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We note at p. 622 a rather interesting and novel point, which was successfully raised in one of the Division Courts, as to the right of a mortg gee to recover money paid by him for taxes due upon the mortgaged lands. The prevailing opinion seems to have been that the mortgagee had such a right under the Act respecting short forms of mortgages, and heretofore the question does not seem to have been raised. We cannot think it could have been the intention of the draughtsman of this statutory form that the mortgagee's right should cease to exist immediately upon a default being made in payment of a gale of interest; but if this judgment be well founded, it will mean that conveyancers must introduce into their mortgage forms a proviso enabling the mortgagee to pay taxes, and add the amount so paid to the principal money, and give him the same rights of recovery.

The interesting question which was discussed in this journal in February and March last, see ante pp. 93, 181, 219, as to the effect of the Statute of Limitations on the rights of mortgagees, has received some elucidation by the recent decision of the English Court of Appeal in *Thornton* v. *Francc*, (1897) 2 Q.B. 143. On reference to that case it will be seen that it is there held that a person paying off a mortgage is not a person claiming under the mortgage for the purpose of the statute, and that the provision in the statute in favour of mortgagees only applies to subsisting mortgages, *i. e.*, mortgages actually current and undischarged, The Court also holds that where a mortgage is executed by a mortgagor out of possession it does not create a new starting point for the statute as against a person in adverse possession who is no party to the mortgage. This decision therefore seems very strongly to support the view maintained by Mr. Holmested in the articles above referred to as to the effect of the statute.

THE AMERICAN BAR ASSOCIATION.

The twentieth annual meeting of this Association, held at Cleveland, Ohio, has just closed. This Association is composed of many of the leading men at the Bar in the United States, and, having no official or political axes to grind, and no favours to ask, they express the best and most independent thought of the profession in that country. A list of the Presidents of the Association, from its inception in 1878 to the present time, indicates the high character, personal and professional, of the membership of the Association.

The proceedings touched upon various points which are of interest in this country, as well as across the border. A resolution was unanimously passed in favour of the adjustment of controversies between nations by the medium of international arbitration, and the hope was expressed that the efforts to establish so beneficent a principle may not be relaxed. We are glad to notice that the *Albany Law Journal*, in referring to this subject, makes some very severe remarks as to the recent action of the United States Senate, saying that "no greater mistake was ever made than when that body deliberately refused to join hands with the foremost nation in Europe in the friendly grasp of complete understanding," and that "to the honour of Great Britain be it said, that she has consistently kept ner agreements, and upported the policy of arbitration established between the two Governments." The writer also refers in complimentary language to the action of the English Government in gracefully and justly accepting the finding of the Court on the Geneva arbitration and paying the award. We trust that they are right also in saying that the action of the Senate is not an expression of the will of the people of that country; they are nevertheless in this difficulty, that the will of the people is supposed to be expressed by the representatives of the people.

The Committee on Uniform State Laws reported that thirty States and one Territory had now appointed commissioners on that subject, the desire there being, as it is with us, to unify the laws on all subjects of general and commer-

cial interest. Among other points touched upon was the expediency of providing for the compensation of counsel for accused persons in all cases. It was thought that in the case of persons indicted for crimes punishable by death or imprisonment for life, some provision of law should be made. The subject of legal education was also discussed, and able addresses read on the Patent laws, as well as on a variety of other matters of more or less interest. The extension of the practice of holding only biennial sessions of State legislatures (a practice prevalent in more than thirty states) was advocated.

The discussions at the American Bar Association are now of more interest to us than formerly, as it occupies in the States the same position which the Canadian Bar Association seeks to fill in this country. The action of the former has already produced good fruit in the amendment of the laws, and we trust the latter will also find its mission in a similar direction.

NEW RULES—ONTARIO.

The re-consolidation and revision of the Rules of Practice to which we referred in our last issue, has, we think, been done in a way which reflects credit on the Commissioners.

In considering the result of their labours we may in the first place observe that some slight rearrangement in the order of the Rules has been effected which will probably prove advantageous to practitioners. For instance, many Rules relating to the procedure in the Masters' office were formerly to be found under the head of "Masters' Office," long before we had reached the Rules regulating the commencement of an action. Now the Rules are arranged as far as possible so as to follow the ordinary progress of an action, and the Rules regulating references to the Master are naturally found after those respecting the entry of judgment.

In the brief space at our disposal it would be impossible to give a minute criticism of the new consolidation, and we shall therefore content ourselves with pointing out the changes

effected thereby in the practice, but before proceeding to do so, we would remark that he who would desire to grasp the general arrangement and contents of this new code of practice will do well not to omit to study in the first place the "Table of Contents." Here before setting out on his journey he will find ready to his hand a general map of the country he is to traverse, which is always of advantage to a traveller.

In the first place we observe that the Rules have been reduced in number from 1,511 to 1,224, thus 287 have disappeared, and yet notwithstanding it will be found that several new ones have been introduced. How this result has been attained can only be discovered by a minuter examination than we are at present prepared to give the matter.

By Rule 9 the offices of the court are henceforth to close on Saturdays at 1 p.m. Under the head of "Weekly Sittings at Ottawa and London," the statutory enactments relating to this branch of business have been incorporated in Rules 104--112.

One of the most important changes of practice has been effected by Rules 138 and 575, which regulate the special endorsement of writs, and the entry of judgment thereon. Under the former Rule 245 a writ could only be specially endorsed when the plaintiff was suing only in respect of a claim which was properly the subject of a special indorsement; if he added any other claim the writ ceased to be a "specially endorsed writ," within the meaning of the Rule authorizing the signing of a final judgment thereon in default of appearance. This procedure is now changed. A claim may be specially endorsed, and other claims may also be added, which are not the subject of a special endorsement, and final judgment may be entered for the specially endorsed claim without prejudice to proceeding with the action for the recovery of the other claims which are not properly the subject of a special endorsement.

The claims which may be specially endorsed are the same as formerly, with the addition of claims for interest when recoverable only by way of damages (such claims being formerly held to vitiate a special endorsement otherwise good),

and also claims for liquidated demands in money, with or without interest, arising in actions for the recovery of chattels. These changes will have the effect of nullifying *Solmes* v. *Stafford*, 16 P.R. 78, and a whole series of cases of a similar character. While on this point we may also point out that provision is made by Rule 603, enabling the Court to amend the writ on a motion for summary judgment on a specially endorsed writ, and to grant judgment in accordance with the writ as amended. We presume "writ" is intended to include the endorsement, but no doubt that point will be ere long presented for judicial decision.

By Rule 173, a conditional appearance may now, by leave of the Court or judge, be entered. Such an appearance is desirable where the defendant wishes to dispute the jurisdiction of the Court, or the fact that he has been duly served.

A comparison of Rule 185 with the former Rule 300, will show that a material change has been made as to regulating the joinder of plaintiffs. The much litigated case of *Hannay* v. *Smurthwaite* (1894), A.C. 494, had the effect of placing a very limited operation on the former Rule 300, notwithstanding the apparently wide language used. The amendment which has been made is based on the later English Rule, and would appear in effect to override *Hannay* v. *Smurthwaite*, but it reserves to the Court power to order separate trials in any case where embarrassment is likely to arise from the joinder of several plaintiffs having separate rights of action.

Rule 198 now requires a written authority to the solicitor, from a person named as a next friend, or relator, in any action or proceeding, to be filed.

In Rule 209 which regulates the cases in which third party notices may be served, we regret to see that the original practice has been restored. By the former Rule, 1313, the original practice was modified, and such notices could only be served where either contribution or indemnity was claimed, now they may also be served where "any other relief over" is claimed against a person not a party. The third party procedure rather tends to complicate actions and its utility

except in very simple cases we are inclined to regard as very doubtful. The right to claim any relief over against any co-defendant is in like manner extended by Rule 215.

Under the head of "Parties" we find Rules 228, 229, which relate to executions against, and attachment of debts due to, firms, we are disposed to think that they would have been more appropriately placed respectively under the head of "Execution" and "Attachment of Debts." The like observation applies to part of Rule 231.

Rule 224 is new and requires that where a writ directed to a firm is served upon a partner or manager, etc., notice in writing must be given whether the person served is served as a partner or as a manager. This is a very useful and needful provision, as a person served under the former practice was often in doubt in what capacity he was served. Rule 227 entitles a person served as partner to appear under protest denying that he is a partner, but this appearance is not to preclude the plaintiff from otherwise serving the firm and obtaining a judgment against the firm if no appearance is entered by a partner in the ordinary form.

We now come to the Rules regulating pleadings, and the first noticeable variation is found in Rule 244, which expressly enables a plaintiff who delivers a statement of claim to alter, modify or extend his claim without any amendment of the endorsement of the writ. We are inclined to think that this provision has not been sufficiently thought out, and that the Rule should have provided that where a statement of claim is so extended or altered it should be required to be personally served on any non-appearing defendant, otherwise a defendant may be served with a writ endorsed with a claim to which he has no defence, and subsequently find a judgment recovered against him on a claim for breach of promise or some other claim of which he has never heard of, and to which he had a perfectly good defence. See Rule 537 which dispenses with personal service of notice of assessment of damages, and Rule 573 which dispenses with service of the statement of claim on a non-appearing defendant unless otherwise so ordered.

