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We have read Mr. Augustin Birrell's address on "Legal Education," which was recently delivered before the Liverpool Incorporated Law Society, with much interest, but we are constrained to ask our best judgment, as it is our misfortune ever to be obliged to do in dealing with any production of this versatile lawyer, Is there anything in it? Although the address does not strike one as being very lengthy, yet within its compass Mr. Birrell succeeds in "surveying mankind from China to Peru"—from Anglican bishops to the "subtle Hindoo"—and wandering from the busy present into the prehistoric leisure of the Iron Age. As is to be expected, where he has spent so much on garnishments, he has a spare and indifferent dish of solid meat. Now all this divagation, of course, may not indicate a mind anxious to seize any peg, however incongruous, to hang a bravery of learning upon; moreover, we would be inclined to deprecate investing Mr. Birrell with the insignia of a pedant. Sometimes, however, we feel that if anybody else did as he does we would be justified in grumbling.

A jury in Hudson County, N.J., recently awarded a man $5,000 damages for the accidental killing of a five-year-old son. In Indiana not long ago, in a similar case, the jury gave the bereaved parent $599 for the abrupt taking off of his eight-year-old boy. In the Exchequer Court, the other day, the widow and infant children of a man who was killed on the Intercolonial Railway in the province of Quebec got only $3,250. But a Toronto jury, with a great largeness of heart, gave a farmer's wife $3,500 for a broken thigh bone and $500 to soothe the lacerations of her husband's feelings. The defendants, however, were a street railway company, and needed a caution to be careful with old ladies. All of which goes to show that life is still worth living—especially in the case of adults.

The elective system so prevalent in the United States, especially with reference to the judiciary, has recently come prominently into view owing to the revelations before a committee

appointed in New York to investigate certain charges. One item of information is that two retired Supreme Court judges paid as the price of their nominations $7,000 to $10,000 each. The City Club is now preparing a bill for introduction at the next session of the Legislature to prevent levying of political assessment upon candidates for judicial offices. The bill would make it felony for any political organization to solicit or receive such assessment from candidates, or for the latter to contribute to political campaign funds. A leading New York journal says, "Nothing more conducive to the demoralization of the Bench could be imagined than such a system." The proposed provision is well enough in its way, but the true remedy is to abolish entirely the elective system so far as the judiciary is concerned.

The same excellent journal draws attention to the crimes and lynchings so prevalent in the United States. Statistics compiled by a Judge Hillyer show that in 1894 there were proximately 5,000 homicides, in 1896 10,000, and in 1898 over 20,000. This appalling record is attributed to the ease with which so many criminals escape punishment, and to the fact that the people have lost confidence in the administration of the law. The race problem, of course, affects this record, and is partly answerable for the inexpressibly shocking and brutal crimes committed both by blacks and white, but, as the writer says, "neither provocation, justification nor condonement can be found for the maimings and torturings of the victims of Judge Lynch, which make the blood run cold as one reads of them," and the article concludes by saying that this state of affairs is "a disgrace in which the whole United States must share. What, if anything, are the United States going to do about it?" The same journal says that a bill is to be introduced in the Georgia Legislature (that state being the worst offender in respect of lynchings) providing for the trial of a prisoner accused of criminally assaulting a woman, within five days after his arrest, and, upon conviction, public execution within five days thereafter, and the testimony of the victim may be taken in private by a special commission in presence of the accused. The very fact of this special legislation being commended as a step in the right direction is not complimentary to the administration of justice in one of the oldest states in the Union.

The time will soon come for meetings of Bar Associations, notably the Canadian Bar Association, the American Bar Association, and the International Law Association. The American Association is to hold its twenty-second annual meeting in Buffalo on August 28th, continuing for three days. In the latter part of the same week the International Association will meet. It is expected that these two important organizations will bring together an unusually large body of lawyers, statesmen, and professors of jurisprudence from all parts of the world, and their proceedings will doubtless be of great interest. The place of meeting, moreover, is conveniently close to the chief city of the most populous province of the Dominion. We notice that the Hon. Joseph H. Choate, United States ambassador to England, is president of the American Bar Association for the coming year, and it is hoped that he will be present. A writer in the *Albany Law Journal* enlarges upon the practical utility of Bar Associations, and makes out a strong case in favour of their support by the profession. In speaking of the New York State Bar Association, he says that it has exerted a powerful and beneficial influence on the profession, on legislation, on codification, on constitutional amendments, and in cleansing the profession of objectionable members. We may add that everything that tends to unify the profession and increase its esprit de corps should be encouraged, and these associations should be a powerful factor in this direction.

In the recent case of *Wright* v. *McCabe*, 30 O.R. 390, it is laid down by MacMahon, J., at p. 396, that the obligation of a father to maintain his infant children is only a moral one at common law. If the common law imposes no such duty, then no legal duty to support his children rests upon a father unless imposed by some statute. No such statute appears to have been passed in Ontario, and, therefore, so far as Ontario is concerned, no such legal liability exists, if the law be as laid down by MacMahon, J. But if that is so, what becomes of the Cr. Code. s 210, which provides that "every one who as a parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under the age of sixteen years, is criminally responsible for omitting, without lawful excuse, to do so," etc., etc, if the death of such child is caused, or his life or health is endangered by the omission. As far

as Ontario is concerned, the section would appear to be practically inoperative, because, according to MacMahon, J., no parent is "under a legal duty" to provide necessaries for his child. Under the English Poor Laws a duty is, we believe, imposed by statutory authority (see 43 Eliz., c. 42, s. 6), and it may be that the section of the Criminal Code we have referred to has been adapted from an English original without taking into account that in this Province, at all events, the law is as stated by MacMahon, J.: See Taschereau Cr. Code, p. 145.

What may be considered as the aftermath of the one-man company case of *Salomon* v. *Salomon* (1897) A.C. 22, was before Kekewich, J., recently, in the shape of an appeal by the solicitor for the successful appellant from the taxation of his costs between solicitor and client. It is said in the report of the case (*Re Raphael*, 80 L.T. 226,) that the effect of the decision of the Court of Appeal in *Broderip* v. *Salomon* (1895) 2 Ch. 223, was to ruin the enterprising defendant and to reduce him to pauperism, so that in order to carry an appeal to the House of Lords it was necessary to obtain leave to carry on the appeal in forma pauperis. This leave was obtained by a solicitor with the alliterative name of Ralph Raphael. The appeal proved successful, and Mr. Raphael's client was rehabilitated financially. Unfortunately for Mr. Ralph Raphael, however, his client died, and his executors or administrators, who "knew not Joseph," or, rather, Raphael, disputed his little bill, and contended that as Mr. Raphael had conducted the appeal for the deceased appellant in forma pauperis, he could not recover from his estate costs. Kekewich, J., however, has held that inasmuch as Mr. Raphael was not assigned by the court as solicitor for the deceased Salomon, but carried on the appeal in pursuance of the deceased Salomon's own retainer of him, the ordinary contract must be presumed to exist between the parties, and that his estate was bound to pay costs to Mr. Raphael, notwithstanding the prosecution of the appeal in forma pauperis. Kekewich, J., with a delicate humour, observes that "the one-man company case was one of some notoriety, and people seemed to consider Mr. Raphael worthy of reward for his services in enabling tradesmen to turn their businesses into one-man companies, and so avoid their liabilities. Thereupon they got up a testimonial to

Raphael for the services he had rendered, not to Aaron Solomon, but to the public, the testimonial consisting of a piece of plate and an address on vellum," but he holds that this did not estop Mr. Raphael from recovering a more substantial reward from his deceased client's estate.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—SEPARATE CAUSES OF ACTION—JOINDER OF PLAINTIFFS—RULE 123—(ONT. RULE 185)—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT. C. 64), S. 3, S-S. 1—(R.S.O. C. 216, S. 4(1)).

