entitled to sell the shares, a considerable sum of money, the price of the shares, and had received from him in good faith the certificate in question without any notice of the fraud. Kennedy, J., held that the company were bound by the certificate which had been issued by their secretary in due course, and that the fact that the directors' signatures thereto had been forged was immaterial; he therefore gave judgment for the plaintiffs. The amount involved being very large no doubt the case will be heard of again in appeal.

LANDLORD AND TENANT—LEASE - NEGATIVE COVENANT—COVENANT NOT TO ASSIGN—PROVISO FOR RE-ENTRY.

In *Harman* v. *Ainslie* (1904) 1 K.B. 698, an appeal was brought from the decision of Wright, J. (1903) 2 K.B. 241 (noted ante vol. 39, p. 666), where he held that where there is a proviso in a lease for re-entry "if the lessor shall commit any breach of the covenants hereinbefore contained on his part to be performed" (there being both affirmative and negative covenants in the lease), such proviso only applies to affirmative covenants and does not extend to breaches of negative covenants, e.g., a covenant not to assign or sublet. This the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) held to be erroneous. The case is important as there were dicta in favour of Wright's view.

SALE OF GOODS – IMPLIED CONDITION — POISONOUS INGREDIENT — BREACH— MEASURE OF DAMAGES—SALE OF GOODS ACT 1893 (56 & 57 VICT. C. 71) SS. 11, 13, 14, SUB-S. 2, 53, SUB-S. 2.

Bostock v. *Nicholson* (1904) 1 K.B. 725. In the year 1900 it may be remembered that a number of persons were made seriously ill and some of them died from drinking beer, which on investigation proved to have been contaminated with arsenic. Litigation took place against the vendors of the beer, and the present was an action brought by the plaintiffs, who were manufacturers of brewing sugar, against the defendants who supplied them with sulphuric acid which was used by plaintiffs in the manufacture of brewing sugar. The plaintiffs did not make known to the defendants nor did the defendants know the purpose for which the acid was to be used, but according to the description in the contract the acid was to be commercially free from arsenic. The defendants at first delivered acid in accordance with the contract, free from arsenic, but subsequently without notice to the plaintiffs delivered acid not commercially free from arsenic. The plaintiffs might by the exercise of ordinary care have discovered the presence of arsenic in the acid, but they did not do so and used it in the manufacture of brewing sugar, which they sold to brewers with the result before referred to. The brewers suffered loss in respect of which the plaintiffs were liable to them. The plaintiffs also lost the price of the acid and the value of the goods spoilt through being mixed with the acid; and the goodwill of their business was also injured. Bruce, J., who tried the action, found that there was a valid sale of goods according to the description within s. 13 of the Sale of Goods Act 1893, and that there had been a breach of the implied condition that the goods delivered should correspond with the description, and on the question of damages he held that the plaintiffs were entitled to recover damages, the measure of which was governed by s. 53, sub-s. 2, of the Act, viz., the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty; and applying that rule, he held the plaintiffs entitled to recover (1) the price paid by the plaintiffs for the acid; and (2) the value of the goods rendered useless by being mixed with the poisonous acid. But he considered that they were not entitled to recover anything for the injury to the goodwill of their business which arose, in his opinion, not from the defendant's act in selling the impure acid, but from the plaintiffs own act in selling the impure sugar to brewers for use in brewing beer.

PRACTICE—EXAMINATION OF JUDGMENT DEBTOR—OFFICER OF CORPORATION—RETIRED OFFICER—RULE 610—(ONT. RULE 902).

In *Société Generale* v. *Farina* (1904) 1 K.B. 794, the Court of Appeal (Collins, M.R., and Mathew, L.J.,) affirmed an order of Phillimore, J., ordering a person who had been, but had ceased to be, a director of the defendant company, to attend for examination as to debts owing to the company and its means of satisfying the plaintiff's judgment. At the time the judgment was signed the party in question had been a director, but he had since resigned, but the Court held that Rule 610 (Ont. Rule 902) entitled the plaintiffs to examine him notwithstanding his resignation.

LANDLORD AND TENANT—DISTRESS—SALE OF GOODS DISTRAINED—PURCHASE BY LANDLORD—2 W. & M. SESS. 1, C. 5, S. 2—(R.S.O. C. 342, S. 16).

In *Moore* v. *Singer* (1904) 1 K.B. 820, the Court of Appeal (Collins, M.R., and Romer and Mathew, L.JJ.,) have affirmed the decision of the Divisional Court (1903) 2 K.B. 168 (noted ante, vol. 39, p. 616), to the effect that on a sale of goods distrained for rent the landlord is not a competent purchaser, and a sale to him is invalid.

COUNTY COURT—JURISDICTION—SALE OF EQUITY OF REDEMPTION—COUNTY COURTS ACT 1888 (51 & 52 VICT. C. 43) S. 67—(R.S.O. C. 55, S. 23 (13)).

In *The King* v. *Whitehorne* (1904) 1 K.B. 827, an application was made for a mandamus to a judge of a County Court to hear and determine an action. By the English County Courts Act the County Courts have jurisdiction in actions for specific performance of any agreement for the purchase of any property where the purchase money shall not exceed £500. The action in question was to compel the specific performance of an agreement for the sale of certain leasehold property which was of the value of more than £500, but which was subject to a heavy charge, the purchase money being only £75. The Divisional Court (Lord Alverstone, C.J., and Wills and Kennedy, JJ.,) held that as the purchase money was only £75 the County Court had jurisdiction although the value of the property exceeded £500. (See R.S.O. c. 55, s. 23 (13)).

INSURANCE—LIFE POLICY—WARRANTY NOT TO COMMIT SUICIDE—POLICY FOR BENEFIT OF THIRD PERSON—CONDITION.

Ellinger v. *Mutual Life Ins. Co.* (1904) 1 K.B. 832, was an action on a policy of life insurance. The policy was issued subject to a warranty by the insured that he would not within one year from its date commit suicide whether sane or insane. The policy

was for the benefit of creditors of the insured. During the year the insured, while insane, committed suicide. It was contended by the plaintiffs that the warranty which was contained in the application for the policy (which by the terms of the policy was made a part of the contract) was not a condition the breach of which would avoid the policy, but merely a personal warranty or independent agreement in respect of which the defendants would have a remedy against the insured's estate. Bigham, J., however, held that the clause in question constituted a limitation of the defendants' liability and that in the event which had happened they were discharged from liability.

TIME—COMPUTATION OF TIME—LIMITATION.

Beardsley v. *Giddings* (1904) 1 K.B. 847, was a prosecution under the Sale of Foods and Drugs Act, and the question was whether it had been brought in time. The Act prescribed that a prosecution shall not be instituted after the expiration of twenty-eight days from the time of purchase. On a case stated by magistrates, the Divisional Court (Lord Alverstone, C.J., and Wills and Kennedy, JJ.,) held that the laying of the information, and not the service of the summons, was the institution of the prosecution.

WILL—CONSTRUCTION—PRECATORY TRUST—"I DESIRE."