Rule 255 enables the Court to stay proceedings on a plaintiff's claim where no defence thereto is set up, but the defendant pleads a counter claim. An important amendment is effected by Rule 271, which now explicitly requires fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds, to be expressly pleaded.

By Rule 369 ex parte motions in Chambers, unless otherwise ordered, are to have precedence over contested motions.

Under the head of Payment of Money into and out of Court are to be found Rules 411 and 418, which require that orders for payment in of money to which an infant is entitled, unless otherwise directed, must state the date of the infant's birth. And no money is to be paid out in any such case to a person named as an infant, or to any person for him, unless the date of the birth is stated. We presume, however, that these regulations will only apply to orders made after 1st September, 1897, and the former practice will continue as regards orders made prior to that date.

By Rule 434 an action in the County of York may be dismissed for want of prosecution if the plaintiff do not within six weeks after the pleadings are closed enter it for and proceed to trial.

Some important changes have been made in regard to the practice for discovery. By Rule 439, where an officer of a corporation has been examined for discovery, no other officer of such corporation can be so examined without leave. A person who has ceased to be an officer cannot now be examined without the leave of the Court being first obtained. Rule 461 enables a party to read as evidence against an adverse corporation, the examination of its officer, past or present,—except where such officer has been dismissed. The wisdom or justice of this provision we very much doubt, and the legality of the Rule may possibly be questioned, as being in excess of the jurisdiction delegated to the commissioners, in that it involves an important alteration of the law of evidence. The exception in regard to dismissed employees, in any case does not appear wide enough, as it is doubtful

whether it would extend to officers who have resigned, in order to avoid dismissal. That a corporation should be liable to be bound by the testimony of such persons seems to us to savour of injustice. No doubt this provision will be very critically discussed, and will ere long be the subject of judicial consideration.

Rule 537 dispenses with personal service of notice of assessment of damages on a defendant who has not appeared, and against whom an interlocutory judgment has been signed. At the same time no provision is made for any other mode of service on a non-appearing defendant. The implication seems to be, that he must have notice, but it need not be personally served. Among the minor changes, is Rule 536, which prescribes the form of a list of exhibits to be made out by the officer attending a trial.

Under the heading of "Judgments and Orders," etc., we find a new Rule, 573, which dispenses with notice to non-appearing defendants, of the future proceedings, except where otherwise provided by the Rules, or ordered by the Court or a judge. The cases in which the Rules seem to provide for notice, seem to be (1) in the case of an assessment of damages, Rule 537, supra, and (2) in the case of a reference to a Master, Rule 658. There may be other cases, but we have not noticed them. The new Rules expressly provide for there being several judgments in an action; for instance, where there is a specially endorsed claim the plaintiff may in default of appearance sign judgment for such claim and proceed with the action to recover a further judgment for any other claims endorsed on the writ: Rule 575. So where there is a specially endorsed claim for recovery of chattels, and some other claim, in default of appearance judgment may be signed for the chattels, and the plaintiff may proceed with the action to recover a further judgment for the other claims endorsed: Rule 577. These provisions, as already pointed out, override a good many decisions under the former Rules. The same procedure may also be followed in default of pleading: see Rules 586 and 588.

Rules 584 and 592 are possibly intended to provide that

in actions for the recovery of land, execution cannot be issued without leave until judgment has been recovered against all the defendants on the record, but they seem somewhat obscurely worded. It would now seem to be necessary in such actions, to provide in the judgment against any contesting defendants, that a provision be inserted authorizing the issue of execution against defendants as to whom judgment by default has been signed.

Under the new Rules an application for a summary judgment may be made in respect of a specially endorsed claim, although there may be other claims also indorsed on the writ see Rule 603. The wording of this Rule, however, will probably give rise to a difference of opinion as it does not expressly provide as do Rules 575, 576, 577, 587, 588, that the judgment may be awarded as to the specially endorsed claim without prejudice to the plaintiff's right to proceed with the action for the recovery of the other claims, but on the contrary says that "such order may be made in respect of the cause of action so specially endorsed as might be made if no other claim were endorsed on the writ."

Rule 625 which relates to the settlement of minutes of judgments in cases tried out of Toronto, slightly varies the former Rules, and in its present shape the practice is to be as follows:—the officer at the place of trial is to settle the minutes, but any of the parties are to be at liberty to apply to the Senior Registrar to settle them, or to reconsider the minutes if settled by the local officer—and when settled, the minutes may be varied by the judge on application of either party.

Rule 658 is new, but embodies, we believe, the previous unwritten practice of the Master's Office, under which it was customary to require notice to be given to all parties interested in, or affected by, any inquiry, of the first proceeding thereon in the Master's Office, whether they had appeared in the action or not, unless such notice should be dispensed with.

By Rule 694 notice of the filing of a report is now required to be served on the opposite party.

Rule 743 is new, and directs that purchase money is not to be paid out of court without consent of the purchaser, or proof being given to the Accountant of his having accepted a conveyance or vesting order, but this is a mere affirmance of the already existing practice.

Rule 767 enables an appeal to be had from an order made in Vacation by any officer, or Local Judge, in Chambers to the Vacation Judge, but the appellant may, if he prefer to do so, wait until after Vacation to prosecute his appeal as if the order had been made on the first day after Vacation.

By Rule 772 an appeal is now given to the Divisional Court, or to the Court of Appeal, from the order of a judge in Court upon an appeal from the certificate, or report of a Master or Official Referee. It is to be, however, remembered that all appeals from the Master-in-Ordinary, except on questions of practice or when acting in Chambers, must, by the Act of last session, 60 Vict., c. 14, s. 88, be heard before a Divisional Court.

Rule 790 makes some useful provisions for recovering the costs of abandoned motions without going through the form of moving the Court therefor. If not paid within four days from taxation an order for payment may issue on præcipe.

Heretofore it has been frequently the practice to prosecute on appeal from a judgment or order before it has been either drawn up or issued. Hereafter on all appeals from any judgment or order of a judge, a copy of the order or judgment as settled or entered is to be delivered to the registrar of the Appellate Court before the appeal is heard: see Rule 791.

Appeals to the Court of Appeal are to be upon a case stated, and to be settled by the Court appealed from in case of difference: see Rule 798. Notice of the appeal is to be filed in the office where the action was commenced, and served on the respondents: Rule 799.

Appeal books may be printed if either party desire it, but if the opposite party object, the question of whether or not they shall be printed is to be decided by the Court of Appeal, or a judge thereof: Rule 802, and the Court of its own motion may order the book or any documents to be printed: See

Rule 803. When the book is not printed the appellant is to serve a copy of it on the respondent within the time limited for serving notice of the hearing of the appeal: see Rule 810, which is to be seven clear days before the first day of the sittings: Rule 811.

By Rule 817 the Court of Appeal is given similar powers as by the former Rule 755 the High Court possessed, on motions for a new trial, so as to enable it to give the proper judgment without directing a new trial.

An appeal to the Court of Appeal is no longer to operate as a stay of execution in all cases. When the judgment appealed from directs the assignment or delivery of documents or personal property, such documents or property must be brought into Court, or security given to obey the order of the Court. Or if a deed is to be executed, it must be executed and delivered to the officer of the Court to abide the order of the Court; or if the judgment directs the sale or delivery of real property or chattels, security must be given against the commission of waste, and for payment of the value of the use and occupation of the property pending the appeal,—and if the judgment award a mandamus or injunction, execution is only to be stayed on application to the Court: see Rule 827.

So also on special application, the Court may in any case order the execution not to be stayed in whole or in part except upon terms. Where execution is stayed pending an appeal all further proceedings in the Court below are also stayed, other than the issue of the order and judgment, and the taxation of costs, unless otherwise ordered: see Rule 829.

By Rules 883-884, provision is made for a sheriff making a return to a writ of execution by certificate, without actually returning the writ itself.

Rule 911 enables a debt due by a garnishee resident out of Ontario, which would be recoverable by the judgment debtor by action in Ontario, to be attached: and that notwithstanding it may have been fraudulently assigned by the debtor: see Rule 912.

Under the head "Proceedings without Writ," the English

practice as regards originating summonses has been practically introduced, but here the proceeding is to be commenced by notice of motion to a Judge in Chambers, instead of as in England by a summons: see Rule 938, et seq. We are somewhat doubtful whether the procedure is sufficiently explicit. Nothing is said as to whether an appearance is to be entered, or as to the power of the Court in case the parties do not appear, or submit themselves to the jurisdiction of the Court. Probably the procedure which has been heretofore in use respecting summary applications for administration and partition will be considered applicable to such cases—a two days' notice of motion seems to be all that is required by Rule 938, but such a notice seems too short for such a proceeding. It is possible that the procedure under this Rule may be found to need a little further elaboration. We should think the procedure prescribed for summary application for administration might well be adopted. We presume that it is intended that such motions must be brought before a judge and not before any officer or local judge exercising jurisdiction in Chambers, Rule 938 requiring that the motion shall be returnable before "a judge of the High Court in Chambers." When we turn, however, to Rule 42, we find the Master in Chambers has all the power of any judge of the said Court sitting in Chambers, except as therein provided, one of which exceptions is "any matter which by these Rules is expressly required to be done by a judge of the High Court"—but whether it can be said that a judge of the High Court is expressly required to hear an originating notice of motion under Rule 938 is not clear. If the Master in Chambers has jurisdiction in such matters then local judges and Masters would also seem to have the like jurisdiction.