Drinqbier v. *Wood* (1899) 1 Ch. 393 was an action brought by four persons, each of whom claimed to have separately purchased debentures of a limited company on the faith of the statements in a prospectus and covering letter issued by the defendants as directors of the company, which statements the plaintiffs alleged were known by the defendants to be false; and the first point discussed in the case was whether the plaintiffs could be joined, each having a separate and distinct cause of action from that of the others. Byrne, J., decided that they could, because the several causes of action were the same, and all arose out of the same transaction, and were against the same defendants. He also held that where a director of a company is aware that a prospectus was being issued to the public inviting subscriptions for debentures, but took no trouble to read it, and abstained from inquiry as to its contents, and refrained from giving any notice under the Directors' Liability Act (53 & 54 Vict. c. 64), s. 3, (R.S.O. c. 216, s. 4), it is too late to repudiate it after action brought against him.

GIFT—EQUITABLE ASSIGNMENT—BANKER'S DEPOSIT RECEIPT—INDORSEMENT AND DELIVERY OF DEPOSIT RECEIPT—DONEE APPOINTED EXECUTOR.

In re Griffin, Griffin v. *Griffin* (1899) 1 Ch. 408, the validity of a gift of a banker's deposit receipt is discussed. The holder before his death had delivered the receipt to his son, and had indorsed on it "pay my son," and signed his name to the indorsement, and

by his will he appointed the donee his executor. Did this amount to a valid gift of the money secured by the deposit receipt? It was contended that the deposit receipt was not a negotiable instrument, and not transferable, and that the order to pay the donor's son was equivalent to a cheque, and was revoked by the donor's death; and that as no notice had been given to the bank before the father's death, therefore it was the case of an incomplete gift which equity will not assist. Byrne, J., however, decided in favor of the validity of the gift. The order to pay, he held, constituted a good equitable assignment, and was not revoked by the father's death. Notice to the bank, he held, was only necessary to protect the donee against other claimants, and its omission did not render the gift incomplete. The true test for determining whether the gift was complete, he says, is whether anything remains to be done by the donor to perfect the gift. He thought the appointment of the donee as executor completed his title, and left nothing to be done.

SHERIFF—POUNDAGE—BANKRUPTCY OF EXECUTION DEBTOR.

In re Thomas (1899) 1 Q.B. 460, a sheriff contended that where an execution against goods was delivered to him, and before sale the execution debtor became bankrupt, and the official receiver in bankruptcy took possession of the goods seized, the sheriff was nevertheless entitled to poundage. The Court of Appeal (Lindley, M. R., and Rigby and Williams, L.JJ.), however, agreed with the Divisional Court (Wright and Darling, JJ.) (1899) 1 Q.B. 60 that in such a case, there having been no sale, the right to poundage did not arise.

LANDLORD AND TENANT—DISTRESS—GOODS DISTRAINED, IMPOUNDED ON DEMISED PREMISES—11 GEO. 2, C. 19, S. 10—MAN IN POSSESSION—POUND BREACH.

In *Jones* v. *Bierstein* (1899) 1 Q.B. 470, the plaintiff sued for pound breach. The facts were as follows: The plaintiff was landlord of certain premises, and distrained for rent in arrear, and did everything required for impounding the goods on the demised premises within the meaning of 11 Geo. 2, c. 19, s. 10, and a man was left in possession. On Saturday night this man left the premises, and did not return until the following Monday. In the meantime the defendant, who was the true owner of the goods

distrained, entered the premises and removed the goods. A judge of a County Court found that the man who had been left in possession, having left without any reasonable necessity, had abandoned possession, but, as he intended to return, he might be considered still in constructive possession; he, however, held that actual possession was necessary to preserve the plaintiff's right to the goods, and therefore dismissed the action. A Divisional Court (Lawrance and Channell, JJ.) reversed this decision, being of opinion that the goods were in custodiâ legis: and there being no intention on the part of the landlord to abandon the distress, it was not necessary that the man should continue in actual and visible possession.

LANDLORD AND TENANT—COVENANT TO PAY CHARGES.

Wix v. *Rutson* (1899) 1 Q.B. 474 is a hard case. The action was brought on a covenant contained in a lease, whereby the lessee covenanted to pay all charges, duties and assessments charged, assessed or imposed upon the premises, or upon the landlord in respect thereof. The lease was terminated by six months' notice; before the notice expired the landlord was served with notice by the municipal authority of an apportionment of the expenses of paving a new street, which, by the terms of a statute, thereupon became a charge on the demised premises. The lease had been terminated before any of the paving was done in respect of which the charge was made; but it was nevertheless held by Bruce, J., that the defendant was, under his covenant, liable for the amount of the charge.

COMPANY—MONEY PAID ULTRA VIRES BY DIRECTORS TO SHAREHOLDERS—DIRECTORS' LIABILITY TO REPLACE MONEY PAID ULTRA VIRES—INDEMNITY.

Markham v. *Grant* (1899) 1 Q.B. 480 was an action brought by the directors of a company against one of the shareholders to whom money had been paid by the plaintiffs ultra vires. The payment had been made under the following circumstances: The plaintiffs, directors of a limited company which had not obtained the sanction of the court to a reduction of its capital, distributed a portion of its capital among the shareholders, of whom the defendant was one, with their assent, and with notice that the money so paid was part of the capital. On the subsequent winding-up of the company, the plaintiff had been ordered to

replace the capital so distributed, on the ground that the payment to the shareholders was ultra vires. The defendant sought to escape liability on the ground that the payment and receipt of the money were wrongful acts, and that there is no contribution or indemnity as between wrongdoers, and that, at any rate, if the money was paid under mistake it was a mistake of law, and not of fact, and on that ground the plaintiffs could not recover. Lawrance and Channell, JJ., however, held that the plaintiffs were entitled to succeed on the ground that the plaintiffs and defendant stood in the position of trustees and cestui que trustent, and that it was a case of breach of trust committed with the assent of the cestui que trustent, for which the cestui que trustent was bound to indemnify the trustees. Strange to say, however, the case does not appear to have been directly covered by any previous authority.

STATUTE OF LIMITATIONS—TENANT-AT-WILL—ENTRY BY LANDLORD TO MAKE REPAIRS—DETERMINATION OF WILL—(R.S.O., c. 133, s. 5 (7).)

Lynes v. *Snaith* (1899) 1 Q.B. 486.—Ejectment. The defendant was, in 1884, allowed by her father-in-law to occupy the premises rent free, and she had continued to occupy them ever since. The father-in-law had from time to time entered the premises with the defendant's consent to make repairs. He died in 1897, having devised the premises in question in trust for the plaintiff. A County Court Judge gave judgment for the plaintiff, holding that the position of the defendant was that of a licensee, and not of a tenant; and, even assuming she was tenant-at-will, that the will was determined each time an entry had been made by the landlord to make repairs. On appeal, however, Lawrance and Channell, JJ., came to a different conclusion, and held that the defendant was in as tenant-at-will, and that the entry of the landlord with her consent to do repairs did not operate as a determination of the will, and that, consequently, the plaintiff was barred by the Statute of limitations.