In re Oldfield, Oldfield v. *Oldfield* (1904) 1 Ch. 549, the doctrine of precatory trusts was again considered by Kekewich, J., and the Court of Appeal, and practically the same conclusion was arrived at as in *Re Hanbury* (noted ante p. 378). In the present case the testatrix gave all her property to her two daughters equally, "as tenants in common for their own absolute use and benefit," and appointed them her executrices. She however added, "my desire is, that each of my two daughters shall during the lifetime of my son pay to him one-third of the respective incomes of my said two daughters accruing from the moneys and investments of this my will." Counsel for the son argued that the clause created a trust in his favour, and that the decisions of the Court of Appeal in *In re Hamilton* (1895) 2 Ch. 370, and *Hill* v. *Hill* (1897) 1 Q.B. 483, and *Re Williams* (1897) 2 Ch. 12, were erroneous, having regard to the fact that the rule laid down by Lord Alvanley in *Malim* v. *Keighley*, 2 Ves. Jr. 333, that "wherever any person gives property and points out the objects, the persons, and the way in which it shall go, that does create a trust, unless he shews clearly that his

desire expressed is to be controlled by the party, and that he shall have an option to defeat it," was expressly affirmed by the House of Lords. The Court of Appeal (Williams, Stirling, and Cozens-Hardy, L.JJ.,) however, considered that on the face of the will it was plain that the daughters were to take absolutely, and that the expression of a desire that they should give a third of their incomes to the son was insufficient to cut down that absolute estate or create any trust in the son's favour.

COMPANY—DIVIDEND OUT OF CAPITAL—ULTRA VIRES—ACTION AGAINST DIRECTORS—RETENTION OF DIVIDEND IMPROPERLY PAID.

Towers v. *African Tug Co.* (1904) 1 Ch. 558, was an action by shareholders on behalf of themselves and all other shareholders of a limited company against the company and the directors for a declaration that a dividend declared by the directors and the payment thereof out of capital were ultra vires and illegal, and to compel the directors to refund the money so paid. Byrne, J., who tried the action, gave judgment as prayed for the plaintiffs and on the defendants' counterclaim ordered the plaintiffs to repay the dividend: but the Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) reversed his decision on the plaintiff's claim, because the plaintiffs had received the dividend with knowledge of the facts and had not before action repaid it, and, though at the trial they had offered to refund it, that was held not to entitle them to bring the action, which was therefore dismissed, but the judgment on the counterclaim was left undisturbed.

CONFLICT OF LAWS—SCOTCH SETTLEMENT—HUSBAND AND WIFE—ALIMENTARY PROVISION FOR HUSBAND—MORTGAGE BY HUSBAND OF HIS INTEREST.

In re Fitzgerald, Surman v. *Fitzgerald* (1904) 1 Ch. 573. The Court of Appeal (Williams, Stirling and Cozens-Hardy, L.JJ.) have reversed the decision of Joyce, J. (1903) 1 Ch. 933 (noted ante, vol. 39, p. 518). The case turned upon a question of conflict between the law of Scotland and England. On the marriage of a domiciled Englishman to a Scotch lady her property, consisting of heritable bonds, which, according to Scotch law are deemed to be real estate, was settled by a settlement in Scotch form under which the husband, in the event of surviving his wife, was entitled to the income of the settled property for life, "all such payments to be strictly alimentary and not liable to assignment or arrestment by creditors;" and, according to Scotch law, if the husband failed to support the issue of the marriage they are entitled to attach the

alimentary provision. The husband survived the wife and mortgaged his life interest under the Scotch settlement. Upon an application by the trustees to determine the rights of the mortgagees as against the husband and the only child of the marriage. Joyce, J., decided in favour of the mortgagees, holding that the provision against alienation of the alimentary provision was inoperative according to English law. The Court of Appeal, however, have held that it is valid and therefore the mortgage void; that although a restraint against alienation by an adult male person is invalid in English law, yet there is nothing in such a restraint against "public order and good morals" and therefore there is no reason why due effect should not be given to the Scotch law under which such a provision is valid. Stirling, J., however, dissented and thought that, although the trustees were bound to pay the income to the husband nothwithstanding his assignment, nevertheless the fund when it came to his hands would be bound by his mortgage.

PATENT—INFRINGEMENT—PATENT FOR COMBINATION—SALE OF COMPONENT PART OF PATENTED ARTICLE—INTENTION OF PURCHASER TO INFRINGE—KNOWLEDGE OF VENDOR.

In *Dunlop* v. *Mosely* (1904) 1 Ch. 612, the Court of Appeal (Willlams, Stirling and Cozens-Hardy, L.JJ.) have unanimously affirmed the decision of Eady, J. (1904) 1 Ch. 164, (noted ante, p. 192), that the sale of a component part of a combination, the subject of a patent, to a person whom the vendors know intends to use it for the purpose of infringing the patent, is not an infringement by the vendors.

EXECUTOR—POWER OF EXECUTOR TO COMPROMISE CLAIM OF CO-EXECUTOR—TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53), S. 21—JUDICIAL TRUSTEES ACT, 1896 (59 & 60 VICT., C. 35), S. 3—(R.S.O. C. 129, S. 33—62 VICT. (2), C. 15, S. 1 ONT.)

In re Houghton, Hawley v. *Blake* (1904) 1 Ch. 622, Kekewich, J., holds that even apart from the Trustee Act, 1893, s. 21 (see R.S.O. c. 129, s. 33), an executor has power to compromise the claim of a co-executor against the estate and that where such a compromise has been made, under the Judicial Trustees Act, 1896, (see 62 Vict. (2), c. 15, s. 1, Ont.), if the executor acts "honestly and reasonably" in making the compromise he cannot be called to account as "for a breach of trust."

COMPANY—DEBENTURE—CONDITION THAT DEBENTURE IS TO BE PAYABLE TO REGISTERED HOLDER—ASSIGNOR—ASSIGNEE—EQUITY AGAINST ASSIGNOR—TRUSTEE FOR CREDITORS.

In re Brown, Shepheard v. *Brown* (1904) 1 Ch. 627. A firm which held certain debentures of a limited company, to which the firm was indebted in £1,666, transferred the debentures to a trustee for the benefit of creditors. Part of the property subject to the debentures was the firms' debt of £1,666. The debentures provided that they should be payable to the registered holder thereof without regard to any equities between the company and the original, or any intermediate holder, and that the company should not be bound to enter or take notice of any trust or to recognize any right in any other person. The assignee caused himself to be registered as the holder of the debentures assigned. The action was a debenture holders' action to realize the amount due under the debentures and on the application to distribute the fund realized among the debenture holders, the point was raised whether the assignee was not bound, notwithstanding the terms of the debentures, to bring into account the £1,666, which his assignors owed the company. Byrne, J., held that he was, and that he had no greater rights than his assignors, neither the company nor the other debenture holders having come in under the creditor's deed.

SPECIFIC PERFORMANCE—CONTRACT REQUIRED BY LAW TO BE IN WRITING—PAROL VARIATION OF CONTRACT—STATUTE OF FRAUDS.

In *Vezey* v. *Rashleigh* (1904) 1 Ch. 634, an order had been made by consent for the execution of a lease of certain lands by the defendant, which order the plaintiff claimed to have specifically performed. The defendant set up that the parties had subsequently agreed by parol to a variation of the terms of the order. Byrne, J., however, held that although parol evidence is admissible to shew that a contract required by law to be in writing has been rescinded by parol so as to induce the Court to refuse the interposition of its equitable jurisdiction to enforce it, yet parol evidence is not admissible to shew that it has been varied.

ADMINISTRATION—CONTINGENT FUTURE LIABILITIES—EXECUTOR—INDEMNITY RETENTION OF ASSETS—PRIVITY OF ESTATE.

In re Nixon, Gray v. *Bell* (1904) 1 Ch. 638, was an action for the administration of the estate of a deceased person. Part of the estate consisted of leaseholds in which the testator was beneficially

interested, though not named as lessee. The executors claimed that a part of the assets should be retained to answer possible contingent future liabilities under the leases, but Byrne, J., held that this ought not to be done unless there is a privity of estate between the executors and the lessors, which there was not in the present case.

RECEIVER—COSTS - INDEMNITY—CHARGES OF FRAUD—COSTS OF DEFENDING ACTION.