In framing the Rules it seems to be a pity that some phraseology was not adopted by which it would be made absolutely clear when any powers given to a Judge in Chambers were not to be exercised by judicial officers or local judges. The result we fear of the uncertainty in this respect, may be that such officers and judges may assume to exercise such powers and adjudicate on rights, and years afterwards it may

be found that the proceedings were wholly nugatory and without jurisdiction, yet the rights of purchasers may intervene, and under the Jud. Act, 1895, s. 53, s.s. 10, the rights of the parties may be effectually barred.

By Rule 954 the Court has given to it what we always supposed it to have, discretion to refuse an application for administration. Rule 955 enables the Court or judge, upon an application for administration to order personal representatives or trustees to deliver an account, or to make an order for administration so as to stay proceedings by other creditors, and at the same time stay proceedings thereon.

An effort has been made, which it is hoped will be found to have been successful, to put the practice relating to bailable proceedings on an intelligible footing. As far as we can see the Rules on this point now seem sufficiently clear and explicit.

By Rule 1129 the English procedure enabling solicitors to obtain charging orders for their costs on property, which is the subject of litigation, is introduced. Such orders, when obtained against real property we presume will require to be registered in order to preserve priority; and it may be necessary in like manner to register them under the Chattel Mortgage Act. We note also that the Rules and forms prescribed by the Settled Estates Act of 1895 are included in the present consolidation, but the Rules of procedure in contested municipal elections have been omitted.

Rule 1136 now gives to the Senior Taxing Officer in Toronto power to allow the costs of examination for discovery.

Turning now to the Forms we find the total number reduced from 218 to 212, but nearly all the forms of pleadings appended to the former Rules have been omitted, and a variety of additional forms of other proceedings have been added. Some of the forms formerly authorized have been simplified and abbreviated.

In the forms of orders and judgments we see that the names of the Judges are to be set out with the prefix of "The Hon. the Chief Justice, etc.," or "The Hon. Mr. Justice," as the case may be; in England "Mr. Justice" is all that is required.

We have now brought our review to an end, and from what has been said it will be seen that the changes effected although in some respects important and beneficial, are yet not very numerous or revolutionary. It will be a boon to the profession to have the Rules of Practice once more in an intelligible shape, and we think on the whole the learned Commissioners are to be congratulated on the result of their labors. The next thing to do is to let the Rules alone.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

MARRIAGE SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—INCOME—ACCUMULATIONS—INVESTMENT BY WIFE OF ACCUMULATIONS.

In *Finlay* v. *Darling* (1897), 1 Ch. 719, a special case was stated for the opinion of Romer, J., for the purpose of determining whether investments made by a married woman of accumulations of income received by her under her marriage settlement, were subject to the covenant to settle after acquired property contained in the settlement, but which covenant did not include income. Romer, J., was of the opinion that as the income itself was not bound by the covenant, the investments in which the accumulations had been invested were not bound by the covenant either; before arriving at this conclusion he had to dissent from the decision of Kekewich, J., *In re Bendy* (1895), 1 Ch. 109 (noted ante vol. 31, p. 166), where that learned judge was of opinion that the apparent intention of the wife to permanently convert income into capital, was sufficient to constitute it "after acquired property," within the meaning of the covenant. In our note of that case we observe a typographical error occurs, and the word "included" should be "excluded" on the 9th line from the end of the note.

ADMINISTRATION ACTION—PRACTICE—COSTS—ORDER TO RAISE COSTS OUT OF ESTATE—DEFAULTING TRUSTEE—SUPPLEMENTAL ORDER STAYING PAYMENT OF COSTS ORDERED TO BE PAID.

In re Scowby, *Scowby* v. *Scowby* (1897), 1 Ch. 741 was an administration action in which an order had been made in 1887, directing trustees to raise out of the estate being administered, a large sum for costs payable out of the estate, and pay the amount into Court with liberty to the parties to apply for payment out. The costs were raised, but instead of paying the amount into Court the trustees suffered their solicitor to retain the money in payment of his costs, although no order for payment had been made. Subsequently in 1892 orders were made for payment of the sums of costs to the trustees, which orders were duly passed and entered. Before these orders were acted on it was brought to the attention of the Court (Kekewich, J.), that the costs referred to in the order of 1887 amounted to one-third of the estate, and were largely occasioned by extravagant and unnecessary proceedings, carried on by the advice of the trustees' solicitor, and that the order of 1887 had not been complied with by the trustees, and he therefore made a supplemental order directing that the costs referred to in the orders of 1892 should not be paid until the trustees had complied with the order of 1887 by paying into Court the moneys raised under that order. It was contended that he had no jurisdiction to make that order and could not interfere with the orders of 1892, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.), though conceding that the orders of 1892 could not be rescinded or varied except on appeal, nevertheless held that there was jurisdiction to make a supplemental order under the circumstances, and an appeal from the order was therefore dismissed.

SUCCESSION DUTY—POLICY OF INSURANCE, VOLUNTARY ASSIGNMENT OF—PREMIUMS—PAYMENT OF BY ASSIGNEE—(55 VICT., C. 6, S. 4 (O.))

The Lord Advocate v. *Fleming*, (1897) A.C. 145, although a Scotch case may serve to throw some light on the Ontario Succession Duty Act (55 Vict., c. 6, s. 4). In this case a father in 1883 made a voluntary assignment to his daughter

of a policy of insurance on his life on which for many years he had paid the premiums. From the date of the assignment the daughter paid the premiums until her father died in 1890, when she received the moneys due under the policy. The Scotch Court held that the policy moneys were not subject to succession duty, and the House of Lords (Lords Herschell, Macnaghten, Morris and Shand) confirmed the decision.

AIR—RIGHT TO ACCESS OF AIR—NUISANCE.

Chastey, v. *Acland*, (1897) A.C. 155, was an appeal to the House of Lords from the decision of the Court of Appeal (1895) 2 Ch. 389 (noted ante vol. 31, p. 513), and after argument of the appeal (in the course of which Lord Halsbury intimated that their Lordships might possibly grant a mandatory injunction, though perhaps not as to the whole of the buildings affected by the injunction granted by Cave, J.,) the parties came to a compromise, the respondent consenting to a variation of the judgment, by inserting a direction to him to pay certain damages agreed on.

COMPANY—CONTRIBUTORY—ALLOTTEE OF SHARES—CERTIFICATE THAT SHARES PAID UP—ESTOPPEL.

In *Bloomenthal* v. *Ford*, (1897) A.C. 156, the Court of Appeal has suffered a further reverse. The case was known in the Court below as *In re Veuve Monnier*, (1896) 2 Ch. 525, (noted ante vol. 32, p. 707). It may be remembered that the question turned upon whether an allottee of certain shares in a joint stock company was liable to be placed on the list of contributories, in respect of certain shares alloted to him and certified by the company to be paid-up shares, but which were not in fact so paid up. The Court below agreed that the certificate of the company would estop it from claiming that the shares in question were not paid, but for the fact that the allottee knew or ought to have known, that they were not paid up. The House of Lords (Lords Halsbury, L.C., and Herschell, Macnaghten, Morris and Shand) however, were unanimous that as the company had obtained the advance from the allottee on the representation that the shares were fully paid, which representation the allottee believed and acted on, the

company and liquidator were estopped from alleging that the shares were not paid up. As will be seen the case in appeal really was reversed on a point of evidence, their Lordships arriving at a different conclusion from that of the Court below on the facts, and being clearly of opinion that there was no ground for saying that the allottee knew, or had any reason to know, that the shares were not "paid-up shares" as represented to him.

PRACTICE—COSTS—SOLICITOR—REVERSAL OF JUDGMENT—REPAYMENT OF COSTS.

In *Hood Barrs* v. *Crossman* (1897), A.C. 172, the House of Lords (Lords Herschell, MacNaghten, Morris and Shand), have affirmed the judgment of the Court of Appeal, *Hood Barrs* v. *Heriot* (1896), 1 Q.B. 610 (noted ante vol. 32, p. 506), holding that where a successful appellant has, pending his appeal, and under threat of execution, paid costs to the respondents' solicitor, under the order appealed from, without any undertaking on the part of the solicitor to refund them in the event of the reversal of the order, the Court has no jurisdiction, on the order being reversed, and the costs being ordered to be repaid, to make any personal order against the solicitor to refund them, even though he has retained them in payment of his costs, and his client is worthless. Their Lordships intimate that the case would have been a very proper one to have imposed such an undertaking as a condition of refusing to stay execution, if the Court had been asked so to do by the appellant, but unfortunately for him he had neglected to make that application.

