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We are compelled to hold over some valuable articles, which will, however, appear in due course.

Sir Henry Crease gives his opinion in another place (post p. 319) on the subject of the law of divorce in British Columbia, taking exception to the views expressed by Chief Justice Davie. The subject is becoming one of more than provincial interest.

Some time ago we suggested the propriety of the Law Society providing a reading room for the use of the profession at Osgoode Hall. The same sort of need is experienced in England, where the General Council of the Bar has recently adopted the following resolution, viz.: "That it is most desirable that there should be set apart for the use of the Bar a room in the Royal Courts of Justice as a reading and writing room." Why does not the Ontario Bar adopt a similar resolution through its various local associations.

CAUSERIE.

"If I chance to talk a little while, forgive me!"
—*Henry VIII., Act I., Scene 4.*

Perhaps of all the *cruces* in the domain of the Common Law that present themselves to the unphilosophic layman the one embodied in the maxim: *Ignorantia legis neminem excusat*, is the chiefest. Indeed, if he were to patiently study some of the explanations of the reason of the rule attempted by

certain English judges and commentators upon the law, he would in no wise see occasion to change his preconceived opinion as to its utter inscrutability.

In the reign of Edward I. we find a consciousness of the fundamental importance of this doctrine stealing over the minds of our pioneer law-builders; and a very funny, though ingenious, reason for it is put forward in Y.B. 39 Edw. I., T. Pasch., to the effect that no person should excuse himself for ignorance of the law, because every person is represented in Parliament and so assents to the laws there made! Some two centuries afterwards old Christopher St. Germain, in his "Doctor and Student" (see Muchall's ed., p. 250), declares it to be a first principle of English law that "ignorance of the law ("though," he naively adds, "it be invincible") doth not excuse"; and he thereupon proceeds to expound its reason in much the same terms as are to be found in the Year Book above cited. Hooker, in his "Ecclesiastical Polity," also adopts this theory of the reason of the rule, and so does Locke in his essay "On Government" (see Hallam's Const. H.E., i., p. 222). Now, putting aside the consideration that the fallacy of this reason is demonstrated in the fact (so much truer then than to-day) that but a small portion of our law is of Parliamentary origin, such an hypothesis must be held untenable simply by reason of it being founded upon a most novel and unwarrantable extension of the doctrine of estoppel.

In the case of *Lansdown* v. *Lansdown*, decided in 1730 (Mos. 364), Lord Chancellor King is reported to have said, without exploiting the principle of it, that the maxim only obtained in criminal cases, and did not apply to civil suits. But that, as Holland says (Jurispr., 7th ed., p. 95), is clearly not the law. Lord Ellenborough, in *Bilbie* v. *Lumley* (2 East. 472), substantially declares that every man must be taken to be cognizant of the law in general, on account of the *convenience* subsisting in such a presumption; and in coming to that conclusion he very nearly compassed the whole truth of the matter. Since the decision in *Bilbie* v. *Lumley*, the doctrine has, in the main, been held to be unassailable in all the Common Law Courts—yet few, if any, of

the cases lay down the unqualified proposition that ignorance of the law will never entitle one to relief. In Equity, the principle has evoked fruitful discussion; but as Snell says (Pr., Eq., 9 ed., 523), it "is about as much observed in Equity as at law." Courts of Equity have, indeed, granted relief in cases where the party has suffered by his mistake of law; yet all such cases will be found to have involved other grounds, connected indeed with such mistake, but in respect of which Equity has always exercised the right to intervene, such as misrepresentation, undue influence, imposition or surprise.

Austin (Prov. Juris. Determ., ii., pp. 481-482), while criticising the reason for the rule given by Blackstone, declares the real reason to be that if ignorance of law were admitted to be a ground of objection, "the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable." This is, of course, putting it in the form of a rule of evidence, and basing its reason entirely on the difficulty of affirmative proof. Judge Holmes ("The Common Law," pp. 48, 49) combats Austin's theory, and says "the true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, etc. Public policy sacrifices the individual to the general good."

Even the Roman jurists, to whom we are indebted for this rule of law, did not clearly apprehend its reason. In the Digest (xxii. 6, 9) we find the maxim so expressed: "Regula est, iuris ignorantiam cuique nocere"; and its reason expounded in this wise (Dig. xxii. 6, 2): "In omni parte, error in iure non eodem loco quo facti ignorantia haberi debebit, quum ius finitum et possit esse et debeat: facti interpretatio plerumque etiam prudentissimos fallat." We gather from this that the Romans rested the idea of responsibility under this maxim purely and simply upon negligence. What they say is tantamount to this—that a man must be held to be guilty of negligence who does not know *what is possible to be known*, and what every other reasonable man knows (cf. Hunter's "Introd. to Roman Law," 3rd ed., p. 135). How

great a sophism this involves becomes clearly manifest when one considers what a violent *tour de force* is necessary in order to bring so artificial a postulate as this within the practical elements of negligence (*culpa*) in the Civil Law.

Space will not allow us to deal with this interesting subject as fully as it demands, but we venture to think that the maxim may be made fairly diaphanous even to the "unphilosophic layman," if it is looked upon simply as an axiom necessarily incident in every system of positive law, and without which such law could never be properly administered. True, it does not seem to be so well-bedded in 'sweet reasonableness' as the twelve axioms of Euclid; but one must remember that Hobbes said of those that they were held to be true simply because no one ever took the trouble to demonstrate that they were not so.

* * * * * * *

That a desire for the betterment of the system in vogue in England for prosecuting the study of the law is taking firm hold upon the minds of the profession in that country, has received frequent demonstration of late. The eloquent plea for the adoption of Continental methods of legal education made by Lord Russell, of Killowen, in October last, on the occasion of the inauguration of the new course of public lectures at the Inns of Court, caused a great shaking of the dry-bones in the Council of Legal Education; and for some little while thereafter the press, both professional and lay, fairly throbbed with the heat of contention engendered by the suggestions of the Lord Chief Justice, at once so startling to the conservatism of the old fogies of the English Bar, and so acceptable to a large portion of its younger members, who believe that the only way to make a polished corner of the temple of Jurisprudence out of the native and barbaric majesty of the Common Law is by *Civil*izing it.

The latest important contribution to the literature of the reform propaganda is the presidential address delivered by Lord Davey at the annual dinner of the Birmingham Law Students' Society, which was celebrated a few weeks ago. In the course of his remarks, he frankly admitted that England

was far behind some of the Continental nations and the United States in affording facilities for a comprehensive study of the philosophy of the law. In his opinion (which coincides with that of the Lord Chief Justice), the desideratum is to be found in a Central School of Law open to all, and with a curriculum so ordered as to impart to its students, first, an adequate knowledge of the liberal arts and sciences as a preparation for entry upon the course of instruction of the second or higher branch of the institution—a College of Jurisprudence, which would constitute, of course, the *raison d'etre* of the whole academic establishment. Lord Davey further thinks that the school or university should be empowered to grant degrees in law, in the same way as the regular universities, and that such degrees should be accepted by the proper authorities as evidence of fitness in every branch of the profession. Now, there are some features of the proposed institution which would seem to us to be open to objection—such, for instance, as the preliminary course of training as embodied in the scheme. While we agree that such knowledge should be exacted as a *sine qua non* in the qualifications of candidates for admission to the Bar, yet we think it might very well be left to be communicated through its present channels. But in all reforms many experiments must be made before a satisfactory level of adequateness is reached; and by what means soever the profession in England is helped to lift itself out of the Serbonian bog of philistinism and empiricism in which it has, as a whole, immemorially floundered, let them, we say, be welcomed with acclaim, and exploited to the uttermost element of good that is in them.

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Lord Russell, of Killowen, is shortly coming to America as the guest of several Bar Associations in the United States. It behooves the profession in Canada to immediately invite him to visit this country, so that we may not be outdone by our cousins across the border in expressing esteem for the great man whom England has delighted to honour. The late Lord Chief Justice was prevented from visiting Canada, while

on this side of the Atlantic some years ago, by baseless fears for his personal safety injudiciously expressed by Lord Lorne. No such untoward event can possibly supervene during the American tour of Lord Russell, and he should not be permitted to return home without having seen the wonders of this splendid portion of the Greater Britain that is soon to be. The initiatory step towards this consummation might be most becomingly taken by the Benchers of the Law Society of Upper Canada. "It is sweet and honourable to di(n)e for one's country!"

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

INJUNCTION—LANDLORD AND TENANT—IMPLIED OBLIGATION—COMMON SCHEME—RESIDENTIAL FLAT.

Hudson v. *Cripps*, (1896) 1 Ch. 265, was an action by a tenant of a residential flat against her landlord, to restrain him from converting the residue of the building in which the flat was situated into a club, on the ground that the plaintiff's tenement was let in accordance with a general scheme, under which the whole building, with some slight exceptions, was occupied as residential flats, as evidenced by certain regulations and conditions annexed to the agreement under which the plaintiff held. The plaintiff applied for an interlocutory injunction, which was granted by North, J., on the ground that what the defendant proposed to do was a violation of the agreement under which the plaintiff held.

TRUSTEE RELIEF ACT—PAYMENT INTO COURT BY ADMINISTRATOR—SUBSEQUENT DISCOVERY AND PROOF OF WILL—PAYMENT OUT OF MONEY IN COURT TO EXECUTOR.

In re Hood's Trusts, (1896) 1 Ch. 271, money had been paid into Court under the Trustee Relief Act by an executor, to the credit of several infants who were some of the next of

kin of a supposed intestate. Subsequently a will was discovered and proved, and the executor applied on petition in the matter in which the money had been paid in, for payment out of the money so paid into Court. The Court granted the application on an affidavit being filed showing that the legacies bequeathed by the will to the infants had been paid.

SETTLEMENT — APPOINTMENT — CONSTRUCTION — REMOTENESS — CONTINGENT REMAINDER.

