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OUR publishers send us a letter from a learned judge of the Superior Court, residing in the western half of the British possessions in North America, and asks us to publish an extract therefrom. As it comes from one who has a good opportunity of forming an opinion on the subject, we do as requested. The learned judge thus alludes to our efforts to meet the needs of the profession in the various Provinces of the Dominion: "THE LAW JOURNAL, which I believe I may say I introduced into this Province, grows steadily in living interest here, where Ontario cases are constantly referred to, and Ontario judges and Ontario cases are (shall I dare to say?) our chief Canadian authorities."

SCARCELY a day passes but the practitioner is met by further evidence either of the difficulties arising under the Mechanics' Lien law, or of the utter carelessness and inartificial drafting of an unwise and unworkable enactment which has long been recognized as detrimental to business, and valueless for the purposes which it was held out would be served by it. Property owners, investors, contractors, and workmen would all be benefited by its repeal. The only persons who make any money by it are the lawyers, and therefore, perhaps, we should not take exception to it, but such a piece of bungling legislation is a disgrace to our statute book, and should be amended by total repeal. Legislation which was introduced and kept alive for political purposes to catch the workingmen's vote is not likely to be very beneficial to the country at large.

THE FRANCHISE ACT.

A correspondent asks our opinion on certain questions of procedure under the above Act. Although it is not altogether within our province, still, as he says revising officers do not agree on the questions, we will endeavour, in as few words as possible, to give our views for his information.

The Act assumes that the old list is to continue in force till altered and revised as provided. The revising officer will endeavour, especially if he be a judge, to construe the Act as fairly as he can; and, if compliance with the directions contained in it do not accord altogether with his own notions, yet still his judicial training will prevent him from putting a construction on it which the wording will not fairly bear.

On looking at the old list, the revising officer will find the names of *income voters*, and it is chiefly with reference to these that our correspondent seems to be troubled. The question he puts squarely is this, Are these voters to be at the outset eliminated altogether, or are they to be allowed to remain on till tested at the final revision of the list? If the revising officer strikes them all off, he will be striking off, it may be, the names of some who are, to his personal knowledge, entitled to be on the list, and some such there must be on every list. If, again, he undertakes to place the names of some against whom objections have been filed with him (assuming, for the present, that such a course is correct) on the preliminary list of names *to be removed*, he will have to assign opposite to each the reason for his doing so, placing the letter D there if the voter is dead, and the letter C if he has *ceased to be qualified*.

What, then, is the evidence he will require to satisfy him that the voter has ceased to be qualified?

Qualification for an income voter consists in his having been a resident in Canada for one year next before his being placed upon the list, or the date of his application to be placed on the list, being then a resident within the electoral district, and having derived an income of at least $300, etc., during such year. He has, therefore, a right of residence anywhere in the Dominion up to the date in question without losing his qualification; and so long as he is a resident within the electoral district at the date of the revision, it would appear as if he had the right, in case he is already there, to

remain on the list till proper grounds are shown for striking him off. But if he has, undoubtedly, removed from the electoral district, without any intention of returning, then any one objecting to his name being on the list must take the steps provided by the Act for that purpose.

It will be observed that nothing is said in section 15 about any "solemn declaration" containing names *to be removed*, but only such as claim *to be added*; but even supposing there was, could a declaration that, at the time of making it, a certain voter was living in another part of the Province or Dominion be held by the revising officer to be a ground of disqualification: *non constat* but that such residence is a temporary one?

There is a specified way, however, of getting rid of such voters, if desired. After the preliminary lists have been published, it is provided by section 19 (2) that any person may give notice to the revising officer of objection to any name either on the original list or the supplementary one, and also to the person objected to, either by personal service or registered letter, and such notices must be given at least two weeks before the day fixed for the final revision.

It would seem to us that once a person is placed on a revised list he ought to be allowed to stay there till proper grounds are shown for striking him off; and also that he should not be struck off in any case unless he has been notified in the manner prescribed by the Act. It is objectionable on every ground that where a mode of procedure is laid down by statute, and there is no difficulty in following it, a ministerial officer should shape out for himself a different mode. Such a course would, undoubtedly, lead to confusion and uncertainty.

INSPECTION OF REGISTRY OFFICES.

THE Annual Report of the Inspector of Registry Offices shows the careful attention which has been paid to the duties by the late inspector, Mr. E. F. B. Johnston, Q.C. His report contains many observations of interest. As will be seen, he speaks in complimentary terms of the conduct of business in Registry offices. There is, no doubt, much less cause of complaint than there used to be, and probably a careful inspection has largely helped in this.

Among the various subjects referred to, he speaks of the power given to the County Judges to order new plans to be filed where land has been put into small parcels, and conveyed without the lots being designated in any way. He says: "In most of the offices, I found the condition of the titles in many localities to be so complicated and obscure as to be wholly unintelligible. Even professional men, skilled in searching titles, would not undertake to give certificates of title to many valuable properties without restrictions and saving clauses. Indeed, the statement of the registrar or his deputy had to be generally accepted, as he, from his local knowledge and long intimacy with the books and records, was the only person who could possibly understand the way in which the land had been dealt with. The cause of this evil is that the owners of property are allowed to subdivide their lands without filing a plan. The descriptions are frequently not exact, and as the parcels into which the land is divided are described by metes and bounds, which are sometimes very imperfect, it is no wonder that these titles become obscure."

As a result of this inspection, he finds that during the past year the Registry offices "are carefully conducted and a due regard is had to the wants of the public. The registrars, in all the offices except in two or three, give their personal attention to the work, many of them working long hours and in excess of the statutory period from ten to four, and attending to all the details, assisting in the copying, and in a number of cases doing all the copying and other work without assistance, except when a rush occurs, and generally superintending and taking a personal interest in the performance of the various duties pertaining to the office. The offices in which this is not done are very few, and are those where the registrar has become enfeebled by sickness or old age, or where it would be impossible for the registrar, by reason of the magnitude of the work, to perform merely clerical services."

Whilst these remarks may be all true, speaking generally, we cannot quite follow him when he inferentially makes them apply to the Toronto Registrars, as he appears to do in the following words:—"In the Toronto offices, where there is a vast amount of work, the public will be better served by the registrar keeping a personal supervision of his office rather than by his sitting at his desk copying documents which could be done by a

clerk at a few cents per folio, amounting to $8 or $10 per week. If a registrar in such an office carefully superintends the work and sees that all his subordinates perform their several functions properly, so that the public will be well served, he is doing infinitely more than if his time were taken up in receiving the documents, copying, comparing, or entering. It is manifest that a registrar cannot, in large offices, perform the whole duties or even a part of all of them. The work must be divided. One clerk makes out abstracts, another receives and enters the instruments and makes the charges, another makes the entries in the abstract indexes, a fourth assists in comparing, and a number are continually engaged in copying. A registrar devoting himself to any one of these branches would be unable to guard the interests of the public or protect himself against mistakes which might be of serious consequence to him as well as to others. Instead of being the head of the office, he would become a mere clerk. This is not what the public interest requires. The registrar of a large division ought to be in his office, not to perform some of the many minor details of the work at the expense or neglect of all the others, but his important duty i to see that the many officials and clerks under him sufficiently perform their several functions. Much time is required at his hands in hearing suggestions from, and giving information to, those doing business in his office, and occasionally complaints have to be investigated, disputed questions to be determined, and a number of other important matters constantly demanding his attention, which, in an office like Toronto, will require a very large portion of his time."

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*THE CORRELATION OF EXECUTIVE AND LEGISLATIVE POWER IN CANADA.**

EXECUTIVE POWER IS DERIVED FROM LEGISLATIVE POWER, UNLESS THERE BE SOME RESTRAINING ENACTMENT.

In *Regina* v. *Horner*, * Ramsay, J., says that the Privy Council recognized the general principle expressed in the above proposition in the case of *Regina* v. *Coote*, † where they held that

* 2 Steph. Dig., at p. 451, 2 Cart. at p. 318 (1876).

† L.R. 4 P.C. 599, 1 Cart., 57 (1873).

*The following article is derived from a forthcoming work by Mr. A. F. H. Lefroy upon the "Law of Legislative Power in the Dominion of Canada."

the statutes of the Quebec Legislature, 31 Vict., c. 32, 32 Vict., c. 29, appointing officers named fire marshals, with power to examine witnesses under oath, and to enquire into the cause and origin of fires, and to arrest and commit for trial in the same manner as a justice of peace, was within the competence of the provincial legislature. Their lordships' reasons, however, for thus holding are not given in their judgment.

It has not been without dispute and some divergence of judicial opinion that the proper application of the principle in question under the constitution conferred upon the Dominion by the British North America Act has been determined. Thus in the Thrasher case,* Begbie, C.J., says: "The first thing to be observed upon s. 92 of the British North America Act is that its object and intention, as well as expressed phraseology, is to confer a legislative power on a legislative body. The words of s-s. 13 and the first part of s-s. 14 are extremely comprehensive. If they stood alone, if 'civil rights and the administration of justice' were handed over to be dealt with by any one department of the Provincial Government, the grant would cover everything that can be done by any of the three branches of civil government—the legislative, the judiciary, and the executive. But the subsections do not stand alone, nor do they contain any words of grant. They are entirely governed and controlled by the operative words in the body of the section, and merely enumerate the topics upon which the grant is to be exercised. And the grant is to a purely legislative body of purely legislative functions, viz., a grant of power 'to make laws' in relation to civil rights and the administration of justice; and there is no grant here to the local legislature, enabling them to exercise either judicial or executive powers or functions in respect of any of the enumerated topics. In defining, asserting, ascertaining, and protecting civil rights, in administering justice, the share of the legislature is probably the most important. But the legislature has only a share in the work. A very important share in all this business belongs to the judiciary; a very important share to the executive alone: and it could not have been intended to give to the legislature power to perform both judicial and executive functions; and, at all events, it has not been expressly given. No part of the administration of

* 1 B.C. (Irving), at p. 170-1 (1882).

justice probably is more important than the safe custody of alleged criminals, and the punishment of persons convicted. For these purposes the legislature has authority to legislate — to provide that prisons shall be built, and constables appointed. But they cannot carry out their own commands; they cannot contract for the building of a lock-up, or appoint a constable, or determine whether an accused person is guilty, or whether a constable does his duty. These matters are clearly left to the executive and to the courts. The gift of power to legislate in relation to the administration of justice, therefore, does not give to a legislature power to interfere in every particular involved in that subject; but only in those particulars which are the proper subjects of legislation. . . . There might be somewhat to be said against this view if it reduced s. 92 to a barren grant; if there were nothing left upon which the grant could operate. But this is by no means the case. The argument leaves to the local legislature, fully and unimpaired, all essentially legislative functions in respect to all the matters enumerated in s. 92; all matters of substantive law; all, surely, that could have been intended to be given to the legislature of the Province. The management of public lands and works, a large part of taxation, the whole law of inheritance to the real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys, and numberless other matters are left to the local legislature; executive and judicial functions, however, are not given, and, therefore, are expressly forbidden to them in regard to these topics."

And in accordance with the views thus expressed, Begbie, C.J., held, with his fellow judges, Crease and Gray, JJ., that s. 28 of the British Columbia Local Administration of Justice Act, 1881, 44 Vict., c. 1, by which it was provided that the judges of the Supreme Court of the Province should sit as a full court only once a year, at such time as might be by rules of court appointed, was *ultra vires* on the ground that,* "Whatever may be said of some topics, this, at all events, is pure procedure, and essentially of judicial cognizance. It is not a legislative function at all, any more than the adjournment of a partly heard case. It, consequently, is not included in any general gift of legislative power.

* At p. 174.

And, therefore, it is not conferred by the gift to a legislative body of a power to make laws in reference to civil rights and the administration of justice. . . . If the Imperial Parliament may, and does, from time to time, thus interfere beyond its proper legislative functions, that is by virtue of its universal sovereignty. No derivative legislature may do so, unless specially authorized in that behalf."

The Supreme Court of Canada, however, upon the question being referred to it by the Governor-General in Council, held that the legislature of British Columbia could make rules to govern the procedure of the Supreme Court of the Province in all civil matters, and could delegate this power to the Governor-General in Council, and they also held that the provincial Act, 44 Vict., c. 1, was *intra vires* of the Legislature of British Columbia.* Their lordships, unfortunately, as has hitherto been usual in such cases, did not give their reasons for this decision.†

However, in the recent British Columbia case of *Burk* v. *Tunstal*,‡ Drake, J., seems to have held that the provincial Act in question in that case, authorizing the appointment of Gold Commissioners of Mining Courts, was *ultra vires*, not only because the intended Gold Commissioners were, in effect, Superior Court judges under another name, but also because: "It is a prerogative of the Crown to appoint all judges, and such prerogative cannot be taken away except by express words. This prerogative has been delegated to the Governor-General, and there is nothing in the Act taking this right away and vesting it in the Lieutenant-Governor," a view which, as will be more clearly seen

* See the answers to the Supreme Court of Canada reported in the footnote to the report of the Thrasher Case, 1 B. C. (Irving), at pp. 243-4; also Cass. Sup. Ct. Digest, at p. 480.

† But see now 54-55 Vict., c. 25, s. 4 (D.). It may be here noted that in his report to the Governor-General of July 10th, 1889, in regard to a petition presented to the latter for the reference of The Jesuits' Estates Act to the Supreme Court of Canada, Sir John Thompson, then Minister of Justice, reviews the different precedents for such references, and also for similar references, in England, by the Government to the Judicial Committee of the Privy Council, arriving at the conclusion that the object and scope of the enactments allowing such references are "not to obtain a settlement, by this summary procedure, of legal questions even of great public interest, or to obtain an adjudication upon private rights, but solely to obtain advice which is needed by the Crown in affairs of administration." This report was published in full in the Toronto *Empire* for August 12th, 1889

‡ 2 B.C. (Hunter), at p. 14 (1890).

presently, seems to ignore the application of the principle of our leading proposition to the legislative powers comprised in No. 14 of s. 92 of the British North America Act, respecting the administration of justice in the Province.

To return to the case of *Regina* v. *Horner*,* above referred to, the question before the Quebec Court of Queen's Bench there was whether provincial executives had the right to appoint district magistrates under the provisions of the then existing Acts of the legislature of Quebec respecting district magistrates and magistrates' courts in that Province. It was contended that the Quebec legislature had no authority to legislate on these matters, and that, even if it had, the Lieutenant-Governor had no right to appoint a district magistrate, for he is a district judge, and that, under the British North America Act, s. 96, the Governor-General has alone the power to appoint such officers. Ramsay, J., however, held that the district magistrate was not a district judge under that section, and that, on the authority of *Regina* v. *Coote*, above cited, and in accordance with the general principle of our leading proposition, the provincial executive has power to appoint the district magistrates in question.

In *Hodge* v. *The Queen*,† again, the Privy Council held that, within the limits of s. 92, local legislatures are supreme, and can confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect, saying: "It is obvious that such an object is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail." And, in the Court of Appeal of Ontario, in that case,‡ Strong, J., observes: "The British North America Act confers a constitution distributively as to powers of legislation, and, with those powers, necessarily all that was needful to make those powers effectual"; and Burton, J.A., speaks much to the same effect, Paterson and Morrison, JJ.A., concurring.

And that the executive power is co-extensive with the legislative has been very clearly affirmed in the recent decision of

* 2 Steph. Dig. 450, 2 Cart. 317 (1876).

† 9 App. Cas., at p. 132, 3 Cart., at p. 162 (1883).

‡ 7 A.R., at p. 252, 3 Cart., at p. 168 (1882).

Attorney-General of Canada v. *Attorney-General of Ontario*,* in the judgments in which and in the arguments of counsel the subject is dealt with at length. The verbatim report of the argument of Mr. Edward Blake in the Court of Appeal has been published by the press of the *Budget*,† under the title of the "Executive Power Case," and there could be no more exhaustive argument in support of the proposition now under discussion, and also of the wider contention as to prerogative powers in relation to the internal affairs of Canada which is advanced in the despatch of the Lieutenant-Governor of Ontario to the Secretary of State, dated January 22nd, 1886.‡ The contention in that despatch§ is that all government and all executive authority are matters of prerogative, and that: "The Lieutenant-Governor is entitled *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters over which provincial legislatures have jurisdiction, as the Governor-General is entitled, *virtute officii*, and without any statutory enactment, to exercise all prerogatives incident to executive authority in matters within the jurisdiction of the Federal Parliament; a Lieutenant-Governor has the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the Province; as the Governor-General has the administration of them, so far as they are capable of being exercised in relation to the government assigned to the Dominion."

In the case of *Attorney-General of Canada* v. *Attorney-General of Ontario*,‖ the provincial Act, 51 Vict., c. 5, the constitutionality of which was under discussion, and which was held to be *intra vires*, purported to vest in the Lieutenant-Governor of Ontario for the time being all powers, authorities, and functions which any of the ante-confederation Governors or Lieutenant-Governors in Canada exercised at or before the passing of the Act, under commissions, instructions, or otherwise, in matters within the jurisdiction of the legislature of the Province, subject always to the royal prerogative as heretofore; and it specially provided that

* 20 O.R. 322; 19 O.A.R. 31 (1890-2).
† 27 Melinda Street, Toronto, 1892.
‡ Ont. Sess. papers, 1888, No. 37, at pp. 20-22.
§ Ont. Sess. papers, *ib.*, at p. 20.
‖ 20 O.R. 222; 19 O.A.R. 31 (1890-2).

this should be deemed to include the power of commuting and remitting sentences for offences against the laws of the Province, or offences over which the legislative authority of the Province extends. In the court of first instance,* Boyd, C., in expressing his view of the matter refers to the principle we are now discussing, and it will be seen that he holds that legislative power carries with it a corresponding executive power, though all executive power may be prerogative power, but he does not seem to go the whole length of holding that, by the British North America Act, there was made a distribution of all prerogative powers, so far as concerns the internal affairs of the Dominion, between the Governor-General and the Lieutenant-Governors of the various Provinces. He says: "Now, it is a well-settled principle of public law that, after a colony has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony as it does to the United Kingdom: *In re the Lord Bishop of Natal*, 3 Moo. P.C.N.S., at p. 148. Effective colonial legislation as to pardon may be attributed to the fact that the Crown is a constituent of the local law-making body. . . . The power to pass laws implies necessarily the power to execute or suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion. The sovereign power is a unity, and, though distributed in different channels and under different names, it must be politically and organically identical throughout the empire. Every act of government involves some output of prerogative power. Prerogatives of the Crown may not have been in any sense communicated to the Lieutenant-Governor as representative of the Queen; and yet the delegation of law-making and other sovereign powers by the Imperial Parliament to the legislature of Ontario may suffice to enable that body, by a deposit of power, to clothe the chief provincial functionary with all needful commuting and dispensing capacity, in order to complete its system of government."

In the Court of Appeal, however, Burton, J.A., goes the whole length of the contention in the despatch of the Lieutenant-Governor of Ontario, above cited, saying†: "I have always been of

* 20 O.R., at pp. 249-50 (1890).

† 19 O.A.R. at p. 38 (1892).

opinion that the legislative and executive powers granted to the Provinces were intended to be co-extensive, and that the Lieutenant-Governor became entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which provincial legislatures have jurisdiction; that he had, in fact, delegated to him the administration of the royal prerogatives as far as they are capable of being exercised in relation to the government of the Provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion." The remaining judges of the Court of Appeal, while agreeing that the Act in question was *intra vires*, do not specifically pass upon this wide question, deciding the matter on narrower grounds. The case has since been carried to the Supreme Court of Canada, where the decisions of the courts below were affirmed, but the judgments are not yet reported.

By a curious coincidence, in the Australian colony of Victoria a similar theory as to the right to exercise all prerogative powers relating to the local affairs of the colony being vested in the Governor, by virtue of the Constitution Act, though not expressly therein conferred, was propounded by counsel, and received the support of the Chief Justice of the Supreme Court of the colony, and of one of the other judges in the recent case of *Toy* v. *Musgrove*,* though the four remaining judges took the other view, namely, that certain of such prerogatives, and no others, were, by the provisions of the Constitution Act and his commission, conveyed to the Governor as representative of the Queen. The Chief Justice sums up his conclusion on the point thus:† "The executive government of Victoria possesses and exercises necessary functions under and by virtue of the Constitution Act similar to and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain." Therefore, with entire consistency he held that, in the exercise of his powers as head of the executive government of Victoria, the Governor was not an agent of the Crown, nor an officer of the Secretary of State for the Colonies: "A new and distinct authority is conferred upon him by law on his appointment; he

* 14 V.L.R. 349 (1888).
† 14 V.L.R., at p. 397.

is created, for all purposes within the scope of the Constitution Act, the local Sovereign of Victoria," and he held that the Crown had no longer any right to "instruct" the Governor with reference to the exercise of his powers as such head of the executive of the colony, and that anything to the contrary in his commission or instructions was illegal and void. At the same time he admits, of course, that: "All the prerogatives and powers of the Sovereign are not vested by law in the Queen's representative in Victoria, nor can all of them be the subject of advice to the Governor by the Queen's ministers for Victoria. The prerogatives of war and peace, of negotiation and treaty, together with the power of entering into relations of diplomacy or trade, and holding communication with other independent States, to some one, or all, of which the power to do an act which shall constitute an act of State appears to be annexed, have not been vested in the Governor of Victoria by law express or implied." And so Kerferd, J., in the same case, says*: "If the Crown" (*sc.*, in the Colony of Victoria) "is restricted to the use of those prerogatives mentioned in the Constitution Act and the Governor's commission, then all other prerogatives must be deemed to be excluded. I can find no authority in support of such a contention. . . . I would say that all the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect), and may be exercised by the representative of the Crown on the advice of responsible ministers."

But, as already stated, the other four judges did not concur in this view, but held that, even if the prerogative power then in question, viz., that of excluding aliens from entering the colony, could be properly regarded as one relating to the local affairs of the colony, yet the Governor had it not either under the Constitution Act or his commission and instructions. Wrenfordsley, J., says,† "I am not aware of any authority to the effect that in a settled colony like Victoria the Act of Constitution carries with it powers outside or beyond the exact terms of the grant itself." A'Beckett, J., says: "Assuming that the right to exclude aliens

* 14 V.L.R., at pp. 409, 411.
†14 V.L.R., at p. 437.

subsisted in England as part of the royal prerogative when our Constitution Act was passed, I can find nothing in the Act or in the system of government which it originated authorizing the exercise of this right by the advice of Ministers in Victoria. It was argued that the authority must be given because responsible government was given, as if the phrase 'responsible government' had a definite, comprehensive meaning, necessarily including the power in question. The phrase has, to my mind, no such force. Responsibility may attach to persons having powers strictly limited, and its existence does not indicate the extent of the authority from which it arises. For this we must look to the terms in which the authority was conferred, that is to say, to the Act of Parliament establishing the system, and to the documents delegating the powers to the Governor who administers it, to ascertain whether by express words or necessary implication the right to exclude aliens has been given." Lastly, Holroyd, J., says, in a passage which also seems worth quoting: "By the Constitution Act itself certain powers are conferred upon the Governor, similar to some of those which in the United Kingdom the Queen enjoys as her exclusive privilege, notably that of proroguing the Council and Assembly, and dissolving the Assembly: that of appointing any officers liable to retire on political grounds, and that of appointing, with the advice of the Executive Council, all other public officers under the Government of Victoria. Powers of this class having been bestowed in express terms, we ought to presume, according to the ordinary rule of constructions, that no others of the same class were intended to pass. The rule is not one of universal application, but in the present instance it should be rigidly applied, inasmuch as it is still a fundamental maxim that the Crown is not bound by any statute, unless expressly therein named, and as a corollary the royal prerogative cannot be touched except in so far as therein expressed. It is, moreover, conceded that the exclusion of aliens is not a local affair in its consequences, which might affect the whole empire; and that circumstance furnishes an additional reason for not implying an intention on the part of the Home Government to vest in the Governor a power which his advisers here might recommend him to execute in a manner detrimental to Imperial interests. Except in so far as his position has been altered by positive enactment of the Home Parliament, or by some statute passed here

and assented to by Her Majesty, the Governor himself is the servant of the Crown, tied down by his commission and instructions. It is not pretended that he has been permitted by either to shut out or to remove aliens; and if no such authority has been distinctly vested in him by statute, or delegated to him by the Queen, we may safely conclude that he does not possess it." The case was carried to the Privy Council,* but the appeal was decided on other grounds, and their lordships say that, this being so, they do not deem it right to express any opinion on what rights the Executive Government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented, and which may " never become of practical importance."†

And before proceeeding further to review our own decisions in reference to the point in question, it may be observed that the opinion of the law officers of the Crown in England, dated December 9th, 1887, in reference to the appointment of Queen's Counsel‡ seems to support our leading proposition as applied to legislative powers conferred by section 92 of the British North America Act, even where the executive power in question is clearly of a prerogative character. It does not appear, however, to go to the full length of upholding the supposed wholesale distribution of prerogative powers by that Act, though the matter may be one of little present practical importance. The questions submitted to the law officers were whether a Lieutenant-Governor of a Province in Canada has power, as it were, *ex officio*, to appoint Queen's Counsel, and whether a provincial legislature has power

* [1891] A.C., 272.

† It appears that on December 22nd, 1869 the Legislative Assembly of Victoria went so far as to pass the following resolution (Parliamentary Debates, vol. 9, pp. 2670, 2671): " That the official communication of advice, suggestions, or instructions by the Secretary of State for the Colonies to Her Majesty's representative in Victoria on any subject whatsoever connected with the administration of the local Government, except the giving or withholding of the royal assent to or the reservation of bills passed by the two Houses of the Victorian Parliament, is a practice not sanctioned by law, derogatory to the independence of the Queen's representative, and a violation both of the principle of responsible government and of the constitutional rights of the people of this colony." It seems, however, that no notice was taken by the Imperial Government of this protest, and the practice condemned in the resolution remains unaltered.

‡Ont. Sess. papers, 1888, No. 37, at p. 30.

to authorize the Lieutenant-Governor to make such appointments. They hold that the appointment of Queen's Counsel is the appointment to an office, and that under section 92, No. 4 (the establishment and tenure of provincial offices, and the appointment and payment of provincial officers), the provincial legislature has power to authorize Lieutenant-Governors to make appointments of Queen's Counsel for the purposes of the provincial courts, but they say: "We feel some doubt as to the power of the Lieutenant-Governor of any Province, other than Ontario or Quebec, to create Queen's Counsel with or without the incidental privilege of pre-audience. But in regard to Ontario and Quebec, we think, having regard to section 134 of the British North America Act, that the Lieutenant-Governors of the Provinces can create Queen's Counsel for the purposes of the provincial courts. Whether the Lieutenant-Governors can regulate the precedence of the members of the provincial bars *inter se* is one, in our opinion, of some difficulty. On the whole, we think not."

And in Sir George Cornwall Lewis' Essay on the Government of Dependencies more than one passage may be found which supports our leading proposition. Thus he says:* "An Act of legislation by a sovereign government implies the necessity of future executive Acts, and every executive Act presupposes a prior legislative Act which is carried into execution." And again:† "With respect to the comparative importance of the legislative and executive powers, it may be observed that a sovereign government possesses both, and that, inasmuch as each of these powers implies the other, neither can exist alone. . . . The power of making laws implies the power of determining the delegation of executive functions to subordinate officers, since it is by means of laws that the delegation is made."

Proceeding now to consider such decided cases not already referred to as illustrate our leading proposition, one of the earliest is *Queen* v. *Paxton*,‡ where Draper, C.J., held that the Act of the Ontario legislature continuing in force an Act of the old Province of Canada which authorized the Government to appoint police magistrates was valid. He held that the latter Act, relat-

*Edition 1891, by C. P. Lucas, at p. 16.

†*Ibid.*, at p. 66.

‡4 O.P.R. 281, 1 Cart. 810 (1868).

ing to the administration of justice, was within the power of the legislature of Ontario. We may compare with this *Regina* v. *Bennett*,* where it was held by the Ontario Queen's Bench Division that the right of provincial legislatures to legislate in relation to the administration of justice includes a right to make provision for the appointment of police magistrates and justices of the peace by the Lieutenant-Governor, though, per Cameron, J., it did not follow that it included the right to create Queen's Counsel, the status of whom "is one of mere honour and dignity, and not necessarily connected with the administration of justice."†

On the same principle, in *In re Wilson* v. *McGuire*,‡ the majority of the Ontario Court of Queen's Bench held that provincial legislatures have complete jurisdiction over Division Courts, and may appoint the officers to preside over them, Hagarty, C.J., observing: "As they (*i.e.*, the local legislatures) have power to abolish such courts, and to establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them." Armour, J., however, took a different view from his brother judges in this case, for, after observing that even without s. 96 of the British North America Act the power to appoint County Court judges would have resided with the Governor-General, as representing Her Majesty in the Dominion,§ and that the power of the local legislatures to appoint judges of the Division Court did not, in his opinion, properly arise in this case, he adds: ‖ "When that question shall arise I will, I trust, be able to show by satisfactory reasons that the local legislature has no such power. The reasoning of the Supreme Court in *Lenoir* v. *Ritchie*, 3 S.C.R. 575, 1 Cart. 488, in which case that court determined against the power of the local legislatures to appoint Queen's Counsel, is altogether against their having the power to appoint any judges." Thus he, evidently, did not consider that No.

*1 O.R. 445, 2 Cart. 634 (1882).

†1 O.R., at p. 460, 2 Cart., at p. 640. As to this matter of Queen's Counsel, see also per Taschereau, J., in *Lenoir* v. *Ritchie*, (1879) 3 S.C.R., at pp. 627-9, 1 Cart., at pp. 534-5, and *passim* in that case; also Hodgins' Reports of Ministers of Justice, etc., vol. 1, pp. 26-7; *ibid.*, vol. 2, pp. 25, 26-7.

‡2 O.R. 118, 2 Cart. 665 (1883).

§As to which, however, see *The Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437.

‖2 O.R., at pp. 128-9, 2 Cart., at p. 677.

14 of the British North America Act, s. 92, whereby provincial legislatures can make laws in relation to "the constitution, maintenance, and organization of provincial courts, etc.," carries with it the power to appoint any judges at all. But the later case of *Regina* v. *Bush** would seem to show a change of view, for Armour, C.J., there concurs with Street and Falconbridge, JJ., of the Ontario Court of Queen's Bench, in holding that the provincial legislatures have, by virtue of No. 14 of s. 92, not only the power, but the exclusive power, to pass laws providing for the appointment of justices of the peace, subject to the royal prerogative power of appointment which still exists, though he says that such prerogative power has not been exercised in Ontario since the passing of the British North America Act. He says:† "Having regard to the purposes for which and the circumstances under which the British North America Act was passed, it cannot, I think, be doubted that the power was thereby conferred either upon the Parliament of Canada or upon the legislatures of the Provinces to pass laws providing for the appointment of justices of the peace, and this Act, having been assented to by the Crown, was in derogation of the prerogative right of the Crown to appoint justices of the peace, although it did not deprive the Crown of that right. . . . It is under this power (s-s. 14 of s. 92), given to the provincial legislatures to make laws in relation to the administration of justice in the Province, that those legislatures have, if at all, the power to pass laws providing for the appointment of justices of the peace. Laws providing for the appointment of justices of the peace are, it is contended—and, I think, rightly—laws in relation to the administration of justice, for the appointment of justices of the peace is a primary requisite to the administration of justice; and, if this contention be correct, the passing of such laws is exclusively within the power of the provincial legislatures." And he cites the cases of *Regina* v. *Reno* and *Regina* v. *Bennett*, which we have above referred to.

And in the previous case of *Richardson* v. *Ransom*,‡ Wilson, C.J., expresses the view that local legislatures can provide for the appointment of justices of the peace, but he evidently was not so clear as the judges who decided *Reg.* v. *Bush*§ that they had the

* 15 O.R. 398, 4 Cart. 690 (1888).
† 15 O.R., at p. 400, 4 Cart., at pp. 692-3.
‡ 10 O.R. 387, 4 Cart. 630 (1886).
§ 15 O.R. 398, 4 Cart. 690 (1888).

exclusive power. At 10 O.R., p. 392, 4 Cart., p. 635, he says: "The Dominion Parliament has, by section 91 of the British North America Act, power 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.' It is not necessary to enquire how far that enactment would enable the Dominion Parliament to legislate with respect to the appointment of justices of the peace and police magistrates in any Province of the Dominion, and to authorize the Governor-General to make such appointments, as with relation to the public works, 32-33 Vict., c. 24, s. 7 (D.), or to the management of Indian affairs, as by declaring that an Indian agent shall have the same power as a stipendiary magistrate, 45 Vict., c. 30, s. 3 (D.)." In his report on the New Brunswick Acts for 1889 the Minister of Justice, Sir John Thompson, objects to section 4 of c. 23, an Act respecting Criminal Courts, which provided that the Lieutenant-Governor in Council might appoint stipendiary or police magistrates within any county, saying: "The undersigned again desires to express his doubts as to the right of the Lieutenant-Governor to appoint or of a provincial legislature to authorize the appointment of justices of the peace or other judicial officers. The question is one of difficulty, and there have been decisions both ways, but no final court of appeal has expressly formulated a judgment upon it," and referring to a recent case, which is evidently *Reg.* v. *Bush* just noted, he strongly objects to the argument based in the judgments in that case on the acquiescence of the Dominion Parliament.

In *Reg. ex rel. McGuire* v. *Birkett*,* however, the principle of *Wilson* v. *McGuire*† was followed, and it was held that the provincial legislatures had power to invest the Master in Chambers at Toronto with authority to try controverted municipal election cases, for, as observed by MacMahon, J. (at p. 173): "As the provincial legislature has the exclusive right to make laws relating to municipal institutions, it carries with it the authority to create the tribunal for the trial of contested elections, and the appointment of a magistrate or other officer to hear and determine the validity thereof," subject, of course, as he intimates, to section 96

*21 O.R., at p. 162 (1891).

†2 O.R. 118, 2 Cart. 665 (1883).

of the British North America Act, by which the power to appoint Superior, District, and County Court judges rests with the Governor-General.

So in *North British & Mercantile Fire & Life Insurance Co.* v. *Lambe*, being the case generally known as *Bank of Toronto* v. *Lambe*,* Tessier J., observes: "Provincial legislatures are governments having the rights and privileges inherent in the exercise of government"; and Ramsay, J., in the same case,† likewise says: "It would seem beyond question that this Act" (*sc.*, the British North America Act) "attributes plenary governmental powers with regard to certain matters to both the federal and local bodies, and, so far as I know, this has never been doubted. We have, therefore, one point settled. The local organizations are governments; they enjoy regalian powers, and all the incidents of such powers."

Again, in *Regina* v. *St. Catharines Milling & Lumber Co.*,‡ Burton, J.A., says: "If it is within the competency of the legislature of Ontario to legislate for the management and sale of these lands (*sc.*, the lands in question), as being public lands belonging to the Province, it would follow that they have the minor power of empowering the executive to make any agreement for the extinguishment of all the so-called Indian right." And, in the same case,§ Paterson, J.A., says: "The administrative and the legislative functions I take to be made co-extensive by the Act, as indicated by, *inter alia*, section 130," which section of the British North America Act enacts: "Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the union had not been made."

Thus the conclusion of the whole matter, as the authorities now stand, would seem to be that all executive power necessary to carry into full effect legislative power conferred by the British

*M.L.R. 1 Q.B. 122, at p. 163, 4 Cart. 24, at p. 57 (1885).
†M.L.R. 1 Q.B., at p. 188, 4 Cart., at p. 80.
‡13 A.R., at p. 166, 4 Cart., at p. 205 (1886).
§13 A.R., at p. 171, 4 Cart., at p. 212.

North America Act belongs to the body which has the legislative power (subject to express provisions of the Act, such as section 96), even though the executive power be of a prerogative character; but it cannot be said to be established that, apart from such legislative action, the Act has distributed all prerogative powers having reference to the local affairs of the Dominion between the Governor-General and the Lieutenant-Governors of the Provinces, so as to make these functionaries, as it were, statutory sovereigns in their respective spheres.

CURRENT ENGLISH CASES.

PRACTICE—EJECTMENT—LEAVE TO SIGN JUDGMENT NOTWITHSTANDING APPEARANCE—(ONT. RULE 739).

Jones v. *Stone*, (1894) A.C. 122, is an appeal from Western Australia, but is useful as an exposition of Ont. Rule 739. The action was for the recovery of land, and the defendant had appeared, and the plaintiff had applied for leave to sign judgment under a Rule similar to Ont. Rule 739. The plaintiff claimed that the defendant was estopped, by payment of rent, from disputing his title. The defendant set up that the rent was not paid to plaintiff as landlord, but as a collector for some third party. The court below had granted leave to sign judgment, but the Judicial Committee of the Privy Council (Lords Watson, Halsbury, Macnaghten, and Morris, and Sir R. Couch, and Davey, L.J.) were of opinion that the defendant was entitled to defend on the merits, and set the order aside.

WILL—CONSTRUCTION—WORDS OF LIMITATION.

In *Hill* v. *Brown*, (1894) A.C. 125, the construction of a will was in question, which was governed by the English law of wills as it stood prior to the Wills Act (1 Vict., c. 26)—(R.S.O., c. 109, s. 30). The devise in question did not contain any words of limitation, but after the devise the following words occurred in reference to the devisees: "And whose names are in the schedule named and property specifically mentioned to each of their respective names." On the left-hand margin of the will was written "schedule," and under the word "schedule" the names of the devisees were written, but no particulars of the property given to the devisees named in the will. It was contended that

the use of the word "property," as above, supplied the omission of the words of limitation, and had the effect of giving to each of the devisees all the property which the testator had in the lands devised; but the Judicial Committee of the Privy Council (Lords Watson, Macnaghten, and Morris, and Sir R. Couch) affirmed the judgment of the Supreme Court of New South Wales, holding that the devisees only took a life estate, and that the words "estate" or "property," or any equivalent expression, cannot have the effect of supplying the omission of words of limitation in wills governed by the law, as it stood prior to the Wills Act, unless they occur in the operative part of the devise, and when they are used in other parts of the will by way of reference, as in the present case, they cannot have that effect.

ACT OF BANKRUPTCY.

The Administrator-General v. *Lascelles*, (1894) A.C. 135, may be referred to briefly for the reason that the Judicial Committee (Lords Watson, Hobhouse, and Macnaghten, and Sir R. Couch) have decided that an assignment of the whole of a debtor's property in consideration of a contemporaneous advance and promise of further assistance "in order to enable the debtor to carry on the business, and in the reasonable belief that he would thereby be enabled to do so," is not an act of bankruptcy.

MORTGAGOR AND MORTGAGEE—SALE BY MORTGAGEE AFTER PREVIOUS SALE TO HIMSELF—SALE, POWER OF—INVALID EXERCISE OF POWER.

Henderson v. *Astwood*, (1894) A.C. 150, was an action for redemption of mortgaged property. The mortgage contained a power of sale under which the mortgagee had put the property up for sale by auction, and a son-in-law of the mortgagee was the highest bidder, and the property was knocked down to him; but though ostensibly the purchaser, he was, in reality, acting for the mortgagee. No money passed, but the mortgagee conveyed the property to his son-in-law, and took back a written agreement from him to reconvey when called on. Thereafter the mortgagee went into possession as owner, and made valuable permanent improvements, and subsequently sold the property to the appellant Henderson. The mortgagors contended that the first sale under the power was fraudulent and void, but that it exhausted the power, and the subsequent sale to Henderson was invalid as a sale under the power, and claimed a right to redeem the prop-

erty on payment of what was due under the mortgage. The Supreme Court of Jamaica had given effect to the plaintiff's contention, and held that the sale to the son-in-law was void, and at the same time an execution of the power so as to invalidate the sale to Henderson as a sale under it. They also held that the mortgagee should not be allowed for his improvements unless, in working out the decree, the plaintiffs should find that they were unable to redeem, in which case they were to be allowed to adopt the sale to Henderson, and the mortgagee was then to be allowed his improvements; but Henderson was refused his improvements on the ground that he had purchased with notice of the defect in his title. The Judicial Committee of the Privy Council (Lords Watson, Hobhouse, Macnaghten, Shand, and Morris, and Sir R. Couch) were unable to assent to this view of the law at all. They expressly and pointedly dissent from the finding of the court below that the sale to the son-in-law was a "fraud." They regard it on the evidence before them as an innocent mistake, which, under the circumstances, was made without any intention of defrauding the mortgagors, the equity of redemption at the time of the transaction being practically valueless, and following *Topham* v. *Portland*, 5 Ch. 40, they hold that the subsequent sale to Henderson was a valid execution of the power, notwithstanding the prior invalid sale thereunder; but they hold that the mortgagee who then discovered the invalidity of the prior sale ought to have informed the mortgagors of his willingness to account, and for not having done so they ordered him to pay the costs of the action up to putting in his defence, and while dismissing the action with costs as against Henderson they directed an account as against the mortgagee charging him with an occupation rent, and allowing him for his lasting improvements so far as they added to the value of the property, and directing the balance to be paid by the party by whom it should be found to be payable.

NEGLIGENCE—MASTER AND SERVANT—"COMMON EMPLOYMENT."

In *Union Steamship Co.* v. *Claridge*, (1894) A.C. 185, the Judicial Committee of the Privy Council virtually adopt the principle laid down in *Johnson* v. *Lindsay*, (1891) A.C. 371, to the effect that the defence of "common employment" cannot be relied on unless the servant by whom the injury is caused and the servant injured

are both servants of the same master. It is not sufficient that the injury occurs whilst they are engaged in the same work. In this case the appellants made a contract with stevedores to unload a ship, and engaged, on their part, to provide winch drivers to manage and work the lifting apparatus. These men were paid by the appellants, and there was nothing in the contract to show that while engaged in the unloading they were to be deemed servants of the stevedores, or that the latter were to have any control over them. Claridge, one of the servants of the stevedores, was injured, owing to the negligence of one of the winch drivers, and the defence of common employment was held not to be applicable. The judgment of the Court of Appeal of New Zealand was, therefore, affirmed.

B.N.A. Act, ss. 91, 92—Local legislatures, powers of—Bankruptcy—R.S.O., c. 124, s. 9.

The Attorney-General of Ontario v. *The Attorney-General of Canada*, (1894) A.C. 189, has already been discussed at length (see *ante* p. 182). It is only, therefore, necessary to say here that the Judicial Committee of the Privy Council (the Lord Chancellor, Lords Watson, Macnaghten, and Shand, and Sir R. Couch) have held that the provisions of R.S.O., c. 129, s. 9, are merely auxiliary to a bankruptcy law, and, as such, are *intra vires* of the Provincial Legislature, so long as they do not conflict with any legislation of the Dominion Parliament on the subject of bankruptcy. This, we may observe, is another case in which the decision of the Privy Council must approve itself to the judgment of the legal profession as an able and well-reasoned solution of a somewhat difficult problem.

The Law Reports for June comprise (1894) 2 Q.B., pp. 1-188; (1894) P., pp. 189-220; and (1894) 2 Ch., pp. 1-183.

Bill of sale—Registration—Sale of goods by husband to wife—Receipt—Possession—Husband and wife.

Ramsay v. *Margrett*, (1894) 1 Q.B. 18; 9 R., June, 189, is a decision of the Court of Appeal under the English Bill of Sales Act, 1878 (41 & 42 Vict., c. 31), and inasmuch as that Act differs in many respects from the R.S.O., c. 125, it is somewhat difficult to apply English cases in the construction of the latter Act. In this case the transaction in question arose between husband and wife, who were living together. The husband was in embarrassed

circumstances, and his wife, in order to enable him to pay some of his debts, agreed to buy his household furniture. She paid him the stipulated purchase money, and took a receipt therefor, which wound up with the words, referring to the chattels, "which I now acknowledge are now absolutely her property." No formal delivery of possession of the goods took place, which remained in the house, and were used by husband and wife as before the sale. Under s. 4 of the English Act every "receipt for purchase money of goods and other assurances of personal chattels" is a bill of sale, and by s. 8, if not registered, is void as against creditors of the vendor. After the goods had been sold to the wife they were seized in execution at the suit of one of the husband's creditors, and, being claimed by the wife, an interpleader issue was directed, which was tried before Wright, J., who decided it in favour of the wife, and from his decision the appeal was had to the Court of Appeal (Lord Esher, M.R., and Lopes and Davey, L.JJ.), who affirmed his decision, on the ground that the receipt in this case was not a bill of sale within the Act, because it was not intended to be nor did it operate as an assurance of the goods. And Lord Esher and Davey, L.J., were also of opinion that the wife had a sufficient possession of the goods to take the case out of the Bill of Sales Act, because the possession being equivocal the law would attribute the possession to the wife, who had the legal title. On this point, however, Lopes, L.J., did not express any opinion. It is very doubtful, however, whether, under R.S.O., c. 125, it would be held that there had, in such a case, been such an actual and continual change of possession as to satisfy that Act: see *Snarr* v. *Smith*, 45 U.C.Q.B. 156.

PRACTICE—SECURITY FOR COSTS—PLAINTIFF RESIDENT OUT OF THE JURISDICTION —ACTION ON FOREIGN JUDGMENT.

In *Crozat* v. *Brogden*, (1894) 2 Q.B. 30; 9 R., April, 226, the plaintiff appealed from an order requiring him to give security for costs. The plaintiff was resident out of the jurisdiction, but disputed the defendant's right to security, because the action was brought on a judgment recovered in a contested action in a foreign court, and the defendant by his defence admitted the judgment, though claiming it had been obtained by fraud. The Divisional Court (Mathew and Collins, JJ.) were in favour of

the plaintiff's contention, on the ground that the defendant was seeking a retrial of matters that had been already adjudicated in the foreign action, and the plaintiff was *prima facie* entitled to succeed. But the Court of Appeal (Lord Esher, M.R., and Lopes and Davey, L.JJ.) were of opinion that the circumstances were an exception to the ordinary rule, and the order for security was therefore restored. Davey, L.J., was of opinion that on an application for security the court cannot go into the merits of the action.

PRACTICE—SUING IN FORMA PAUPERIS—NOTICE OF MOTION—COSTS.

In *Jacobs* v. *Crusha*, (1894) 2 Q.B. 37; 9 R., May, 241, the plaintiff had been admitted to sue *in forma pauperis*, but no solicitor had been assigned to him. He gave a notice of motion to reinstate the action, which had been dismissed for default, and it was held not to be open to objection, because it was not signed by a solicitor. The Ord. xvi., r. 29, on which this objection was based, and of which there is no counterpart in the Ontario Rules, was held not to apply, as no solicitor had been assigned. The court, as a condition of granting the application, ordered the plaintiff to pay the costs, and the Court of Appeal (Lopes and Davey, L.JJ.) were of opinion that as the plaintiff was asking an indulgence the court might, as a condition of granting it, impose the terms of paying costs, notwithstanding the applicant was suing *in forma pauperis*.

PRINCIPAL AND AGENT—UNAUTHORIZED BORROWING—MONEY APPLIED FOR BENEFIT OF PRINCIPAL—CHEQUE SIGNED BY PROCURATION—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61), S. 25—(53 VICT., C. 33, S.25) (D.)).

Reid v. *Rigby*, (1894) 2 Q.B. 40, was an action to recover the amount of a cheque signed by the defendants' manager by procuration for the defendants. The manager had authority to draw on the defendants' banking account for the purposes of their business, but he had no authority to overdraw the account, or to borrow money on behalf of the defendants. The manager had, in fact, overdrawn the account for his own purposes; and he then applied to the plaintiff to lend him money for the purpose of paying the wages of the defendants' workmen. The money was lent, and the cheque in question given in payment. The money lent was paid into the defendants' banking account, and used in paying the wages due to the defendants' workmen. The defendants

resisted payment of the cheque on the ground that it being signed by procuration, under the Bills of Exchange Act, 1882, s. 25, (53 Vict., c. 33, s. 25 (D.), the defendants were only bound by such signature if the agent was acting within the actual limits of his authority. Charles and Collins, JJ., although of opinion that this constituted a good answer to the action on the cheque, yet considered that the plaintiff was entitled to recover for money had and received, as the money had actually been used for the defendants' benefit. This case is also reported 10 R., July, 298.

LIBEL—PRIVILEGED OCCASION—ABSENCE OF INTEREST OR DUTY IN PERSON TO WHOM LIBEL ADDRESSED—COMMUNICATION BY DEFENDANT UNDER ERRONEOUS BELIEF IN THE EXISTENCE OF INTEREST.

Hebditch v. *MacIlwaine*, (1894) 2 Q.B. 54, was an action for libel. The plaintiff was elected a guardian of the poor, and the defendants, who were electors, in the *bona fide* belief that the Board of Guardians were the proper authorities to inquire into corrupt practices at such elections, wrote a letter to the board, alleging that the plaintiff had been guilty of treating in order to secure his election, and asking for an inquiry. As a matter of fact, the Board of Guardians had no power to deal with the matter. The defendants claimed that the occasion was privileged, and, therefore, that they were not liable in damages in the absence of proof of malice. The Court of Appeal (Lord Esher, M.R., and Smith and Davey, L.JJ.) were unanimous that the occasion was not privileged, and that it made no difference that the defendants, *bona fide*, believed that the guardians were the proper persons to investigate such charges. Lord Esher, M.R., says: "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge—not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury; but when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion," and he, therefore, held that it was not necessary to submit to the jury any question as to whether the defendants, *bona fide*, believed that the guardians had the right to investigate the charges. The case illustrates the difficulty of wading through our case law. A dictum of Fitzgerald, B., in the Irish case of *Waring* v. *McCaldin*, Ir. R. 7 C.L. 282, which favoured the defendants' contention, is said to have been uttered

per incuriam. *McDougall* v. *Claridge*, 1 Camp. 267, and *Fairman* v. *Ives*, 5 B. & A. 642, which also supported the defendants' view, are supposed to be "not quite accurate, and that qualifying words must have been omitted"; and *Thompson* v. *Dashwood*, 11 Q.B.D. 43, a decision in his favour, is declared to have been wrongly decided. At the same time it is satisfactory to learn that the law was correctly expounded by Parke, B., in *Toogood* v. *Spyring*, 1 C. M. & R. 181, and by Campbell, C.J., in *Harrison* v. *Bush*, 5 E. & B. 344. We suppose the law may now be taken to be settled that, in order to constitute a privileged occasion, the person making the communication must have a duty or interest in making it, and the person to whom it is made must have a corresponding duty or interest in receiving such communication, and that whether such duty or interest exists is a question of fact, and, if the fact does not exist, it is immaterial that the person publishing the libel *bona fide* believed that it did. This case is also reported 9 R., July, 204.

INFANT—CONTRACT—AGREEMENT BETWEEN RAILWAY AND INFANT THAT RAILWAY SHALL NOT BE LIABLE FOR NEGLIGENCE.

Flower v. *London & Northwestern Railway Co.*, (1894) 2 Q.B. 65, was an action brought by an infant against the defendants to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendants' servants. The plaintiff was a boy of about fourteen years of age, and was employed at a colliery, and agreed with the defendant company that, in consideration of their permitting him to travel on their railway to and fro between his house and the colliery, under a certain special arrangement between the colliery proprietor and the defendant company, neither he nor his executors or administrators or relatives should have any claim against the company for any accident, injury, or loss occasioned to him by the negligence of the defendants' servants; and, further, that he, his executors and administrators, would indemnify the company from and against all loss, etc., by reason of any legal proceedings instituted by him or them against the company or any of their servants. The defendants set up this agreement in bar of the action, but the Court of Appeal (Lord Esher, M.R and Smith and Davey, L.JJ.) were of opinion that the agreement was not for the benefit of the plaintiff, and was unfair and not binding upon

him, and they affirmed the judgment of Kennedy, J., at the trial in favour of the plaintiff. This case is also reported 9 R., July, 246.

JOINT CONTRACTOR—CHEQUE GIVEN BY ONE JOINT CONTRACTOR—UNSATISFIED JUDGMENT ON CHEQUE—ACTION AGAINST JOINT CONTRACTOR ON CONTRACT—RES JUDICATA.

In *Wegg Prosser* v. *Davis*, (1894) 2 Q.B. 101, an unsuccessful attempt was made to extend the principle of *Kendall* v. *Hamilton*, 4 App. Cas. 504. The action was brought on a guarantee given by the defendant and one Thomas jointly for the payment by a third person of his rent. Thomas had given his cheque for half a year's rent, and the plaintiff had sued Thomas on the cheque and recovered a judgment, which was still unsatisfied. The action was brought to recover the same half-year's rent from the defendant, and he claimed to be released, by reason of the judgment recovered against his co-contractor on the cheque. He relied on *Cambefort* v. *Chapman*, 19 Q.B.D. 229, but Wills, J., declined to follow that case, and held that, as the cause of action on the cheque and on the guarantee were not the same, the judgment recovered on the cheque was no bar to the action against the defendant on the guarantee, notwithstanding that the cheque had been given in respect of the joint contractors' liability on the guarantee, and he gave judgment in favour of the plaintiff.

CROSSED CHEQUE—TROVER—CONVERSION—BILLS OF EXCHANGE ACT.

Kleinwort v. *Comptoir National D'Escompte de Paris*, (1894) 2 Q.B. 157, illustrates very forcibly the benefit of crossing a cheque in the manner provided by the Bills of Exchange Act. In this case the payee of a crossed cheque indorsed it to the plaintiffs, and posted it to them. In the course of transmission the cheque went astray, and got into the possession of a stranger, who obliterated the indorsement in favour of the plaintiffs, and substituted a special indorsement in favour of himself. He indorsed the cheque and presented it to the defendants, who carried on a banking business in Paris, and requested them to collect it, which they did, and handed him over the money; and it was held by Cave, J., that the defendants, by receiving the money and paying it over to a person who had no title to the cheque, were guilty of a conversion of the cheque, and were therefore liable to

the plaintiffs for the full amount of the cheque. This case is also reported 10 R., July, 277.

COSTS—PRACTICE—REFERENCE OF WHOLE CAUSE OF ACTION TO REFEREE FOR TRIAL—COSTS OF REFERENCE INCLUDED IN COSTS OF ACTION.

In *Patten* v. *The West of England Co.*, (1894) 2 Q.B. 159, a Divisional Court (Charles and Collins, JJ.) decided that where the whole cause of action is referred to a referee for trial, the costs of the reference are part of the costs of the action, and are payable according to the referee's order as to the costs of the action. Under ss. 100 and 101 of the Ontario Judicature Act, and Ontario Rule 550, it is somewhat difficult to say whether this decision has any application in Ontario. These sections of the Statute and the Rule seem to contemplate that in no case can the whole cause of action be referred either to an arbitrator or to a referee for trial, but only some particular question of fact or account. In practice, however, actions are referred for trial to referees to all intents and purposes, except that the judgment is pronounced by the court upon the referee's report, and not by the referee. In such cases the rule laid down in this case is usually followed, and the costs of the reference are deemed to be part of the costs of the action. This case is also reported 10 R., July, 303.

CRIMINAL LAW—"PREVIOUS CONVICTION," MEANING OF.

In *The Queen* v. *Blaby*, (1894) 2 Q.B. 170; 10 R., June, 283, it became necessary to consider what is meant by a previous conviction. The difficulty arose from the fact that the prisoner, although previously found guilty of the offence in question, had not been sentenced, but had been released upon recognizance to come up for sentence when called on, and the point raised on behalf of the prisoner was that without sentence the conviction was not complete; but on a case reserved the court (Lord Coleridge, C.J., and Hawkins, Mathew, Cave, and Grantham, JJ.) were of opinion that the conviction was complete on the prisoner being found guilty, and that a plea of guilty would equally be a conviction. The objection was therefore overruled.

CRIMINAL LAW—FALSE PRETENCES—INDICTMENT, FORM OF.

In *The Queen* v. *Sowerby*, (1894) 2 Q.B. 173; 10 R., June, 245. Lord Coleridge, C.J., and Hawkins, Mathew, Cave, and Gran-

tham, JJ., were agreed that in an indictment for obtaining or attempting to obtain money by false pretences, it is absolutely essential to allege the person to whom the false pretence was made, and also the person from whom the money was obtained, or attempted to be obtained. An averment that the money obtained was the property of a company was held to be unnecessary, and not to cure the omission of the allegations above mentioned.

Notes and Selections.

LORD RUSSELL will be the ninth Lord Chief Justice in one hundred and thirty-eight years. The occupants of the office, therefore, are a long-lived race. The average tenure of the office has been seventeen years. Of the eight who have passed away, Kenyon, Ellenborough, Tenterden, Cockburn, and Coleridge died in office, Mansfield and Denman resigned, and Campbell was promoted to the Woolsack. Lord Campbell held the office for nine years. With this exception, Lord Coleridge's tenure of office was the shortest.—*Law Journal.*

PHOTOGRAPHS AS EVIDENCE.—It was, some time since, decided (*Regina* v. *Tolson*, 4 Fost. and Fin.) that a photograph was admissible to prove identity. In that case, a woman was on trial for bigamy, and, for the purpose of proving the identity of the first husband, a witness was shown a photograph taken from the prisoner, who said it was that of her first husband. The witness was allowed to say that she had seen the prisoner married, and that there was a resemblance between the photograph and the person to whom the prisoner was married. Another witness was called, who, on being shown the photograph, was allowed to say that he had seen the man, whose photograph he held, alive at a certain date. It was held by Wills, J., that the photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or object it represents, and therefore is, in reality, only another species of the evidence which persons give of identity when they speak merely from memory. This principle was followed at the last criminal assizes at Rat Portage. The witness, seeing the prosecutrix in court at the trial, was

unable, owing to the change in her personal appearance, to identify her as the person on whom the offence was committed. The Crown prosecutor thereupon proved certain negatives and photographs as those taken of the prosecutrix on the day of the offence, and the witness at once swore that they represented the woman seen at the time of the offence, and the prisoner was, accordingly, convicted.

LORD COLERIDGE.—The estimates which have been formed and published of Lord Coleridge's quality as an advocate and a judge, in the course of the last few days, have been numerous and bewildering. One inspired critic has been pleased to assert that the late Lord Chief Justice was merely a master of dignified and graceful platitudes; that his cross-examinations at the Bar were notoriously futile; and that his law on the Bench was "always interesting and sometimes accurate." This is not a character sketch, but a caricature, and a very ungenerous and unworthy one. On the other hand, we have been told by high authority, and with equal confidence, that Lord Coleridge and Lord Mansfield will occupy about the same place in the legal firmament. It is to be feared that this estimate is coloured by the warmth and sorrow of an *eloge*. It is useless to compare Coleridge with Cairns or Jessel even, much more with the master intellect of the creator of English commercial jurisprudence. That he had high legal aptitudes is certain, but that he did not care or trouble to cultivate them to the extent which would entitle him to be ranked among supreme lawyers is equally true. The verdict of legal posterity on the late Chief Justice will probably be a compound of the views which lie between these two extremes. Lord Coleridge was not the equal of Sir Henry Hawkins as a cross-examiner. We are satisfied that Sir Henry would have broken the claimant down, which Lord Coleridge certainly did not. But no student of his forensic duels can doubt that he was a skilful handler of the foils. His speeches contained less "grit and iron" than those of Cockburn; but he was unquestionably a more polished advocate; and so on through the whole gamut of forensic and judicial attributes. On one point Lord Coleridge's supremacy will not be challenged—he was the most eloquent speaker whom the Bar, in this country at least, has produced.—*Law Journal.*

DIARY FOR OCTOBER.

1. Monday.....Wm. D. Powell, 5th C.J. of Q.B., 1887. Meredith, J., Chy. D., 1890.
2. Tuesday.....Supreme Court of Canada sits.
7. Sunday.....*20th Sunday after Trinity.* Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Monday.....County Court sitts. for motions and sitts., Surrogate Court in York. Sir W. R. Richards, C.J.S.C., 1875; R. A. Harrison, 11th C.J., Q.B., 1875.
9. Tuesday.....De la Barre, Governor, 1682.
11. Thursday.....Guy Carleton Governor, 1774.
12. Friday.....America discovered. Battle of Queenston Heights, 1812.
14. Sunday.....*21st Sunday after Trinity.*
15. Monday.....County Court non-jury sitts. in York. English law introduced into U. C., 1791.
17. Wednesday...Burgoyne's surrender, 1777.
18. Thursday.....St. Luke.
21. Sunday.....*22nd Sunday after Trinity.* Battle of Trafalgar, 1805.
23. Tuesday.....Supreme Court of Canada sits. Lord Lansdowne, Gov.-Gen., 1883.
24. Wednesday....Sir J. H. Craig, Gov.-Gen., 1807. Battle of Balaclava, 1854.
27. Saturday.....C.S. Patterson, J. of S.C., 1888. Jas. Maclennan, J., Court of Appeal, 1888.
28. Sunday.....*23rd Sunday after Trinity.* St. Simon and St. Jude.
29. Monday.....Battle of Fort Erie.
31. Wednesday....All Hallow's Eve.

Reports.

IN THE MATTER OF THE CITY MANHOOD SUFFRAGE REGISTRATION ACT, 1894, AND IN THE MATTER OF THE APPEAL OF HERBERT MCCOLL.

Registration voters in cities—57 Vict., c. 4, ss. 4, 31—Appeal under s. 31.

The police magistrate, acting as registrar for one of the divisions of the city of St. Thomas, refused to register the appellant, who was willing to take the oath prescribed (Form 8 of the Act) because during the three calendar months next preceding the first sitting of registrars of city manhood suffrage voters of St. Thomas he had been confined in the county gaol, situate within the city, as a convict under sentence, and could not, therefore, be held to have been "a resident of and domiciled in the city," on the list of which he claimed to be entered. Upon application to the Board of Appeal, consisting of the senior and junior judges, and the police magistrate himself, the junior judge held that the appellant *had* the right and the police magistrate held that he had *not* the right to be registered. These opinions were given orally at the hearing. The senior judge reserved his decision until the following day, when he

Held, that the appellant was entitled to the manhood suffrage.

[ST. THOMAS, June 12th.

This was an appeal by Herbert McColl from the decision of the police magistrate of St. Thomas, in his capacity as a registrar of two of the polling subdivisions preparatory to the last general election, refusing to allow the appellant as a voter because he had been confined under sentence for assault in the St. Thomas county gaol during part of the three months next preceding the registry to the Board of Appeal constituted by section 31, consisting of the senior and junior county judges and the police magistrate himself, the *ex officio* registrars, claiming the right to be registered as a manhood

suffrage voter by reason of his alleged residence and domicile in the city of St. Thomas. It was admitted that the claimant had resided in the province all his life, and that he had been a resident of the said city for the three months next preceding the 5th of June, 1894, as well as of the electoral district of West Elgin. But the question was raised upon the appeal as to whether he had been "domiciled," within the above-mentioned period, he having spent some days of the time as a convict in the common gaol of the county of Elgin at St. Thomas.

Harvey for the appellant.

McNish, contra.

The judgment of the court was delivered on the 11th day of June, 1894, by Judge Ermatinger and the police magistrate, orally, the first in favour and the police magistrate against the appeal. The senior judge reserved his decision, but on the 12th of June delivered judgment as follows:

HUGHES, C.J.: I find that three essentials are indispensable under section 4 besides the ordinary ones of full age and citizenship (there being no prohibition nor disqualification under the Ontario Election Act, 1892) in order to entitle a person to be entered on the list of manhood suffrage voters this year.

(1) He must have *resided* within the province for the twelve months next preceding the 5th of June, 1894.

(2) That he was in good faith on that day, and for three calendar months next preceding that day, a *resident of* and *domiciled* in the city on the list of which he is to be entered. (This language is peculiarly unsuitable in defining what ought to be and what *must* or "is" to be, because he is *not* to be entered unless he has a right to be so): "And was in good faith on the 5th of June, 1894, and for the next preceding thirty days a resident of and domiciled within the territory comprising the electoral district, on the list of which he is to be (which means on which he claims to be) entered," etc.

It has been determined in England that a "residence" and a "dwelling" are synonomous terms: *Butler* v. *Ablewhite*, 6 C.B.N.S. 747; *Macdougall* v. *Patterson*, 11 C.B. 755.

In *Dunston* v. *Paterson*, 5 C.B.N.S. 267, it was held that a temporary or a compulsory residence at the time of the commencement of an action in a gaol does not constitute the place of detention the "dwelling" of the party; it must, therefore, only be regarded as a temporary absence, but not one that deprives him of his civil rights. He had no other *home* than in St. Thomas, and for that reason, if a young man not living in a home of his own, or with father or mother or other relative in a home not his own, may be regarded as *residing* in the city and *domiciled* in it at all, then surely the appellant has such right, and was not deprived of it by having spent part of the necessary three months in the gaol which is situated in this city on a compulsory detention there.

Under the English Poor Law Acts a party's residence is where he sleeps, and as Cockburn, C.J., in *Dunston* v. *Paterson*, 5 C.B.N.S. 275, intimated that Maidstone gaol, in which a woman was involuntarily confined, could not be said to have been, in the sense of changing her place of domicile, a person's dwelling place, so I think and determine here that the confinement of this appellant in the county gaol in this city was only temporary, and did not

change or break either the residence or the domicile of the appellant, because it was not voluntary, but compulsory, and in obedience to law.

The word "residence" is quite as large as the word "dwelling," and, as "dwelling" and "domicile" necessarily mean the same, there can be no material distinction between where he is domiciled and where he resides, although the 4th section of this Act seems to draw such distinction. The residence of an officer in barracks has been given as an illustration on this subject—*i.e.*, that if it be urged that the residence of the appellant in gaol here was compulsory, the same may be said of the residence of such officer as equally compulsory; but that circumstance would not deprive the officer from the exercise of his civil rights or of his eligibility for the manhood suffrage attaching to any resident of a city domiciled therein.

Again, the case of a gypsy or a tramp who has no fixed abode—he may be held to reside or dwell wherever he sleeps, but, for want of a three months' domicile, he could have no civil rights or right to the manhood suffrage prescribed by this Act.

The remarks made by Lord Cranworth on *Aikman* v. *Aikman*, in the H. of L. case reported in 4 L.T.N.S. 377, apply in this case, wherein he is reported as saying: "The difficulty in these cases arises from the circumstance that the character of the residence of a man who is making his way in life, or passing idly through it, is often equivocal. His residence at a particular place may have been intended to be merely temporary; it may have been selected from motives of health, or economy, or convenience, or from mere restlessness or instability of character, without the intention, in any of these cases, of abandoning a prior home and adopting a new one. Whether this is or is not the nature of any particular residence must depend on all the circumstances connected with it, the investigation of which must obviously open the door to wide and extensive enquiries."

A person's "domicile" means, generally speaking, the place where he has his permanent home.

That place has been held to be properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special or temporary purpose, with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home, but it must be always the act and choice of himself and of no one else. In Bowyer's "Conflict of Laws," p. 166, we find it laid down that "in cases of conflict depending on the question of domicil there is frequently much difficulty in determining the domicil of the party. This is generally a question not of *law*, but of *fact*, for that is the domicil of a person where he has his true fixed home and principal establishment, and to which, when absent, he has the intention of returning (Anthony's 'Conflict of Laws,' 41 Ch. 4, p. 44, *cum multis aliis*), and two things must occur to constitute *domicil*—first, *residence*; and, secondly, the intention to make it the home of the party."

Where an unmarried man has neither family nor home, but boards, perhaps, in one place and sleeps in another, as some do, within the same munici-

pality; or where he does not sleep in the same bed two nights in succession, but always in the same city, unless he is temporarily absent from it in pursuit of his lawful calling, he must be held to be on the same footing as a commercial traveller having his domicile in St. Thomas. There is no other way of giving a proper and liberal construction to the Act in question, for it never could, with reason, be insisted that young men pursuing an industrious, honest calling which necessarily takes them often from home, as do the employees of railroad companies, possibly could, by this Act, be placed in a position of disadvantage compared with that of the uncertain class of young men familiarly styled "loafers," who eat, drink, and sleep, and smoke cigars in the city at the expense and by the thrift and industry of some one else, but who do nothing whatever to earn their own livelihood, and who are the drones in the city's hive—who are consumers and non-producers of anything that is good or profitable to society, but who are held to be entitled to the suffrage on the principle of counting heads!

I therefore agree in this matter in the opinion expressed by His Honour Judge Ermatinger, that this appeal should be allowed, and that the appellant be certified as entitled to the manhood suffrage.

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [June 21.

WILLIAMS *v.* THOMAS.

Landlord and tenant - Rent - Distress - Action for conversion—Evidence—Finding of trial judge—Non-interference with—Double value of goods distrained—Chattel mortgage—Jus tertii—Assessment of damages—Recovery of amount received from sale of goods—Claim and counterclaim—Judgment—Set-off.

In an action by a tenant against his landlord for a wrongful distress in October, when no rent was due, as the plaintiff alleged, until December,

Held, that although the direct evidence of the defendant and his wife that the rent was due in October, before the distress, was corroborated by the fact that in the previous years of the tenancy the plaintiff had always paid his rent before December, the finding of the trial judge, that the defendant and his wife were not worthy of belief, and that no rent was due at the time of the distress, could not be reversed.

There was no allegation in the statement of claim that the action was brought upon 2 W. & M., sess. 1, c. 5, s. 5, nor that the goods distrained were

"sold," but an allegation that the defendant "sold and carried away the same, and converted and disposed thereof to his own use," nor was a claim made for double the value of the goods distrained and sold, within the terms of the statute.

Held, reversing the decision of FERGUSON, J., that the action was the ordinary action for conversion, and that the value, and not the double value, of the goods distrained should be recovered; but, according to the finding that no rent was due, it was proper to make a liberal assessment of the damages.

Held, also, reversing the decision of FERGUSON, J., that a wrongdoer taking goods out of the possession of another is not at liberty to set up the *jus tertii*, but the person out of whose possession the goods are taken may show the *jus tertii*, and in such case the wrongdoer may take advantage of its being so shown; and the plaintiff, having shown a chattel mortgage subsisting upon a portion of the goods distrained, could not be allowed to recover the value of the mortgaged goods from the defendant without protecting the latter against another action at the suit of the mortgagee.

Held, also, per FERGUSON, J., that the plaintiff was not entitled to recover from the defendant the amount received by him from the sale of the plaintiff's goods in addition to the value of the goods; nor was the defendant obliged to deduct the amount so received by him from the rent which afterwards fell due.

Hoe v. *Lee*, 5 C.B. 754, followed.

Judgment being given in favour of the plaintiff upon his claim, and in favour of the defendant upon his counterclaim,

Held, reversing the decision of FERGUSON, J., that the amounts should be set off.

McConnell for the plaintiff.

N. McDonald and *Tremeear* for the defendant.

Div'l Court.] [June 21.

STEWART *v.* SCULTHORP.

Bailment—Delivery of seed on contract to plant—Property not passing—Condition—Warranty—Damages to land from impurity of seed—Remoteness—Performance of contract—Estoppel—Slander—Words not imputing crime—Privilege—Actual malice.

The defendant gave the plaintiff two bushels of variegated sweet peas to be planted by the plaintiff in his own land, and the produce to be cultivated, harvested, threshed, and delivered to the defendant, for the reward to the plaintiff of $2 per bushel. This contract was performed on both sides, but the peas turned out to be only partly variegated sweet peas, and partly vetches.

The defendant delivered the seeds as and for variegated sweet peas, honestly believing them to be such, and the plaintiff so received them, and neither knew that there were vetch seeds among them, nor at the time did either of them know vetch seeds from variegated sweet peas.

In an action for damages for the injury sustained by the plaintiff by reason of the peas turning out to be partly vetches,

Held, that if the transaction had been a sale of the peas, it would have been

a condition that the seeds delivered should have been variegated sweet peas; and, if they were not, the plaintiff would have been at liberty to reject them.

Chanter v. *Hopkins*, 4 M. & W. 399, specially referred to.

But if, instead of rejecting them, the plaintiff had accepted them, the condition would have become an implied warranty, for the breach of which the plaintiff would have been entitled to compensation.

Behn v. *Burness*, 3 B. & S. 751, followed.

The transaction was, however, not a sale, for the property did not pass; it was merely a bailment.

Assuming that the principles applicable to a sale were also applicable to a bailment such as this, the damages which the plaintiff sought to recover by reason of some of the seeds of the vetches dropping upon the ground when harvested, and cropping up in the following year, were not within the rule laid down in *Hadley* v. *Boxendale*, 9 Ex. 346, and *Cory* v *Thomas Iron Works Co.*, L.R. 3 Q.B. 181, and were too remote.

McMullen v. *Free*, 13 O.R. 57, and *Smith* v. *Green*, 1 C.P.D. 92, distinguished.

The vetch was not a weed, but a plant cultivated in husbandry; and if the plaintiff had strictly performed his contract and delivered the entire produce of the seed, he would not have been damnified.

The plaintiff had, besides, disentitled himself to recover, because, knowing that vetches were growing with the peas from the seed which the defendant had delivered to him, he permitted them to continue to grow, and harvested, threshed, and delivered them to the defendant and received pay for them, without ever mentioning the fact to the defendant.

McCallum v. *Davis*, 8 U.C.R. 150, specially referred to.

The plaintiff also claimed damages for slander in respect of words spoken by the defendant to a third person, to the effect that the plaintiff had changed the seed given him. The jury found that the defendant did not by these words charge the plaintiff with a crime.

Held, that the plaintiff could not recover.

The plaintiff also claimed damages for slander in respect of words spoken to him by the defendant, in the presence of others, to the effect that he had sold the seed given him. The jury found that the words were not spoken in good faith in the usual course of business affairs for the protection of his own interests.

Held, that there was no evidence to sustain such a finding; that the evidence showed that the defendant honestly and justifiably believed that the plaintiff had defrauded him; that the occasion was privileged, and the plaintiff had failed to show actual malice; and therefore he could not recover.

E. B. Stone and *W. R. Riddell* for the plaintiff.

Aylesworth, Q.C., and *Gunther* for the defendant.

STREET, J.] [Sept. 14

IN RE MARTIN AND COUNTY OF SIMCOE.

Public schools—54 Vict., c. 55, ss. 82, 96—Boundaries of school sections—Action of township council—Appeal—Time—County council—Jurisdiction—By-law—Appointment of arbitrators—Award—Confirmation—Waiver—Evidence of.

In the absence of satisfactory evidence of waiver of the objection by all persons interested, a county council has no jurisdiction under s-s. 3 of s. 82 of The Public Schools Act, 54 Vict., c. 55, to appoint arbitrators to hear an appeal from the action or refusal to act of a township council, and to determine or alter the boundaries of school sections, unless a notice of appeal has been duly given within the time mentioned in s-s. 1.

Where a by-law of the county council appointing arbitrators was passed pursuant to a notice of appeal, in the form of a petition, filed with the county clerk after such time had expired, and there was no waiver;

Held, that the authority of the arbitrators to enter upon the inquiry being affected by the want of jurisdiction of the council to pass the by-law, their award could not be confirmed by s. 96 of The Public Schools Act; and the by-law was quashed.

The application to quash was made by a ratepayer of the school section whose boundaries were in question, acting at the request of the trustees of the section, and the solicitors acting for him were also retained by the trustees, whose secretary-treasurer appeared before the committee of the county council, before the by-law was passed, and before the arbitrators, and did not make objections to the jurisdiction of either body.

Held, that, in the absence of proof of the authority of the secretary-treasurer to represent the trustees, it could not be said that they had waived their right to object to the proceedings, nor that the rights of the applicant were entirely gone and merged in those of the trustees.

C. E. Hewson for the applicant.

Pepler, Q.C., for the county corporation.

Chancery Division.

Div'l Court,] [June 30.

MCCAUSLAND *v.* QUEBEC FIRE INSURANCE COMPANY ET AL.

Insurance—Policies in different companies—Division of risks—Relative proportion of loss—Costs.

The plaintiff has insured a building, composed of a front and rear parts, in three different insurance companies; for $3,000 in the first company, placing $2,000 on the front, and $1,000 on the rear; for $2,000 in the second company, placing $1,000 on each; and in the third company for $2,000 on the whole building, making no division.

A loss occurred, appraised at $2,819.81, of which $162.55 was in respect of the front, and $2,657.26 in respect of the rear.

Held, per ROSE, J., that the proper mode of ascertaining the relative amounts payable by the three companies was to add the amounts of their policies together, without reference to the division of the risks, and that each company was liable for its relative proportion, and that the third company, which had the risk on the whole building, was liable for two-sevenths of the loss.

Held, also, that as that company had offered that proportion before actio the plaintiffs should pay their costs, as there was no issue between the defendants on the record, refusing to allow certain letters from the other defendants' solicitors to be put in.

Held, (on appeal to the Divisional Court) that an appeal lies from a judgment awarding costs on a wrong principal, though there is no appeal from the exercise of an erroneous discretion on particular facts; that this was an appealable matter, specially having regard to the correspondence which was excluded by the trial judge in disposing of the costs; and that as the litigation was an essence attributable to the refusal of two of the companies to pay their proper share of the loss, which was so found by the trial judge, the companies who failed should pay the costs of the company who succeeded, and the judgment was modified to that extent.

At the trial, *Geo. Kerr, Jr.*, and *Rowell* appeared for the plaintiff; *Riddell* and *Charles McDonald* for the Quebec Company; *Armour*, Q.C., for the Alliance Company *A. Hoskin*, Q.C., for the Liverpool Company.

Geo. Kerr, Jr., for the appeal.

A. Hoskin, Q.C., *contra*.

Div'l Court.] [June 30.

CARSON *v.* SIMPSON.

Fixtures—Severance from realty—Mortgage of realty—Mortgage of personalty—Execution creditor—Mortgagee—Rights of.

On August 13th, 1881, G., being the owner, mortgaged a biscuit factory, in which were certain fixtures (machinery), to the H. trustees. Two days after he, by a chattel mortgage, mortgaged these fixtures and certain other machinery, not then on the premises, but which were subsequently placed upon the premises as fixtures, to F. On November 3rd, he, by a chattel mortgage, mortgaged both sets of fixtures to the same trustees, and F.'s mortgage was paid off. On June 24th, 1884, he further mortgaged the premises on which the fixtures were to H. M. became the assignee of a judgment against G. and of the mortgage to H., and commenced an action on both, making C. (the present claimant), who had become a tenant of the premises previous to the making of the mortgage to H., a party, and in that action C. as such tenant in November, 1887, redeemed M. and obtained an assignment of the H. mortgage. C. had also become the assignee of the mortgage to the H. trustees. On August 16th, 1888, the sheriff seized the fixtures under an execution in the judgment against G.

Held, (affirming ROBERTSON, J.) that for the purpose of the F. and H. trustees' mortgage there was a severance of the chattels from the realty, but

at the date of the seizure the F. mortgage was at an end, and only the mortgage to the trustees existed; that the effect of the mortgage to H. was that the whole place, land and fixtures, was mortgaged to him in June, 1884, and thus an intention was indicated by the owner G. to reunite the property temporarily severed by the mortgage to the H. trustees, and the whole became land, subject to that intermediate chattel mortgage, and when it expired (which it did in 1889) the temporary character of the personalty disappeared, and the increased value went to feed the landowner's title, and was not intercepted by the execution.

Langton, Q.C., for the appeal.

Walkem, Q.C., *contra*.

STREET, J.] [Sept. 14.

IN RE ONTARIO FORGE AND BOLT COMPANY.

Company—Winding up—R.S.C., c. 129, s. 3—52 Vict., c. 32, s 3.—Voluntary winding up—Compulsory liquidation—"Doing business in Canada."

There is no clashing between s. 3 of The Winding-up Act, R.S.C., c. 129, and s. 3 of The Winding-up Amendment Act, 52 Vict., c. 32. The latter Act provides for the voluntary winding up of the companies falling within its provisions, and not to their compulsory liquidation, which is provided for by the former.

A company incorporated under an Act of the Province of Ontario, and carrying on business in Ontario, is "doing business in Canada" within the meaning of s. 3 of the original Act.

John Greer for the petitioners.

McCarthy, Q.C., and *W. B. Raymond* for the respondents.

Common Pleas Division

STREET, J.] [May 14.

RE KOCH AND WIDEMAN.

Vendors and Purchasers' Act—Power of sale—Surviving executors.

Where executors were given power to sell lands, with a direction to invest part of the proceeds of said sale,

Held, on a petition under the Vendors and Purchasers' Act, that such power could be exercised by the surviving executor, and was not interfered with by The Devolution of Estates Act, R.S.O., c. 108, and amending Act, such power not being merely a bare power, but one coupled with an interest; and it was likewise exercisible, even though it should be held to be without an interest.

A. H. Marsh, Q.C., for the petitioner.

No one showed cause.

STREET, J.] [May 16.

RE CHILLIMAN

Infants—Custody of—Religious faith.

C. died in 1892, leaving him surviving his widow and five children. By his will he appointed J. as executor and guardian of his children, to whom probate was granted. The children lived with their mother until her death in 1894, when J. took charge of them and had the custody of them for a few days, when they were clandestinely taken away by F., the wife's sister, who claimed she was entitled to their custody under a document made by the wife, not under seal, purporting to place the children and her property in her charge. C. and J. were Protestants, while F. was a Roman Catholic, and the object of appointing J. as guardian was that the children should be brought up in their father's faith. S. F. was not possessed of any means to support the children, while J. had made arrangements to have the children placed in an institution where they would be brought up in their father's faith. The custody of the children under the circumstances was granted to J.

The document made by the wife was not subject to probate, not being of a testamentary character, as it purported to take effect immediately; nor did it take effect as an appointment under R.S.O., c. 137, s. 14, not being under seal; but even were it held to be a valid appointment under said section, the court, under the powers conferred by s. 15, would direct that the children should be placed in the institution in question.

The inference, in absence of evidence to the contrary, is that the children are to be brought up in their father's faith.

F. E. Hodgins for the applicant.

Murphy, Q.C., *contra.*

Practice.

STREET, J., In Chambers. [Sept. 10.

HAYES *v.* ELMSLEY.

Dismissal of action—Non-compliance with judgment—Specific performance—Payment of purchase money.

This was an appeal by the defendant from an order of the Master in Chambers made upon an application by the defendant to dismiss the action after judgment in favour of the plaintiff (purchaser) for specific performance of a contract for the sale and purchase of land. The case was appealed to the Supreme Court of Canada, and the judgment there limited a time in which the plaintiff was to pay the purchase money, less [illegible], and receive a conveyance of the land. The purchase money not having been paid within the time limited, the defendant moved to dismiss the action, and the Master made an order dismissing it unless the plaintiff should pay the money within ten days From this order the defendant appealed.

STREET, J.: "I think it was the plaintiff's duty, if he wished to set off his costs against the amount due the defendant, as directed by the Supreme Court, to have taxed them. If he had applied for time, it would only have been granted as a matter of indulgence, and not of right. Here the costs have since been taxed and paid, and there is no case for any indulgence to the plaintiff shown."

Appeal allowed with costs, and order made dismissing the action with costs.

Donovan for the plaintiff.

D. T. Symons for the defendant.

MANITOBA.

COURT OF QUEEN'S BENCH.

Full Court.] [July 27.

TURNER *v.* FRANCIS.

License to take possession of defendant's goods if, in plaintiffs' opinion, he should become incapable of carrying on business—If opinion formed bona fide, the court cannot review it—Appeal from findings of trial judge on conflicting evidence.

The defendant, being indebted to the plaintiffs, had given them a license or power contained in an agreement under seal, made to secure the indebtedness and to indemnify the plaintiffs against certain indorsements for defendant, which provided that upon the death of the defendant or "upon his becoming incapacitated, in the opinion of the plaintiffs or either of them, from any cause from attending to his business," the plaintiffs, or either of them, might take possession of his stock and other property, and sell the same and apply the proceeds upon defendant's liabilities to the plaintiffs.

The plaintiff Turner swore at the trial that he had formed the opinion that the defendant had become incapacitated from attending to his business, but his cross-examination tended to the conclusion that such opinion was not sufficiently founded on facts, and that other persons not in a position of interest would not, probably, have formed such an opinion upon the facts set out in evidence.

The plaintiffs acted on the license and seized the goods and placed an agent in charge, who employed the defendant as his substitute, and left the defendant for a few days in apparently sole possession.

On attempting afterwards to resume actual possession, the plaintiffs were prevented by the defendant from doing so, and then replevied the goods. At the trial of the action before the learned Chief Justice, he entered a verdict in favour of the plaintiffs, finding on the evidence that they had been *bona fide* of the opinion at the time of the seizure that the defendant then was incapable of attending to his business properly, and holding that nothing more was necessary under the agreement in question to entitle the plaintiffs to seize.

Held, on appeal to the Full Court, that on the above finding the verdict was right, and that although there might have been some doubt as to whether such opinion was honestly entertained or sufficiently founded, and another judge

on merely reading the evidence might come to a different conclusion, yet the court, following the principles laid down in *The Glannibanta*, 1 P.D., at p. 287, and *Ball* v. *Parker*, 1 A.K. 603, would not undertake to say that the trial judge was wrong in believing the statement of Turner who was before him, and whose demeanour could only be observed by the trial judge.

Allcroft v. *Bishop of London*, (1891) A.C. 666, followed.

Appeal dismissed with costs.

Howell, Q.C., and *Darby* for the plaintiffs.

Ewart, Q.C., and *Elliott* for the defendant.

Full Court.] [July 27.

CONFEDERATION LIFE ASSOCIATION *v.* THE MERCHANTS BANK OF CANADA.

Money paid in mistake—Recovery of, from agent.

This was an action to recover back money received by the defendants from the plaintiffs under the following circumstances: The plaintiffs had agreed to advance to Bell Bros. the sum of $18,000 upon mortgage of land in Brandon, upon which they were erecting a $29,000 building. The money was to be paid out on progressive estimates during the erection of the building and upon architect's certificates, and the plaintiffs were always to retain in their hands enough of the loan to complete the building.

Bell Bros. had given an order to the defendants' manager at Brandon entitling the bank to receive the several sums to be advanced by the plaintiffs as soon as payable, in order to secure the bank for advances to be made to Bell Bros., and the bank manager was made aware of the manner in which the plaintiffs were to pay out the mortgage moneys.

In pursuance of the above arrangements, the plaintiffs made several payments, amounting, in all, to $15,400, prior to February 1st, 1893, when they received an architect's certificate showing that $1,500 was yet required to complete the building. Upon receipt of this certificate, the mortgage clerk in the plaintiffs' office at Toronto, who had charge of the matter, overlooking the last of the prior advances, a $1,500 cheque, which had not been posted up in the ledger account, issued a new cheque for $2,000 on account of the loan and sent it to the defendants. The defendants' manager, as well as Bell Bros., expected to receive only $500 at that time, as they knew of the architect's certificate then sent, and, in fact, the manager advanced to Bell Bros. only $500 on the strength of it. On receipt of the $2,000 the manager of the bank, suspecting that a mistake had been made, kept the extra $1,500 in a special account, awaiting events.

On the morning of February, the 20th, the plaintiffs' agent informed the bank manager that a mistake had been made and that too much money had been sent, and later on the same day the latter appropriated the $1,500 to making payment *pro rata* on notes given by Bell Bros. to various persons which had been discounted by the bank. A telegram from the plaintiffs' Toronto office requesting the bank to return the money was received the same day, but after banking hours.

The plaintiffs then sued for the return of the $1,500.

The action was tried before DUBUC, J., who entered a verdict for the full amount claimed.

The defendants then appealed to the Full Court, asking that a nonsuit be entered.

Held, that the plaintiffs were entitled to recover from the defendants whatever amount they would have been entitled to recover from Bell Bros. under the circumstances, but that the verdict should be reduced to $933, because although the plaintiffs had by mistake paid $1,500 more than they intended to pay at the time, yet they were only entitled to retain $1,500 out of the loan to complete the building, besides $33 for the costs, so that the sum which Bell Bros. would have been entitled then to receive, and which it would not have been inequitable for them to retain if received, was $1,067, and the excess over his paid was only $933.

Chambers v. *Miller*, 13 C.B.N.S. 125, distinguished.

Appeal dismissed with costs, but verdict reduced to $933.

Atkins, Q.C., and *Dawson* for the plaintiffs.

Ewart, Q.C., and *Wilson* for the defendants.

Full Court.] [July 22.

MACDONALD *v.* G.N.W. CENTRAL R.W. CO.

Sheriff's interpleader—Delay in application for—Defending action by claimant not necessarily a bar—Ambiguous claim.

Appeal from judgment of TAYLOR, C.J., noted *ante* page 366.

Decision affirmed, and appeal dismissed with costs.

Held, also, that the notice given to the sheriff in August, 1893, that Delap and the engine company, "or one or other of them," claimed the engines and tenders, was too indefinite, and would not have warranted an interpleader application.

Bradshaw for Delap.

Clark for the sheriff.

Nugent for the plaintiff.

Full Court.] [July 27.

JOHNSTON *v.* HALL.

False representation—Damages for—Measure of damages—Recovery of future damages.

Judgment of KILLAM, J., noted *ante* page 328, affirmed, and appeal dismissed with costs.

Held, also, that although the lease had still a year to run after the commencement of this action, the plaintiff could, nevertheless, recover all his damages in this action, there being only one contract; and no right to bring a second action under it.

Mayne on Damages, p. 103; Sedgwick on Damages, section 87; *McMullen* v. *Free*, 13 O.R. 57.

Cooper, Q.C., for the plaintiffs.

Anderson for the defendant.

BAIN, J.] [July 19.

RE THE COMMERCIAL BANK OF MANITOBA.

Winding up—Interest to be allowed to creditors.

This was an application by the liquidators of the bank for the direction of the court as to the allowance of interest to the several classes of creditors other than noteholders.

Held, that unless there is a surplus of assets available after payment of the principal of the debts, all interest ceases after the commencement of the winding up.

If, however, there shall be any funds available for the purpose, interest should be allowed as follows:

Depositors who before the winding up had been receiving interest without written agreement, and depositors entitled to interest by special agreement, should now be allowed interest at the agreed on rates, just as if the bank were not being wound up, and any dividends paid them should be applied, first, in payment of the interest accrued, and then on account of principal in the ordinary way.

Depositors whose accounts did not bear interest and general creditors can only claim interest if they have made a demand in writing upon the liquidators under the statute 3 & 4 William IV., c. 42, s. 28, "with notice that interest will be claimed from the date of such demand until the time of payment," and then they are entitled to interest at six per cent. per annum.

Holders of drafts and bills of exchange issued by the bank, drawn either on its own branches, or on other banks or bankers who acted as agents of the bank, will be entitled under s. 5, s-s. 2, of The Bills of Exchange Act to treat them either as bills of exchange or promissory notes of the bank, and can claim interest at six per cent. from the time of presentment for payment to the drawees under section 57 of the Act. The fact that these holders knew that an immediate presentment for payment would be useless does not entitle them to interest from the date of the winding up: *In re East of England Banking Co.*, L.R. 4 Ch. 14, and section 46 of The Bills of Exchange Act.

Holders of cheques drawn on the bank by customers and accepted or certified by the ledger-keepers in the ordinary way and charged to the customers' accounts will not be entitled to interest, unless they have served the demand and notice under the statute 3 & William IV., as in the case of other ordinary creditors.

Such an acceptance or certifying of a cheque by the bank cannot be held to be an "acceptance" of it so as to make it an accepted bill within the meaning of s. 17, s-s. 2, of The Bills of Exchange Act, especially in view of the provisions of section 90 in the case of an instrument "signed" by a corporation, the impression of the name of the bank by the rubber stamp in use not being equivalent to sealing the instrument by its corporate seal.

Phippen for liquidator.

Aikins, Q.C., *Howell*, Q.C., and *J. Campbell*, Q.C., for the several classes of creditors.