CRIMINAL LAW—CROWN CASE RESERVED—JURISDICTION TO QUASH CONVICTION—CROWN CASES ACT, 1848 (11 & 12 VICT., c. 78, s. 2)—(CR. CODE, s. 746)

In *The Queen* v. *Saunders* (1899) 1 Q.B. 490 two prisoners were indicted together for conspiracy, one of them defended by counsel and the other defended in person. In the course of the trial

certain questions were asked of the prosecutor, which the counsel for the prisoner who defended by counsel objected to, and as to the admissibility of which a case was reserved at his request, both prisoners were convicted. On the argument of the case, the court was of opinion that the evidence objected to was inadmissible, and the question then arose whether the court could quash the conviction of both the prisoners; and the Court (Lord Russell, C.J. and Wills, Lawrance, Bruce and Kennedy, JJ.) came to the conclusion that it could properly deal with both convictions, notwithstanding the objection was raised by only one of the prisoners, the Act (11 & 12 Vict., c. 78, s. 2) enabling the Court, after deciding the question reserved, "thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment," and the conviction was consequently quashed as to both prisoners. Probably the general powers given to the Court by the Cr. Code, s. 746, though not in the same terms, would enable a Canadian court to do likewise.

INTERPLEADER—RIGHT TO SET UP JUS TERTII—BAILEE—ESTOPPEL—PRACTICE —RULES 851, 852 (ONT. RULES 1104, 1105).

Ex parte Mersey Docks (1899) 1 Q.B. 546. This was an application by bailees for an interpleader order. The application was resisted by one of the claimants, a bank, on the ground that the bank had advanced money on the faith of a letter signed by the bailees, stating that they held the goods to the bank's order. The other claimant was also a bank. It was contended by the first-mentioned bank that the letter constituted an estoppel, which prevented the bailee from disputing that bank's title to the goods in question and from obtaining any relief by interpleader. Ridley, J., granted the interpleader order as asked, and staying all proceedings by both claimants against the bailees; and the Court of Appeal (Smith and Collins, L.JJ.) affirmed the order, but with the variation that the stay of proceedings should not extend to any claim which the first-mentioned bank might have against the bailee by virtue of the said letter.

RECEIVER AFTER JUDGMENT—NOTICE OF APPLICATION—DEFENDANT NOT APPEARING—RULE 1015—(ONT. RULE 330)—PRACTICE.

Tilling v. *Blythe* (1899) 1 Q.B. 557 is a case on a simple point of practice. The action was brought to recover a money claim, and judgment had been recovered against the defendant by default of appearance; the plaintiff then applied for the appointment of a receiver by way of equitable execution. The notice of the motion was served by filing it in the office under Rule 1015 (Ont. Rule 330); and Ridley, J., at first granted the application, but subsequently, on his attention being drawn by the officers of the court to the fact that, according to the usual course of practice, the notice of such a motion was required to be served personally, or, if personal service could not be effected, then substitutionally as the Court might direct, he revoked his order and refused the motion. The Court of Appeal (Smith and Collins, L.JJ.) dismissed an appeal from his decision, holding that in such a case service as prescribed by Rule 1015 would not suffice.

INSURANCE—BURGLARY AND HOUSEBREAKING—LOSS BY THEFT—ENTRY BY UNLOCKED DOOR—BREAKING OPEN SHOW-CASE—"ACTUAL FORCIBLE AND VIOLENT ENTRY."

In re George & The Goldsmiths and General Burglars Insurance Association (1899) 1 Q.B. 595, the judgment of the Divisional Court (1898) 2 Q.B. 136 (noted ante, vol. 34, p. 651), has failed to pass the ordeal of an appeal. It may be remembered that the judgment of the Divisional Court was pronounced upon a case stated by an arbitrator. The question at issue arose under a policy of insurance "against loss and damage by burglary and housebreaking as hereinafter defined," and the risk insured against being thereinafter stated to be loss of the property, "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate." The property in question was stolen from the shop of the assured by a thief who, during the temporary absence of the assured's servant, entered by turning the handle of the front door, which was neither locked nor bolted, and broke open a locked-up show-case in which the property was placed, and made off with the property insured. The Divisional Court held that the loss was covered by the policy, but the Court of Appeal (Lord Russell, C.J., and Smith and Collins, L.JJ.) have unanimously reversed that decision. The

Divisional Court held that the entry of the thief into the shop was "a forcible and violent entry" within the meaning of the policy; and it was argued, on the appeal, that even if that was not so, still the breaking open of the show-case was clearly within the policy. The Chief Justice, however, points out that it is not burglary or housebreaking, as defined by the criminal law, which was insured against, but burglary and housebreaking as defined by the contract, and he also points out that the policy contained a stipulation that the assured should "take all due precautions for the safety of the property insured, as if the same were not insured, as regards selection and supervision of employees, securing all doors and windows, and other means of entrance, or otherwise." The Court of Appeal, therefore, concluded that the parties had, by their contract, defined what they intended by "burglary and housebreaking," and it was only an entry effected as provided by the policy which would be covered thereby. They also held that the policy contemplated a forcible and violent entry from without the premises, and therefore that the breaking open of the show-case within the premises was not covered by the policy.

FRAUDULENT CONVEYANCE - ASSIGNMENT TO ONE-MAN COMPANY—13 ELIZ., C. 5—LIQUIDATOR—COSTS.

In re Hirth (1899) 1 Q.B. 612 is a case which seems to show that the jubilation of a certain section of the public on the decision of the House of Lords in the one-man company case of *Salomon* v. *Salomon* (1897) A.C. 22 (noted ante, vol. 33, p. 313), referred to by Kekewich, J., in a recent case of *Re Raphael*, was probably premature. In the present case Hirth, being liable on a judgment for costs, formed a one-man company, to which he transferred all his assets. He was chairman, managing director, and treasurer and secretary of the company, and all the shares were held by him, or his nominees. The transfer purported to be made in consideration of the company undertaking to pay Hirth's debts. Hirth was put into bankruptcy for non-payment of the costs above referred to, and a receiving order was made. His liabilities exceeded £2,000, and his assets were nil. Between the presentation of the petition in bankruptcy, and the making of the receiving order, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. The trustee in bankruptcy then applied to compel the liquidator to deliver up the

assets transferred to the company, on the ground that the transfer was fraudulent and void against the bankrupt's creditors under 13 Eliz., c. 5, or under the Bankruptcy Act. Wright, J., who originally heard the case, although of opinion that the transaction with the company was a voidable contract, yet thought that after the commencement of the liquidation proceedings it was too late to rescind the contract. The Court of Appeal (Lindley, M. R., and Rigby and Williams, L.JJ.) were of a different opinion, and held that, although there might be difficulty in declaring the transaction fraudulent and void under 13 Eliz., c. 5, as it would be necessary to show that the sale was of the whole, or substantially of the whole, of Hirth's estate, and that the company had notice that he was cheating his creditors, nevertheless held that it was fraudulent and void under the Bankruptcy Act, as, under that Act, it was not necessary, in order to avoid the transaction, that the transferee should have any knowledge of the fraud, nor that it should be a transfer of the whole, or of substantially the whole, of the debtor's property; and that, as the title of the trustee in bankruptcy related back to the date of the fraudulent transaction, the winding-up proceedings did not prevent the transaction being set aside. Williams, L.J., thought the case was also within the statute of Elizabeth. The liquidator was allowed his costs of realizing the assets, but he was refused his costs of the application.

SHERIFF'S FEES — POSSESSION MONEY — CONTINUANCE OF POSSESSION BY SHERIFF FOR FIFTEEN MONTHS BY CONSENT.