In re Dunn, Brinklow v. *Singleton* (1904) 1 Ch. 648, is a case which seems to shew that a person undertaking an office of trust may incur liabilities in respect of his fiduciary character, for which he may not be entitled to indemnity out of the trust estate. In this case a receiver had been appointed in the action, and an action was brought against him, charging him with fraud in his character of receiver. He successfully defended the action and it was dismissed with costs, which he was unable to recover from the plaintiff. These costs he now claimed to be paid out of the estate of which he had been appointed receiver: but Byrne, J., came to the conclusion that the guiding principle on which receivers are entitled to indemnity against costs incurred by them in defending actions is, that the defence of the action was for the benefit of the trust estate. Here the charges against the receiver were personal, and the defence of the action being of no benefit to the estate the receiver's claim to indemnity was rejected.

VENDOR AND PURCHASER—PURCHASER'S INTEREST IN LAND—JUDGMENT CREDITOR OF PURCHASER—RECEIVER OF PURCHASER'S INTEREST—NOTICE—RESCISSION OF CONTRACT ON MONEY PAYMENT TO PURCHASER.

In *Ridout* v. *Fowler* (1904) 1 Ch. 658, the plaintiff recovered a judgment against one Green, who had entered into a contract with the defendant to purchase certain lands for £2,850 and had paid £300 as a deposit and been let into possession of the property. The plaintiff in August, 1902, obtained an order, appointing himself, on giving security, receiver of Green's interest in the land under the contract of sale. He gave notice of this order to the defendant in August, 1902, but did not perfect his security as receiver until May, 1903. In March, 1902, the defendant had given notice to Green, rescinding the contract and forfeiting his deposit, and in May, 1902, Green had commenced an action

against the defendant, claiming a return of the deposit, in which the defendant counterclaimed for specific performance. In January, 1903, an order was made by consent in the action of *Green* v. *Fowler* whereby the contract was rescinded and Green, on payment of £110, delivered up possession of the premises to Fowler. After completing his security as receiver the plaintiff brought the present action, claiming a lien on the property for the amount of his judgment. Farwell, J., dismissed the action, holding that under the circumstances the defendant was not a trustee of the land comprised in the contract for Green, and that Green's interest under the contract was not such an interest in land as could be charged by the receivership order, and inasmuch as the plaintiff had not perfected his security until after the compromise, he had no claim against the vendor in respect of the £110.

PUBLIC HEALTH—NUISANCE—SMALLPOX HOSPITAL—QUIA TIMET ACTION—EVIDENCE—INJUNCTION.

Attorney-General v. *Nottingham* (1904) 1 Ch. 673. This was a quia timet action to prevent the defendant corporation from using a building lately erected by them, as a smallpox hospital, on the ground that so to do would be a public and a private nuisance. The evidence of experts was conflicting as to the possibility of aerial dissemination of the disease for any considerable distance, say for more than 50 feet, and the hospital was distant 51 feet from the nearest highway and there were no residents within a quarter mile radius, and it was not contended that there was any consensus of opinion on the point, and Farwell, J., came, therefore, to the conclusion that no case had been made by the plaintiff on that ground, and there was no evidence that the hospital was not properly conducted, and he, therefore, held that it was not a nuisance either public or private and refused the injunction. In disposing of the case he had to consider the question of the admissibility of evidence of what had occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, and came to the conclusion that it was receivable on the authority of *Hill* v. *Metropolitan Asylum* (1879) 42 L.T. 212; (1882) 47 L.T. 29. At the same time he expresses a doubt whether the admission of such evidence is not wrong in principle and calculated to confuse and embarrass the case by raising a number of collateral inquiries on which it is impossible for the Court to pronounce.

GOODWILL—SALE OF BUSINESS—VENDOR SOLICITING OLD CUSTOMERS.

In *Curl* v. *Webster* (1904) 1 Ch. 685, the defendant had sold a business carried on by him to the plaintiffs, and he subsequently organized a limited company for the purpose of carrying on a similar business, and thereafter solicited custom from some of the customers of his former business for the new company. The action was, therefore, brought to restrain the defendant from soliciting business from his former customers, and the only question was as to the form of the injunction. For the defendants it was contended that it should be limited so as not to prevent the defendant soliciting old customers, who, of their own accord, had become customers of the new company before any solicitation was made to them, but Farwell, J., decided that there should be no such limitation and granted the injunction in general terms, restraining the defendant from soliciting or directing, or suggesting solicitation by travellers, or other agents of the company, of any of the customers of the business sold by him to the plaintiff.

COSTS—TAXATION—INSPECTION OF PROPERTY IN QUESTION BY CONSENT—RULE 659—(ONT. RULE 1096.)

In *Ashworth* v. *English Card Clothing Co.* (1904) 1 Ch. 702, an inspection of the property in question in the action had been arranged between the solicitors without any order being obtained under Rule 659 (Ont. Rule 1096), and on a taxation of costs the Master had disallowed the costs incurred in the inspection. On appeal, however, to Joyce, J., he held that such costs were properly taxable and considered it would be the worst possible precedent to disallow such costs merely because the inspection was made without an order of the Court being obtained.

COSTS REFUNDED ON REVERSAL OF JUDGMENT—INTEREST.

S.C., p. 704. Another point of practice is dealt with by Joyce, J., concerning the right to interest on costs. The action was dismissed with costs, and these costs were paid by the plaintiff to the defendants with interest to date. The Court of Appeal subsequently reversed the judgment and ordered the costs so paid to be refunded, and the defendants repaid the sum they had received with interest to date. Upon a further appeal, the House of Lords restored the original judgment, dismissing the action, and the

plaintiff repaid to the defendants the sum he had received from them, but without any further interest. Joyce, J., held that the plaintiff was liable to pay interest on the amount refunded from the time he received it from the defendants down to the time he repaid it.

NUISANCE—NOISE—VIBRATION—ELECTRIC GENERATING STATION—INJUNCTION.

Colwell v. *St. Pancras* (1904) 1 Ch. 707, was an action to restrain a nuisance caused by the erection and operation by the defendants of an electric generating station whereby, owing to the noise and vibration thus occasioned, the plaintiffs were damnified. The station had been erected by the defendants under a provisional order made under a statute, which order, however, expressly declared that nothing therein contained should exonerate the defendants from an action for nuisance in the event of any being occasioned by them. It was admitted that the vibration caused by the defendants' machinery was an actionable nuisance, unless it was excusable as being merely temporary and the defendants alleged that the nuisance could be obviated in time by experiment and alteration of the machinery, and contended that until the machinery was perfected their works were not complete and the action would not lie. Joyce, J., however, was of opinion that the nuisance could not properly be called merely temporary or occasional, and that the plaintiffs were under no obligation to put up with the nuisance occasioned by the noise and vibration of the defendants' machinery until they had succeeded in finding some means of using it without creating a nuisance, and he granted the injunction as asked.

We need scarcely say that the article in our issue of June 1st regarding evidence of accused persons and their privilege as to comment was not intended as a review on the subject, but merely to call attention to the divergent views in Scotland and Nova Scotia. In Ontario, as our readers are doubtless aware, the subject was discussed in *Reg.* v. *Coleman*, 30 O.R. 93; 2 Can. Cr. Cas. 523, and the rule there settled is the same as in Nova Scotia. The old and the new Scotias differ. We think those of the "Mayflower" and not those of the "Thistle" are in the right.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

(Que.] CITY OF HULL *v.* SCOTT. [April 27.

Constitutional law—Navigable waters—Arm of river—Possession—Title.

By the law of the Province of Quebec, as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable in consequence of its connection with the navigable stream unless it be itself navigable or floatable as a matter of fact.