"PROCEEDINGS INSTITUTED"—APPEAL BY DEFENDANT.

Hood Barrs v. *Heriot* (1897), A.C. 177, although turning on the construction of a statute, of which no counterpart is in force in Ontario, is yet deserving attention, inasmuch as the House of Lords (Lords Herschell, Macnaghten, Morris and Shand) have therein placed a judicial construction on the words "proceedings instituted.' The Act in question enables the Court to order the costs of "proceedings instituted" by a married woman to be paid out of her separate property,

and the question was whether an unsuccessful appeal by a married woman defendant from a judgment in favour of the plaintiff was a "proceeding instituted" by her. Their Lordships agreed with the Court of Appeal in *Hood Barrs* v. *Cathcart* (1894) 3 Ch. 376, that the appeal was not a "proceeding instituted" by the married woman within the meaning of the Act, and that what was meant was a proceeding originally initiated by her, and not any proceedings taken to resist proceedings commenced against her.

MORTGAGE—POWER OF SALE—SALE TO ONE OF SEVERAL MORTGAGORS - TENANT IN COMMON—MORTGAGEE, DUTY OF.

Kennedy v. *De Trafford*, (1897) A.C. 180, is the case in which the question is discussed whether mortgagees in the exercise of a power of a sale can properly sell to one of two mortgagors who were tenants in common, of the equity of redemption. It may be remembered that the Court of Appeal decided that question affirmatively (1896) 1 Ch. 762 (noted ante vol. 32, p. 542,) and this decision is now affirmed by the House of Lords (Lords Herschell, Macnaghten, Morris and Shand). One of the mortgagors had become bankrupt and the other at the request of the mortgagees had managed the property and collected the rents, and paid them over to the mortgagees, and subsequently became the purchaser of the mortgaged property at about the amount of the mortgage debt. The assignee of the bankrupt was the plaintiff in the action, and contended that the sale was bad on the ground that it was a breach of their duty on the part of the mortgagees; and if not, at all events the purchaser must be taken to have purchased for the joint benefit of himself and cotenant. But their Lordships agreed with the Court of Appeal that the sale was bona fide and for a fair price, and was unimpeachable, and that the purchaser was competent to buy for himself and did not stand in any judiciary relation to his cotenant of the equity of redemption, and the latter was therefore not entitled to any benefit of the purchase. The appeal was therefore dismissed.

LAW OF BRITISH COLUMBIA—C.S.B.C. c. 51, s. 1—(R.S.O. c. 124, s. 1)—CONSENT JUDGMENT WITH INTENT TO DELAY CREDITORS—PRESSURE.

Edison General Electric Co. v. *Westminster & V. Tramway Co.*, (1897) A.C. 193, was an action brought for the purpose of obtaining a declaration that a judgment obtained by consent against an insolvent creditor in British Columbia was fraudulent and void as against the plaintiff and other creditors of the debtor under the Provincial Act, C.S.B.C. c. 51, s. 1, which is in the same terms as R.S.O. c. 124, s. 1. The defendant sought to uphold the judgment on the ground that it was given under pressure, but their Lordships of the Privy Council) Lords Hobhouse, Macnaghten and Davey, and Sir R. Couch) were unanimous that as there was a clear intent to defeat and dely other creditors proved, it was immaterial whether the consent was given under pressure. Their Lordships expressed their approval of the decision of the Court of Appeal for Ontario in *Martin* v. *McAlpine*, 8 A.R. 675.

LAW OF CANADA—INDIAN RESERVE—ANNUITIES TO INDIANS, LIABILITY FOR—B.N.A. ACT, 1867, SS. 109, 111, 112.

Attorney-General of Canada v. *Attorney-General of Ontario*, (1897), A.C. 199, is not a case of any general interest, but as it deals with the rights of Ontario in respect to the matters in controversy, it may be worth noting here, inasmuch as it gives a judicial construction of certain sections of the B.N.A. Act. By treaties made in 1850 the Governor-General as respecting the Crown and the then Provincial Government of Canada, obtained the cession of certain Indian lands (now within the limits of Ontario), the beneficial interest passing to the then Provincial Government, together with the liability to pay to the Indians certain perpetual annuities. By s. 109 of the B.N.A. Act, all lands within Ontario are vested in the province of Ontario, subject to any trusts existing in respect thereof; and it was held that under this section the beneficial interest in the ceded lands above mentioned vested in Ontario. The perpetual annuities having been capitalized on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111 of the

B.N.A. Act. Thereafter the amounts of these annuities were increased according to the treaties, and the question raised by this case was whether the ceded lands were charged with such increased payments in the hands of the Province of Ontario, or whether they were payable by the Dominion and chargeable jointly against Ontario and Quebec, under ss. 111 and 112 in the same manner. The Privy Council decided that the latter view was the correct one, and that Ontario and Quebec were conjointly liable for the increased payments, that neither the original nor the increased annuities were a charge on the land, and that no trust was imposed on the ceded land in respect thereof within the meaning of s. 109.

BARRISTER AND SOLICITOR--ORDER STRIKING OFF ROLLS REVERSED.

In re Renner, (1897) A.C. 218, a barrister and solicitor practising at the Gold Coast having by order of the Court been ordered to be struck off the rolls for improper conduct, appealed successfully to the Privy Council and obtained a reversal of the order on the ground that the facts on which the Colonial Court had acted were insufficient to warrant the order. The offence alleged against the appellant was twofold, (1) That he had, for the purpose of enabling his client to commit a fraud, drawn up a mortgage which he antedated and in which he inserted the consideration as being £100 more than was actually advanced, and (2) that an interpleader having been afterwards ordered to be tried between an execution creditor of the mortgagor and the mortgagee, the appellant appeared as counsel for the mortgagee and was present at the examination of his client when the mortgage was put in evidence on behalf of the mortgagee, and that the appellant neglected to inform the Court that the date of the mortgage was false. Of the first charge the appellant had been (and as the Judicial Committee, held, rightly,) acquitted, but of the second charge he was found guilty and ordered to be struck off the rolls. But on the second charge their Lordships came to the conclusion that on the facts proved in reference to the mortgage, and it being in fact a real transaction and money having been actually advanced thereon, the fact that the

mortgage was antedated was an immaterial circumstance, and even if its true date had been brought to the attention of the Court it ought not, in point of law, to have altered the judgment given in the issue, and for that reason they held that it did not justify the order appealed against.

B N.A. Act, s. 92, sub-secs. 2, 9—Provincial legislature, powers of—Brewers' licenses—R.S.O., c. 194, s. 51, sub-sec. 2—Direct taxation.

Brewers and Maltsters' Association v. *Attorney-General of Ontario* (1897), A.C. 231, was an appeal from the Court of Appeal for Ontario, in which the Court had followed its previous decision in *Reg.* v. *Halliday*, (1893) 21 A.R. 42, touching the powers of the Provincial Legislature to pass those clauses of the Liquor License Act, R.S.O., c. 194, requiring every Brewer and distiller to obtain a license thereunder to sell wholesale within the province. The Judicial Committee (Lords Herschell, Watson, Hobhouse, and Morris and Sir R. Couch), held the Act to be intra vires of the Provincial Legislature, both on the ground of its being direct taxation within the B.N.A. Act, s. 92, sub-sec. 2, following *Bank of Toronto* v. *Lambe* (1897), 12 App. Cas. 575; and also on the ground that such licenses are comprised within the words "other licenses," in sub-sec. 9 of the same section.

Legislative power conferred on Governor—Construction.

Sprigg v. *Sigcau* (1897), A.C. 238, involves a constitutional question of some importance. By an act of a colonial legislature providing for the annexation of certain territory the Governor of Cape Colony was empowered to add to the existing laws already proclaimed and in force in the territories annexed, such laws "as he shall from time to time by proclamation declare to be in force in such territories," and the question at issue was whether this gave the Governor power to make new laws, or whether it merely empowered him to extend to the new territories already existing laws of Cape Colony. The Judicial Committee held that the latter was the proper construction of the Act, and that the Governor's proclamation of new laws was ultra vires of any authority given by the Act, and a power only exercisable by an irresponsible

sovereign, or a supreme and unfettered legislature. The respondent having been arrested and imprisoned under laws thus improperly proclaimed by the Governor, was held to have been rightly discharged.

PATENT, PROLONGATION OF—ASSIGNEE OF INVENTOR.

In re Hopkinson's Patent (1897), A.C. 249, was an application by the assignees of a patent for the prolongation of the patent. It was contested on the ground that the original inventor had been sufficiently remunerated for his invention, having received about $100,000. The assignee, however, contended that their expenditure in acquiring the patent and defending their rights against encroachment, had largely exceeded their receipts. The Judicial Committee, though conceding that under 46 & 47 Vict., c. 57, the assignees of a patent are entitled to apply for a prolongation, were yet of the opinion that unless they established that the original patentee had not been sufficiently remunerated their application for a prolongation ought not to be granted.

LAW OF CANADA—DOMINION RAILWAY—SECTION OF RAILWAY PARTLY WITHIN ONE PROVINCE - PROVINCIAL COURT, JURISDICTION OF, TO DECREE SALE OF DOMINION RAILWAY—MORTGAGE—PRACTICE—ISSUE NOT RAISED IN COURT BELOW.