In re Beetson (1899) 1 Q.B. 626, raised the question as to the right of a sheriff to possession money under the following circumstances: The sheriff had gone into possession of a debtor's goods under execution, and at the request of the debtor, and by consent of the creditor, he continued in possession for fifteen months, and at the end of that time the debtor was declared bankrupt on his own petition. On taxation of the sheriff's fees on the execution, he was allowed possession for fifteen months. It was contended that the sheriff's remaining in possession so long was unreasonable, but the Court of Appeal affirmed the order of Wright, J., dismissing an appeal from the taxing officer. The Bankruptcy Act provides that the continuance of a sheriff in possession for twenty-one days under an execution is an act of bankruptcy, and it was contended that after twenty-one days it was no longer competent for the

execution creditor or debtor to consent to the sheriff's continuance in possession, and that his doing so was a continuing act of bankruptcy; but the Court of Appeal held that there was but one act of bankruptcy, and that the sheriff continuing in possession for twenty-one days, and that, consequently, there was no act of bankruptcy within three months preceding the declaration of bankruptcy. Although the case turns largely on the English Bankruptcy Act, it may perhaps be of some use in determining the rights of execution creditors under the Ontario Act relating to assignments by insolvents, (R.S.O., c. 147, s. 11.).

SALE OF GOODS—BILL OF LADING—SALE BY PERSON HAVING BILL OF LADING—PASSING PROPERTY—POSSESSION OF GOODS—SALE OF GOODS ACT, 1893 (52 & 53 VICT., C. 45), S. 2, S-S. 2 (R.S.O., C. 150, S. 5).

In *Cahn* v. *Pocketts B.C.S.P. Co.* (1899) 1 Q.B. 643, the Court of Appeal (Smith, Collins and Romer, L.JJ.) have reversed the decision of Mathew, J. (1898) 2 Q.B. 61 (noted ante, vol. 34, p. 649). It may be remembered that one Steinman had consigned the goods in question to one Pintscher, to whom Steinman sent the bill of lading, accompanied by a bill of exchange for the price. Pintscher refused to accept the bill of exchange, but kept the bill of lading, and in fraud of Steinman sold the goods to the plaintiffs, and indorsed the bill of lading to them, and they paid him the price. Steinman thereupon stopped the goods in transitu, and the present action was brought to recover the goods from the bailees by virtue of the title conferred on the plaintiffs as bona fide indorsees of the bill of lading. Mathew, J., came to the conclusion that Pintscher was not an agent of Steinman, entrusted with the bill of lading and competent to confer a title. The Court of Appeal have come to the conclusion that, as the plaintiffs had taken the bill of lading in good faith without notice of the rights of Steinman, from a person who held possession of it with the consent of Steinman, they had acquired a good title, because under the Factors' Act, 1889, s. 2, Pintscher was competent to transfer the bill of lading so as to give a good title to a bona fide transferee, as if he, Pintscher, were the duly authorized agent of Steinman, and under the Sale of Goods Act, 1893 (56 & 57 Vict., c 71), s. 25, s-s. 1, the plaintiffs had a good title, and Steinman was not as against them entitled to stop the goods in transitu.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

B.C.] McBRYAN *v.* C.P.R. Co.—SHAW, THIRD PARTY. [Feb. 22.

Adjoining lands—Injury to one property by water—Right of owner to guard against without regard to neighbour's rights.

M. owned land bounded on one side by a river and on the other by land of the C.P.R. Co. On the other side of the railway land was that of S., who was in the habit of irrigating it with water brought from a creek at some distance away. There was a slight depression from S.'s land to the river and the water so used by S. ran across the railway land to the property of M., which was protected from injury by a dam which penned the water back. It was not usually in sufficient quantity to damage the adjoining lands. In 1895 S. used much more water than usual for irrigation, and M.'s dam had to be raised to effectively prevent his land from being flooded and the water sent back on the railway property caused considerable damage. The Co. brought an action against M. for damages and an injunction which was twice tried. (See 5 B.C.R., 187, ordering a new trial). On the second trial the judgment was sustained by the full court (6 B.C.R. 136.)

Held, reversing the last mentioned judgment, TASCHEREAU, J., hesitante, that M. had a right to protect his land by all lawful means against the threatened injury without regard to any damage that might result to the adjoining land from the measures he adopted; and that the remedy of the Co. for the injury to its land was against S. the original author. Appeal allowed with costs.

Aylesworth, Q.C., and *Wilson*, Q.C., for appellant. *S. H. Blake*, Q.C., for respondent.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] IN RE GRENIER AND THE QUEEN. [April 4.

Government railway—Death resulting from negligence of fellow servant—Common employment—Art. 1056, C.C.L.C.—Widow and children—Right of action—Bar—Measure of damages.

Held, The doctrine of common employment has no place in the law of the Province of Quebec. *Robinson* v. *Canadian Pacific Railway Co.*, (1892) A.C. 481, and *Filion* v. *The Queen*, 4 Ex. C.R., 134; 24 S.C.R., 482 followed.

2. The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action

against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow-servant of the deceased.

3. The right of action in such case is given by The Exchequer Court Act, sec. 16 (c), and by Art. 1056, C.C.L.C., and is an independent one in behalf of the widow and children. It is not under the control or disposition of the husband in his life-time, and nothing he may do in respect of it will bar the action.

4. Under the provisions of section 50 of "The Government Railways Act," while the Crown may limit the amount for which in cases of negligence it will be liable, it cannot contract itself out of all liability for negligence. *The Grand Trunk Railway* v. *Vogel*, 11 S.C.R., 612; and *Robertson* v. *The Grand Trunk Railway Co.*, 24 S.C.R., 611 applied.

5. In cases such as this it is the duty of the Court to give the widow and children such damages as will compensate them for the pecuniary loss sustained by them in the death of the husband and father. In doing that the Court should take into consideration the age of the deceased, his state of health, the expectation of life, the character of his employment, the wages he was earning and his prospects; on the other hand the Court should not overlook the fact that out of his earnings he would have been obliged to support himself as well as his wife and children, nor the contingencies of illness or being thrown out of employment to which in common with other men he would be exposed.

Stuart, Q.C., and *Riou* for suppliant. *The Solicitor-General* and *Dunbar*, Q.C., and *Pouliot* for respondent.

Burbidge, J.] SCHULZE *v.* THE QUEEN. [April 10.

Customs Law — Breach — Importation — Fraudulent undervaluation — Manufactured cloths — Cut lengths — Trade discounts.

Claimants were charged with a breach of the Customs Act by reason of fraudulent undervaluation of certain cloths imported into Canada. The goods were imported in given lengths cut to order and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty showed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of showing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shown on the invoices were further reduced by certain alleged trade discounts for which there was no apparent justification or excuse.

Held, that the circumstances amounted to fraudulent undervaluation of the goods and that the decision of the Controller of Customs declaring the goods forfeited must be confirmed.

Hogg, Q.C., and *T. Dickson* for claimants. *The Solicitor-General* and *Newcombe*, Q.C., for defendant.

Province of Ontario.

COURT OF APPEAL.

Osler, J. A.] YOUNG *v.* TUCKER. [May 3.

Appeal to Supreme Court of Canada—Bond—Defect in form—Jurisdiction—Action begun in County Court—Removal into High Court—Report of Drainage Referee in Action—Title to land—Servitude.

Motion by the defendant for allowance of bond on appeal to the Supreme Court of Canada.

Held, that the bond must be disallowed on the ground of substantial error in the form—"by" instead of "binds" in the operative part which arose from following the form in Cassel's Supreme Court Practice, 2nd. ed., p. 220, as recently pointed out in *Jamieson* v. *London and Canadian L. & A. Co.*, ante 280.

Held, also, that the action originated in the High Court, notwithstanding that it was removed in fact into that court from the County Court by certiorari.

This was not a case like *Re Township of Raleigh and Township of Harwich*, the appeal in which to the Supreme Court was quashed in May, 1895, for want of jurisdiction. That was an appeal in a matter which originated in an appeal to the Drainage Referee from the report of an engineer for the purposes of a drainage by-law, while here the appeal to the Court of Appeal was from the report of the same referee in an action.