The land in dispute forms part of the bed of a stream, called the Brewery Creek, which was originally a narrow inlet from the Ottawa River, dry during the summer time in certain parts, and whose waters passed over certain lots shewn on the survey of the Township of Hull, and granted by description according to that plan to the defendants' auteur, in 1806, without any reservation by the Crown of those portions over which the waters of the creek flowed. Under that grant, the grantee and his representatives have ever since had possession of the lands on both sides of the creek and of the creek itself. The erection, during recent years, of the public works constructed in the Ottawa River for the improvement of navigation and in the interest of the timber trade, have caused its waters to overflow into the creek to a considerable extent at all seasons of the year. In 1902, the City of Hull obtained a grant by letters patent from the Province of Quebec of a portion of the bed of the creek, as constituting part of the Crown domain, and brought the present action au petitoire, for a declaration of title, the Attorney-General intervening for the province as warrantor.

Held, affirming the judgment appealed from (Q.R. 24 S.C. 59):

1. That as the Brewery Creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa River into it could not have the effect of altering the natural character of the creek.

2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.

3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent

of the Crown was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water described in the grant.

Foran, K.C., and *Cannon*, K.C., for appellants. *Aylen*, K.C., for respondents.

Ont.] EAST HAWKESBURY *v.* LOCHIEL. [April 27.

Municipal corporation—Survey—Road allowance—Evidence—Departure from instructions and plan.

The Township of Lochiel forms part of the original Township of Lancaster laid out and partially surveyed about the years 1784 or 1785, as composed of seventeen concessions. Subsequently an eighteenth concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the Township of Lochiel. During the year 1798 the Township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partially surveyed by a deputy provincial surveyor, named Fortune, who returned his plan and field notes without the double lines generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury in 1816 a D P.L.S., named McDonald, planted posts on the ground, but returned the plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury and, in the Lancaster boundary, the rectangular form was broken.

Held, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken.

Held, also, that even if the work subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet having regard to the decisions in *Tanner* v. *Bissell*, 21 U.C.Q.B. 553 and *Boley* v. *McLean*, 41 U.C.Q.B. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey.

Appeal dismissed with costs.

Leitch, K.C., and *O'Brien*, for appellant. *Maclennan*, K.C., and *Tiffany*, for respondent.

Ex. C.] THE KING *v.* KITTY D. [May 4.

Illegal fishing—Seizure of vessel—Evidence of vessel's position.

The American vessel Kitty D. was seized by the Government cruiser Petrel for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture the evidence was conflicting as to the position of both vessels at the time of seizure, and the local judge in Admiralty decided that the weight of evidence warranted a finding that the vessel seized was not in Canadian waters at the time. On appeal by the Crown,

Held, that as the Petrel was furnished with the most reliable log known to mariners for registering distances and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the Kitty D. and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book, and as the local judge had misapprehended the facts as to the course sailed by the Petrel, the evidence of the officers of the Petrel must be accepted, and it establishes that the Kitty D. had been fishing in Canadian waters and her seizure was lawful. Appeal allowed with costs.

Newcombe, K.C., for appellant. *German*, K.C., for respondent. *Ritchie*, K.C., for United States Government.

Ont.] RANDALL *v.* AHEARN & SOPER CO. [May 4.

Negligence—Electric wire—Trespasser—Evidence—Contributory negligence—New trial.

The Ahearn & Soper Co. had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa and obtained power from the Ottawa Electric Co. For the purposes of the contract wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole and in doing so his hands touched the ends of the tie wire by which he received a shock and fell to the ground being seriously injured. To an action for damages for such injury the Ahearn & Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held that this defence was established and dismissed the action.

Held, reversing said judgment, 6 O. L. R. 619, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract and the evidence did not shew that R. was engaged in the ordinary business of his employers and the case should be retried, the jury having failed to agree at the trial.

A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves which would be furnished on application. R. was not wearing such gloves when he was hurt.

Held, that the mere fact of the absence of gloves was not such negligence on R.'s part to warrant the case being withdrawn from the jury; that as to the Ahearn & Soper Co., R. was not bound by said rules; and that though his failure to take such precaution was evidence of negligence he had a right to have it left to the jury and considered in connection with other facts in the case. Appeal allowed with costs.

Fripp and *Magee*, for appellants. *Riddell*, K.C., and *Fisher*, for respondents.

Ont.] MILLER *v.* KING. [May 4.

Negligence—Master and servant—Workmen's Compensation Act.

M., proprietor of iron works, had built an engine in the course of business, and while it was standing on a railway track in the workshop a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate the jury found that the accident was due to the negligence of M. in not having the engine properly braced.

Held, that this finding was justified by the evidence and M. was liable under The Workmen's Compensation for Injuries Act (R.S.O. 1897, c. 160).

Held, also that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer." Appeal dismissed with costs.

Riddell, K.C., and *G. L. Smith*, for appellant. *Aylesworth*, K.C., and *Stone*, for respondent.

N.B.] IN RE HENRY VANCINI. [May 4.

Criminal law—Jurisdiction of magistrate—Crim. Code, s. 785—Constitutional law—Constitution of criminal courts.

By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 (63 Vict. c. 46), the

provisions of said section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada.

Held, that though there are no courts of General Sessions except in Ontario the amending Act is not therefore inoperative but gives to a magistrate in any other province the jurisdiction created for Ontario by s. 785.

Though the organization of courts of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing courts or individuals the duty of administering the criminal law and their action to that end need not be supplemented by provincial legislation. Appeal dismissed without costs.

Crockett, for appellant. *Newcombe*, K.C., for Attorney-General of Canada.

N.B.] WOOD *v.* LEBLANC. [May 4.

Title to land—Colourable title—Possession—Statute of limitations—Evidence.

The possession of a part of land claimed under colour of title is constructive possession of the whole which may ripen into an indefeasible title, if open, exclusive and continuous for the whole statutory period.

Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other parties lumbered on the land, continuously or at intervals, during any portion of such period. Appeal dismissed with costs.

Powell, K.C., and *Teed*, K.C., for appellant. *Pugsley*, K.C., *Masters*, K.C., and *Friel*, for respondent.

N.S.] MORGAN SMITH CO. *v.* SISSIBOO PULP CO. [June 8.

Mechanic's lien—Machinery furnished—Contract price.

Under the Mechanics' Lien Act of Nova Scotia, R.S.N.S. (1900) c. 171, a lien for machinery for a mill does not attach until it is delivered and if the contractor for building the mill has then been fully paid there is nothing upon which the lien can operate as by s. 6 of the Act the owner cannot be liable for a sum greater than that due to the contractor.

B., holder of more than half the stock of a pulp company for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill and furnish working capital on receipt of all the bond issue and cash on hand. The offer was accepted and all the stock issued as fully paid up was deposited with a Trust Co. and the cash his own cheque and the price of five shares handed to B. The stock was sold and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the

mill was constructed. The machinery was supplied by an American company but when it was delivered all the money had been paid out as above.

Held, affirming the judgment appealed from (36 N.S. Rep. 348) that as all the money had been paid before delivery the company was not liable under the Mechanics' Lien Act to pay for the machinery.

Held, also, that s. 8 of the Act which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply as no price for building the mill was specified but the price was associated with other considerations from which it could not be separated. Appeal dismissed with costs.

Pelton, K.C., and *R. V. Sinclair*, for appellants. *H.A. Lovett* and *F.H. Bell*, for respondents.

Ont.] EWING *v.* DOMINION BANK. [June 8.

Estoppel—Forgery—Promissory note—Discount—Duty to notify holder.

E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for $2,000 would fall due at that Bank on a date named and asking them to provide for it. The name of E. & Co. had been forged to said note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees.