Grey v. *Manitoba & N.-W. Ry. Co.*, (1897) A.C. 254, is an appeal from Manitoba, in which the jurisdiction of a Provincial Court to order a sale of a Dominion railway in a suit by mortgagees is discussed. The plaintiff's mortgage covered an entire division of the defendant's railway consisting of 180 miles, 170½ miles of which were within the limits of Manitoba, and the rest in the North-West Territories. Killam, J., made the usual decree for sale and for the appointment of a receiver. On appeal to the Full Court it was held that the first division of 180 miles of the defendant's railway was a section within s. 278 of the Railway Act, but that the Court had no jurisdiction to decree a sale of that part of it situated out of Manitoba, and had, therefore, no power to decree a sale of any part of the first division, so far as it consisted of real property; that Court was also of opinion that the working expenses of the entire railway was a prior charge to the plain-

tiff's mortgage on the entire revenue of the railway, but made no declaration on that point. The Judicial Committee of the Privy Council (Lords Watson, Hobhouse, Macnaghten, Morris, Shand and Davey) agreed with the Manitoba Court that the whole division of 180 miles was under the Railway Act a section capable of sale in its entirety, and that the Provincial Court had no power to order a sale, because a part of the section was situate outside of its territorial limits. The Committee also held that until sale, or entry by the mortgagees, the working expenses of the whole line are chargeable on the whole revenues of the railway, and only the net earnings of the division mortgaged to the plaintiffs, would be applicable in the hands of the receiver to the payment of the plaintiff's mortgage. On the appeal to the Privy Council the respondents attempted to argue that the power of sale in the plaintiff's mortgage was invalid, and the appellant also attempted to raise questions as to the position of the appellant in the event of his making an entry under the mortgage and of the purchaser in the event of a sale under the power, but none of these questions having been presented for adjudication in the Court below, the Committee declined to hear argument or pronounce any opinion thereon. This case, we may observe, seems to disclose a defect in our judicial system, which it may at no distant date be necessary to rectify. It would seem to be expedient that the Exchequer Court should be empowered to deal with cases in which the Provincial Courts are unable to administer justice, owing to the subject matter of a controversy being partly in one Province and partly in another. It also seems to suggest the very gravest doubt as to the constitutionality of those sections of the Mechanics' and Wage Earners' Lien Act of 1896, of Ontario, which purport to enable the High Court to enforce mechanics' liens against railways under Dominion control.

COMPANY—ARTICLES OF ASSOCIATION—CONSTRUCTION CHAIRMAN—ADJOURNMENT, REFUSAL OF BY CHAIRMAN - PRACTICE LEAVE TO APPEAL.

Salisbury Gold Mining Co. v. *Hathorn*, (1897) A.C. 268, is a somewhat exceptional case, because leave was granted by the Privy Council to appeal from a judgment which was not final,

on the ground that the determination of the question was of much importance and might put an end to further litigation. The action was brought by a shareholder of a company against the company, to prevent it carrying out an agreement which had been confirmed at a meeting of shareholders, after a motion for adjournment had been agreed to by the meeting, but rejected by the chairman. The articles of association provided inter alia, "The chairman may with the consent of the members present, at any meeting, adjourn the same from time to time." A motion to adjourn a meeting called for the confirmation of the agreement in question, was carried by the members present, but the chairman refused to act upon it, and proceeded with the business of the meeting, and declared the agreement confirmed. The plaintiffs contended that all proceedings after the motion to adjourn had been carried were null and void, but the Judicial Committee (Lords Halsbury, L.C., Herschell, Watson, Hobhouse, Macnaghten, Morris, Shand and Davey, and Sir R. Couch), were of the opinion that upon the true construction of the articles the chairman had a discretionary power to refuse an adjournment notwithstanding the members present desired it, and that consequently the agreement in question had been validly adopted, and any representations by the chairman as to its nature or effect did not affect the validity of the confirmation, even though such representation might be incorrect.

PRACTICE—ARBITRATION—AGREEMENT TO REFER—CONTRACT FOR EMPLOYMENT—WRONGFUL DISMISSAL—ARBITRATION ACT, 1889 (52 & 53 VICT. C. 49), S. 4—(ARBITRATION ACT, 1897 (O.) (60 VICT., C. 16), S 4.)

Renshaw v. *Queen Anne Residential M. & H. Co.*, (1897) 1 Q.B. 662, was an action brought by the plaintiff for wrongful dismissal from employment. The contract of employment on which the plaintiff relied was for five years, but provided that the defendants might dismiss the plaintiff if he were guilty of gross misconduct, and that if any dispute should arise it should be referred to arbitration. The dismissal of the plaintiff had been on the ground of alleged gross misconduct. The defendant applied to stay the action, and to

refer the plaintiff's claim to arbitration, as provided by the contract under section 4 of the Arbitration Act, 1889 (see 60 Vict., c. 16, s. 4, O.). The Master to whom the motion was originally made, refused the application, but Day, J., on appeal, granted the order, and his decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Chitty, L.J.), on the ground that the dispute was one within the terms of the arbitration clause.

PRACTICE—DISCOVERY—INSPECTION OF DOCUMENTS—DOCUMENTS REFERRED TO IN AFFIDAVIT, NOT FILED, BUT OF WHICH COPY SERVED ON OPPOSITE PARTY—ORD. XXXI. RR. 15-18—(ONT. RULES 469-470).

In re Fenner & Lord, (1897) 1 Q.B. 667, notice of motion was given to set aside an award on the ground of the misconduct of the arbitrator, and for the purpose of opposing the motion the opposite party procured from the arbitrator an affidavit in which he referred to certain letters which passed between the solicitor of that party and the arbitrator. The affidavit was not filed, but a copy was served on the party giving the notice of motion, who applied to a judge under Ord. xxxi. rr. 15-18 (Ont. Rules 469-470), for an inspection of the letters. The judge (name not given) refused the application, but the Court of Appeal (Lord Esher, M.R., and Chitty, L.J.) granted it, being clearly of opinion that the letters were within the Rules above referred to.

APPEAL—TIME FROM WHICH ORDER IN APPEAL TAKES EFFECT—RELATION BACK.

In re Donisthorpe and the Manchester S. & L. Ry. Co., (1897) 1 Q.B. 671, although dealing with a procedure which does not prevail in Ontario incidentally determines a point in reference to the time at which an order made by a judge on appeal from a Master takes effect, which renders it deserving of attention. Under the English Railway Act and Land Clauses Consolidation Act, where lands are expropriated by a Railway company, the company is empowered before issuing a wararnt to a jury to assess the compensation, to apply to a judge to order a trial of the question. The company in the present case applied to a Master to direct a trial, which was refused, and the company then issued a warrant to the sheriff to sum-

mon a jury, as the time for doing so would elapse before an appeal from the Master's order could be heard. The company, however, appealed from the Master's order and was successful, and the claimant then appealed to the Court of Appeal, contending that by issuing the warrant for a jury the company had precluded itself from going on with its application for a trial, and also on the ground that the Master had only jurisdiction to exercise powers conferred on the judges by the Judicature Act, and that the power to order a trial in such cases was given not by the Judicature Act but by the Railway Act, and that the Judge's order was therefore an original order and made too late. But the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) considered that the Judicature Act had vested in the High Court *inter alia* the jurisdiction which at the passing of the Act was capable of being exercised by any judge under any statute (see a similar provision in Ont. Jud. Act, 1895 (58 Vict., c. 12, sec. 37), and, therefore, that such statutory jurisdiction was now capable of being exercised by the Master, furthermore that the time when the Master decided the case must be taken as the time when the Judge's order took effect, and therefore that it was in time, and rendered the warrant to the sheriff subsequently issued of no effect.

MUNICIPAL AUTHORITY—REFUSAL TO APPROVE BUILDING PLANS—MANDAMUS—ACTION FOR MANDAMUS—PREROGATIVE WRIT OF MANDAMUS.

In *Smith* v. *Chorley*, (1897) 1 Q.B. 678, the Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.), has affirmed the judgment of Kennedy, J. (1897), 1 Q.B. 532, noted ante p. 424.

CONTRACT—MEMORANDUM IN WRITING—NAMES OF PARTIES—ADDRESS ON ENVELOPE—LETTER AND ENVELOPE ENCLOSING TAKEN AS ONE DOCUMENT—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4.

Pearce v. *Gardner*, (1897) 1 Q.B. 688, is another contribution towards the exposition of the Statute of Frauds. In this case it is held by the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), that the name of one of the contracting parties on an envelope enclosing a letter embody-

ing the terms of a contract, may be read as part of the letter, and that together they may constitute a sufficient contract, within section 4 of the statute, although the name of the person for whom the letter is intended does not appear on the letter itself.

COMPANY—AGREEMENT TO ADVANCE MONEY ON THE SECURITY OF DEBENTURES—BREACH OF CONTRACT TO LEND MONEY—MEASURE OF DAMAGES—SPECIFIC PERFORMANCE.