Held, also, that, although the damages were no more than $25, the title to some interest in real estate came in question as the result of the judgment, which in effect decided that the defendant was not entitled to the servitude to which he contended that the plaintiffs' land was subject.

Order to go allowing the appeal upon filing a proper bond. Costs to the plaintiffs in any event.

R. McKay, for defendant. *Aylesworth*, Q.C., for plaintiffs.

From Rose, J.] [May 5.

SCOTTISH ONTARIO AND MANITOBA LAND CO. *v.* CITY OF TORONTO.

Municipal corporations—Toronto water works—Purity of water—Injury to hydraulic elevator.

The city of Toronto are bound by law to supply water from their system of water works to any inhabitant of the city who applies therefor and complies with the statutory conditions, and therefore no contractual relationship arises between the city and the consumer by reason of the application for water and the city's compliance therewith, and the city are not liable to the

consumer, as upon a breach of contract to supply pure water, for injuries caused to his hydraulic elevator by sand in the water supplied. Judgment of ROSE, J., 34 C.L.J. 418, 29 O.R. 459, affirmed.

Langton, Q.C., and *H. M. Mowat*, for appellants. *Robinson*, Q.C., and *Fullerton*, Q.C., for respondents.

From Ferguson, J.] [May 5.

KEEFER *v.* PHOENIX INSURANCE CO. OF HARTFORD.

Insurance—Fire Insurance—Vendor and purchaser—Partial interest.

A person who has only a partial interest in the subject matter may insure for his own benefit to the full insurable value of that subject matter, but in that event the policy must define in express terms the nature of the interest insured, and if there is any ambiguity the insured will be entitled to recover only the value of his own interest. A policy issued to a vendor, who has received part of his purchase money, insuring the buildings on the land in question in a specified sum, with a proviso that the insurers are "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described," does not cover more than the vendor's interest or enable him to recover for the benefit of himself and the purchaser the full value of the subject matter. Judgment of FERGUSON, J., 34 C.L.J. 317, 29 O.R. 394, reversed, MACLENNAN, J.A., dissenting.

Aylesworth, Q.C., and *G. L. Smith*, for appellants. *H. H. Collier*, for respondents.

From Meredith, C.J.] WARD *v.* CITY OF TORONTO. [May 5.

Landlord and tenant—Covenant for renewal or payment for improvements—Election.

Under a covenant in a lease that if, at the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew or pay for improvements, the lessors have the right to elect, and the lessee must accept a renewal unless before the expiration of the term the lessors elect not to renew. Judgment of MEREDITH, C.J., 34 C.L.J. 701, 29 O.R. 729, affirmed.

Armour, Q.C., for appellants. *Fullerton*, Q.C., and *W. C. Chisholm*, for respondents.

From Divisional Court.] [May 5.

SAUNDERS *v.* CITY OF TORONTO.

Master and servant—Negligence—Independent contractor.

The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove

street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place. Judgment of a Divisional Court, 34 C.L.J. 272, 29 O.R. 273, reversed, Moss, J.A., dissenting.

Fullerton, Q.C., for appellants. *N. B. Gash*, for respondent.

From Drainage Referee.] [May 5.

IN RE TOWNSHIP OF RALEIGH AND TOWNSHIP OF HARWICH.

Drainage—Outlet—Drainage Act, 1894, s. 75.

A drainage scheme under above section cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with. Judgment of the Drainage Referee reversed.

Aylesworth, Q.C., and *J. B. Rankin*, for appellants. *M. Wilson*, Q.C., for respondents.

Practice.] REGINA *v.* CUSHING. [May 5.

Court of Appeal—Jurisdiction—Order quashing conviction.

No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law.

MacKelcan, Q.C., for appellant. *W. Nesbitt* and *J. G. Gauld*, for respondent.

From Meredith, C.J.] IN RE LAZIER. [May 5.

Extradition—Forgery—Initiating prosecution.

The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank:—

Held, that this was forgery, and that the prisoner should be extradited.

A prosecution under the Extradition Act may be initiated by anyone who, if the offence had been committed in Canada, could put the criminal law in motion. Judgment of MEREDITH, C.J., 34 C.L.J. 171, 30 O.R. 419, affirmed.

R. G. Smyth, for prisoner. *P. J. M. Anderson* and *J. W. Curry* for prosecution.

From Meredith, C.J.] May 5.

SONS OF SCOTLAND BENEVOLENT ASSOCIATION *v.* FAULKNER.

Estoppel—Res judicata—Benevolent society—Dispute as to age of applicant.

After an application for membership in a benevolent association had been accepted, a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age, and thereupon issuing the certificate of membership. Subsequently the association brought this action, asking for cancellation of the certificate on the ground that the applicant's age was not, in fact, that stated by his brother:—

Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate. Judgment of MEREDITH, C.J., affirmed.

Watson, Q.C., and *J. J. Maclennan*, for appellants. *J. M. Clark* and *R. U. Macpherson*, for respondent.

From MacMahon, J.] [May 5.

DUEBER WATCH CASE MANUFACTURING COMPANY *v.* TAGGART.

Bankruptcy and insolvency—Assignments and preferences—Sale of assets—Extinguishment of debt.

An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm, in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom.

Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets. Judgment of MACMAHON, J., affirmed.

C. Millar, for appellants. *Osler*, Q.C., and *J. A. Mills*, for respondents.

From Meredith, J.] [May 5.

WOOLEY *v.* VICTORIA MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Mutual company—Assessment note—Default—Forfeiture.

Default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a Mutual Fire Insurance Company, under s. 129 of the Act, R.S.O., c. 203, does not ipso facto work a forfeiture.

A notice by the company to the insurer treating the payment as an

assessment, and notifying him that, in the event of non-payment, the policy would be suspended, is not an assessment under s. 130, and non-payment pursuant to the notice does not suspend the operation of the policy. Judgment of MEREDITH, J., affirmed.

Armour, Q.C., and *J. J. Scott*, for appellants. *G. L. Staunton* and *W. L. Ross*, for respondents.

From Rose, J.] WILSON *v.* BOULTER. [May 5.

Master and servant—Workmen's Compensation for Injuries Act—Defect in plant—Damages—Infant—Mother's services and expenditure.

The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam, which was forced through the boiler, there being an intake pipe and escape pipe, which had to be adjusted by hand, and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion, and the defendants contended that it was due to a latent defect in the boiler.

Held, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable. Judgment of ROSE, J., affirmed.

Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness, and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him. Judgment of ROSE, J., reversed.

W. Nesbitt and *Glyn Osler*, for appellants. *Clute*, Q.C., for respondents.

From Falconbridge, J.] [May 5.

BIGGS *v.* FREEHOLD LOAN AND SAVINGS COMPANY.

Mortgage — Sale — Account— Trust — Limitation of actions — Interest — Acceleration clause.

When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale upon trust to pay costs and charges, and the principal and interest of the debt, and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale, and the mortgagor is entitled to bring an action against him for an account, notwithstanding the expiration of six years from the time of sale. Sec. 32 of the Trustee Act, R.S.O., c. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee. Judgment of FALCONBRIDGE, J., reversed.

A mortgage provided for payment of the principal money in two years from the date of the mortgage, with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured, the whole of the instalments secured should become payable; and that, on default of payment of any of the instalments secured at the times provided, interest at the said rate should be paid on all sums so in arrear.

Held, that the principal money was an instalment within the meaning of the proviso, and that interest at the rate of nine per cent. per annum was chargeable upon it after the expiration of the two years.

J. Bicknell, for appellant. *Armour*, Q.C., for respondents.

From Drainage Ref.] McKENZIE *v.* WEST FLAMBOROUGH. [May 5.