Held, affirming the judgment of the Court of Appeal, 7 O.L.R. 90, SEDGEWICK and NESBITT, JJ., dissenting, that on receipt of said notice E. & Co. were under a legal duty to inform the bank, by telegraph or telephone, that they had not made the note and not doing so they were afterwards estopped from denying their signature thereto. Appeal dismissed with costs.

Osler, K.C., for appellants. *Aylesworth*, K.C., and *Milliken*, for respondents.

N.S.] DOMINION IRON & STEEL CO. *v.* MCDONALD. [June 8.

Assessment and taxes—Exemption—Railways—Imposition of tax—Date —Municipal Act.

Sec. 3 of R.S.N.S. (1900) c. 73 exempted from taxation "the road, rolling stock....used exclusively for the purpose of any railway, either in course of construction or in operation, exempted under the authority of any Act passed by the legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation but all former assessment acts were repealed by these Revised Statutes so that

it was not "exempted" when the latter came into force. By 2 Ed. VII. c. 25, assented to on March 27, 1902, the word "exempted" was struck out of the above clause and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway.

Held, per FITZPATRICK, C.J., that under the above recited clause the railway was exempt from taxation.

Held, per SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ., that if the railway could be taxed under the Assessment Act of 1900 the rate was not authorised until the amending Act of 1902 by which it was exempt had come into force and no valid tax was, therefore, imposed. Appeal allowed with costs.

Lovett, for appellants. *Borden*, K.C., for respondents.

N.S.] KNOCK *v.* OWEN. [June 8.

Solicitor and client—Costs—Confession of judgment—Agreement with counsel—Overcharge.

A solicitor may take security from a client for costs incurred though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements.

A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him.

Held, that though the arrangement was improper it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom. Appeal dismissed with costs.

Wade, K.C., for appellant. *Borden*, K.C., for respondents.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J., Teetzel, J.] [Feb. 11.

REX *v.* JOHNSON.

Criminal law—Wilful destruction of fence—Criminal Code, ss. 481 (2), 507—"Colour of right"—Conviction—Jurisdiction of magistrate—Rejection of evidence—Unregistered plans.

The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. By s. 481 (2) there is no Criminal offence under s. 507 unless the act of damages is done "without legal justification or excuse and without colour of right."

Held, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.

Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction.

Held, also, that the convicting magistrate erred in disregarding plans of the locus because they were not registered. Where lots are sold in sections pursuant to plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not.

Tucker, for defendant. *Cartwright*, K.C., for magistrate. *Du Vernet*, for complainant.

Boyd, C., Ferguson, J., Meredith, J.] [Feb. 11.

REX *v.* JOHNSON.

Criminal law—Conviction—Motion to quash—Recognizance—Insufficiency—Justice of the Peace—Married woman—Separate estate.

The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.

Semble, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance.

J. E. Jones, for complainant. *H. G. Tucker*, for defendant.

Street, J.] McINTYRE *v.* LONDON AND WESTERN TRUSTS CO. [Feb. 23.

Executors and administrators—Administration—Cash on deposit—Rate of interest—Bequest of use of chattels for limited period—Sale of chattels—Interest on proceeds—Land contracted to be sold by testator—State of nature—Right to dower—Payment to widow for release—Compensation of executors—Infants—Contingent legacies—Interest as maintenance.

Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees.

Held, that the executors would not have been justified in making long or permanent investments of the money which came to their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for 20 days during which it was invested in a debenture, and 3 per cent. thereafter until it was distributed: *Inglis* v. *Beaty*, 2 A.R. 453, and *Spratt* v. *Wilson*, 19 O.R. 28, distinguished.

A part of the will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors at H.'s request, and the proceeds were paid to him.

Held, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account.

The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her,

and she released her dower; they then conveyed to the purchaser under s. 24 of the Trustees and Executors Act, R.S.O. 1897, c. 129.

Held, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland firewood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R.S.O., c. 129, to apply the money of the estate in the purchase of a release of the widow's dower, and were entitled to charge the estate with the $390.

The estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000 worth of property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $6,500 interest. They managed the estate for a period of a little more than four years, down to the date of a report providing for their remuneration.

Held, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected and to be collected, and $100 a year in addition for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus.

The testator bequeathed to his two infant sons $4,000 each contingent upon their attaining 25 years of age. The only other provision for them was a gift to each of one-tenth of the residuary estate.

Held, that interest as a means of maintenance is payable out of the general residue of an estate upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies: the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable.

Aylesworth, K.C., *Folinsbee*, *Hume Cronyn*, *T. G. Meredith*, K.C., *Gibbons*, K.C., and *A. Stuart*, K.C., for the various parties.

Trial.—Meredith, C.J.C.P.] [March 2.

HOLLAND *v.* TOWNSHIP OF YORK.

Way—Highway laid out by private person—Assumption for public user—Expenditure by township corporation on sidewalk—Non-repair—Negligence—Act of wrongdoers—Relief over.

A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment has been duly made to the persons who built it.

Held, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII, c. 19 (O.) The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person who has been assumed for public user.

The highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road, in order to afford a passage across it.

Held, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants.

Geary, for plaintiff. *Shepley*, K.C., and *Kyles*, for defendants. *Lawrence*, for third parties.

Boyd, C.] IN RE DUNN. [March 10.

Will—Construction—Legacies—Abatement—Devastavit.

Testator died in 1878, having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell, and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other

executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated.

Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor.

Simpson, K.C., for administrators. *Riddell*, K.C., for specific legatees *Shepley*, K.C., for estate of John Simpson. *W. N. Ferguson*, for estate of David Fisher.

Boyd, C.,] IN RE OLIVER AND BAY OF QUINTE R.W. CO. [March 11.

Costs—Taxation—Railway Act—Delegation by judge—Review of taxation—Principle of taxation—Items—Desistment—Arbitration.

The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 Vict., c. 29 (D.), provided for by ss. 154, 158, is not for the judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred: and his conclusions may be adopted or varied by the judge.

If lands are taken compulsorily, the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed.

Held, with regard to items in dispute upon taxation:—

1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed.

2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named.

3. That "instructions for brief" upon arbitration should be allowed.

4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed.

5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with.

6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature.

7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be allowed, the liability for costs having been disputed: see 6 O.L.R. 543.

Marsh, K.C., for owner and mortgagee. *Middleton*, for railway company.

Maclennan, J.A.] EVANS *v.* TOWN OF HUNTSVILLE. [April 11.

Payment out of court—Money paid in as security for costs of appeal—Surplus—Execution creditor—Stop order—Agreement with solicitors.

The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of $200, paid into court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed with costs, was held entitled to payment of the surplus of the $200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established.

Hewson, K.C., for defendants. *J.E. Jones*, for plaintiff.

Osler, J.A.] WALLACE *v.* BATH. [April 13.

Court of Appeal—Notice of intention to appeal—Rule 799—Time—Pronouncing or entry of judgment.

A judgment in a mechanic's lien action, tried by a local Master, was signed March 12, but dated Feb. 24, being the day on which the Master had signed a memorandum of his findings, a copy of which he on the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to the costs of the action, but they were disposed of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail.

Held, that the month within which notice of intention to appeal from the judgment must, by Rule 799, to be given, ran from the signing of the judgment on the 12th March.

N. McKay, for plaintiffs. *F.E. Hodgins*, K.C., for Playfair-Preston Co.

Trial—Anglin, J.] BLACK *v.* WHEELER. [April 15.

Costs—Scale of—Trespass to land—Title—Pleading—Amendment—Terms—Discretion.

In an action in the High Court for trespass to land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence denied both, and asserted title and right to possession in himself, and also pleaded leave and licence. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy and occupation, and expressly admitting both, and withdrawing his own claim to right

of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and licence, and assessed the plaintiff's damages at $1, for which a verdict was entered.