The South African Territories v. *Wallington*, (1897) 1 Q.B. 692, was an action brought by a joint stock company to enforce an agreement by the defendant to advance money on the security of debentures of the plaintiff company. In response to a prospectus of the plaintiff company, inviting applications for the purchase of its debentures the defendant agreed to take 16, and paid a deposit of £80 on account, but he subsequently refused to pay any further instalments or to take up the debentures. The judge at the trial gave judgment for the plaintiff for the amount overdue in respect of the purchase money, but the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), came to the unanimous conclusion that the contract sought to be enforced, was in substance nothing more than an agreement to lend money which could not be specifically enforced, and that for breach of such a contract the plaintiff can only recover nominal damages unless he shows an actual loss, in which case the measure of damages is the loss he suffers. No actual damage having been shown, the plaintiff's damages were reduced to a nominal sum.

STATUTE OF LIMITATIONS (21 JAC. 1, C. 16), S. 3—4 & 5 ANNE, C. 16, S. 19—SOLICITORS' BILL OF COSTS—CAUSE OF ACTION, ACCRUAL OF—SOLICITOR AND CLIENT.

Coburn v. *Colledge*, (1897) 1 Q.B. 702, was an action on a solicitor's bill, to which the client pleaded the Statute of Limitations, 21 Jac. 1, c. 16. The work was completed on 30th May, 1889. On 7th June following the defendant left England. On 12th June following the plaintiff posted a letter to the defendant containing a signed bill of costs,

which reached the defendant in Australia in 1891. The defendant returned to England in 1896, when the action was commenced. Charles, J., who tried the action, held that the plaintiff's claim was barred, as the statute began to run when the work was completed, and not from the expiration of a month from the delivery of the bill, and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Lopes and Chitty, L.JJ.). It is evident that if the cause of action did not accrue until the expiration of a month from the delivery of the bill, a solicitor might indefinitely postpone the running of the statute by neglecting to deliver his bill, and there cannot well be any question that the delivery of a bill, though a necessary preliminary to bringing an action on it, is nevertheless not any part of "the cause of action."

SHIP—SEAMAN—MERCHANT SHIPPING ACT 1894 (57 & 58 VICT., C. 60) S. 186—"PASSAGE HOME."

In *Edwards* v. *Steel*, (1897) 1 Q.B. 712, the construction of s. 186 of the Merchant Shipping Act, 1894, came in question. By that section where the service of any seaman belonging to any British ship terminates at any port out of Her Majesty's Dominions, the master besides paying the seaman's wages shall as one of several specified alternatives "provide him with a passage home." The plaintiff who resided at West Hartlepool shipped there for a voyage to foreign ports under articles which provided that he might be discharged at any port between Elbe and Brest, or at any port in the United Kingdom. He was discharged at Antwerp and provided with a passage from there to Grimsby, in the United Kingdom. He claimed that he should have been provided with a passage to West Hartlepool, but Collins J., held that inasmuch as the articles provided that the plaintiff might be discharged at any port within the United Kingdom, the providing of a passage to Grimsby was providing "a passage home" within the meaning of the statute.

Correspondence.

A WRONG WITHOUT A REMEDY.

To the Editor of the Canada Law Journal.

SIR,—Judging by the report of the case of the *Pictou Iron Foundry Co.* v. *Archibald*, appearing in the August number of the JOURNAL, it would seem that the maxim "no wrong without a remedy," does not always hold good in Nova Scotia. The defendant made a contract with A for the construction of a boiler, and another with B to complete an engine for his steamer. Both A and B failed to complete their contracts, and the full court seems to have held that defendant could not recover damages from either, because even if one had fulfilled his contract, defendant would not have been able to engage in the business for which the steamer was intended, and to earn profits, because of the failure of the other to complete his contract. This is a most extraordinary result, and seems to leave the door open for any amount of neglect and carelessness on the part of contractors, provided only that there is some other contractor equally negligent and careless at the same time.

It is true that, even if A had completed his work in time, the defendant could not have used his steamer on account of the default of B, but then he might have recovered damages against B, so that it might fairly be said that by reason of A's default the defendant suffered damages in the actual circumstances of the case, viz.: that he lost his right to recover damages against B for the latter's neglect.

Similarly in an action against B for damages, he might fairly claim that if B had completed his work in time he might have recovered damages ngainst A for his default.

A difficulty might arise, of course, in case the defendant had sued both A and B for damages. The Court would naturally hesitate to allow him a double recovery, but an astute judge would readily discover some way of preventing injustice by ordering a stay of proceedings, on terms of the parties equitably adjusting the various matters between them. I would like to see this case carried to the Supreme Court, as it leaves the law on the point involved in a most unsatisfactory position.

BARRISTER.

Winnipeg, Sept. 4th.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

ARMOUR, C.J.] [Sept. 3.

BULST *v.* CURRIE.

Discovery—Examination of non-appearing defendant.

An appeal by the defendant, John Currie, from an order of a local judge at Barrie, requiring the appellant to attend for examination for discovery at the instance of the plaintiff. The appellant had not entered an appearance in the action, and the statement of claim had not been served upon him. The action was, however, proceeding to trial as against the other defendants.

R. McKay, for the appellant, contended that the plaintiff was not a "party adverse in interest," within the meaning of Rule 439; and also that the appellant was not examinable because his statement of defence had not been delivered, nor had the time for delivering it expired, as required by Rule 442.

J. Bicknell, for the plaintiff.

ARMOUR, C.J., held that the appellant could be examined by the plaintiff, and dismissed the appeal with costs.

MEREDITH, C.J., ROSE, J., MACMAHON, J. [Sept. 7.

VANSICKLE *v.* AXON.

Discovery—Production of documents—Affidavit—Objection to produce—Specification of document.

Decision of Moss, J.A., ante p. 475, affirmed on appeal.

R. McKay, for the plaintiff.

Lynch-Staunton, for the defendant, Frederick Axon.

FIRST DIVISION COURT COUNTY OF YORK.

MORSON, J.J.] [April 15.

LEE *v.* GREEN.

Mortgage—Covenant as to taxes—Short Forms Act.

Action by mortgagees to recover from mortgagor amount paid by them for taxes due in respect of mortgaged lands. The mortgage was in the statutory form. Before the taxes had accrued, default in payment of interest had been made by the mortgagor.

Held, following the dictum of Mr. Leith (see Leith & Smith's Blackstone, p. 420) that the covenant by the mortgagor to pay taxes applies only until default be made in payment of principal or interest.

Held, further, that as there is an express contract by the mortgagor to pay taxes until such default, the right, if any, which the mortgagees had to recover the money so paid as being money due by the mortgagor which they had been compelled to pay to protect their security, is, therefore, excluded.

R. L. Defries, for the plaintiffs.

J. B. O'Brian, for the defendant.

Province of Nova Scotia.

SUPREME COURT.

GRAHAM, Eq. J., At Chambers. [June 30.

BANQUE D'HOCHELAGA *v.* MARITIME RAILWAY NEWS COMPANY.

Execution against partner—Ord. 40, Rule 10—Costs.

The writ of summons was served upon the following partners of defendant company, Frederick Dillon, F. W. Cunningham and James D. O'Connor. They appeared, and Dillon and Cunningham contested the claim, and costs were given against the firm. The plaintiff now applies under Order 40, Rule 10, for an execution against Burns, who was a partner but said that the partnership was dissolved on 1st November, 1895, before the issue of the writ—that he was not served, and was not aware of the nature of the action or of the contestation of it until after the termination of the proceedings. It was not proved that the dissolution was known to plaintiff: Order 16, rule 14 proviso. It was stated on affidavit that the reason given by plaintiff's counsel for not having served Burns with a copy of the writ of summons was that the plaintiffs were not aware that he was a partner of the defendant company until after action brought.

GRAHAM, Eq. J.—The plaintiffs are asking from Burns the costs incurred through the contestation of Cunningham and Dillon, that is the judgment and also the costs of a rule dismissing appeal from that judgment. I think the plaintiff is entitled to an execution against Burns, and moreover I think he is liable to the costs of the judgment and the rule and his remedy, if any, is against his co-defendants. It seems to me to be a hard case and it is giving effect to constructive service beyond what the plaintiffs had in their mind but still within the rules. I refuse the costs of this application.

C. H. Cahan, for plaintiff.

J. A. Chisholm, for defendant.

Province of New Brunswick.

SUPREME COURT.

BARKER, J., In Equity.

[August 17

RYAN *v.* MCNICHOLL.

Contract—Sale of practice by physician—Covenant not to practice—Covenant in restraint of trade—Legality.