Drainage—Want of repair—Act of God.

Where a drain is out of repair and lands are injured by water overflowing from it, the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall, unless it is shown that, even if the drain had been in repair, the same injury would have resulted. Judgment of Drainage Referee reversed.

G. L. Staunton and *W. A. Logie*, for appellants. *Watson*, Q.C., and *A. R. Wardell*, for respondents.

From Street, J.] FAWCETT *v.* FAWCETT. [May 5.

Benevolent society—Insurance—Change in rules—Creditors

In his application for membership in a benevolent society, the applicant directed that the amount to which he should be entitled should be paid, "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding $3,000, and he now directs that in case of his death the said sum be paid, subject to his will." The insured died on the 5th of January, 1897, having on the 12th of September, 1896, made his will, by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate, there was no restriction in the rules of the society as to the person to whom payment could be made, and no provision as to payment in the event of an invalid appointment; but in July, 1896, new rules were passed limiting the persons who could take as beneficiaries, and excluding expressly creditors and persons designated only by will.

Held, that the new rules did not affect certificates then existing, and that the insured's executors were entitled to the amount (fixed at $1,500)

for distribution among the insured's creditors. Judgment of STREET, J., affirmed.

Aylesworth, Q.C., for appellant. *W. E. Middleton* and *J. F. Macdonald*, for respondents.

From Boyd, C.] KIDD *v.* THOMSON. [May 5.

Ship—General average—Ice.

A liability to general average contribution arises only where both ship and cargo are in imminent and uncontemplated peril, and there is expenditure or sacrifice to secure their safety. There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and tugs are employed for the purpose of releasing her to enable her to complete her voyage. Judgment of BOYD, C., reversed.

W. R. Riddell and *Glyn Osler*, for appellants. *J. W. Hanna*, for respondents.

Practice.] CITY OF TORONTO *v.* CANADIAN PACIFIC R. W. Co. [May 9.

Stay of proceedings—Action for rent—Pending reference as to title and other matters—Vendors and Purchasers Act—Scope of reference—Leave to appeal.

The Court refused the plaintiffs leave to appeal from the decision of a Divisional Court, 18 P.R. 374, affirming an order staying proceedings in this action, deeming that the action was unnecessary.

Robinson, Q.C., and *Fullerton*, Q.C., for plaintiffs. *Armour*, Q.C., and *Angus MacMurchy*, for the defendants.

Practice.] IN RE SHAW AND CITY OF ST. THOMAS. [May 10.

Municipal corporations—By-law—Motion to quash—Time—Service of notice of motion.

A summary application to quash a municipal by-law registered under s. 396 of the Municipal Act, R.S.O c. 223, is "made" within the meaning of s. 399, when notice of the motion is served, the affidavits in support of it having been already filed; it is not necessary that the motion should be brought on for hearing within the time prescribed by the section. *Re Sweetman and Township of Gosfield*, 13 P.R. 293, approved. Decision of Rose, J., affirmed.

W. R. Riddell, for appellants. *W. L. McLaws* and *T. A. Hunt*, for respondent.

HIGH COURT OF JUSTICE.

Barron, Loc. J.] [Oct. 27, 1898.

CRAWFORD *v.* TOWNSHIP OF ELLICE.
KERR *v.* TOWNSHIP OF ELLICE.

Drainage Act R.S.O. c. 226 ss. 93-94—Jurisdiction of Referee—Notice of discontinuance—Power of Local Judge to grant orders of reference under s. 94.

Motion for an order referring the action to the Referee.

BARRON, Loc. J.—Each action is in damages, resulting from the non-repair of drains, which it is alleged, defendants have to keep in repair and maintain. In the Crawford action a mandatory order is asked for, requiring the defendants to maintain and keep the drain in order. The pleadings are closed. It appears that proceedings were at first taken under s. 93. The notice required by that section was served in due time. Applications were made before the Referee who made certain orders. The plaintiffs on such proceedings were examined. After this the plaintiffs served but did not file notice of discontinuance. This step was taken under section 104 of the Act. The defendants set up that by reason of this, the claims of the several plaintiffs are already in another forum; that the referee is now seized of the claims; that upon the trial this contention could be successfully urged in favour of dismissal of the actions and therefore that I, as Local Judge, have no jurisdiction. It is further said that the notice of discontinuance is not in effect such a notice, because the plaintiffs have not taken out an appointment to tax the defendant's costs, or at least have not permitted sufficient time to elapse to enable defendants to do so.

The reason requiring the plaintiff to wait is, against the plaintiff, so as not to permit him to forestall the defendant, who first has the right to take out an appointment and tax costs; but I do not find that not waiting is to bar plaintiff from bringing another action within the time he reasonably should wait for another and entirely different purpose. Nor is the notice less effectual, because the plaintiffs have not ascertained and paid the defendant's costs (see *Barry* v. *Hartley*, 15 Prac. R. 376.) Then as to the objection that the claims of the plaintiffs are now in another forum, and that the Referee is seized thereof. It appears from the statement of claim in each case, that the claim is one in regard to which he, the Referee, has no jurisdiction except under s. 94, and that section has never been invoked to give and secure him jurisdiction. Under s. 93 the jurisdiction of the Referee is as to damages done "in the construction of drainage works, or consequent thereon." By the words "consequent thereon" is meant consequent upon the construction of drainage works. Now these actions are not for such damage at all; but for damages arising since the construction "in not maintaining the drains." There is no fault found with the drains or with their construction, on the contrary the drains and their construction

are inferentially approved of, for in effect it is said, that which is a benefit you do not maintain as a benefit. Hence the Referee never had jurisdiction in these actions under s. 93, and I cannot see how, when he never had jurisdiction to hear and determine, his having proceeded is to prevent the Court or Judge making an order of reference under s. 94 which but for this he could do. Then it said that the rules framed under the Judicature Act do not confer power upon me as a Local Judge of the High Court of Justice in regard to another Act (the Drainage Act). I cannot agree with this contention. The words in the rule "In all other motions, matters and applications" give me as Local Judge full power to make the order. But I am embarassed by the section itself; by the words "the Court or Judge" in the 12th line of the section (94). Am I the Court or Judge there mentioned—clearly not, because I have no power to try the action. "The Court or Judge" there mentioned is the Court or Judge who, should no order be made, has jurisdiction to try these actions. Now, I have no jurisdiction to try these actions. Then is not "the Court or Judge" mentioned in the 12th line the Court or Judge mentioned in the 5th line, or rather vice versa? I think so. If I am not the one, I am not the other. I am clearly not the Court or Judge mentioned in the 12th line, for the Court or Judge there mentioned is the Court or Judge to try the case, and this I cannot do. I must therefore refuse to grant the order, but only on this last ground.

Maybee, for plaintiff. *G. G. McPherson*, for defendants.

Falconbridge, J.] HASTINGS *v.* SUMMERFELDT. [March 25.

Election—Provincial Legislature—Deputy returning officer—Spoiled ballot paper—Showing ballot paper and refusing to give new one—Breach of duty—Damages.

The plaintiff, a Conservative, to the knowledge of the defendant, a deputy returning officer and Reformer, in marking his ballot inadvertently marked it for the Reform candidate, against whom, however, he intended to vote. He immediately and before he had left the apartment set apart for marking ballots, informed the defendant of his mistake, and asked for another ballot paper, but the defendant said he must first see the ballot paper, which the plaintiff at first refused to do, but, on the Conservative scrutineer recommending him to do so, he handed it to the defendant, without creasing or folding it so that it might be placed in the ballot box, but so that those present could not see how it was marked. The defendant looked at it, and then either showed or placed it in such a manner that it could be seen, and was seen, by all present except one person, and contending that it was not a spoilt ballot, and, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote.