Symes v. *Symes*, (1896) 1 Ch. 272, was a special case stated for the purpose of obtaining a construction of a deed of appointment. The deed in question was executed in pursuance of a power contained in a marriage settlement of real estate executed in 1848, and was made by the husband and wife, and they thereby jointly appointed that the estate after the death of the survivor of them (they being tenants for life) should be to the use of the three children then born (naming them), of the only son of the marriage, and all other his child or children, who should be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain 25, equally as tenants in common. But in case either of the three named children, and any such other child or children as aforesaid, should die under twenty-five, then immediately after his or her death, to the use of the survivor or survivors of them and their assigns, provided that, in case the appointment thereby intended to be made in favor of after born children of the son should from any cause fail of effect, the appointors declared that the appointment should operate as an appointment in favor of the three named children, or such of them as should attain twenty-five, their respective heirs and assigns. The husband died in 1867, and the wife in 1873. There were seven of the children living at her decease; the three elder ones, who were those named in the deed, had then attained twenty-five, and the other four subsequently attained that age. The question was whether the limitations of the deed of appointment were to be construed as creating a contingent remainder or an executory use. North, J., determined that they created a contingent remainder, and that the limitation of the fee in favor of the

children who had not attained twenty-five at the death of their mother in 1873, was inoperative, because it failed to vest on the death of the mother, or in other words, because there then was no particular estate to support it. The effect of the appointment he therefore held to be to vest the estate in the seven children, equally, as tenants in common for life, with remainder as to an undivided one-seventh to each of the three elder children in fee simple, and as to the remaining undivided four-sevenths, to the three elder children as tenants in common in fee in equal shares. The decision thus arrived at may be, and probably is, correct from a legal point of view, but it must be admitted to result from a highly technical mode of reasoning, and there can be no doubt whatever that it defeats the perfectly legitimate, equitable, and reasonable intentions of the settlors. Such a result seems to show that the provisions of R.S.O., c. 100, ss. 28, 29, do not go far enough.

PRACTICE—INJUNCTION—OFFER OF UNDERTAKING BY DEFENDANT—COSTS.

Jenkins v. *Hope*, (1896) 1 Ch. 278, was an action to restrain the infringement of the plaintiff's patent. On being served with the writ the defendant offered to undertake not to infringe, to give the other relief claimed by the writ, and pay the plaintiff's costs. Notwithstanding this offer the plaintiff delivered a statement of claim, and the defendants delivered a defence setting up their offer, which they thereby adhered to, and submitting that plaintiff should be ordered to pay the costs incurred subsequent to the making of the offer. The plaintiff moved for judgment on the pleadings, and North, J., was of opinion that the defendant's offer should have been accepted, and upon the defendants giving an undertaking not to infringe he refused to grant an injunction, and while giving the plaintiff costs up to the date of the offer, he ordered him to pay the defendant's costs subsequently incurred.

INFANT—MAINTENANCE—DISCRETION OF TRUSTEES—POWER TO RESORT TO ACCUMULATIONS—WILL—CONSTRUCTION—REMOTENESS.

In re Wise, Jackson v. *Parrott*, (1896) 1 Ch. 281, a testator devised and bequeathed his residuary real and personal

estate to trustees, subject to the payment of certain annuities in trust, to invest and out of the income in their absolute discretion to apply the whole or any part thereof to the maintenance of the children of his sister, who was one of the annuitants, until they attained 23, and to accumulate and invest the unapplied portion of the income: and upon further trust as to both capital and income of the investments in trust for the child or children of his sister, who either before or after her decease should attain 23, and the issue of such of her children as might be then dead, such issue to take only the share their parents would have taken if living. The testator died in 1888, and his sister, who was a widow, had only two children, a daughter who attained 23 on 10th March, 1892, and a son born May 28, 1874. In 1889 it was determined that the gift to the children of the sister of the residue of the personalty was void for remoteness, but that the persons entitled to it could not be determined until the sister's death, and it was then ordered that the trustees should accumulate the surplus personalty until further order. No part of the income had been applied towards the maintenance of either of the sister's children. An application was now made to North, J., on behalf of the two children of the sister for maintenance, and he held that the trust for maintenance out of the income of the residuary personalty was distinct from the trust of the capital; and that the trustees could now exercise the discretion given them by the will, and were entitled in their discretion to apply all or any part of the income of the fund, including any accumulations thereof, towards the maintenance of the children in accordance with the will, for the past maintenance of the daughter until she attained 23, and for the past and future maintenance of the son until he should attain 23. The accumulations of income made by the trustees pursuant to the order of the Court of 1889, he held would not be deemed any exercise of their discretion, and did not now preclude their exercising it.

TRUST—TRUSTEE—NEW TRUSTEES—POWER OF APPOINTMENT—TRUSTEE "ABROAD" - EXECUTOR TRUSTEE—SOLICITOR.

In re Stamford, Payne v. *Stamford,* (1896) 1 Ch. 288. Under a will whereof the executors were also trustees there was a power enabling the tenant for life to appoint a new trustee in place of any trustee who should be "abroad." After the personal estate had been fully administered one of the trustees went to reside in Normandy, and had taken a lease of a house there for five years; he came occasionally to England on the business of the trust. The tenant for life appointed his solicitor trustee in the place of the trustee who was thus abroad, and the other trustees, and the trustee thus displaced, now applied for the opinion of the Court as to the validity of the appointment of the new trustee, and Stirling, J., held that the trustee who had gone to reside in Normandy was "abroad," and that the appointment of the solicitor, though not one which the Court would have made, was nevertheless valid; the beneficiaries did not object, and the solicitor, apart from his status as solicitor to the appointor, being otherwise unobjectionable: That as the personal estate had been administered, and as no part of the testator's personal estate remained vested in the absent trustee as executor, his position was merely that of trustee, but that as he might be entitled as personal representative to indemnity out of the real estate, liberty to apply should be reserved to him, notwithstanding the substitution of a new trustee in his place, in case it should turn out that any liability on his part as personal representative still existed.

TRUSTEE—POWER TO APPOINT NEW TRUSTEES—PERSONS TO EXERCISE POWER—EVENT NOT SPECIFIED IN TRUST DEED—TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53), S. 10, (R.S.O., C. 110, S. 3).

In re Wheeler, (1896), 1 Ch. 315, turns upon the construction of the Trustee Act, 1893 (56 & 57 Vict., c. 53), sec. 10; (R.S.O., c. 110, sec. 3); that section authorizes the persons nominated for that purpose by the deed, etc., or if there be no such person then the continuing trustees to appoint a new trustee. In this case, by the instrument creating the trust, two of the cestuis que trust were empowered to appoint a new trustee in

the event of any trustee becoming incapable, but not in the event of any trustee becoming unfit. One of the trustees became unfit, but not incapable, and the question arose whether the cestuis que trust or the continuing trustees were the parties to appoint a new trustee in place of the trustee who had become unfit. Kekewich, J., decided that the continuing trustees were the proper persons to make the appointment, and that the words "nominated for that purpose" only apply to persons nominated to appoint new trustees in the particular event which has happened, and do not enable them to appoint in an event not contemplated by the terms of their power. But it might be asked in such a case, who are "the continuing trustees?" Does that expression include the trustee who has become unfit, who certainly continues de facto and de jure trustee up to the time of his removal; but this case throws no light on that question, inasmuch as the Court itself, on the application of some of the cestuis que trust, appointed a new trustee in the place of the one who had become unfit.

COMPANY—WINDING UP—MISFEASANCE—DIRECTORS—AUDITORS—FALSE BALANCE SHEETS—PAYMENT OF DIVIDENDS WHEN NO PROFITS—DAMAGES—REMOTENESS—WINDING UP ACT, 1890 (53 & 54 VICT. C. 63) S. 10—(R.S.C. C, 129, S. 83.)

In re Kingston Cotton Mill Co., (1896) 1 Ch. 331, an application was made against the auditors and directors of a company being wound up, to compel them to make good certain moneys lost by their misfeasance. The application was made under the Winding up Act, 1890, sec. 10 (R.S.C. c. 129, sec. 83) under the following circumstances. For some years before the company was ordered to be wound up, balance sheets signed by its auditors were published by the directors to the shareholders, in which (1) the value of its mill and machinery, and (2) the value of its stock in trade were greatly over-stated. The directors and two of the auditors knew that (1) was an over-value, but none of them, except one of the directors named Jackson, knew that (2) was over-valued, but the auditors and directors (other than Jackson) believed and relied on a statement as to value furnished by Jackson, who was also manager of the company. Dividends

were for several years paid on the assumption that the balance sheets were correct; but if the excess in value of the properties 1 and 2, or either of them, had been deducted, there would be no profits available for dividends. But taking the stock in trade and mill and machinery and site at their true value, the company was not insolvent until the last year of its existence. The official liquidator sought to make the auditors and directors liable for the dividends improperly paid, and also for damages resulting from continuing the company's business on the footing that the balance sheets were correct. Williams, J., held that the directors other than Jackson were not, but that Jackson and the auditors were, liable for the dividends improperly paid, but that none of them were liable for the damages claimed, on the ground that they were too remote. In doing so he decides that the word "misfeasance" in the sec. 10 above referred to, covers every misconduct of an officer of the company as such, for which such officer might have been sued apart from that section, and not merely breaches of trust. And he also decides that though the mill and machinery were over-valued, yet that such over-valuation would not of itself be material so far as the declaration of the dividend was concerned, because even assuming that to the knowledge of the directors the depreciation in the value of fixed capital had occurred, it would not make the declaration of the dividend ulta vires, nor prevent the payment of a dividend out of the excess of current receipts over current payments. With regard to the auditors, although conceding that it was no part of their duty to take stock, yet he considered it was their duty to test the accuracy of the manager's statements as to the value of the stock in trade by a comparison of the figures in the books audited, and had they done so they could not have failed to discover the falsity of the statements.

AGREEMENT TO REFER—STAYING ACTION—"STEP IN PROCEEDINGS"—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49), S. 4; R.S.O., C. 53, S. 38.)

Ford v. *Bartlett*, (1896) A.C. 1, was an appeal to the House of Lords from the decision of the Court of Appeal in *Bartlett* v. *Ford*, (1895), 1 Q.B. 850, which was an application to stay

the action on the ground that the parties had agreed to submit the matters in dispute to arbitration. The Arbitration Act, 1889, authorizes such an application to be made by a defendant before taking "a step in the proceedings," in which respect it differs from R.S.O., c. 53, sec. 38, which authorizes such an application "after appearance and before statement of defence." The defendant before moving had applied for and obtained further time to deliver a defence, and the question was whether that was "a step in the proceedings." The House of Lords affirmed the Court of Appeal's decision holding that it was.