Held, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court.

Semble, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made.

B. N. Davis, for plaintiff. *Raney*, for defendant.

Street, J.] LONG *v.* LONG. [April 15.

Trial—Notice of trial—Close of pleadings—Several defendants—Irregularity—Waiver—Delay.

A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it.

A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice.

McBrady, K.C., *W. H. Blake*, K.C., *Harcourt*, and *Slaght*, for various parties.

Cartwright, Master in Chambers.] [May 18.

REX EX REL. MOORE *v.* HAMMILL.

Quo warranto—Mayor and town councillors—"Current expenditure"—Nature of loans for—Borrowing by outgoing council—Relator's motives—Affidavits as to—Costs.

A mayor and five councillors of a town having voted for borrowing money to meet the current expenditure for 1903 in excess of the amount authorized by s. 435 of the Municipal Act of 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation. The same relator then took further proceedings against the mayor and four old councillors on the same grounds to have them unseated again.

Held, in answer to the contention that sums expended for school purposes and debentures, and other special charges, were not "current expenditure"; that the by-laws recited that the loans were to meet "current expenditure," and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers; that the sums borrowed were in the estimates and were part of the current expenditure for 1903, and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated.

Held, also, that a sum of $5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902 should be taken into account.

Held, also, that the personal motives of the relator had no bearing on the motion or any part of it, and affidavits and counter affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs.

Aylesworth, K.C., and *C. F. Sutherland*, for the relator. *A. G. MacKay*, K.C., contra.

Meredith, C.J.C.P., Maclaren, J.A., MacMahon, J.] [June 10.

REX *v.* MANCION.

Justice of the Peace—Conviction—Minute of—Absence of formal entry—Quashing—Costs.

Where a Justice of the Peace convicts or makes an order against a defendant and a minute or memorandum of such is then made the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed.

The Court has jurisdiction by virtue of sec. 119 of the Judicature Act to award the costs of a motion to quash a conviction under the Ontario statute against either the Justice of the Peace or informant. *Rex* v. *Bennet* (1902) 4 O.L.R. 205, distinguished.

Marsh, K.C., for defendant. *Middleton*, for informant and magistrate.

Street, J.] CAMDEN CHEESE AND BUTTER CO. *v.* HART. [June 13.

Cheese factories—Arbitration.

By reason of s. 16, R.S.O. 1897, c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between members of a Cheese and Butter Manufacturing Association, and one of the members with reference to a withdrawal of a member unless and until the association forms rules in accordance with sec. 6 of that Act in reference to the expulsion of a member.

H. L. Drayton, for defendant appellant. *D. L. McCarthy*, for plaintiff.

Street, J.] IN RE CURRY AND WATSON'S SETTLEMENT. [June 14.

Settled Estates Act—Leave to mortgage—Express declaration to contrary in settlement.

This was an application by the trustees of a settled estate under R.S.O. 1897, c. 71, for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "Sell, but not mortgage, the trust property or any part thereof."

Held, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of sec. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage.

W. H. Blake, K.C., for applicant. *Harcourt*, for infants.

Boyd, C.] STANLEY *v.* HAYES. [June 15.

Lunacy—Civil liability of lunatic—Trespass to property.

Under the Common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though being incapable of criminal intent he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to show that while not responsible, it may be, to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong.

Held, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate.

R. Robertson, for plaintiff. *F. J. Palmer*, for defendant.

Trial—Britton, J.] [June 15.

ELGIN LOAN AND SAVINGS CO. *v.* ORCHARD.

Fraudulent conveyance—Voluntary deed—Creditors.

A grantor in January, 1903, believing himself to be in perfectly solvent circumstances made a voluntary conveyance of property to his daughter. At the time he made the conveyance he owed the plaintiffs $6,150. He died in August, 1903, when $5,000 still remained due to the plaintiffs and the deceased left no property out of which the amount could be realized. The plaintiffs now claimed to have the conveyance set aside or decreed subject to the payment of the deceased's debts. At the time of his death the deceased had 345 shares of stock in the plaintiff company, which failed on June 15, 1903. At the time of the impeached conveyance the deceased also owned other property to the value of over $4,000. At the time the debt to the plaintiffs was incurred the stock of the company was regarded both by the deceased and the company as ample security for their claim

and was pledged to them for it, and so continued down to the time of the impeached conveyance.

Held, that the action should be dismissed because this was not a case where the necessary consequence of what the deceased did was to defeat or delay his creditors within the meaning of the Statute of Elizabeth, nor was there any evidence of actual intent so to do.

W. K. Cameron, for plaintiffs. *J. M. Glenn*, for defendants.

Idington, J.] DINI *v.* FAUQUIER BROS. [June 16.

Administrator—Right of action—Action before letters granted—Lord Campbell's Act.

This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence as alleged, of their neglegence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ in this action issued, but that letters were not actually issued until two days later. The plaintiff never had any personal right or interest in the subject matter of the litigation.

Held, that the action must be dismissed, but without prejudice to the plaintiff bringing another action.

Boultbee, for plaintiff. *Hearst*, for defendants.

Trial—Britton, J.] [June 16.

DELEHANTY *v.* MICHIGAN CENTRAL R.W. CO.

Railways—Negligence—Ejection of drunken passenger—Lord Campbell's Act.

The deceased was a passenger on defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily and when near Bridgeburg began to annoy passengers and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the International Railway bridge over the Niagara River; and the deceased who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. The train was only five minutes run from the city of Black Rock and only twenty minutes run from Buffalo, its destination.

Held, that the defendants were liable for damages, inasmuch as the act of the deceased was such as it might reasonably be expected that a

man in his condition would do upon being put off the train when and where he was put off.

German, K.C., and *Petit*, for plaintiff. *Saunders* and *Cattenach*, for defendants.

Boyd, C.] BROWN *v.* BROWN. [June 17.

Dower—Locatee of Crown lands—Bond—Unregistered assignment.

A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage, obtained the patent.

Held, that his widow was not entitled to dower inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son.

A locatee of land transferred all his interest therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office.

Held, that notwithstanding R.S.O. 1897, c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act.

A. Shaw, K.C., for plaintiff. *Aylesworth*, K.C., for defendant.

Trial—Teetzel, J.] KERR *v.* MURTON. [June 18.

Stockbrokers—Dealings on margin—Obligation of broker to sell.

There is no obligation on a broker in the absence of the customer's orders, to sell shares during a falling of market after he has demanded further margins, and received no reply from his customer; and therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer.

Joseph Montgomery, for plaintiff. *R. W. Eyre*, for defendant.

Britton, J.] ELLIS *v.* WIDDIFIELD. [June 20.

Public schools—School sections—Subdivision into—Mandamus.

The Public School Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:—"The Municipal Council of every township (except where Township Boards have been established) shall subdivide the township into school sections so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants here asked

for an order of mandamus commanding the respondents to subdivide the township into school sections.

Held, that there must be some discretion left to a township council as to when the township shall be subdivided; and that even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body has honestly attempted to do their duty; and upon the facts as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of mandamus should be made.

Du Vernet, for applicants. *Browning*, for respondents.

Britton, J.] STROUD *v.* SUN OIL COMPANY. [June 21.

Partition or sale—No common title—Easement.

When on an application for partition or sale of lands it was alleged by the defendant and prima facie evidence given that he had acquired as to part of the land title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself.

Held, that there being no common title, no interest in common, no order for partition or sale should be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to get a sale by partition proceedings and thus force the defendants to protect their easement by purchasing, or permit it to be destroyed by sale.

I. Dickson, for plaintiff. *McClemont*, for defendant.

Province of New Brunswick.

SUPREME COURT.

Gregory, J.] [April 18.

MARYSVILLE BOARD OF HEALTH *v.* MCNALLY.

Summary conviction—Offences against Health Act—Conviction charging two offences.

Defendant was convicted by the police magistrate of Fredericton for that he did "unlawfully and wilfully obstruct and interfere with a person employed under the authority of the local board of health of the said town in preventing any person entering into a district there situate and placed under quarantine by said local board of health, and did force an

entrance into said district contrary to the provisions of the Public Health Act."

Held, that the conviction was bad in that it charged two separate offences against the Health Act, in support of one of which (obstruction of the officer) there was not a particle of evidence in the record.

R. W. McLellan, for complainant. *O. S. Crocket*, for defendant.

En banc.] EX PARTE DEAN. [June 17.

Order without hearing—Appeal—Certiorari.

The Judge of the Saint John County Court made an order under 59 Vict. c. 28, s. 48, committing the applicant to prison for three months, because, after his arrest in a civil suit in the St. John County Court, he had made an appropriation of property in payment of another debt without paying the debt sued for. The Judge based the order upon evidence, which the applicant had given upon the trial of the action, and not upon any hearing upon the application for the order under the provisions of the Act referred to. The order did not set out the ground upon which it was granted.

Held, on motion to make absolute a rule nisi for certiorari and to quash, that, notwithstanding the provisions of 59 Vict. c. 28, for appeal, a certiorari ought to be granted under these exceptional circumstances.

Held, also, that the order was bad, there having been no hearing of evidence upon the application therefor, and the grounds upon which it was granted not being set out therein.

A. W. McRae, in support of rule. *E. P. Raymond*, contra.

En banc.] EX PARTE BERTIN. [June 17.

Liquor License Act—Conviction—Payment of part of penalty—Warrant of commitment—Certiorari.

The applicant was convicted for selling liquor without license contrary to the Liquor License Act, 1896, and fined $50.00 and $6.00 costs, in default of which he was ordered to be imprisoned. A few days after the conviction he paid the magistrate the costs. Subsequently the magistrate issued a warrant of commitment, under which the applicant was arrested and imprisoned. The Supreme Court granted a rule nisi for a certiorari and a rule nisi to quash the conviction, and "all the proceedings on which the same was based, and all the proceedings had thereon."

Held, on motion to make the rule absolute,—without deciding as to the legality of the imprisonment under the commitment after the costs had been paid without an offer to pay them back,—that the conviction could not be attacked upon this ground and that certiorari would not lie to remove the warrant of commitment.

Barry, K.C., in support of rule. *J. P. Byrne*, contra.

En banc.] SCHOOL TRUSTEES *v.* HAINES. [June 17.

School contract—Ambiguity—Parol evidence.

On January 23rd, 1902, S., one of the defendant trustees, requested P. to telephone to the plaintiff and ask her if and on what terms she would teach their school for the balance of the then current school term, which began on January 1 and would end on June 30. P. talked to the plaintiff over the telephone in the hearing of S. Plaintiff said she would go at the rate of $90 a term, and P. said that as there were five months, or five-sixths, of the term remaining, that would be about $75 for the unexpired portion. Plaintiff said she would go at the rate of $90 a term, or $75 for the balance of the term. S. agreed, and plaintiff went to the district and began teaching on the 2nd of February, and on the 4th of February signed a written contract agreeing to teach the school "during the unexpired portion of the term" ending June 30, 1902, for $75. This term contained 121 teaching days of which plaintiff's contract covered 100. Clause 4 of this contract provided that "for a term or for any part of a school year the teacher is to receive such a proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term," and clause 5 that in default of written notice it shall continue in force from school year to school year. Plaintiff taught the unexpired portion of the term and was paid the agreed salary. No notice was given by either party, and she went on and taught the next term, which began on July 1 and ended on December 31 following, but which in consequence of certain holidays under the regulations of the Board of Education, contained only 92 teaching days. In the teachers' and trustees' returns sent to the chief superintendent, as required by the School Law, for both terms her salary was stated to be $180 per year. These returns were sworn to by two of the trustees. When the trustees paid the plaintiff for the short term they claimed she was entitled only to the same rate per day as the first term, viz., 75c., and refused to pay more than that, or $69 for the term.

In an action brought by her for her salary in the York County Court, evidence of the verbal agreement and of the school returns was received to explain the written agreement in its application to the second term. The trial Judge admitted it upon the ground that the terms of the agreement were ambiguous because of the use of the expression "the unexpired portion of the term" when it came to be applied to a subsequent term under the operation of clause 5. Reading the written agreement and the parol evidence together, he held that the contract was not a contract fixing $75 as the salary for the unexpired portion of the term, and then a per diem rate based upon that salary for any future term, but a contract for a definite portion of the first term, with a provision that in default of notice it should continue from school year to school year, applicable in all its provisions alike to each subsequent term as to the first term, and that

clause 4 provided only for the deduction from the salary for lost time upon the basis of the number of teaching days in the particular period to which the contract under the operation of clause 5 should apply. The trial Judge held that plaintiff was entitled to the same salary for the same portion of the second term as of the first, i.e., $75 for five-sixths of the term (which the evidence shewed the unexpired portion of the (first) term in fact was), or $90 for the whole term. Verdict for plaintiff on this basis.

Per TUCK, C.J., and HANNINGTON and MCLEOD, JJ. This appeal from the County Court Judge's judgment must be dismissed with costs; LANDRY and GREGORY, JJ., dissenting.

Gregory, K.C., in support of appeal. *O. S. Crocket*, contra.

Province of Manitoba.

KING'S BENCH.

Richards, J.] [April 26.

BRITISH CANADIAN LOAN CO. *v.* FARMER.

Description of land—Inner and outer two miles of parish lot—Mistake—Rectification of deed—Possession—Occasional hay cuttings—Interest, rate of—Meaning of "liabilities"—Only six years arrears of interest on foreclosure.

Foreclosure of mortgage by defendant to plaintiffs of land described as "Lots 19 and 20 in the Parish of Headingly, according to the Dominion Government survey thereof, containing by admeasurement 418 acres, be the same more or less," and for rectification of the mortgage so as to make it cover the outer two miles of said parish lots as well as the inner; plaintiffs alleging that such was the intention of the parties at the time the loan was made and that the outer two miles were omitted by mutual mistake.

The acreage of the inner two miles of the two lots was only 223.65, and that of the outer two miles 197.57, or altogether 421.22 acres.

Held, that the case for rectification of the mortgage as asked for was good on the following among other grounds:—

(1). Because the defendant, who was a man of intelligence and education, had signed the mortgage which stated that the property he was conveying contained 418 acres more or less whereas without the outer two miles the two lots only contained 223.65 acres.

(2). The defendant had, three years after the date of the mortgage, asked the plaintiffs to discharge the mortgage as to the right of way of a railway company running to his knowledge only through the outer two miles of the lots, and had arranged that the price of such right of way should be paid by the Railway Company to the plaintiffs in reduction of the debt due under the mortgage.

The payment by the Railway Company above referred to was made in 1885, and was the last payment on account of either principal or interest of the mortgage, and defendant claimed the benefit of the Statute of Limitations. He had left the land in 1892, but claimed that he afterwards continued to hold possession for several years through his brother-in-law, Alfred Fowler, as his tenant. Almost all that Alfred Fowler did was to cut hay on the land. He did not reside on it, and at the same time that he was cutting the hay, Robert Fowler, who cut it with him, was acting under permit from the plaintiffs. The plaintiffs had paid all the taxes on the lands from 1888 inclusive, and the defendant had never paid or attempted to pay any taxes on them since those for 1887. The mortgage was in the usual form under the old system of registration with the statutory provisions for quiet possession to the mortgagees on default and for possession by the mortgagor until default.

Held, following *Bucknam* v. *Stewart*, 11 M.R. 625, and *Trustees, etc., Co.* v. *Short*, 13 A.C. 793, that defendant had not been in actual adverse possession for a sufficient length of time to acquire title under the statute as against the plaintiffs.

The remaining questions were as to the rate of interest to be allowed to the mortgagees after default and as to the number of years arrears to be allowed. The principal fell due on 25th May, 1884, and it was provided that the interest at the rate of eight per cent. per annum was to be paid half yearly * * * * till the whole of the principal was paid.

Held, following *Freehold Loan Co.* v. *McLean*, 8 M.R. 116, and *M. and N. W. Loan Co.* v. *Barker*, 8 M.R. 296, that, after May 25, 1884, interest was only recoverable as damages and only at the statutory rate and only for the six years prior to the commencement of the action.

Held, also, that, although 63 & 64 Vict. (D.), c. 29, making five per cent. the legal rate, provides "That the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act," the interest for that part of the six years since the passing of that Act should only be allowed at the rate of five per cent. per annum: Am. & Eng. Encyc. of Laws, 2nd ed., vol. 16, pp. 1061 & 1062, and cases there cited, followed.

The word "liabilities" in that Act held not to refer to the principal debt, but to the obligation to pay interest as damages.

It is only in an action for redemption, or one in which the question of the number of years arrears of interest to be allowed is to be treated as if the action were one for redemption. That more than six years arrears are allowed on the principle that he who comes into equity must do equity: *Dingle* v. *Coppen* (1899) 1 Ch. 726; and *In re Lloyd* (1903) 1 Ch. 385, distinguished.

Mulock, K. C., and *Haggart*, K. C., for plaintiffs. *Wilson* and *Affleck*, for defendant.

McGREGOR *v.* WITBERS. [May 19.

Agreement of sale of land to be paid for by share of successive crops—Assignability—Personal contract.

We have received a note of this case; but if the note correctly states the facts and the finding of the learned Judge we should have thought that the contract was assignable. It seems desirable to wait and see if there is an appeal from this judgment. ED. C.L.J.

Province of British Columbia.

SUPREME COURT.

Full Court.] BRIGGS *v.* FLEUTOT. [Jan. 25.

Champerty and maintenance—Void agreement—Parties entitled to take advantage of—Res judicata—Litigation over specific property—Person not a party but supplying funds for litigation—Estoppel by conduct.

Appeal from judgment of MARTIN, J., declaring that defendant was a trustee for plaintiff of an undivided one-fourth interest in two mineral claims.

Held, that the laws of champerty and maintenance, as they existed in England on Nov. 19, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void.

The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement.

Per HUNTER, C.J.: It is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and in the event of the latter's defeat claim to fight the battle over again himself. He is not bound to intervene, and if he does not he must accept the result so far as concerns the title to the property.

At the trial plaintiff obtained judgment declaring that defendant was a trustee of an undivided one-quarter interest in two mineral claims: on appeal by defendant plaintiff's interest was declared to be only one-fortieth.

E. P. Davis, K.C., and *R. M. Macdonald*, for appellant. *S. S. Taylor*, K.C., for respondent.

Martin, J.] DUMAS GOLD MINES *v.* BOULTBEE. [March 18.

Mining law—Transfer of mining claim—Time for recording.

Interpleader issue. Sec. 19 of the Mining Act requires the locator of a mining claim to record it within 15 days if the location is within 10 miles of the recorder's office; one additional day is allowed for every additional 10 miles. By s. 49 of the Act every bill of sale of a mining claim shall be recorded within the time allowed for recording claims. The claimant of an interest in a mining claim seized under an execution on May 18, 1903, relied on a bill of sale obtained by him on Feb. 23, 1903, while in Dawson,

Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until May 22, 1903.

Held, that as the time for recording mining claims, fixed by s. 19 of the Mining Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution.

J. A. Macdonald and *A. C. Galt*, for claimant. *C. R. Hamilton*, for defendant.

Full Court]. LASHER *v.* TRETHEWAY. [April 26.

Practice—Parties—Action to set aside tax sale deed and for damages against the municipality.

Plaintiff sued to set aside a tax sale deed obtained by the defendant Tretheway, issued in pursuance of a tax sale held by the defendant municipality. The sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessment roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed. The relief sought was a declaration that the deed and the sale were both void, an account from the municipality of taxes unpaid and damages.

Held, affirming an order of IRVING, J., who dismissed an application to have the municipality struck out as being wrongly joined, that the municipality was properly joined as a party defendant.

McPhillips, K.C., for appellant. *McCaul*, K.C., for respondent.

Duff, J.] RUSSELL *v.* BLACK. [May 26.

Costs on County Court scale—Jurisdiction of judge to order.

Judgment for $227.00. Counsel for defendant asked that costs be allowed on the County Court scale as the action could have been brought in the County Court. By Supreme Court Act, 1903-4, s. 100, the costs of trial follow the event.

Held, that there was no jurisdiction to order costs on the County Court scale.

F. R. Russell, for plaintiff. *F. Higgins*, for defendant.

UNITED STATES DECISIONS.

RESTRAINT OF TRADE:—A combination to fix prices in restraint of trade is held, in State ex rel. *Crow* v. *Armour Packing Co.* (Mo.) 61 L.R.A. 464, to be properly shewn by acts on the part of several competing dealers in the same line of trade, such as selling at a fixed price, from which rebates are given in goods or weights, giving notice of coming advances in price, which always follow as announced, securing concessions from competitors of the right to sell shop-worn goods, gathering evidence of sales under price, and abandoning such conduct as soon as legal proceedings are instituted to punish them.

Courts and Practice.

JUDICIAL APPOINTMENTS.

James Magee, of London, K.C., to be a Judge of the Supreme Court of Judicature, and a Justice of the High Court of Justice for Ontario, and a member of the Chancery Division of that Court in the room of Hon. Mr. Justice Ferguson, deceased. Gazetted July 2.

His Honor Edward O'Connor, Junior Judge of Algoma, to be a Surrogate Judge in Admiralty of the Exchequer Court for that District. Gazetted July 2.

THE BAR.

Mr. John S. Ewart, K.C., has removed from Winnipeg to Ottawa, and joined the firm of Wyld & Osler as counsel, the firm hereafter being known as Ewart, Wyld & Osler. Mr. Ewart has enjoyed an extensive practice at the Manitoba Bar during the past twenty years, and he brings a ripe experience to his new sphere of labour. As a writer on the more erudite side of legal literature Mr. Ewart has become well known to the readers of the CANADA LAW JOURNAL. He is the author of a work on "Costs" and one on "Estoppel"; at the present time he is engaged upon a treatise on the equitable doctrine of "Election." We extend our best wishes to Mr. Ewart on his return to Ontario, his domicil of origin, and express the hope that both the courts and the printers will be busied by him for a long time to come.

Book Reviews.

The Yearly Digest of reported cases for the year 1903, decided in the Supreme and other Courts of England, edited by G. R. Bell, M.A., Barrister-at-law, London, Butterworth & Co., 12 Bell Yard, Temple Bar, W.C., 1904.

This necessary yearly addition to every library includes a copious selection of reported cases decided in English, Irish and Scotch Courts, with lists of cases digested, overruled, considered, etc., and all statutes, orders and rules referred to. This digest is a continuation of Mr. Beal's work, taken up by the present editor, who follows on the methods of his predecessor. The selection includes several series of reports in addition to the "authorized." The publishers' work is, of course, as usual, done excellently well.