Held, that the defendant by his acts in disclosing how the plaintiff

marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, he was thereby guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties provided for by the statute.

C. Ritchie, Q.C., and *J. Greer*, for plaintiff. *T. N. Higgins*, for defendant.

Rose, J.] RE WILSON, REID *v.* JAMIESON. [April 17.

Will—Devise—Power of appointment—"By will or otherwise"—Disposition by will—Invalidity of the bequest—Validity of the execution of the power.

A wife having a power of appointment under her husband's will in the words "my said wife shall have full power to dispose of by will or otherwise" by her will devised all her real and personal estate to executors "in trust to convert the same into cash" and pay legacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors."

Held that the disposition made, clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void as too indefinite; and that the executors took the property in trust for the next of kin *of the appointor* and not beneficially.

D. Fasken, *W. Davidson*, *H. E. Rose*, *A. J. Boyd* and *Goldwin L. Smith*, for the various parties.

Ferguson, J.] COPE *v.* CRICHTON. [April 24.

Counterclaim—Relief against co-defendant—Striking out—Costs—Pleading to counterclaim—Waiver.

One of the defendants, in an action brought to recover possession of land and to set aside a conveyance of the land from him to his co-defendant, delivering with his statement of defence a counterclaim against his co-defendant, for relief upon the covenants contained in the conveyance attacked and in a prior mortgage deed, but sought no relief against the plaintiff in that regard, and did not serve a third party notice upon his co-defendant. The latter pleaded to the counterclaim, but at the trial moved to strike it out, and after an expression of opinion from the trial Judge, the counterclaiming defendant submitted to have it struck out.

Held, that the co-defendant was entitled as against the counterclaiming defendant to such costs as he would have been entitled to upon a successful motion to strike out the counterclaim.

Held, also, that the fact of his having pleaded to the counterclaim did not militate against his rights.

J. E. Day, for defendant J. P. Cope. *W. R. Riddell* and *D. Fasken*, for the defendant Crichton.

Boyd, C.] CLAPPERTON *v.* MUTCHMOR. [April 25.

Bankruptcy and insolvency—Proof of claim—Promissory note—Indorser—Incomplete instrument—Suretyship—Maturity after assignment for creditors—Statute of frauds.

The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs, to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors under R.S.O. c. 147 before the maturity of three of the notes, in respect of which the plaintiffs right to rank upon his estate in the hands of the defendant, as assignee.

Held, following *Jenkins* v. *Coomber* (1898) 2 Q.B. 168, that, as against the Statute of frauds, no action could be maintained upon the notes against the president, as to whom the instrument was incomplete.

And, although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment.

Grant v. *West*, 23 A.R. 533, and *Purefoy* v. *Purefoy*, (1) Vern. 28, followed.

Belcourt and *R. V. Sinclair*, for plaintiffs. *G. F. Henderson*, for defendant.

Armour, C.J.] BREWSTER *v.* HENDERSHOTT. [April 28.

Church—Change in doctrine—Secession of members—Religious Institutions Act, R.S.O., c. 307.

In 1865, under the powers conferred by the Religious Institutions Act, R.S.O., c. 138, certain land was acquired in trust for a religious body, called the United Brethren in Christ, whereon a church was erected at the expense of the individual members of the congregation. In 1889 a schism occurred, in consequence of a change of faith, though not a fundamental one, as held by the Court of Appeal in *Itter* v. *Howell*, 23 A.R. 206, the congregation of this church adhering to the old faith. Subsequently, at the yearly conference of the body, and also at the Quarterly Conference of the circuit in which this church was, resolutions were passed, purporting to appoint, as trustees, the plaintiffs, who were adherents of the new faith,

in the place of the defendants, who were the survivors of the original trustees, and those appointed by the congregation in the place of those deceased; and claimed possession of the said land, and also asked for a declaration that they were the owners in trust for the said brethren.

Held, that the legal estate in the lands was vested in the defendants; that the plaintiffs failed to prove any title thereto, and the defendants were therefore entitled to retain the possession thereof, and the declaration of ownership asked for by the plaintiffs was refused.

German, for plaintiffs. *Cowper*, for defendants.

FOURTH DIVISION COURT, COUNTY OF PERTH.

Barron, Co. J.] [March 30.

FARRELL *v.* SCHOOL TRUSTEES SCHOOL SECTION NO. 2, NORTH EASTHOPE.

Equitable assignment—Order to pay a particular sum—Intent thereby to assign a particular fund, shown by correspondence—Fund designated in documents other than the order.

The plaintiff sued as assignee of one Stewart of an order in favour of Stewart from one Bell on the defendants for $96.45, which order was in the following words: "Shakespeare, Sept. 29. $96.45. To Trustees of SS. No. 2, North Easthope. Please pay Mr. P. Stewart the sum of ninety-six 45 Dollars, and charge to my account. J. N. Bell." This document was given to Stewart enclosed in a letter to one of the trustees, which letter said, inter alia, "will you kindly accept the enclosed orders, and we can deduct it from my salary to-morrow when we settle." This amount was in fact coming to Bell on account of salary, and only on that account. Notwithstanding notice of the above document and letter the trustees paid the full amount of salary to Bell, on the pretence or belief that the absence of the year in the first mentioned document, absolved them from liability to Stewart.

BARRON, Co. J.:—The order of September 29 is nothing more than a bill of exchange. It indicates no fund out of which the money is to be paid, and in fact is less in favour of the holder of it, than was the bill of exchange in favour of the plaintiff in the case of *Hall* v. *Prittie*, 17 A.R. 306, and I am bound by that authority even though the fact be that there is in this case no other fund out of which the money could be paid to Stewart. See *Bush* v. *Foote*, 58 Miss. 5; 38 Am. Rep. 310. But accompanying this order or bill of exchange is a letter in which appears the words above quoted. It has been held that a draft payable generally, operates as an equitable assignment where an intent to assign a particular fund is shown by correspondence accompanying the draft. Here the letter says to deduct the amount from salary. So that the amount

of the draft had to be paid out of salary and from no other source. In *Hall* v. *Prittie* the words in the order or draft were "for flooring supplied," and this was said to be a mere designation of the consideration for the debt, but in this case the drawee is told specifically out of what funds the amount of the order is to be deducted, viz.: from salary. I must therefore hold that the order of September 29, with the letter, amount together to an equitable assignment. See *Throop Train Cleaner Co.* v. *Smith*, 110 N. Y. 83.

Maybee, for plaintiff. *Robertson*, for defendant.

Province of New Brunswick.

SUPREME COURT.

In Equity. Barker, J.] WINSLOW *v.* DALLING. [March 21.

Highway—Dedication—Non-user.

A way once dedicated to the public cannot be extinguished by acts of the grantor. Neither can the public by non-user release their rights.

A. B. Connell, Q.C., for plaintiff. *A. A. Stockton*, Q.C., for defendant.

In Equity. Barker, J.] JONES *v.* BREWER. [March 28.

Specific performance—Agreement to give chattel mortgage.

Specific performance will be decreed of an agreement to give a bill of sale upon a scheduled list of household furniture sold and delivered upon credit upon the strength of such agreement.

G. G. Ruel, for plaintiff. *W. B. Wallace* and *G. H. V. Belyea*, for defendant.

In Equity. Barker, J.] HUTCHINSON *v.* BAIRD. [March 28.

Will—General power of appointment—Intention to exercise—Direction to pay debts—C. 77, s. 22, C.S.N.B.