GOOD WILL—SALE OF GOOD WILL—CANVASSING CUSTOMERS OF BUSINESS SOLD—PARTNERSHIP.

In *Trego v. Hunt*, (1896) A.C. 7, the House of Lords (Lords Herschell, Macnaghten and Davey) have reversed the decision of the Court of Appeal, (1895) 1 Ch. 462 (noted *ante*, vol. 31, p. 298). The facts of the case were that the defendant had been taken by the plaintiff into partnership on the terms that the good will of the business was to be and remain the sole property of the plaintiff. The defendant, while a partner, had obtained a list of the customers of the firm for the purpose of using it for the purposes of an independent business, which he intended to set up at the expiration of his partnership with the plaintiff. The Court of Appeal had affirmed the judgment of Stirling, J., refusing an injunction, on the ground that the defendant was, as a partner, entitled to the information. The case, as presented to the House of Lords, turned upon the point whether *Labouchere* v. *Dawson*, L.R. 13 Eq. 322, or *Pearson* v. *Pearson*, 27 Ch. D. 145, was to be followed. In the former case Lord Romilly M.R., had laid it down that on a sale of a business and good will, the vendor might be restrained by injunction from canvassing the customers of the business sold, for the purpose of a new business set up by him; but in *Pearson* v. *Pearson*, the Court of Appeal decided that in the absence of any covenant not to canvass the customers of the business sold the purchaser had no right to restrain the vendor from canvassing them. In Lord

Herschell's judgment the various authorities pro and con are elaborately reviewed, and the conclusion is reached that *Labouchere* v. *Dawson* was rightly decided, and applying the principle of that case to the one in hand their Lordships held that the plaintiff was entitled to an injunction notwithstanding *Pearson* v. *Pearson*, to the contrary. Whether the obligation is founded on the principle that a grantor may not derogate from his grant, as Lord Romilly declared, or whether it rests on an implied contract on the part of the vendor to refrain from canvassing the customers of the business sold, their lordships do not decide, but content themselves with declaring that the obligation exists on whatever ground it may rest. It may be well to note that Lord Macnaghten expresses the opinion that there is a material distinction between the sale of a good will made by the beneficial owner and a sale made by process of law, *e.g.*, by a trustee in bankruptcy.

LIBEL—MISDIRECTION—NEW TRIAL—"SUBSTANTIAL WRONG OR MISCARRIAGE"—ORD. XXXIX., r. 6—(ONT. RULE 791).

Bray v. *Ford*, (1896) A. C. 44, is a decision of the House of Lords on the construction of Ord. xxxix. r. 6 (Ont. Rule 791). The action was for libel, and a verdict had been given in favor of the plaintiff for £600. The defendant moved for a new trial on the ground of misdirection. The Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.), although of opinion that there had been misdirection, nevertheless refused a new trial on the ground that if the direction had been the other way the jury might, and probably would, have given the same verdict. Their Lordships (Halsbury, L.C., Macnaghten, Watson, Herschell and Shand) were, however, of the opinion that the defendant was entitled to a new trial, and that inasmuch as the defendant's real case had not been properly submitted to the jury, it was impossible to say whether, if it had been, it might not have influenced their verdict, and that under the circumstances there had been "a substantial wrong or miscarriage" within the meaning of Ord. xxxix. r. 6 (Ont. Rule 791), entitling the defendant to a new trial, which was accordingly ordered.

NEGLIGENCE—MASTER AND SERVANT—EMPLOYER AND WORKMAN—"PERSON IN CHARGE OR CONTROL OF LOCOMOTIVE ENGINE OR TRAIN"—EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 VICT., C. 42), S. 1, S-S. 5—WORKMAN'S COMPENSATION FOR INJURIES' ACT (55 VICT., C. 30, [O.])

McCord v. *Cammell*, (1896), A.C. 57, is an important decision of the House of Lords in a case arising under the Employers' Liability Act (43 & 44 Vict., c. 42), which is the Act from which the Ontario Workmen's Compensation for Injuries' Act (55 Vict., c. 30), is derived. The facts were simple: the plaintiff's husband was a workman of the defendant company, and he was killed by reason of a wagon which had been detached from a train for the purpose of being unloaded, running down an incline, owing to its having been insecurely scotched in consequence of the negligence of another servant of the company in using slag for the purpose. The wagon in question formed part of a train in charge of an engine-driver and fireman, which having arrived at a point on an incline, was uncoupled by the fireman for the purpose of being unloaded, while the rest of the train proceeded to another point for discharge. There was evidence that the method of scotching employed was dangerous, and was known to and approved by the engine driver. The principal point of difficulty was whether or not the negligence which resulted in the death of the deceased could be properly attributed to any person "in charge or control" of the train. And on this point there was a great conflict of judicial opinion. The action was brought in the County Court, and the judge who tried the case held that there was no evidence of negligence under the Act, and the Divisional Court (Wills and Wright, JJ.,) dismissed an appeal on the ground that the negligence was that of the fireman, and he was not in charge or control of the train. This decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes, L.J., Rigby, L.J., dissenting). Rigby, L.J., was of opinion that the engine driver could not get rid of the charge he had of the train by uncoupling his engine and leaving the train, and that since he knew and permitted the use of slag as a scotch for the wagons that were left standing on the incline, there was evidence for the jury of negligence by the person having the charge or

control of the train. The House of Lords (Halsbury, L.C., Watson, Herschell, Macnaghten, Morris, Shand and Davey) were unanimous that there was evidence to go to the jury of negligence, although their lordships were not all agreed as to whether the engine driver or the fireman was "the person in charge or control of the train." Lord Halsbury contented himself with saying that there was evidence, without expressing an opinion as to the result of it; Lord Watson thought the words "any person in charge, etc.," do not necessarily point to one person who is in charge of the whole train, but that one person may be in charge of part and another of another part, and if any one is negligent in his own department that is enough to constitute negligence within the Act—and at any rate the plaintiff was entitled to go to the jury upon the alternative that either the fireman or the engine driver was in charge. Lords Herschell, Shand, MacNaghten and Davey agreed with the view of Rigby, L.J., but were also of opinion that if the engine driver could be said to have ceased to have control of the wagon in question, there was evidence to justify the finding that the fireman had control. Lord Morris thought the engine driver was in control, and that there was evidence of negligence on his part.

SHIP—CARRIAGE OF GOODS—COMMON CARRIER—BILL OF LADING—SHORT DELIVERY—EVIDENCE—BURDEN OF PROOF.

Smith v. *Bedouin Steam Co.*, (1896) A.C. 70, was an action brought by ship owners to recover freight for the conveyance of 1,000 bales of jute, against onerous indorsers of the bill of lading. The defendants claimed to retain out of the freight the value of 12 bales short delivered out of the 1,000 covered by the bills of lading. There was no clear evidence as to how or where the missing bales disappeared. The Scotch Court of Session under the circumstances considered the defendants were not entitled to deduct the value of the missing bales, but the House of Lords (Lords Halsbury, L.C., Watson, Shand and Davey) were of opinion that the bills of lading constituted prima facie evidence that the bales in question had been duly delivered to the plaintiffs, and that the burden of displacing that evidence was on them, and not having dis-

charged it, the defendants were entitled to deduct the value of the missing bales as claimed by them. It may be noticed that both this case and the preceding one turned upon a question of fact, and in both cases the appeal was successful, which seems rather to show that the infallibility which some judges are inclined to attribute to a judicial finding of facts is rather fallacious; and, at all events, we have the high authority of the House of Lords that a finding of fact by a judge is examinable by an appellate Court, and that the reasons of that finding may be inquired into, and, if erroneous, the finding may properly be set aside.

R.S.O. c. 184, s. 495—CONSTRUCTION—BY-LAWS—POWER TO REGULATE A TRADE DOES NOT INCLUDE POWER TO PROHIBIT.

In *Virgo* v. *Toronto*, (1896) A.C. 88, ante vol. 31, p. 692, the Judicial Committee (Lords Watson, Macnaghten, Morris and Davey, and Sir R. Couch) have sustained the judgment of the Supreme Court of Canada (22 S.C.R. 447), holding that under the Municipal Act (R.S.O. c. 184, s. 495), the power given to municipal corporations to regulate the trade of peddling does not enable the corporation to prevent the trade from being carried on altogether within any particular streets of the municipality, no question of apprehended nuisance being involved.

CORRESPONDENCE.

DIVORCE IN BRITISH COLUMBIA.

To the Editor of the Canada Law Journal.

It was a surprise to me to see in a recent number of your valuable journal (ante, p. 139), a reference to the case of *Levey* v. *Levey*, and to a note which appears in the draft Revised Statutes of British Columbia, wherein a question is raised as to the validity of an Act which has been settled law here for over 22 years, viz.: the Divorce and Matrimonial Causes Act (20 & 21 Vict., c. 85, Imp.), as amended by 21 & 22 Vict., c. 108, under which the present Divorce Court has so long been in operation here unchallenged and unappealed; and especially as no application has been made to the Dominion Parliament or the Privy Council with respect to it. Under these statutes divorces have been granted, marriages annulled, judicial separations decreed, descents cast, new marriages by divorced persons have been made; numbers of children under such marriages have been born, monies paid over, and other

things done which even legislation cannot now disturb. In short, the provisions of the Act have been freely exercised, and that for so long a period that it has become part and parcel of the every day law of the province.

No Supreme Court Judge of British Columbia has in all these years actually refused to act under it, until the tentative suggestion of the present Chief Justice sprang into life, and it strikes one as being all the more strange that the revision of the statutes should have been selected as the occasion for suddenly raising and publishing a grave doubt as to a statute upon which the B. C. Full Court has, after prolonged consideration, deliberately pronounced a decision which has ever since been followed by the Supreme Court as settled and competent law.

Sir Matthew Begbie, after he had passed through the first occasion on which his opinions had been combated in Full Court, acted under the Divorce Act in *Scott* v. *Scott*, as did Gray, J., Crease, J., Walkem, J., and Drake, J., and this during long years past, without (as already mentioned) any question or appeal to the Privy Council being made.

It must not be forgotten, too, that the rules for divorce proceedings for carrying out the Act were the English rules adapted to meet the changed position of affairs in the province, published by authority in 1877, approved and signed by the only three judges then on the Bench—first the late Chief Justice, Sir Matthew Begbie, Mr. Justice Crease and Mr. Justice Gray. At the time the Order-in-Council adopting these Supreme Court Rules was passed, viz., 22nd October, 1892, the present Chief Justice was the Attorney-General, and he presumably must have been familiar with, if not responsible for them.

The Act itself has not been altered since *Sharpe* v. *Sharpe*, or doubted, until the present Chief Justice indirectly raised it in *Levey* v. *Levey*. But hitherto it has been acted upon as law, and for the simple reason frankly given by the late Chief Justice Begbie after *S*—— v. *S*—— was passed and gone, "because now it is law."

If any alteration of such construction of the law had been thought necessary or advisable, in the public interest, it could only have been obtained, and should only have been attempted, by recourse to a superior authority competent to declare it—certainly not by the volunteer utterances of any person or persons not sitting (in a case) in a superior judicial or legislative capacity.

I see your correspondent in the article under notice, brings forward a suggestion, that "having the matter discussed pro and con. in the Full Court is now the proper thing to be done, and this doubtless will shortly be done." Divorce Acts and laws are not to be altered or disposed of by any such off-hand process.

The Act which the Full Court has declared makes divorces lawful, has not been altered by competent authority, i.e., the Dominion, which by the Constitutional B.N.A. Act, 1867, is the only power which has sole control over divorce, and that being the case, how could the B.C. Full Court, in which all the judges who then composed it, sat—if they discussed the matter pro and con. for a month among themselves—affect what is now out of their hands? The local legislature could offer no assistance. Divorce is beyond their competence. The Full Court (*Scott* v. *Scott*) could give no appeal. And supposing the members of the Full Court could so meet, what would be the use of it? As the Court is at present constituted—of four judges only—with the

differences of opinion on the subject which at present are believed to exist among them, a conference so constituted, must necessarily be barren of results. The doubt derives its only practical importance from appearing in your columns, and it is to be hoped that through the same channel it will be set, as it can be, entirely at rest.

It is not generally known that the English divorce law was first practically introduced into British Columbia by the late Chief Justice Begbie himself as far back as 1870, in the case of *Scully* v. *Lee* (cited in *Sharpe* v. *Sharpe*, 1 B.C.R. 25). That was an action for crim. con., where a demurrer was heard against the plaintiff's pleading, on the ground that the action of crim. con. had been abolished by the Divorce Act, which was then in force in B. C. The demurrer was sustained on that ground, and with costs. So also in 1877, in the case of *Lawrence* v. *Lawrence and Egerton*, where on the ground that the Divorce Act was in force in B.C., Sir Matthew Begbie refused to entertain the common law action of crim. con. which it abolished.

It is noteworthy that this abolition of the previously existing remedy, was treated, by those who drew the Act, as a necessary prelude, to clear the ground of the old remedy in order to introduce the then new remedies of the Act—judicial separation or divorce—for which clearly it was passed. Sir Matthew thus admitted the operation of the Act in B.C., and when *Sharpe* v. *Sharpe* (hereinafter referred to) came up, he acknowledged himself bound by that admission.

His only objection to the fullest exercise of divorce à vinculo was not one of principle at all (the Imperial Parliament had settled that) viz.: That divorce was a right, but was based on the technical objection that it had not in B.C. certain particular judges to administer it, although the B.C. Supreme Court Judges had by law every authority and jurisdiction in the power of the Crown to confer, to enable them to do all that English judges could do. And that, too, under enabling statutes, which Dwarris tells us are to be construed liberally, as well as a Royal Commission signed by the Queen, giving Mr. Begbie all the powers as judge which she could bestow—powers of which each of the subsequent judges by statute equally partook.

The first statutory authority for the applicability of the Divorce Act to British Columbia is the English Law Act, R.S. No. 70, sec. 3. This Act was passed upon the suggestion of the then Secretary of State for the Colonies (Lord Lytton) contained in his dispatch to Governor Douglas, of 14 Feb., 1859 (vide note P.S., to the judgment in *S*—— v. *S*——, 1 B.C.R., p. 25, calling his attention to the questions of divorce, bankruptcy, lunacy, probate, etc., and suggesting legislation on all these subjects to make the laws thereon, for obvious reasons, as uniform as possible through these and the other colonies of the Empire. His directions were followed: first on the mainland of British Columbia, by the proclamation having the force of law of the 19th November, 1858, which, after it had been approved by the Secretary of State for the Colonies, being the form usual, with necessary variations, for establishing British law in all the colonies, enacted "That the civil and criminal laws of England, as the same existed on the 19th November, 1858, and so far as the same were not from local circumstances inapplicable, were and should be in force in British Columbia."

It was under this statute that the Imperial Bankruptcy Act, 1854, was introduced and acted upon by then Mr. Justice Begbie up to Confederation, when bankruptcy was exclusively dealt with under Dominion law (B.N.A. Act, 1867). Under this statute also, the English laws regulating divorce, lunacy, probate, intestacy, administration, etc. (omitting for the present purpose criminal matters), were adopted and practiced by the Supreme Court of Civil Justice of B.C., up to and until the union of the formerly separate colonies of British Columbia and Vancouver Island, into the united colony of British Columbia on the 19th November, 1866, and thenceforward under the Supreme Court of B.C. as heir to the main land and island Supreme Courts of Civil Justice. Upon this union the English Law Ordinance, 1867, was passed, extending the same provisions to Vancouver Island with a saving of all that had been lawfully done in the interim in the main land and in the island under the respective legislative authorities then therein existing.

And finally, upon Confederation with Canada, the English Law Act, R.S. cap. 69, 1888, was passed, confirming all that had been lawfully done in the premises. This statute extended the introduction of English laws upon all the subjects mentioned, e.g., divorce, probate, administration, etc. Bankruptcy and criminal law were already merged in the Dominion Bankruptcy Act and criminal laws respectively, to the whole of British Columbia as she now is (1896), and have been enforced unchallenged ever since.

Had the Divorce Act not been settled law here now, the Dominion Parliament could, or rather would not have given any assistance to make it go—as the article thinks it "possibly" might—to render it more effective now.

If the doubt now suggested were entertained seriously—or in other words, the above inevitable deadlock reached, where would British Columbia be? What would become of the divorced people, their issue and property, and the new issue, and the married people of the future.

In the absence of the existing divorce law the old chaotic state of things would recur once more. The guilty conjux would cross the 49th parallel, procure an imaginary divorce acquired on grounds and by methods happily unknown to our law, from an adjoining State. The guilty parties would then come back, ostensibly married, to British Columbia, to reside, to the great scandal of respectable society and the misery and loss of the really injured parties. The children of the guilty couple would perhaps be registered as legitimate, to the utter confusion of family relationships and titles by descent.

No greater or more vital injury could be inflicted upon the Province than to deprive it of its divorce law, which has been declared by the regular authoritative decision of a competent Court, approved by the practice of years, to be in full force in this province.

Another advantage of the present law is that it applies without partiality to all classes. Its assistance can be had without undue expense, because it can be had on the spot, and the poorest can have the full benefits of its provisions with equally the same facility as the richest inhabitants of British Columbia. It would be an ill day and an ill turn that would seek to hamper or take away the existing right of divorce from the province.

H. P. P. CREASE.

Victoria, B.C.

DIARY FOR MAY.

2 Saturday .....Battle of Cut Knife Creek, 1885. J. A. Boyd, 4th Chancellor, 1881.
3 Sunday.....*Fourth Sunday after Easter.*
4 Monday .....Wm. A. Henry, J. of S.C., died, 1888.
5 Tuesday .....Supreme Court of Canada sits.
6 Wednesday....Lord Brougham died, 1868, aged 90.
10 Sunday.....*Rogation Sunday.*
12 Tuesday .....Court of Appeal for Ontario sits. Battle of Batoche, 1885.
14 Thursday.....Ascension Day.
17 Sunday.....*Sunday after Ascension.*
18 Monday .....Law Society of U.C. Convocation meets. Montreal founded, 1642.
21 Thursday.....Confederation proclaimed, 1867.
22 Friday ..... Earl of Dufferin, Governor-General, 1872.
24 Sunday..... .*Whit Sunday.* Queen's Birthday; born 1819.
25 Monday .....Princess Helena born, 1846.
27 Wednesday....Habeas Corpus Act passed, 1679.
28 Thursday.....Hon. G. A. Kirkpatrick, Lieut-Gov. of Ontario, 1892.
29 Friday .....Battle of Sackett's Harbor, 1813.
31 Sunday.....*Trinity Sunday.*

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Quebec.] [March 24.

O'NEILL *v.* ATTORNEY-GENERAL OF CANADA.

The Criminal Code, sec. 575—Persona designata—Officers de facto and de jure—"Chief Constable"—Appointment of deputy—Common gaming house—Confiscation of gaming instruments, moneys, etc.—Evidence—The Canada Evidence Act, 1893, secs. 2, 3, 20, 21—Judgment in rem—Res judicata.

The High Constable of the District of Montreal (which includes the city of Montreal, as well as a large territory adjacent thereto), was appointed under a Commission from the Crown in the year 1866, and has ever since then continued to hold that office. In 1885 he appointed a deputy, who thereupon took the oath of office, the attesting magistrate adding in the record of the oath the words "jusqu' au ler., Mai, 1886." The deputy was never re-sworn, but has continued to act as such ever since then, and on the 14th October, 1893, in execution of a warrant issued by a Police Magistrate under the 575th section of the Criminal Code, and addressed to him by name as "Deputy High Constable of the City of Montreal," he seized certain moneys and instruments in a common gaming house within the limits of the city of Montreal. The section referred to empowers "the Chief Constable or Deputy Chief Constable of any city or town, or other officer authorized to act in his absence," to make the reports and seizures provided for therein.

Held, GIROUARD, J., dissenting, that an officer whose functions and duties are of a character sufficient to bring him within the designation of the officer named in the section, is competent to execute warrants and make seizures under it, although his office may not bear the exact title given in the Code.

That the High Constable of the District of Montreal has power to appoint a deputy to perform acts of a ministerial nature under the provisions of sec. 575 of the Criminal Code.

That a seizure under the 575th section of the Criminal Code by a person exercising de facto the duties of Deputy High Constable, is sufficient upon which to ground a confiscation under that section.

That notwithstanding the omission to be re-sworn, the executing officer in this case was not only de facto but strictly de jure the deputy chief constable for the District of Montreal and an officer in all respects competent to act under section 585 of the Criminal Code, and even if he had merely filled the office de facto, the proceedings taken by him could not be vitiated by reason of his failure to be re-sworn.

In an action to revendicate the moneys so seized, the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff would not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the Province of Quebec.

Held, per STRONG, C.J., that a judgment declaring the forfeiture of moneys seized under the provisions of section 575 of the Criminal Code, could not be collaterally impeached in an action of revendication brought against the high constable and the Clerk of the Peace for the specific recovery of the moneys confiscated.

Appeal dismissed with costs.

Guerin, for the appellant.

Hall, Q.C., for the respondent.

Nova Scotia.] [Feb. 18.

SLEETH *v.* HURLBERT.

Canada Temperance Act—Search warrant—Seizure of goods under—Replevin—Judgment quashing warrant—Justification under warrant after—Estoppel.

A search warrant was issued under the C. T. Act to search for liquors on the premises of H., a hotel keeper in Yarmouth. The goods having been found were seized, and on subsequent proceedings before a magistrate they were ordered to be destroyed, which was done, though H. had caused a writ of replevin to be issued. The proceedings before the magistrate were then removed into the Supreme Court of Nova Scotia by certiorari (*The Queen* v. *Hurlbert*, 27 N.S. Rep. 62), and the search warrant was quashed for not having stated that the premises of H. were within the jurisdiction of the magistrate. In the replevin suit the Nova Scotia Court held that the warrant having been quashed H. was entitled to recover the value of the goods destroyed.

Held, reversing the judgment of the Supreme Court of Nova Scotia (27 N.S. Rep. 375), TASCHEREAU, J., dissenting, that the warrant having followed

the form prescribed in the Act, and having been issued by competent authority, the officer executing the order of the magistrate could justify under it notwithstanding it had been quashed.

Held, also, that the officer having been no party to the proceedings in which the warrant was quashed, and the judgment therein not being a judgment in rem, but inter partes only, he was not estopped thereby from setting up the warrant as a justification.

Appeal allowed with costs.

Orde, for the appellant.

Roscoe, for the respondent.

Nova Scotia.] [March 24.

KIRK *v.* CHISHOLM.

Assignment for benefit of creditors—Preferences—R.S.N.S. 5 ser. c. 92, ss. 4, 5, 10—Chattel mortgage—Statute of Eliz.

Though an assignment contains preferences in favor of certain creditors, yet if it includes, subject to such preferences, a trust in favor of all the assignor's creditors, it is "an assignment for the general benefit of creditors," under sec. 10 of the Nova Scotia Bills of Sale Act (R.S.N.S. 5 ser. c. 92,) and does not require an affidavit of bona fides. *Durkee* v. *Flint*, 19 N.S. Rep. 487, approved and followed. *Archibald* v. *Hubley*, 18 S.C.R. 116, distinguished.

A provision in an assignment for the security and indemnity of makers and indorsers of paper, for accommodation of the debtor, not due does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable, and the assignor retaining no interest in it.

An assignment is void under the statute of Eliz. as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member, and provides for allowance of interest on the claim of said firm until paid, and the assignor is permitted to continue in the same possession and control of the business as he had previously had.

A provision that "the assignee shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part," will also avoid the assignment under the statute of Eliz.

Authority to the assignee not only to prefer parties to accommodation paper, but also to pay all "costs, charges and expenses to arise in consequence" of such paper, is a badge of fraud.

Appeal dismissed with costs.

Mellish, for the appellant.

Gregory, for the respondent.

Prince Edward Island.] [Feb. 27.

GORMAN *v.* DIXON.

Principal and surety—Giving time to principal—Reservation of rights against surety.

Gorman, as surety for his brother, was a joint maker with him of a promissory note which was dishonored. The bank holding the note accepted

a part payment and a newnote for the balance indorsed by Dixon, and retained the old note. Dixon had to retire the paper he indorsed and brought an action against Gorman on the old note. On the trial the manager of the bank testified that it was arranged when the new security was given that he was to retain the old note until it was paid. A verdict was given in favor of Dixon.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, GWYNNE, J., dissenting, that taking the new note was giving time to the principal by which the surety would have been discharged, but that the evidence of the manager showed that when time was given to the principal debtor to pay the remedy against Gorman as his surety was reserved, and Dixon was entitled to hold his verdict.

An appellate court will not give effect to a mere technical ground of appeal, against the merits, and where there has been no surprise or disadvantage to the appellant.

Appeal dismissed with costs.

Stewart, Q.C., for the appellant.

Peters, Q.C., Attorney-General, P.E.I., for respondent.

Province of Ontario.

COURT OF APPEAL.

From ROSE, J.] [March 10.

HAMILTON PROVIDENT AND LOAN SOCIETY *v.* STEINHOFF.

Partnership—Covenant in firm name.

Two persons carrying on business in partnership as bankers took from a customer as security for his indebtedness to them a conveyance to them individually of certain land which was subject to mortgages in favor of the plaintiffs. Subsequently, upon proceedings being threatened by the plaintiffs upon their mortgages, one of the partners, without the knowledge or assent of the other, in consideration of a stay of proceedings, signed in the firm name a covenant under seal to pay to the plaintiffs the arrears due on the mortgages.

Held, affirming the judgment of ROSE, J., that this covenant bound only the partner who signed it.

Osler, Q.C., and *Crerar*, Q.C., for the appellants.

Watson, Q.C., for the respondent.

From Q.B.D.] [March 10.

SCARLETT *v.* NATTRESS.

Chose in action—Covenant—Assignment of covenant by one joint covenantee to his co-covenantees—Mercantile Amendment Act R.S.O. c. 122—Mortgage—Conveyance of equity to one of several trust mortgagees.

One joint covenantee can by virtue of the Mercantile Amendment Act, R.S.O. c. 122, assign to his co-covenantees his interest in the covenant, and they can then sue upon it without joining him as plaintiff; BURTON, J. A., dissenting on this point.

A conveyance of the equity of redemption to one of several joint mortgagees, he covenanting to pay off the mortgage, does not extinguish the mortgagor's liability on his covenant for payment of the mortgage debt.

Judgment of the Queen's Bench Division affirmed.

J. M. Clark, and *R. U. McPherson*, for the appellant.

E. P. McNeill, for the respondents.

From STREET, J.] [March 10.

WATERFORD SCHOOL TRUSTEES *v.* CLARKSON.

Bond—Public schools—Secretary-treasurer.

The secretary-treasurer of a public school board holds office for a year only, and not during pleasure, and the sureties to a bond given as security for the performance of his duties, though on its face unlimited as to time, are not liable for defaults occurring after the year, notwithstanding his re-appointment to office.

Judgment of STREET, J., affirmed.

Wilkes, Q.C., for the appellants.

Cassels, Q.C., for the respondent.

From ROSE, J.] [March 10.

ONTARIO FORGE AND BOLT CO. *v.* COMET CYCLE CO.

Costs—Company—Liquidator—Claim and counter-claim.

Where an action is brought by the liquidator of a company in liquidation, in the name of the company, and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it.

Where the plaintiff succeeds upon his claim, and the defendant upon his counter-claim, the former should receive the costs of the action, and the latter those of the counter-claim.

Judgment of ROSE, J., varied.

Robinson, Q.C., and *John Greer*, for the appellants.

E. B. Ryckman and *A. T. Kirkpatrick*, for the respondent.

From DIVISIONAL COURT.] [April 7.

REGINA *v.* GRANT.

Jury notice—Crown—Rule 364—Trial judge.

The Crown coming into the High Court of Justice is in the same position as the subject; and a Judge, on the application of the Crown, can make an order striking out a jury notice given by the defendants.

Rule 364 applied.

Per OSLER, J.A.—If before the trial the Court or Judge has ordered that the action may be tried without a jury, the Judge presiding at the trial has no power to say that it shall be tried by a jury.

F. E. Hodgins, for the Crown.

A. E. H. Creswicke, for the defendants.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT.] [Feb. 13.

UNION SCHOOL SECTION *v.* LOCKHART.

Public schools—Union school section—Alteration of—Petition of ratepayers—Award—54 Vict., c. 55, sec. 87 (O.).

The joint petition of five ratepayers from each of the municipalities concerned required under 54 Vict., c. 55, sec. 87, s-s. 1 (O.), for the formation, alteration, or dissolution of a Union school section, means that each set of five ratepayers shall join in a petition to the municipal council of the municipality of which they are ratepayers, and not that there should be a joint petition of five ratepayers from each municipality.

Judgment of MEREDITH, C.J., following *Trustees of School Section No. 6 York* v. *Corporation of York*, reversed.

Where the award in such case was that no action should be taken on the petition, the restrictions in sub-sec. 11 of sec. 87 against any new proceedings for a further period of five years, does not apply.

Judgment of MEREDITH, C.J., affirmed.

J. R. Cartwright, QC., for the plaintiffs.

Dickenson, for the defendant.

BOYD, C., STREET, J., MEREDITH, J. [Feb. 26.

YOUNG *v.* WARD, ET AL.

Married woman—Status of judgment creditor—Right of husband—"Married Women's Property Act"—Fraudulent conveyance.

In an action to set aside a lease and conveyance of a farm as a fraud on creditors brought by a judgment creditor under a judgment in a Division Court for $58 and costs, recovered after such action brought by a married woman who was living apart from her husband, for board, lodging, washing and medicine supplied to the defendant's wife.

Held (reversing ROBERTSON, J., who had found on the facts that the arrangement as made was a reasonable one, and for value); but BOYD, C., dissentiente; that the plaintiff's claim under the Division Court judgment was under "The Married Women's Property Act" her separate property, so as to entitle her to bring this action, and that on the evidence there was an actual intent to delay, hinder and defeat creditors and that the transaction could not stand.

Per BOYD, C.: The bulk of the plaintiff's claim was for board and lodging supplied, the plaintiff having no order for the protection of earnings, her husband being legally liable for the provisions supplied to her, and for the rent of the house, and so being liable, the rent coming from a lodger would be his property to be collected at his suit and not at that of his wife, and the separation of his claim from that of his wife for personal services would leave a residue too small whereon to found a writ of execution against lands under 57 Vict., c. 23, sec. 8 (O.)

J. McGregor, and *B. E. Swayzie*, for the appeal.

DuVernet and *J. E. Jones*, contra.

MEREDITH, C.J., ROSE J., MACMAHON, J. [Feb. 29.

IN RE COCKBURN.

Way—Easement—Implication—Prescription—Interruption—Unity of possession—Unity of seizin—"Lost grant"—Tenancy—Estoppel.

A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant had, it was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood.

Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4.

The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1884, the owner of No. 13 was also the tenant of No. 9.

Held, per MEREDITH, C.J., that the unity of possession during that period would interrupt the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R.S.O. c. 111, sec. 35.

Dictum of HATHERLY, L.C., in *Ladyman* v. *Graves*, L.R.. 6 Ch. 768, not followed.

But, per Curiam, that at all events the locus in question could not be treated as a way to lot 4 ; it was rather a way to that portion of lot 5 on which house No. 9 stood ; and there being unity of seizin of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued ; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation.

Semble, per MEREDITH, C.J., that but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant."

And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant.

Shepley, Q.C., for the appellant.

W. M. Clark, Q.C., for the respondent.

ARMOUR, C.J., STREET, J. FALCONBRIDGE, J. [March 26.

IN RE WILLIAMS.

Executors—Payments by—Promissory notes—Consideration—Gifts—53 Vict., c. 33, sec. 30 (D.)—R.S.O., c. 110, sec. 31.

Upon appeal from the order of a Surrogate Court upon the passing of executors' accounts,

Held, that payments made by them to the payees of promissory notes signed by the testator, with notice that such notes were made without consideration and were intended by the testator as gifts o the payees, were not protected either by the prima facie presumption of a valuable consideration raised by sec. 30 of the Bills of Exchange Act, 53 Vict., c. 33 (D.), nor by the provisions of sec. 31 of R.S.O., c. 110, making it lawful for "executors to pay any debts or claims upon any evidence that they may think sufficient."

Decision of the Surrogate Court of the County of Elgin, 32 C.L.J. 130, reversed upon this point.

J. M. Glenn, for the residuary legatees.

J. B. Davidson, for the executors.

J. A. Harvey, for the payees of the notes.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [March 27.

FOX *v.* FOX.

Jury notice—Striking out—Discretion—Local judge, powers of—Equitable issues.

Although by Rule 1287 (16), the Master in Chambers has no power to strike out a jury notice except for irregularity, a local Judge has jurisdiction, in an action brought in his own county, where the solicitors for all parties reside in such county, by virtue of sec. 185 (5) of the Judicature Act, 1895, to make an order under sec. 114, striking out such a notice as a matter of discretion ; and he may do so sitting in Chambers.

And where the issues raised in an action of ejectment were mainly equitable, and it appeared to be a case in which the Judge at the trial would dispense with the jury :

Held, that the local Judge should have exercised his discretion and struck out the jury notice.

Semble, that where there are both legal and equitable issues on the record, in the absence of an order under sec. 114, a party has the right to have the legal issues tried by a jury.

Baldwin v. *McGuire*, 15 P.R. 305, commented on.

F. A. Anglin, for the plaintiff.

L. G. McCarthy, for the defendant.

ARMOUR, C.J., STREET, J., FALCONBRIDGE, J. [April 4.

ANDERSON *v.* GRAND TRUNK R. W. CO.

Railways—Passenger—Ticket—"Station"—Access to—Expropriation of land—Use of railway lines—Necessity—Invitation—Passenger lawfully upon the railway—Negligence—Passing train—Neglect to give warning—Liability.

A man who had bought a ticket by the defendants' railway from London to Ailsa Craig found that the train which he wished to take had been cancelled ; he thereupon took the train to Lucan Crossing, from which point he

commenced to walk along the railway westward towards Ailsa Craig, and about thirty rods from the Crossing was struck by a freight train (the persons in charge of which were not obeying the requirements of sec. 256 of the Railway Act) and killed.

The nearest public highway crossed by the railway was twenty-five rods east of the Crossing, and the nearest to the west was at a distance of over one mile from the Crossing. There was no way for passengers to get from or to either of these roads, except by going along the railway or by trespassing upon private grounds, which had been forbidden, and the defendants owned no lands at the Crossing except such as were taken for their lines. Passengers had been in the habit of coming to and going from the Crossing along the lines, without interference by the defendants.

Held, that the deceased was entitled to travel on his ticket from London to Lucan Crossing, and when he arrived there was at a place where he had a right to be.

2. That the defendants had made the crossing a "station" by selling tickets to it and receiving passengers at it, although there was no ticket nor telegraph office there.

3. That the defendants had power under the Railway Act to expropriate the land necessary to give ingress and egress to and from this station.

4. That the deceased, being lawfully at the station, had a right to egress from it, and, there being no other way, had a right, from necessity, to gain egress by the railway: and the defendants had impliedly invited the public to walk along the railway for such purpose; and the deceased was therefore lawfully upon the railway when he was killed.

5. That all persons are entitled to the benefit of sec. 256 of the Railway Act, whether travelling on a highway or not; and the omission by the defendants of the duty imposed by that section to ring the bell or sound the whistle at the highway crossing to the east of the station, was evidence of the neglect of a duty which they owed to the deceased, which entitled the plaintiffs to have the case submitted to the jury.

6. That a person walking on the railway by necessity or by the implied invitation or license of the defendants would not be liable to conviction under sec. 273.

Aylesworth, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

FALCONBRIDGE, J., STREET, J. [April 22.

SPENCE *v.* GRAND TRUNK R. W. CO.

Statutes—Law Courts Act, 1896—Amendment—Procedure—Pending actions—Judgment not entered—Leave to appeal—Grounds.

By paragraph 7 of the schedule to the Law Courts Act, 1896, sec. 73 of the Judicature Act, 1895, was amended so as to enable a Divisional Court and the Court of Appeal, and any Judge thereof, to grant leave to appeal in cases where no absolute right to appeal exists, and where, under the law as it stood before the amendment, no such leave could have been obtained.

Held, that being a matter of procedure, it applied to pending actions.

Watton v. *Watton*, L.R. 1 P. & M. 227, followed.

2. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending.

Holland v. *Fox*, 3 E. & B. 977, and in *Re Clagett's Estate*, 20 Ch. D. 637, followed.

3. Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued was a serious one, and there was no authority upon the question of law decided by the Divisional Court.

J. J. Maclaren, Q.C., for the plaintiff.

W. M. Douglas, for the defendants, the Grand Trunk Ry. Co.

W. Nesbitt, for the defendants, the Canadian Pacific Ry. Co.

FERGUSON, J.] [Feb. 7.

LOCKE *v.* LOCKE.

Mortgage—Building loan—Prior mortgage—Mechanic's lien—Selling value—Priority—R.S.O., c. 126, s. 5, s-s. (3)—56 Vict., c. 24, sec. 6.

A mortgage dated 27th August, 1894, for $2,700, to be advanced for building purposes, was made repayable in monthly instalments of $35.95 each during ten years, but did not on its face disclose, nor by reference to any other document declare, that it was a mortgage under 56 Vict., c. 24, sec. 6. By a letter from the mortgagor to the mortgagees, delivered to them prior to the mortgage, it appeared that the mortgage money was to be advanced as follows: $1,600 when the whole job was ready for plaster, $500 when plastered, $300 when trimmed, and $300 when completed. At the time of the loan the property was encumbered by a mortgage amounting to $1,134.55, which the mortgagees paid out of the first advance of $1,600, and gave the balance to the mortgagor upon his making the declaration required by sec. 6, and without notice of any unpaid claims. Upon a reference in a mechanic's lien action, the Master in Ordinary found that the "land and property" was encumbered by a prior mortgage for $1,134.55, within R.S.O., c. 126, sec. 5, s-s. 3, before the 27th August, 1894; that this mortgage was paid as above stated; that the selling value of property had been increased by work done to the extent of $2,000, and that the plaintiff's lien was entitled to priority upon the selling value over the mortgage for $2,700, to the extent of $1,134.55.

Held, on appeal, affirming the Master's decision, that as to the sum of $1,134.55 the mortgage for $2,700 was not a mortgage within sec. 6 of the first mentioned Act.

E. F. B. Johnston, Q.C., for the appellants.

H. E. Caston, for the plaintiff.

MEREDITH, C.J.] [March 11.

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

Life insurance—Premium—Promissory note of third person—Acceptance by insurers in satisfaction—Promissory note of insured—Discount by agent—Payment.

The defendants' agent accepted promissory notes in his favor made by the insured and his brother, for the first premium on policies of life insurance, discounted the notes with his bankers, and retained the proceeds. He sent to the defendants his own promissory note for the amount of the premium, less his commission, in a letter in which he described it as "settlement of new premiums." The defendant's manager, by letter, acknowledged the receipt of this note, and added, "which we will hold as requested." The notes given by the insured were renewed, and were unpaid in the hands of the bankers, and one of the renewals overdue, at the time of the death of the insured, after which they were retired by the defendants. The agent did not communicate to the defendants the fact that he had taken these notes, or inform them how he had arranged for payment of the premium, and they supposed it had been paid in cash. The policies were issued and were included in the defendants' return to the government. In the bond given by the agent and his sureties to the defendants, it was agreed that it should cover payment of all notes made by the agent that the defendants might accept from him for premiums under policies effected by him. The agent's note was not paid.

Held, that it was received by the defendants in satisfaction and discharge of the premium; that there was nothing to prevent them so accepting the note of a third person; and that a condition of the policy to the effect that if a note should be taken for the first premium and should not be paid when due, the policy of assurance should become null and void at and from default, was not applicable to a note so taken, but to one taken for and on account of the premium.

Semble also, that the transaction between the agent and the insured amounted, when the proceeds of the discount were received, to a payment in cash of the premiums.

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

Wallace Nesbitt, and *R. A. Dickson*, for the defendants.

MEREDITH, C.J.] [March 11.

ELLIOTT *v.* MORRIS.

Will—Widow—Legacy—Dower—Election—Estoppel.

A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity. The will also provided for the early conversion into money and distribution of the estate.

Held, that the widow was not put to her election, but was entitled both to her legacy and to dower.

The will further provided that the widow for the $25,000 legacy might have the first selection of such securities or real estate as she might think desirable. After the death of the testator the widow joined with her co-executors in sales and conveyances of parts of the real estate, and selected the remainder of it in part satisfaction of her legacy, without making any claim to dower, and subsequently dealt with such remainder as her own. It appeared that the question of dower was not considered by any of the parties, but all proceeded, without inquiry, upon the assumption that the widow had no claim except that which the will gave her, and it was not until after the sales and selection referred to that she became aware that she was entitled to dower as well as the legacy, upon which she immediately asserted her right to it.

Held, that under these circumstances, and having regard to the fact that the transfer to the widow of the lands selected by her had not been completed by conveyance, and the fact that the residuary legatees had not been prejudiced by her dealings with the lands selected by her, she was not estopped from claiming dower, but was entitled to treat the executors as having received for her use so much of the purchase money of the lands sold as was equal to the value of her dower in them, ascertained on the same principle as it would have been had the sale been one made by the Court of the lands free of her dower, and so much of the sum at which the lands selected by her were valued at, as was equal to the value of her dower in those lands, ascertained in the same way.

Bingham v. *Bingham*, 1 Ves. Sen. 126, applied.

D. E. Thompson, Q.C., and *W. N. Tilley*, for the plaintiff.

A. H. Macdonald, Q.C., for the defendants, the executors.

Moss, Q.C., and *W. A. McLean*, for defendants, the Guelph General Hospital.

MEREDITH, J.] [March 26.

MAY *v.* LOGIE.

Will—Construction—Absence of material words—Devise.

A testator provided as follows: "It is my will, that as to all my estate, both real and personal, whether in possession, expectancy, or otherwise, which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."

Held, that the above must be construed as a devise to the testator's wife.

The words "It is my will that as to all my estate" meant no more or less than "I will all my estate," and the omission of the word "to" before the words "my wife Elizabeth" made no more difference than the almost universal omission of it before the like words in the transposed use of them, as "I will my wife all my estate"; neither technical nor grammatical accuracy is required in wills or other legal documents. No matter how ungrammatical, how inaccurate, how complicated, how clumsy, or how great the evidence of ignorance in its writing, effect must be given to the will of the testator in every particular in which his meaning can be gathered from anything contained anywhere within the four corners of the writing.

J. A. Donovan, for the plaintiff.

W. M. Clark, Q.C., and *Shepley*, Q.C., for the defendant.

MEREDITH, J.] [Brantford, April 14.

FLEMING *v.* WOODYATT, ET AL.

Action against public officers—Arrest without personal possession of warrant —Assent to imprisonment in wrong place—Leave and license—Failure of action.

This was an action for assault and false imprisonment against the chief constable and two inferior constables of the city of Brantford. There was an outstanding fine against the plaintiff for some minor violation of the conditions of his license as a tavern keeper in the city of Brantford. A writ of certiorari had been applied for, and the proceedings thereon were pending at the time of the grievances complained of. Knowledge of these circumstances was not, however, brought home to the defendants.

The plaintiff, advised by his solicitor of the supersession of the conviction by the writ, had not paid the fine and costs, and was, about 12.30 o'clock at night arrested by one of the defendants, without the personal possession of any warrant, though one had been issued, and delivered for execution soon after the making of the conviction. The constable did not lay hands upon the plaintiff, but simply told him that he had better come to the office, (the police station) and settle the matter, intimating that there was a warrant out for him. The constable was well known by the plaintiff to be such, and was on regular duty at the time of the encounter. Several minutes after their coming together, the constable, having then conveyed the plaintiff for nearly half a mile in the opposite direction from the common gaol, in which the warrant of commitment directed him to be confined, and towards the city lock-up, the plaintiff expressed his preference to be detained in the latter place over night, that he might more readily make known his strait to his friends, and procure assistance from them in paying the fine. The constable, on arriving at the station, made a note in writing that he had arrested the plaintiff. The next day, a request by the plaintiff to remain in the lock-up an hour or two longer for the purpose named was denied by the chief constable, who, despite his protest, caused him to be transferred to the gaol, where he was kept for some hours, being finally released only on payment of the fine and costs.

Held, that although the offence of the plaintiff, had he, in resisting the arrest, killed the constable, would be reduced to manslaughter, he could not maintain an action therefor.

Held also, (distinguishing *Barsham* v. *Bullock*, 10 A. & E., 23) that the doctrine of leave and license must be extended to the case, to prevent the recovery of damages for the detention in the lock-up; and moreover, that there was no grievance for the subsequent imprisonment in the common gaol, as the plaintiff should have been originally taken there.

Semble, the arrest was sufficiently made out without the memorandum in the police register.

Heyd, for the plaintiff.

Hardy, Q.C., for the defendants.

OSLER, J.A.] [April 22.

MCCORMICK *v.* TEMPERANCE AND GENERAL LIFE ASSN. CO. OF N.A.

Security for costs—Appeal to Court of Appeal—Special order—Judicature Act, 1895, sec. 77.

Standing alone, the appellant's poverty is not a circumstance, within the meaning of sec. 77 of the Judicature Act, 1895, entitling the respondent to a special order for security for costs.

L. G. McCarthy, for the plaintiff.

W. H. Blake, for the defendants.

WINCHESTER, Master.] [Feb. 26.

GILLELAN *v.* GRAHAM.

Security for costs—Commission to take evidence.

Action by five daughters against the executors of their father's will. Each claimed an equal amount. One only resided within the jurisdiction. The four without were not possessed of property within the jurisdiction. Plaintiffs asked for a commission to examine plaintiffs in Manitoba, but the evidence sought under the commission was not in favor of the plaintiff within the jurisdiction, but of the other plaintiffs.

Held, that the plaintiffs should give security for the costs of taking their evidence as a term of the commission issuing.

Langen v. *Tate*, 24 Ch. D. 522, followed.

J. A. Macdonald, for the plaintiffs.

J. M. Clark, for the defendants.

WINCHESTER, Master.] [Feb. 26.

CALLANAN *v.* SPRINGER.

Venue—County Court—Policy of the law—Action against sheriff.

Action brought in the County Court of the County of Perth, against the Sheriff of the County of Waterloo, for neglect of duty in connection with the execution of an attaching order directed to him. The parties all resided in the County of Waterloo and the defendant moved to change the venue to that county.

Held, that the policy of the law in County Court actions is similar to that laid down by the recent Act respecting venue in High Court actions, and that each county should bear the expense of its own litigation.

Venue changed from Perth to Waterloo.

The following cases were referred to :—*Brannen* v. *Jarvis*, 8 P.R. 322 ; *Payne* v. *McLean*, Taylor's R. 325 ; R.S.O. c. 73, sec. 15.

W. H. P. Clement, for the plaintiff.

L. G. McCarthy, for the defendant.

COUNTY JUDGES' CRIMINAL COURT.

SNIDER, Co. J.] [Hamilton, March 30.

REGINA *v.* CARTER.

Personation at municipal elections—Con. Mun. Act (s. 167 s-s. (e): s. 210, s-s. 2, s. 420)—Provision for proceedings on summary conviction—Remedy by indictment—Inapplicability of—Criminal Code, ss. 766, et seq.

The prisoner was arrested for personation at the municipal elections for Hamilton in January, 1894, and was brought before the Police Magistrate and charged with two offences. He refused to elect and was sent up for trial, bail being accepted by the P. M. At the next assizes the Grand Jury found true bills against him, but on being called for trial he did not appear and was not arraigned. In February, 1896, proceedings were taken under sec. 648 of the Criminal Code, and the prisoner was again arrested, and was committed to gaol to await his trial on the same charges. He notified the Sheriff that he wished to be brought up before the County Judge's Criminal Court for election, and he was so brought up.

Held, that never having been elected to be tried by a jury, and being in gaol awaiting trial, the prisoner now had the right to elect to be tried by the Judge without a jury.

The prisoner having so elected was then charged with personation, the indictments being in the same terms as the old indictments. He pleaded that this Court had no jurisdiction over the offence, and not guilty.

Held (following *Regina* v. *Rose*, 32 C.L.J. 125), that the indictments could not be upheld under s-s. (e) of sec. 167 of the Municipal Act; and also (following *Regina* v. *Bennett*, 21 U.C.C.P. 235), that the charge being only supportable under s-s. 2 of sec. 210, could be and should have been tried summarily under sec. 420, and the offence was not an indictable one. The indictments were therefore quashed and the prisoner discharged.

John Crerar, Q.C., for the Crown.
S. F. Washington, for the prisoner.

Province of Nova Scotia.

SUPREME COURT.

EN BANC] [March 7.

STAIRS *v.* ALLEN.

Service out of jurisdiction—Stipulation as to forum of action—Uncertainty of terms.

In an action against defendants, foreign steamship owners, for breach of contract arising out of the non-delivery of goods at Halifax, plaintiffs obtained leave to serve out of the jurisdiction. The bill of lading under which the

goods were shipped contained the following clause: "The claims, if any, for loss by damage, short delivery or any other cause, shall, in the option of the ship owner, be settled direct with the agents of the line at Liverpool, according to British law, with reference to which this contract is made, to the exclusion of proceedings in any other country." On appeal from an order setting aside the writ of summons and order for service upon the defendants on the ground that England was the proper forum of the action,

Held (following *Hoerler* v. *Hanover*, 10 C.L.R.), that where, as in the present case, a grave uncertainty exists as to the true forum of the action, the proper course is to allow service, and leave the question to be subsequently determined.

2. That the plaintiffs were entitled to such consideration owing to the difficulty of determining whether the words "to the exclusion of proceedings in any other country" should be read in connection with the words "in Liverpool," or with the words "according to British law."

3. That, however, the above stipulation was simply an attempt to determine by agreement which of two co-ordinate jurisdictions should adjudicate between the parties, and did not fall within that principle of law which on the ground of public policy holds invalid agreements to supplant the particular jurisdiction to which the parties are subject, and to substitute therefor a self-constituted tribunal.

Appeal allowed with costs.

C. D. Macdonald, for appellants.

Borden, Q.C., for respondents.

EN BANC.] [March 7.

QUEEN *v.* MCNUTT.

Information for warrant—In what respect amendable—Waiver of objection by pleading and defence—Conviction.

In a prosecution under the C. T. Act, a warrant issued against defendant on the information of B., purporting to have been taken on the oath of the said B., but signed by another person, McM. Before the opening of the examination the Justice erased the name of B. and substituted that of McM., with the latter's assent, defendant's counsel objecting, and contending that the information should be re-sworn. The conviction, moreover, contained no provision as to costs of distress. On appeal from a decision granting a writ of certiorari to remove the conviction,

Held, that before a warrant could properly issue there must have been an information on oath; that the information being defective could not be amended without being re-sworn; that defendant by pleading and entering into a defence did not waive his objection to the irregularity; but that the omission from the conviction of a provision for costs of distress would form a proper matter for amendment.

Appeal allowed.

EN BANC] [March 7.

MCNEILL *v.* MCDOUGALL.

Petition between co-tenants—Rights of grantee of co-tenant—To what consideration entitled.

When one co-tenant has conveyed a portion of the common property by metes and bounds, in an action for partition, the Court will so far as it can be done without detriment to the interests of the other co-tenants, set apart to the grantee of the special location the portion thus conveyed, and when the tract consists of several parcels it will require the whole to be partitioned in one suit so that the rights of the grantees may be best protected.

Province of New Brunswick.

SUPREME COURT.

EN BANC.] [April 16.

EX PARTE CASEY.

Acquittal—Application to quash—Power to revive matter.

Casey was convicted of an assault before a Justice of the Peace for Charlotte County. He appealed to the County Court, where the matter was reheard by the County Court Judge, who quashed the conviction. In Easter term

G. J. Clarke moved for a rule absolute for certiorari to quash the order of the County Court Judge on the ground of wrongful refusal to admit certain evidence. There were also some other grounds.

Held, that the defendant having been once acquitted could not be brought before the courts again.

McMonagle, contra, was not called on.

COUNTY COURT OF ST. JOHN.

FORBES, J.] [April 2.

SIMONDS *v.* HALLETT.

Privilege of attorney—Statutory Court.

The plaintiff, who was an attorney of the Supreme Court, had endorsed to him a bill of exchange accepted by the defendant, for the purposes of collection, and brought suit on the bill (which was for an amount under $80) in his own name in the County Court of St. John. This Court has no jurisdiction in actions in which the City Court has jurisdiction ; and the latter has jurisdiction in all actions of debt where the sum demanded does not exceed $80, and the word debt by statute is made to include actions on promissory notes and bills of exchange. The defendant resided in the city of St. John.

Defendant moved for a non-suit on the ground that the County Court had no jurisdiction, the amount being under $80.

Plaintiff contended that as he was an attorney, by privilege he could bring the action in any Court he wished.

Held, that the County Court being a Statutory Court and the plaintiff being an attorney of the Supreme Court, he had no privilege in the county, none being given in the County Court Act.

Non-suit ordered.

MacRae, for defendant.

Campbell, for plaintiff.

Province of Manitoba.

QUEEN'S BENCH.

KILLAM, J.] [April 10.

LINSTEAD *v.* HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgage—Landlord and tenant—Attornment clause in mortgage—Distress for interest—The Distress Act R.S.M. c. 46, sec. 2.

The plaintiff purchased a horse at a sale by the defendants of chattels distrained for arrears of rent on the premises of one of their borrowers, who had given them a mortgage containing a special attornment clause, which in the opinion of the learned judge effectually created the relation of landlord and tenant between the defendants and the mortgagor.

A third party claiming that the horse belonged to him replevied the animal from the plaintiff, and succeeded in the County Court. The plaintiff then brought this action for damages for breach of warranty of title, and had a verdict in the County Court.

On appeal to a Judge of the Queen's Bench,

Held, that the distress made by defendants was valid, and that they could seize and sell the property of any person on the mortgaged premises; that plaintiff had acquired a good title to the horse, and had no right of action against defendants. *Trust and Loan Co.* v. *Lawrason*, 10 S.C.R. 679, distinguished, because in that case there was no fixed rent reserved. This case also differed from *Hobbs* v. *Ontario Loan Co.*, 18 S.C.R. 483, because in the latter case the disproportion of the rent purported to be reserved, with the fair annual value of the land, in the opinion of the majority of the Court showed the attempted creation of a tenancy to be a sham, and not really intended by the parties.

Held also, following the latter case, that a tenancy was validly created, although the instrument was not executed by the mortgagee.

It was contended on behalf of the plaintiff that sec. 2 of The Distress Act, R.S.M. c. 46, which provides that the right of mortgagees to distrain for interest due upon mortgages shall be limited to the goods and chattels of the mortgagor only, and as to such goods and chattels to such only as are exempt from seizure under execution, was applicable, and prevented the mortgagees from distraining the goods of a third person, but the learned Judge held, that this section must be strictly construed, and has no reference to the right of

mortgagees to distrain for rent under a tenancy validly created, but only to the right to distrain for interest as such provided for in the ordinary distress clause in the short form of mortgages referred to in the Act respecting Short Form of Indentures.

Appeal allowed with costs, and plaintiff non-suited.

Wilson, for plaintiff.

Clark, for defendants.

North-West Territories.

WESTERN ASSINIBOIA JUDICIAL DISTRICT.

RICHARDSON, J., In Chambers. [March 3.

WHITEFORD *v.* BONNEAU, ET AL.

Practice—Appeal to Court in banc—Stay of execution—Special circumstances—Secs. 319 & 515 of Judicature Ordinance.

Judgment on Nov. 16th, 1895, declaring the defendants mortgagees in possession of certain lands of plaintiff in Manitoba; directing accounts to be taken of moneys received by defendants on behalf of plaintiff, and further directing that defendants should have a lien on the lands for the balance (if any) found due them by accounts. Defendants had served notice of appeal to the Court in banc from the above judgment. The formal order was served on defendants' advocate January 16th, 1895. By it defendants were directed to pay plaintiff forthwith after taxation the costs of the action up to and including judgment, less certain costs of amendment by plaintiff, to be set off. Plaintiff having issued execution for the amount of these costs, defendants applied by summons for a stay of execution until the accounts should have been taken, and for an order for leave to pay into Court the amount of taxed costs. The application was supported by an affidavit of the defendants' advocate, and by evidence taken at the trial, which showed that the defendants resided 80 miles from the railroad, and that there had been only one mail to their place of residence since service of the formal order, for which reason their accounts had not been brought in; that the accounts might disclose a balance due defendants exceeding the value of the lands; that the plaintiff had sworn at the trial that he had no means other than the property involved in the present action, and that the defendants were ready and willing to bring into Court the amount of the taxed costs.

For the defendants *Barker* v. *Lavery*, 14 Q.B.D. 769, and *McCarthy* v. *Cork Steam Packet Co.*, 16 L.R. Ir. 194, were relied upon to show that power to stay execution is discretionary, and should be exercised under the present circumstances. *Lynde* v. *Waithman*, L.R., August, 1895, was also cited as showing the principle upon which the Courts act for the protection of suitors, and *Jersey (Earl of)* v. *Uxbridge Sanitary Authority*, 64 L.T. 858, to

show that a stay would be granted where execution had issued. For plaintiff it was contended that the circumstances disclosed were not such as are required by *Barker* v. *Lavery*, that a stay of execution would not be granted on the ground that an appeal or other proceeding was pending, by which costs might become payable to the applicant: *Bradford* v. *Young*, 28 Ch. D. 18, and *Grant* v. *The Banque Franco-Egyptienne*, 1 C.P.D., 143; and that time should not be granted to enable the applicants to file further affidavits. It was also urged that an undertaking by plaintiff's advocates to refund the amount of taxed costs in the event of the appeal succeeding should be sufficient: *Merry* v. *Nickalls*, L. R. 8 Ch. 205; *Morgan* v. *Elford*, 4 Ch. D. 352; *Cooper* v. *Cooper*, 2 Ch. D. 492; and *Kelly* v. *Imperial Loan Co.*, 10 P. R. 499.

Held, that lack of means by plaintiff was not sufficiently shown to bring the case within *Barker* v. *Lavery*, and other cases cited, and that the accounts not having been filed, there was not sufficient evidence that the amount with which the plaintiff would be charged would exceed the value of the lands upon which the defendant had been given a lien. Application dismissed with costs.

R. Rimmer, for applicants.

Hamilton, Q.C., for plaintiff.

BOOK REVIEWS.

There is always an endless surprise of good things to be found in *Littell's Living Age*, and recent numbers have been no exception to the rule. We note in particular "Recent Science," by Prince Kropotkin, the eminent Russian scientist and revolutionist, which consists of two papers, "Rontgen's Rays," and "The Erect Ape-man." The same issue contains an article by Eivind Astrup, "In the Land of the Northernmost Eskimo," and another, "The Chevalier D'Eon as a Book Collector," by W. Roberts. Notable papers in other late issues are "South Africa and the Chartered Company," by Charles Harrison; "In Praise of the Boers," by H. A. Bryden; "National Biography," by Leslie Stephen; "The Baltic Canal and How it Came to be Made," by W. H. Wheeler; "Spenser, and England as he viewed it," by Geo. Serrell; "Cardinal Manning and the Catholic Revival," by A. M. Fairbairn; "Personal Reminiscences of Cardinal Manning," by Aubrey de Vere: "The Rival Leaders of the Czechs," by Edith Sellers, etc., etc.

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