The plaintiff was a medical practitioner of many years standing and in the enjoyment of a large practice at Sussex. On his removing to California he entered into negotiations with the defendant, a recently graduated physician, for the sale of his practice to him and to lease him his house and offices. An agreement was entered into between them dated May 3rd, 1894, which after providing for the lease of the premises for two years from July 1st, 1894, at an annual rental of $200, contained the following covenant by the defendant: "That said lessee will at the end or other sooner determination of said lease either (*a*) purchase all said lot of land and said buildings thereon at $3,000, or (*b*) will forthwith leave and depart from said parish of Sussex and will not for a period of at least three years next thereafter reside in said parish of Sussex or practice thereat either as physician or surgeon, or act directly or indirectly as partner or assistant to or with any other physician or surgeon practising in said parish of Sussex or elsewhere within ten miles thereof, and that said lessee will at least three months before the end of said term of two years give said lessor notice in writing whether said lessee will so purchase said house and lot or will depart from Sussex as aforesaid." The lessor for himself covenanted with the lessee that he would from and after July 1st, 1894, cease to practice as physician or surgeon in said parish of Sussex for and during said term of two years, or until breach by the lessee of some one or more of his covenants, and that if the lessee purchased the house and lot and kept his covenants that he (the lessor) would not practice as physician or surgeon in Sussex for three years from July 1st, 1894. The plaintiff discontinued his practice and remained absent from Sussex until July, 1896. At the expiration of the lease the defendant declined to purchase the propepty or to cease practising at Sussex. In a suit to restrain the defendant from practising,

Held, that the agreement was not unreasonable and was not void as being in restraint of trade and contrary to public policy, and that an injunction should be granted.

White, *Sol.-Gen.*, and *Allison*, for the plaintiff.

L. A. Currey, Q.C., and *J. M. McIntyre*, for the defendant.

BARKER, J. Equity Chambers.

[Aug. 20.

TOWNSHEND *v.* MCINTYRE.

Practice—Security for costs—Residence of plaintiff abroad.

In a suit for dissolution of a partnership carried on in New Brunswick application was made for security for costs, on the ground that plaintiff re-

sided abroad. It was shown that plaintiff's interest in the partnership assets within the jurisdiction was nominal, and that he was largely indebted to the partnership.

Held, that the existence of property within the jurisdiction belonging to a plaintiff must be clearly shown, and not subject to dispute, and that the application should be granted.

C. A. Palmer, Q.C., and *Montgomery*, for the application.
MacRae, contra.

TUCK, C.J.
In Chambers. [Aug. 24.

GREENE *v.* PUGSLEY.

Practice—Action against attorney—Privilege—Setting aside plea—60 Vict., c. 24, s. 133.

An action against the defendant, an attorney of the Court, was commenced by the ordinary writ of summons, and the declaration was for money paid and money had and received. The defendant pleaded in abatement that he was attorney of the Court, and could only be sued by bill filed and exhibited against him as being present in Court. The plaintiff applied under 60 Vict. c. 24, s. 133, to have the plea struck out on the ground that it was framed to prejudice, embrace and delay the fair trial of the action.

Held, that an attorney may be sued by writ of summons, and plea ordered to be struck out.

Jordan, Q.C., for the plaintiff.
Earle, Q.C., and *MacRae*, for the defendant.

TUCK, C.J.,
In Chambers. [August 24.

IN RE LIQUIDATORS OF ST. JOHN BUILDING SOCIETY.

IN RE EXECUTORS OF EDWARD HAYES.

Winding-up Act—R.S. Can. c. 129, ss. 43, 44—Executors of deceased shareholder—Contributories.

A shareholder of the St. John Building Society was placed by liquidators on the list of contributories by reason of his double liability, but no steps were taken against him to recover the amount payable by him as he was thought to be in straitened circumstances. At his death it was learned that he was possessed of considerable property.

Held, that under R.S.C. ss. 43, 44, c. 129, his executors should be placed on the list of contributories of the society for the amount payable by him, but under the circumstances they should not be charged with interest.

C. J. Coster, for the liquidators.
J. L. Carleton, for the executors.

BARKER, J.
Equity Chambers.

[Aug. 27.

GAULT *v.* YOUNGCLAUS.

Practice—Setting cause down for hearing—Clerk's certificate.

On an application by the plaintiff to set the cause down for hearing, an affidavit by the plaintiff's solicitor of the state of cause is sufficient without the clerk's certificate.

A. O. Earle, Q.C., for the plaintiff.

C. A. Stockton, for the defendant.

MCLEOD, J.
In Chambers.

[Aug. 30.

EX PARTE WILLIAM G. ABELL.

Liquor License Act, 1887—First offence—Appeal—Commitment.

The prisoner was convicted of a first offence for selling liquor without license and fined $50 and costs, and in default of payment ordered to be committed. On appeal the conviction was affirmed by the Judge of the Saint John County Court, and a warrant under s. 118, sub-sec. 5, was issued, committing the prisoners to gaol for default in paying the fine. On an application for a writ of habeas corpus,

Held, that the power conferred on a reviewing judge under the above section relates to a conviction for a third offence, and that the prisoner should be discharged.

W. B. Wallace, for the prisoner.

L. A. Currey, Q.C., contra.

Province of British Columbia.

SUPREME COURT.

DAVIE, C.J.]

[July 27.

GORDON *v.* CITY OF VICTORIA.

Liability of municipality for damages arising out of injuries incurred through non-repair of highway.

Motion by the plaintiff for judgment on the findings of the jury at the trial. The action was brought by a widow to recover damages against the city of Victoria and the Consolidated Railway Company on account of the death of her husband on 26th May, 1896.

On the day in question, a holiday, the deceased was a passenger on a densely crowded street car going to a naval review being held in the neighborhood of Esquimalt, to which place the company ran cars from Victoria, passing over on the way the Point Ellice Bridge, which was within the city limits. It was a truss bridge, containing two spans, and upon the car reaching the first span the bridge collapsed and the car plunged into the water below and fifty

and more passengers including the plaintiff's husband were drowned or killed by the falling timbers. The bridge was not built by the municipal corporation but under contract for the Provincial Government in 1885, and was then outside the city limits.

By the extension of the limits the control and management of the bridge passed from the Chief Commissioner of Lands and Works to the civic authorities, who under the Municipal Act, 1891, ss. 89, 106, 113, 119, 120, had power to pass by-laws for purposes of regulating the traffic thereon and in all matters relating thereto. 57 Vict., c. 63, after reciting an agreement with the city of Victoria dated November 20th, 1888, for the running of tramways within the city, the 33rd clause of which agreement stipulated that the parties of the second part (of whom the company were the successors) might construct and operate street railways over any bridge in the city, provided that they should at their own expense furnish and lay a new flooring over any bridge so crossed, and provided also that the location of any such bridge line, and the work done thereon and the material provided therefor should be to the satisfaction of the city surveyor, enacts under s. 12, that in addition to the powers conferred by the agreement, the company might "upon the terms and conditions as fully set forth in the agreement, lay their tracks and operate their railway, upon and along (among other places) the bridges lying in and between Victoria and Esquimalt."

Under these powers then, the city had full authority to dictate the size, character and weight of the cars to be run upon the bridges, and it appears that after the city had taken control, cars of double the weight and capacity of the former cars were permitted to operate there, the cars weighing together with trucks and motor about ten tons. In 1892 an accident happened owing to the breaking of one of the floor beams whilst a street car was passing over it. Several repairs were then made, some by the city and some by the railway company, the whole work being done under the supervision of the city engineer. After the accident one of the old hangers was found to be broken and disconnected at the eye or bend, but still attached to the beam.

At the trial the jury acquitted the company of negligence, and judgment was entered for them. The jury found that the proximate cause of the accident was the breaking of a hanger, and in reply to the question, "Was the corporation blamable for such cause? and how?" they reply: "Yes, because having been made aware of the bad condition of the bridge through the report of the engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure. In our opinion it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy cars to pass over it."

The jury found that although they could have readily acquired that information, the corporation at the time of the repairs in 1892 did not know the plan and design of the bridge, the method of construction and the nature of the material employed, and the capacity of the bridge; and they also find that the corporation, with a view to increased traffic, and the use by the company of large cars, effected alterations in the bridge, but that such alterations were not done properly, having regard to the intended use by the company of large cars,

and all that the jury have to say about the alterations effected by the company was that they might have been better; and they also say that the company, with the consent of the corporation, used cars of a size and weight beyond the strength of the bridge to carry.

In the case of municipal corporations governed by the General Municipal Act of the province, there is the mere power without the statutable obligation to repair.

Held, that although the city might and probably should have passed by-laws preventing heavy street cars running as well as heavy traffic of any kind, beyond the capacity of the bridge, the action does not lie for omitting to pass a by-law, nor for mere omission to do anything else, all these omitted duties coming within the scope of the immunity for non-feasance, and are not misfeasance.

Wilson, Q.C., and *L. Crease*, for plaintiff.

Cassidy and *Mason*, for the defendants, the city.

NOTE.—In a subsequent case (*Patterson* v. *Victoria*) arising out of the same accident, and in which judgment is still pending in the Full Court, it is worthy of remark that the jury ascribed the accident to the breaking of a floor beam, discarding the theory of the broken hanger adopted by the former jury.

BOLE, Loc. J.] [Aug. 5.

WULFSSOHN *v.* S. ET UX.

Promissory note—Mortgage—Merger.

Action for $323.90, being principal and interest due on a promissory note, Mrs. S. being the maker and her husband the endorser.

The defendants pleaded that the plaintiff's claim had been merged and extinguished by Mrs. S. giving to the plaintiffs a deed charging certain lands with the payment of the debt and covenanting therein to pay the same to the plaintiffs. There was originally a note for $100 on which Mr. S. was liable to plaintiffs, and Mrs. S.'s title deeds to the lands were deposited with plaintiffs as a collateral security therefor. More money being required a new note was given by Mr. and Mrs. S. for $300 and a mortgage for $300 executed by Mrs. S. at the same time, and the difference between the old $100 note and the new $300 one was paid over to Mr. S. When that note became due it was again renewed by Mrs. S. as maker and Mr. S. as endorser.

Held, that there was no merger, following *Snow* v. *Boycott*, (1892) 3 Ch. 110; *In re Pride*, 6 I.L.J., Ch. 9; *Thorne* v. *Cann*, (1895) A.C. 11; *Liquidation Purchase Co.* v. *Willoughby*, 65 L.J. Ch. 486, (C.A.) and that the liability of Mrs. S. on the note remained unaffected.

North-West Territories.

SUPREME COURT.

IN BANC.] [June 8.

MORTON *v.* BANK OF MONTREAL.

Practice—C.J.O. s. 504—Extension of time—Security for costs of appeal—"Special circumstances."

On March 31, 1897, plaintiffs served notice of appeal from the judgment herein, but took no further steps until May 7, 1897, when an affidavit explaining that owing to poverty he had been unable until that day to procure sufficient means to cover the necessary disbursements for printing appeal books, he obtained an ex parte order extending the time for filing same. On May 8th, 1897, defendants took out a summons for an order extending the period of fifteen days after service of notice of appeal prescribed by C.J.O. s. 504, in which to apply for security for costs of appeal, and also for an order for security for costs of appeal.

The motion was founded upon (1) the affidavit filed on behalf of plaintiff disclosing his poverty, and (2) an affidavit showing that on 15th April, 1897, an execution for costs taxed to the defendant in this action had been placed in the sheriff's hands, whose only return to the writ, if called for, would be "nulla bona."

The Judge in Chambers referred to the Supreme Court in Banc the points (1) whether the extension of time for applying for security for costs should be granted, and (2) whether security for costs of appeal should be ordered.

Held, (1) that as defendant's delay in applying had not prejudiced plaintiff's position, the extension of time asked for should be granted, and (2) that plaintiff's poverty and inability to pay costs constitute "special circumstances" as mentioned in s. 504 of C.J.O., and that security for costs should be ordered. *Re Ivory*, 10 C.D. 372; *Farrar* v. *Lacy*, 23 C.D. 432; *Harlock* v. *Ashberry*, 19 C.D. 84, and *Darnelly* v. *Ames*, 17 Ont Pr. R. 106.

Order made that plaintiff pay into Court $100 as security for defendant's costs of appeal. Costs of application and reference to be costs to the successful party in the appeal.

Ford Jones, for applicant.

Secord, Q.C, for plaintiff, contra.

In Banc.] [June 11.

IN RE F. AN ADVOCATE.

Striking advocate off the rolls—Ordinance No. 9 of 1895—Jurisdiction to reinstate or rescind order striking off.

F., an advocate of the Supreme Court of the N.W.T., was struck off the roll of advocates in June term, 1896, for retaining trust funds of one C., a client.

T. C. Johnstone, for the advocate, moved on notice for an order to reinstate him, or in the alternative for an order to rescind the order of the Court striking him off the rolls, or for an order directing his re-enrolment.

Affidavits were filed showing that all monies due the client had been since paid by the advocate, and that he had not now any trust funds of any clients in his hands. Affidavits were also filed showing that the advocate had been of good conduct and character for the six months prior to the application.

Hamilton, Q.C., opposed the motion, and raised the question of jurisdiction, contending that although the Court had power to strike an advocate off the rolls, they had no power under the Legal Profession Ordinance to reinstate him or rescind the order striking off the rolls.

Held, per RICHARDSON, J., that the Court had no jurisdiction to reinstate an advocate already struck off, or to rescind the former order, or to direct his re-enrolment.

ROULEAU, J., WETMORE, J., and MCGUIRE, J., concurred.

EN BANC.] [June 11.

THE QUEEN *v.* MCARTHUR.

Criminal law—Practice—Estreat of bail—Discharge of forfeited recognizance—Right of appeal—Crim. Code, s. 922—Jurisdiction of single judge.

W. and W. were sureties by recognizance for the appearance at trial of one McArthur, charged with theft of cattle. McArthur failing to appear, the recognizance was duly estreated and a writ of fieri facias and capias issued to the sheriff of the Judicial District of Northern Alberta against the sureties. Under this the sheriff made a levy. An application was thereupon made under s. 922 of the Crim. Code, on behalf of the sureties, to the Judge who presided at the trial Court at which McArthur had been bound over to appear for an order discharging the forfeited recognizance. The Judge made an order that upon payment of certain costs and compensation to the owner of the stolen cattle the sheriff should withdraw from seizure and return all moneys or securities deposited with him by the sureties, and discharging the sheriff from all duties and liabilities in connection with the writ. An appeal was brought on behalf of Her Majesty from that portion of the order directing withdrawal from seizure, return of moneys or securities, the discharge of the recognizance, and the discharge of the sheriff from all duties and liabilities in connection with the writ.

An objection was taken to the jurisdiction of the Court to hear the appeal, on the ground that it was an appeal in a criminal matter, for which there is no provision.

Held, following *In re Talbot's Bail*, 23 O.R. 65, that the order in question was a civil proceeding, and consequently that the Court had jurisdiction to hear the appeal from it.

Held, that orders under s. 922 of the Criminal Code can be made by the Court en Banc only, and that the single judge had no jurisdiction to make the order in question.

Appeal allowed with costs.

A. L. Sifton, Crown Prosecutor, for appellant.
Costigan, Q.C., for respondents.

RICHARDSON, J.] [July 3.

SLATER *v.* RODGERS.

Voluntary sale by judgment debtor of chattels exempt from seizure under execution—Right of judgment creditor to garnish proceeds—Special case.

Plaintiffs were judgment creditors of defendant, all of whose property was exempt from seizure under any writ of execution under No. 45 of Revised Ordinances of 1888. Defendant voluntarily had this exempted property sold at public auction, and the proceeds of such sale were garnisheed by the plaintiffs in the auctioneer's hands, and by him paid into Court. It was admitted that the money in Court was the proceeds of the sale of the exempt property, and ear-marked as such, and that the sole question to be determined was whether or not, the property itself having been exempt from seizure and sale under execution, and cash realized by the sale thereof, was attachable by garnishee proceedings.

Held, that the moneys in question were attachable. Order made for payment out to plaintiffs of the money in Court to be applied first in payment of the costs of the garnishee proceedings and the trial of this issue, balance to be applied in reduction of judgment debt.

Ford Jones, for plaintiffs.
N. Mackenzie, for defendant.

Book Reviews.

A Handy Book on Fire Insurance Law, by RODERICK JAMES MACLENNAN, of Osgoode Hall, Barrister-at-law; Toronto, The Carswell Co., Limited, 1897.

This volume contains the fire sections of the Ontario Insurance Act, 1897, with a reference to the Ontario decisions since 1876, and those of the Supreme Court of Canada. This is a useful addition to an office library, to the extent to which it goes, and the work seems to be carefully done, and the printing and paper are of the best description.

We notice that the publishers have departed from the usual rule by inserting a number of outside advertisements at the end of the volume, which rather spoils its appearance.

United States

NOTES OF RECENT DECISIONS.

In *McLaughlin* v. *Louisville Electric Light Co.*, 37 S. W. Rep. 851, Court of Appeals, Kentucky, it was held that an electric light company is required to perfectly insulate its wires at points where persons are apt to come in contact with them, and to use the utmost care to keep them perfeetly insulated. It appeared that plaintiff, a painter by trade and not in privity with the defendant, was engaged in painting a house, and while so engaged, was injured by coming in contact with an electric light wire erected and maintained on the side of said house by defendant, the insulation of which at a joint had become defective by reason of the wrapping having become loosened. It was held that conclusive proof of actionable negligence had been made out.

The unreasonable cutting or trimming of trees on a sidewalk by employees who have authority to cut or trim trees so far as is necessary in removing telephone wires which they have been lawfully ordered to remove, is held, in *Southern Bell Telephone & Telegraph Co.* v. *Francis* (Ala.) 31 L.R.A. 193, to give the owner no right of action in trespass against the employers or a cause of action in case, if there was any liability.

The title to an island formed in a navigable river where land had been washed away years before, is involved in *Wallace* v. *Driver* (Ark.) 31 L.R.A. 317, in which it is held that it does not belong to the owner of the remainder of the tract unless the washing away was sudden and perceptible and the limits of the change or channel or banks can be determined, or unless the formation of the island is made by accretions beginning at the water line of his remaining land.

A guaranty of the payment of interest on a note is held, in *Rector* v. *McCarthy* (Ark.) 31 L.R.A. 121, to run only until the maturity of the note. The court considers that the case is not altogether free from doubt, and says there are few cases in the books that bear directly upon the point, but resolves the doubt in favor of the guarantor.