A testatrix, having a general power of appointment under the will of her father over real and personal estate, by her will directed that her debts and funeral expenses should be paid out of her estate. After making certain bequests, the testatrix proceeded as follows: "The real estate of which I am possessed, and the personal estate to which I am entitled, came to me under the will of my late father, and it is my will that after the payments above provided for, that the residue of my estate such as came to

me under my said father's will, and all other I may be entitled to, both real, personal and mixed, shall be divided between my three children." The testatrix had no estate of her own.

Held, that the will operated as an exercise of the power; the direction to pay the testatrix's debts out of her estate being but one circumstance to be considered in determining what her intention was.

C. N. Skinner, Q.C., and *A. I. Trueman*, for parties interested.

In Equity. Barker, J.] ATKINSON *v.* BOURGEOIS. [April 18.

Debtor and creditor—Fraudulent conveyance—13 Eliz., c. 5.

An insolvent debtor being in expectation that his property would be seized under execution, conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration, but not expressed in the conveyance, of the son's bond to support him and his wife for their lives. After the conveyance to the father he conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land, and agreeing to support the father and his wife.

Held, that the conveyance from the son to the father having been made in good faith and for valuable consideration, and not for the purpose of retaining a benefit to the son, was good within the statute 13 Elizabeth, c. 5, though made for the purpose of preferring the father as against other creditors.

W. B. Chandler, for plaintiff. *A. A. Stockton*, Q.C., for defendant.

In Equity. Barker, J.] SCHOFIELD *v.* VASSIE. [April 18.

Will—Construction—Gift of income to trustees for maintenance and education of children—Income payable to father.

A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of 21 years. Two of the children were of age and the others were minors. The father was able to support maintain and educate the children.

Held, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate them, and did so.

A. I. Trueman, for trustee under the will. *A. O. Earle*, Q.C., and *H. H. Pickett*, for father.

Full Court.] EX PARTE MILLER. [April 21.

Justice's civil court—Proof of witnesses' mileage—Review—Certiorari.

The County Court judge of Westmoreland, on review of a cause tried in a justice's civil court, received affidavits to prove the mileage of witnesses which had been allowed by the magistrate in the judgment entered by him without any proof of same having been made by affidavit or otherwise before him, and these affidavits, so used on review, having shown the mileage as allowed by the magistrate to be correct, the review judge confirmed the judgment.

The court refused a rule for a certiorari to remove the proceedings on review.

Harvey Atkinson, in support of motion.

Full Court.] EX PARTE GELDART. [April 21.

Disclosure under Act 59 Vict., c. 28—An estate by the courtesy—Crops created by husband's labour on wife's land.

On an application for the discharge from custody of a debtor in a suit in a justice's civil court under c. 28, Act 59 Vict., the evidence showed that the debtor was entitled to an estate of courtesy in property belonging to his wife, situate in an adjoining county, with growing crops thereon created by his labour.

Held, on motion to make absolute a rule nisi for certiorari to remove the order of discharge, that under this evidence and sec. 4, sub-sec. 4, of the Married Woman's Property Act, 1895, there was property liable to be taken in execution, but not in execution out of the court in which the debtor was arrested, and that he was not, therefore, entitled to his discharge under the Act 59 Vict., c. 28.

Rule absolute for certiorari.

J. H. Dickson, in support of rule. *W. B. Chandler*, contra.

In Equity—Baker, J.] MCPHERSON *v.* GLASIER. [May 12.

Costs in Equity—C. 119 C.S N.B.—60 Vict., c. 24.

The provision in the table of fees of the Supreme Court in Equity that, for services not therein provided for, the like fees are to be allowed as are allowed to attorneys on the common law side of the Supreme Court applies to the table of fees of the Supreme Court provided in 60 Vict., c. 24.

C. E. Duffy, for the plaintiff. *F. St. John Bliss*, for the defendant.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] UNGER *v.* LONG. [April 27.

Practice—Service on solicitor—Examination for discovery—Witness fees—Queen's Bench Act, 1895, Rules 382, 381 and 390—Alterations and interlineations in subpœna.

This was an application under Rule 390 of the Queen's Bench Act, 1895, for an order for an attachment against the plaintiff for not attending on an appointment for his examination for discovery before a special examiner. A copy of the appointment was taken to the office of the plaintiff's solicitor more than forty-eight hours before the time appointed for the examination; and as the office was locked, the copy was pushed under the door, where it was found by the solicitor on his return to his office less than forty-eight hours before the time appointed.

Held—following *Consumers' Gas Co.* v. *Kissock*, 5 U.C.R. 542, and *McCallum* v. *Provincial Ins. Co.*, 6 P.R. 101—that Rule 382 had not been complied with.

Held, also, that it is necessary, under Rule 381, to hand the party with the subpœna enough money to pay his railway fares or mileage both ways, and also his witness fees for as many days as he will certainly be absent from his home in attending on the examination and returning home.

Quære, whether alterations and interlineations in a subpœna not authenticated by the prothonotary do not make it invalid. Application dismissed with costs.

Mathers, for plaintiff. *C. H. Campbell*, Q.C., for defendant.

Province of British Columbia.

EXCHEQUER COURT.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BJERRE *v.* THE SHIP "J. L. CARD."

Action for wages—Assignment—Rights of Assignee—Action in rem.

The right of action in rem for wages cannot be assigned. *Rankin* v. *The Eliza Fisher*, 4 Ex. R. 461 followed.

[VICTORIA, April 17, 1899.—McColl, C.J.

This was an action for wages earned by the plaintiffs, one of whom was the master of and the others engineers, on the ship "J. L. Card." The Bank of Montreal, the mortgagees of the ship, appeared and intervened. At the trial evidence was produced to show that the claims for wages had been assigned to one Mellon, before action brought. The action came on

for trial before A. J. McColl, C.J., Local Judge of the British Columbia Admiralty District, on 8th April, 1899.

Peters, Q.C., and *W. A. Gilmour*, for plaintiffs, contended that the assignment not being absolute, but by way of security only for advances, the lien was not lost but could be asserted by plaintiffs for the benefit of assignee.

Wilson, Q.C., and *Corbould*, Q.C., for Bank of Montreal, interveners.

The Local Judge now (17th April, 1899) delivered judgment:

McColl, C.J., Loc. J.:—The plaintiffs before action, but after their wages had accrued due, assigned them to one Mellon by assignments absolute in form. Evidence was given to show that Mellon or his firm had advanced to the plaintiffs in different sums at various times the full amount of their wages, and it was contended that because the plaintiffs are liable personally in respect of these advances, the assignments are not a bar to recovery in this action. The right of action in rem for wages is personal and cannot be assigned: *Rankin* v. *The Eliza Fisher*, 4 Ex. C. R. p. 461. And I do not see how I can give effect to the plaintiffs' contention. The assignee, as it seems to me, is a necessary party to the action. It is admitted that he has indemnified the plaintiffs against the costs of this action and that it is for his sole benefit. I find lest it should be considered material in appeal that the advances were made as claimed. Judgment for the Bank of Montreal, interveners, with costs.

Flotsam and Jetsam.

The following incident is mentioned by Josiah Quincy in his entertaining little book, entitled "Figures of the Past," of a journey that he made in stage-coach days—away back in 1826—from Boston to Washington, with Mr. Justice Story, of the Federal Supreme Court:

"The justice was telling of the routine of the court's Washington social life. 'We dine,' he said, 'once a year with the president, and that is all. On other days we take our dinner together and discuss at table the questions which are argued before us. We are great ascetics, and even deny ourselves wine, except in wet weather.' Here the judge paused, as if thinking the act of mortification he had mentioned placed too severe a tax upon human credulity, and presently added: 'What I say about the wine, sir, gives you our rule, but it does sometimes happen that the chief justice will say to me, when the cloth is removed: "Brother Story, step to the window and see if it does not look like rain." And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply: "All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere."