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We recorded in our last number the elevation of Mr. Archer Martin, of Victoria, to the British Columbia bench, an appointment which has been very well received. He is the second son of Mr. Edward Martin, Q.C., of Hamilton, Ontario, having been born in 1865. In 1887 he was called to the Bar of Manitoba, and in January, 1894, went to Victoria, where he was shortly afterwards appointed counsel for the Dominion Government, and agent for the Minister of Justice in that city. Mr. Martin recently published a book, which is well thought of in England and in this country, on the land tenures of the Hudson's Bay Company. He was for several years editor of the *Western Law Times*, published in Winnipeg. Being only 33 years old, he must be, we think, the youngest Judge on the Canadian Bench. As a brother journalist we congratulate him upon his appointment, and venture to predict that he will prove a most useful member of the Bench.

Attention has been called in England to what has been styled a "judicial eccentricity," viz.: the sentencing of a prisoner, who was a Frenchman, in his own language. The sentence should undoubtedly have been pronounced in English, but as the prisoner was a Frenchman he was given the benefit of a sentence in a language which he could understand, and probably no great harm was done. There is not much fear of England (whatever may happen in a peaceable manner to the English speaking people in Canada) being dominated either by Frenchmen or the French language. As a contemporary remarks, since the time of Edward III. our own tongue has taken the place of the French in the courts

of law, and although the language of the statutes prior to the reign of Richard III. is generally in Latin or French, all the statutes of Richard III. are in English, and so they continue to be drawn in all subsequent periods. Mr. Justice Darling, who pronounced the sentence, should first have delivered the sentence in English, and then, if thought proper for the benefit of the prisoner, have interpreted it to him in French.

We notice in the issue of the *American Law Review* for August last a discussion by our esteemed contributor, Mr. C. B. Labatt, as to the right of employers to carry on their business with extra-hazardous appliances. The author notices a fact which, so far as we know, has not received as much attention as it deserves, viz., that the period which witnessed the earlier stages of the development of the doctrine of assumption of risks was absolutely dominated by the ideas of the laissez faire school of political economists, and that the more rigorous applications of this doctrine are merely a juridical deduction from the theories of non-interference by the state, and of the sanctity of freedom of contract. It is argued, in the article referred to, that, as those theories have been rudely shaken by the logic of events which have shown conclusively that unrestrained competition cannot be safely trusted to produce the best social results, the law finds itself in the awkward position of administering principles which depend upon discredited hypotheses. It is almost universally admitted by modern thinkers that the state cannot, without serious injury to itself, hold aloof altogether from the struggle between capital and labor, and it is a decided anomaly that the judiciary should be unwilling to recognize this fact. Never, perhaps, has the operation of the rule of stare decisis been productive of greater mischief than it has been in fettering the American courts to precedents resting upon these antiquated theories of the relations between employers and employed. As matters stand, legislation probably furnishes

the only means by which this very important branch of the law can be brought into harmony with the views which have come into vogue since its foundations were laid—a remark which, it may be observed in passing, is to some extent applicable to our own country as well as to the United States, to which the article has a more special reference, though the doctrine of assumption of risks has, so far as the English colonies are concerned, been deprived of much of its sting by the well-known case of *Smith* v. *Baker* (1891) A.C. 325, whilst the "Workmen's Compensation Act" has done away with a few of the more odious results of the defence of common employment.

We have recently given the profession in this Dominion the benefit of the learned writer's views on a recent judgment of the Court of Appeal for Ontario, touching on another point in the law of Master and Servant. (See ante, p. 587). Letters received show that his very able criticism has, in the opinion of at least some of the leading members of the profession, seriously impaired the value of the decision referred to.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

FRAUD—JUDGMENT OBTAINED BY—PRACTICE—ACTION TO SET ASIDE JUDGMENT OBTAINED BY FRAUD.

Cole v. *Langford* (1898) 2 Q.B. 36, was an action brought to set aside a judgment in a previous action which had been obtained by false and fraudulent evidence. The action was undefended. The motion for judgment in default of defence was heard before a Divisional Court (Ridley and Phillimore, JJ.), who, after hearing argument, held that there was jurisdiction to entertain the action, and judgment was granted as prayed; Phillimore, J., referring to *Priestman* v. *Thomas* (1884) 9 P.D. 210, where similar relief was granted.

JOINDER OF PLAINTIFFS—SEPARATE CAUSES OF ACTION—PRACTICE—STRIKING OUT STATEMENT OF CLAIM AS EMBARRASSING, ORD. XVI. R. 1—(ONT. RULE 185).

In *Stroud* v. *Lawson* (1898) 2 Q.B. 44, a motion was made to strike out the statement of claim as embarrassing. The statement of claim alleged as a cause of action that the plaintiff had been fraudulently induced to take shares in a company of which the defendants were directors, and claimed damages against them in consequence. It also alleged that the defendants had paid a dividend on the shares so subscribed for by the plaintiff when there were no profits, and he claimed on behalf of himself and all other shareholders, a declaration that such payments were ultra vires and illegal, and judgment for repayment by defendants of the amount of such dividend to the company. Darling, J., had affirmed the order of a master refusing the application, but the Court of Appeal (Smith, Chitty and Williams, L.JJ.) were of opinion that notwithstanding the alteration made in the Rule, ord. xvi., r. 1 (Ont. Rule 185) consequent on *Somurthwaite* v. *Hannay* (1894) A. C. 494, a plaintiff could not join two causes of action in different capacities, unless he could show that they both arise out of the same transaction. In this case the right which the plaintiff claimed in his representative capacity was held to be quite independent of any fraud on the part of the defendants in inducing him to subscribe for the stock, and therefore the two causes of action did not arise out of the same transaction within the meaning of the Rule. The order of Darling J., was therefore reversed, and the statement of claim was ordered to be struck out unless the plaintiff elected as to which of the two causes of action he would proceed for.

LIBEL—NEWSPAPER—PLEADING—PAYMENT INTO COURT—LIBEL ACT, 1843 (6 & 7 VICT., C. 96), S. 2—(R.S.O., C. 68, SS. 6, 7).

Oxley v. *Wilkes* (1898) 2 Q.B. 56, was a libel case against a newspaper. The defendant pleaded under s. 2 of the Libel Act, 1843 (see R.S.O., c. 68, ss. 6 and 7), that the libel was published without actual malice and without gross negligence, and payment into Court of £5. At the trial the jury found the publication was without actual malice, but not

without gross negligence, and they assessed the damages at £5. Upon these findings the judge at the trial gave judgment for the plaintiff for £5, and the Court of Appeal (Smith and Williams, L.JJ.), held that this was right, as the defence had failed as to the question of negligence, and the payment having been made as part of the defence under the Libel Act it could not be treated as a general payment into Court, so as to entitle the defendant to judgment on the ground that the plaintiff had not recovered more than the amount paid in. Owing to the difference between the English and Ontario Statutes and Rules it may, however, perhaps be doubtful whether this case would necessarily be followed in Ontario.

SALE OF GOODS—BILL OF LADING—SALE BY PERSON HAVING BILL OF LADING—PASSING PROPERTY—POSSESSION OF GOODS—SALE OF GOODS ACT, 1893 (56 & 57 VICT., C. 71), S. 19, S.-S. 3; S. 25, S.-S. 2—FACTORS ACT, 1889 (52 & 53 VICT., C. 45), S. 2, S.-S. 2—(R.S.O., C. 150, S. 5).

Cahn v. *Pocketts B.C.S.P. Co.* (1898) 2 Q. B. 61, was an action to recover goods sold by a person without authority of the owners, under the following circumstances: The goods in question consisted of a quantity of copper sold by Steinmann & Co. to one Pintscher. The copper was shipped on the defendants' steamer, and Steinmann forwarded the bill of lading to Pintscher, together with a bill of exchange for acceptance. Pintscher refused to accept the bill, but kept the bill of lading and, in fraud of Steinmann, sold the copper to the plaintiffs, in whose favour he indorsed the bill of lading. Steinman thereupon stopped the delivery of the copper; and the question was whether under the Sale of Goods Act, 1893, and the Factors Act, 1889 (see R.S.O., c. 150, s. 5), the plaintiffs had acquired a good title as indorsees of the bill of lading. By the Sale of Goods Act, s. 19, s.-s. 3, where a seller of goods draws on the buyer for the price, and transmits the bill of exchange with the bill of lading, if the buyer does not accept the bill of exchange he is bound to return the bill of lading to the seller. This, however, merely gives statutory sanction to the decision of the House of Lords in *Shepherd* v. *Harrison*, L.R. 5 H.L. 116, but it was claimed by the plaintiffs, notwithstanding, that under the Factors Act, the buyer

having in his possession the bill of lading was an agent entrusted therewith, and competent to confer a title; but Mathew, J., was of opinion that he was not an agent within the meaning of the Act, and not entrusted with the bill of lading "with the consent of the seller" within the meaning of s. 25, s.-s. 2 of the Sale of Goods Act, 1893. How far this case may be of authority for the construction of R. O., c. 150, s. 5, needs some consideration, owing to the difference in the statute law of England and Ontario. The case is, however, one which can hardly be neglected in considering the Ontario Act.

CHATTEL MORTGAGE—MORTGAGEE TAKING POSSESSION FOR DEFAULT IN PAYMENT OF INSTALMENT—RIGHT OF MORTGAGOR TO REDEEM—REDEMPTION —ACCELERATION OF PAYMENT OF PRINCIPAL.

Ex parte Ellis (1898) 2 Q.B. 79. In this case a chattel mortgagee had taken possession of the mortgaged property for default in payment of an instalment of interest, whereupon the mortgagor claimed the right to redeem the mortgage, which did not become due until the end of two years. Darling, J., held that he was so entitled; but the Court of Appeal (Smith & Williams, L.JJ.) held, that as the mortgagee had merely taken possession for the purpose of enforcing payment of the interest in arrear, and not for the purpose of recovering the principal, the mortgagor had no right to accelerate the payment of the principal.

BY-LAW—REASONABLENESS—PREVENTION OF STREET SINGING AND MUSIC—DIVISIONAL COURT DECISION OF, WHEN NOT BINDING ON ANOTHER DIVISIONAL COURT.

In *Kruse* v *Johnson* (1898) 2 Q.B. 91, a strong Divisional Court (Lord Russell, C.J., Jeune, P.P.D., Chitty, L.J., and Wright, Darling, Channell and Mathew, JJ., was called on to determine the validity of a municipal by-law prohibiting any person playing music or singing in any public street within fifty yards of any dwelling house after being requested by any constable, or an inmate of such house, or his or her servant, to desist. The Court held that the by-law was valid, Mathew, J., dissenting, and, in doing so, the majority of the

Court lays down the principle that in considering the validity of by-laws made by a public representative body like a county council the Court ought to be slow to ajudge them unreasonable, unless they find them to be partial and unequal in their operation as between different classes, or manifestly unjust, or made in bad faith: or involving oppressive and gratuitous interference with the rights of those subject to them, as would in the minds of reasonable men be without justification. Mathew, J., suggests that in cases where there is no appeal from the decision of a Divisional Court, the decisions of one Divisional Court are not binding on another. This view was recently acted on by the Chancery Divisional Court in Ontario, sitting as a Court for Crown Cases reserved, when it differed from a previous decision of a similar court composed of the Judges of the Queen's Bench Division. See *Queen* v. *Hammond*, 29 Ont. 211.

INSURANCE—BURGLARY—LOSS BY THEFT—ENTRY BY OPENING DOOR—ACTUAL FORCIBLE AND VIOLENT ENTRY.

In re Goldsmiths and General Burglary Ins. Co. (1898) 2 Q.B. 136, a special case was stated by an arbitrator in this case. A policy of insurance was expressed to be made against "loss or damage by burglary and housebreaking as hereinafter defined," and witnessed that if the property, which was jewellery, should be lost by theft following upon actual forcible and violent entry upon the premises wherein the same was situate, the insurers should pay. The jewellery was in a shop, the front door of which was shut, but not locked or bolted, and access could be gained by turning the handle of the door. In the absence of the porter, before the shop was opened for business in the morning, somebody opened the front door, entered the shop and stole the jewellery. The question was whether this was a loss covered by the policy. Wills and Kennedy, JJ., held that it was, and that the words "actual forcible and violent entry" excluded a constructive entry, but were satisfied by an actual entry, although not accompanied by any great degree of force or violence—provided it was such as to constitute housebreaking or burglary of the premises, and was equivalent to "breaking and entering."

EVIDENCE—COMMISSION—SENDING SUBJECT MATTER OF ACTION OUT OF JURISDICTION FOR INSPECTION OF WITNESSES—ORDER XXXVII. R. 5, ORD. L., R. 3 (ONT. RULES 499, 1096).

Chaplin v. *Puttick* (1898) 2 Q.B. 160. This was an action brought to recover a stamp album alleged to have been stolen from the plaintiff at Johannesburg, in the Transvaal. On his application the album was ordered to be sent out to the Transvaal for the purpose of being inspected by witnesses for the plaintiff, who were to be examined by commission. The application being based on the provisions of Rules, Ord. xxxvii. r. 5, Ord. l., r. 3. (Ont. Rules 499, 1096).

INTERPLEADER—PAYMENT INTO COURT BY CLAIMANT—SUBSEQUENT SEIZURE OF SAME GOODS BY ANOTHER CREDITOR—FURTHER PAYMENT INTO COURT—PRACTICE.

In *Kotchie* v. *Golden Sovereigns* (1898) 2 Q.B. 164, goods had been seized under execution, and had been claimed by a third person, as between whom and the creditor an interpleader issue had been directed, the claimant paying the value of the goods into Court to abide the result. The goods were subsequently seized by another execution creditor, and again claimed by the same claimant, and the question was whether he could be required, as against the subsequent execution creditor, again to pay the value of the goods into Court. Grantham, J., held that he was only liable to pay the extra costs, but the Court of Appeal (Smith and Chitty, L.JJ.) allowed the appeal from his order, and held that the second execution creditor was entitled to require security to be given for the full value of the goods, as the first payment into court did not operate as a purchase of the goods.

BILLS AND NOTES—ENDORSER LIABILITY OF—ENDORSEMENT OF INCOMPLETE BILL—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., S. 61) SS. 55, 56 (53 VICT., C. 33, SS.).

Jenkins v. *Coomber* (1898) 2 Q.B., 168, was an action against an indorser of a bill of exchange which failed, because at the time of the indorsement by the defendant, the bill was incomplete. The facts of the case were as follows: Arthur Coomber owed the plaintiffs money, and for the purpose of securing the amount due, it was agreed that the plaintiffs

should draw a bill on Arthur Coomber, which Alfred Coomber, the defendant, should indorse. The plaintiffs accordingly drew a bill on Arthur, payable to their own order, which was accepted by Arthur, and indorsed by Alfred Coomber, and handed to the plaintiffs, and afterwards indorsed by them. Under these circumstances it was held by Wills and Kennedy, JJ., that the defendant was not liable to the plaintiffs as indorser under the Bills of Exchange Act, s. 56 (53 Vict. c. 33, s. 56 D.), because when he indorsed it, it was not a regular and complete bill of exchange, it not having been then indorsed by the plaintiffs, to whose order it was made payable. Neither was the defendant liable as an indorser to the plaintiffs under s. 55, s.-s. 2 (53 Vict. c. 33, s. 55 D.) because they were prior parties to the bill, and the case was therefore governed by *Steele* v. *McKinlay*, 5 App. Cas. 754, the contract of indemnity on which the plaintiff relied as making the defendant primarily liable to the plaintiff not being recognized by the law merchant, and as a contract of suretyship being insufficient under the Statute of Frauds.

In connection with this case *Duthie* v. *Essery*, 22 A.R. 191, may be referred to, where an indorser indorsed a note before it had been delivered to the payee or indorsed by him, but nevertheless was held liable to a holder "in due course."

SHERIFF—Execution—Going out of possession—Abandonment of seizure.

In *Bagshawes* v. *Deacon* (1898) 2 Q.B. 173, the question upon an interpleader issue was whether a sheriff, who had seized the goods in question, had gone out of possession. Deacon, the execution creditor, had a judgment against Bagshawe Bros. on which he issued execution which he placed in the sheriff's hands, who seized thereunder the goods in question. Bagshawe & Bros. had previously agreed to sell the property seized to a trustee for Bagshawes, Limited, and on 10th July, when the sheriff went in, the sale was about to come off. The officer was told that the goods were about to be sold, and he was given a paper by one of the execution debtors under which, if the man in possession was withdrawn, he was to be at liberty to re-enter at any time until the action

of the execution creditor was settled. The sheriff's man was thereupon withdrawn. The proposed sale was then completed on 12th July, to the claimants Bagshawes, Limited, and they took delivery of the property in dispute. On the 13th July the sheriff's officer again took possession of the goods under Deacon's fi. fa. The Court of Appeal (Smith and Chitty, L.JJ.) affirmed the judgment of Ridley, J., in favour of the claimant's, holding that on the evidence the sheriff must be taken to have abandoned the seizure, that the question of abandonment is one of fact, and the evidence in the case showed that the sheriff had withdrawn because the debtor had represented that it would be inconvenient to have him in possession, pending the contemplated sale, and he must therefore be taken to have abandoned the seizure to enable the sale to be completed.

DISCOVERY—SHIP'S PAPERS—MARINE INSURANCE.

In *China Traders' Ins. Co.* v. *Royal Exchange Ins. Co.* (1898) 2 Q.B. 187, the Court of Appeal (Smith, Chitty, and Williams, L.JJ.) overruled Mathew, J., on a point of practice. The action was on a policy of marine re-insurance, in which the defendants applied for discovery of the ship's papers, which Matthew, J., refused, but which the Court of Appeal held they were entitled to.

SOLICITOR'S LIEN—ADMINISTRATION ACTION—DOCUMENTS IN SOLICITOR'S POSSESSION BEFORE ACTION—THIRD PARTIES, RIGHT OF, TO PRODUCTION OF DOCUMENTS.

In re Hawkes, Ackerman v. *Lockhart* (1898) 2 Ch. 1, a solicitor of executors who were parties to an administration action, had documents relating to the estate which had come into his possession before action commenced. Third parties interested in the estate applied to have the documents produced for the purpose of the administration proceedings; the solicitor resisted the application, alleging a lien on the documents for his costs. The fact that the documents had come into the solicitor's possession before action was relied on, as taking the case out of the ordinary rule, that documents required for the purpose of an administration action in which

third parties are interested must be produced, notwithstanding a solicitor's lien thereon, but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) agreed with Kekewich, J., that that circumstance did not affect the right of the third parties to production, and it was accordingly ordered, and the solicitor was ordered to pay the costs of the application and appeal.

DOMICIL—INTERNATIONAL LAW—MARRIAGE—MATRIMONIAL DOMICIL—CHANGE OF DOMICIL—MOVABLE GOODS—FRENCH LAW—COMMUNITY OF GOODS.

In re De Nicols, De Nicols v. *Curlier* (1898) 2 Ch. 60, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Kekeiwich, J., (1898) 1 Ch. 403 (noted ante, p. 374), holding that by reason of the change of domicil after marriage, the law of the matrimonial domicil of the parties ceased to govern their rights in the movable goods of the spouses, and as, at the time of the husband's death, the parties were domiciled in England, the law of England governed the rights of the parties in unsettled movable property, and that the whole of the husband's personal estate was effectually disposed of by his will. The decision of the House of Lords in *Lashley* v. *Hog*, 4 Pat. 581 was considered to govern the case.

ARBITRATION—STAYING PROCEEDINGS—STEP IN THE PROCEEDINGS—APPLICATION TO STAY PROCEEDINGS—TIME—ARBITRATION ACT, 1889 (52 & 53 VICT. C. 49) S. 4—(R.S.O. C. 62, S. 6.)

In *Zalinoff* v. *Hammond* (1898) 2 Q.B. 92, an application was made by a defendant to stay the action on the ground that the plaintiff had agreed to refer the matters in question to arbitration. Under the Arbitration Act, 1889, s. 4 (see R.S.O. c. 62, s. 6.) such an application is required to be made by a defendant at any time after appearance, but before delivering pleadings, or taking any other steps in the proceedings. The defendant in the present case had filed affidavits in answer to a motion by the plaintiff for a receiver, but this was held by Stirling, J., not to be a step in the proceedings within the meaning of the section.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT BY ONE OF TWO EXECUTORS AND TRUSTEES—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 W. 4, c. 27), s. 42—(R.S.O., c. 133, s. 17).

Astbury v. *Astbury* (1898) 2 Ch. 111, is a case as to the sufficiency of an acknowledgment under the Statute of Limitations (see R.S.O., c. 133, s. 17). The acknowledgment in question was given by one executor and trustee without the consent and concurrence of his co-executor or trustee, that more than six years arrears of interest was due on the plaintiff's mortgage, and it was held by Stirling, J., not to be a sufficient acknowledgment to bind the real estate under the Act, although it might be sufficient to bind the personal estate, a point which he did not decide. This decision turns on the ground that, qua executor, he had no power to bind the land, and as trustee of the land he could not bind it without the concurrence of his co-trustee. But in Ontario where an executor, qua executor, has a similar power over the land to that which he has over the goods of his testator, it is possible that the consent of an executor under such circumstances might be sufficient.

SPECIFIC PERFORMANCE — CONTRACT — VENDOR AND PURCHASER — "SUBJECT TO APPROVAL OF CONDITIONS AND FORM OF AGREEMENT"—MISTAKE RESCISSSION—INTEREST—WILFUL DEFAULT.

North v. *Percival* (1898) 2 Ch. 128. This was an action for specific performance of a contract for the sale of land. By "heads of agreement" between the plaintiff and defendant it was agreed that the plaintiff should purchase "36 acres of land," the boundaries of which were accurately defined on three sides, but not on the fourth, for £3,600, "subject to the approval of conditions and form of agreement by purchaser's solicitor." The defendant subsequently discovered that the land he intended to sell measured 42 acres, and he refused to carry out the sale, unless the plaintiff took the 42 acres at £4,200. The plaintiff on the other hand insisted that the contract should be carried out for the 36 acres, and brought the action for specific performance. The contract contained a stipulation that if the purchase was not completed by a day named, the purchase money should bear interest from that

day until actual completion. Kekewich, J., held that the plaintiff was entitled to specific performance, because the fourth boundary could be readily fixed so as to include 36 acres, and the "heads of agreement" constituted a completed agreement, and that the clause "subject to the approval, etc.," was not a condition precedent to its taking effect, and that there was no such mistake as would entitle the defendant to a recission of the contract. He, however, held that the defendant's resisting specific performance did not constitute "wilful default" so as to disentitle him to interest on the purchase money.

HOUSE OF LORDS—FINALITY OF DECISION BY.

In *The London Street Tramways Co.* v. *The London County Council* (1898) A.C. 375, the House of Lords lays down the very reasonable rule that its decision on a point of law is conclusive and binding in all subsequent cases, and the law as so settled can only be altered by statute; whether this rule has always been observed, however, is we think open to doubt. We presume the same finality should, and theoretically does, attach to decisions of the Judicial Committee of the Privy Council, though its decisions in ecclesiastical cases are certainly hard to reconcile. The Lord Chancellor is careful to point out that where a previous decision is based on a mistake of fact, as for instance, an omission to notice the existence of a statute affecting the question, or an erroneous assumption that a statute is in force when in fact it is repealed,—in such a case the decision would not have a binding effect.

CONTRACT—CONSTRUCTION—"ERECTION OR USE."

Southland Frozen Meat Co. v. *Nelson* (1898) A. C. 442, is a decision of the Judicial Committee of the Privy Council (The Lord Chancellor, and Lords Herschell, Macnaghten and Morris, and Sir R. Couch) on an appeal from New Zealand. The point at issue was the construction of a contract whereby the respondents had agreed with the appellants "not to erect or assist, or be in any way concerned or interested in the

erection of or use of freezing works at Bluff." The respondents had thereafter contracted with one Ward to purchase all frozen meat produced at his works at Bluff, and also to purchase his freezing works at Bluff at the expiration of their contract with the appellants, together with additional works to be completed at that date. It was claimed that this was a being "concerned or interested in the erection or use of freezing works at Bluff" in breach of the respondents' contract with the appellants, but the Privy Council affirmed the judgment of the New Zealand Court, dismissing the action, being of opinion that the "use" contemplated by the contract was the manufacturing use, and not the mere buying of the output of other works; and that the agreement to buy the contemplated additions to Ward's works was not assisting or being in any way concerned in the erection of "freezing works" within the meaning of the contract.

COMPANY—STATUTORY DUTIES OF—BREACH OF—CAUSE OF ACTION.

Johnston v. *Consumers Gas Co.* (1898) A C. 447, is a question which has excited some interest in Toronto, the action having been brought by the plaintiff on behalf of himself and other consumers of gas, to compel the Consumers Gas Co. of that city to refund alleged overcharges for gas supplied by them in excess of what they were entitled to, and to compel them to fulfil certain statutory obligations. The Court of Appeal dismissed the action (see 23 A.R. 566), on the ground that the plaintiff had no locus standi, because the special case agreed to between the parties contained no admission of the alleged overcharge. In dismissing the appeal the Judicial Committee (The Lord Chancellor and Lords Watson, Macnaghten and Morris, and Sir R. Couch) take somewhat broader ground and hold that no individual customer has any right of action against the company for alleged non-compliance with their statutory duty, but that the corporation of the city alone has power to enforce the due performance of those obligations.

STATUTE—RETROSPECTIVE EFFECT OF.

Young v. *Adams* (1898) A.C. 469, may be referred to as bearing on the question when a retrospective effect ought to be given to a statute. The Judicial Committee of the Privy Council (Lords Watson, Macnaghten and Morris, and Sir R. Couch) affirm the rule that a statute ought never to be given a retrospective effect, unless the intention of the legislature that it shall be so construed, is expressed therein in plain and unambiguous language.

MUNICIPAL ELECTION—NOMINATION PAPER—ELECTION ORDER—1898 R. 4 (2)—(R.S.O. c. 223, s. 128 (1).

Cox v. *Davis* (1898) 2 Q.B. 202, is a case which may be useful as an authority for the construction of the Municipal Act (R.S.O. c. 223) s. 128 (1). The point in question was as to the validity of a nomination paper, which under the English Election Ord. 1898, r. 4 (2) is required to contain the names of the candidate nominated, and to be signed by the proposer and seconder, as does s. 128 (1) of the Municipal Act. The paper in question was in proper form, but the name of the candidate had been filled in after the paper had been signed by the proposer and seconder, but there was no evidence that the proposer and seconder had not assented to the name filled in as candidate. Grantham and Lawrance, JJ., held that the paper was valid, though conceding that it would not be so if the name filled in had not been assented to by the proposer and seconder. The decision of the returning officer in favour of the validity of the paper was, under the Election Ord. 1898, r. 7, held to be final and conclusive, and the case cannot, therefore, be regarded as an authority.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Nova Scotia.] MURRAY *v.* JENKINS. [June 14.

Vendor and purchaser—Principal and agent—Mistake—Contract—Agreement for sale of land—Agent exceeding authority—Specific performance—Findings of fact.

Where the owner of land was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her, and under the mistaken impression that the offer was for the purchase of certain swamp lots only, whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her, and was set aside by the court on the ground of error, as the parties were not ad idem as to the subject matter of the contract, and there was no actual consent by the owner to the agreement so made for the sale of her lands. Appeal allowed with costs.

Newcombe, Q.C., for appellant. *Borden*, Q.C., for respondent.

Ontario.] BOULTON *v.* BOULTON. [June 14.

Estoppel—Conveyance by married woman—Agreement—Recital.

B., a married woman, in order to carry out an agreement between her husband and his creditor, consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on the farm, and of indemnity against her personal liability on a mortgage against said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels, but gave the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor.

Held, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife; and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage. Appeal dismissed with costs.

Wallace Nesbitt, and *W. J. Clarke*, for appellants. *O'Flynn*, for respondent.

New Brunswick.] WALLACE *v.* LEA. [June 14.

Married woman—Separate property—Conveyance—Contracts—C.S.N.B. c. 72.

Sec. 1 of C.S.N.B. ch. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband, and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power of disposing of such property, or allow her to enter into contracts which at common law would be void. The judgment reported in 33 N.B. Rep. 492 reversed. *Moore* v. *Jackson*, 22 S.C.R. 218, referred to. Appeal allowed with costs.

Pugsley, Q.C., and *Teed*, for appellants. *Powell*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Divisional Court.] MOORE *v.* CARBERRY. [July 15.

Malicious prosecution—Conspiracy—Reasonable and probable cause—Evidence of.

In an action for malicious prosecution in charging the plaintiff with conspiracy to defraud the defendant of a sow, claimed by the defendant to be his, the laying of the information, the prosecution on the charge, and the dismissal were proved, and evidence given by the plaintiff and two others charged with the offence, denying it, while the magistrate stated that in his judgment, there was no evidence to prove the conspiracy, but the evidence given before him was not produced. Evidence was also given by a neighbour that, before the charge was laid, he informed the defendant that he did not believe the sow to be the defendant's, giving the defendant his reasons therefor, though he thought the defendant honestly believed it to be his. Evidence was also given by the County Attorney that the defendant had laid a number of the facts before him, and that he had drawn up the information, and, though he stated at the trial that he did not think there was much in it, it did not appear that he had so informed the defendant.

A finding by the learned trial judge that the absence of reasonable and probable cause had not been shown was affirmed by the Divisional Court, ROSE, J., dissenting.

Blain for plaintiff. *Justin* for defendant.

Divisional Court.] RE BRITISH MORTGAGE LOAN CO. [July 15.

Municipal corporations—Assessment and taxes—Court of Revision—Appeal to County Judge—Assessor—Right to appeal.

The appeal from the Court of Revision to the County Judge in a case where such court allows an appeal against an assessment, cannot be made by the assessor as such, nor as a ratepayer, but the appeal must be by the corporation itself.

Judgment of ARMOUR, C.J. reversed, MEREDITH, C.J. dissenting.

W. H. Blake for the loan company. *Idington*, Q.C., for the corporation.

Divisional Court.] DOUGLAS *v.* HUTCHINSON. [Aug. 1.

Libel—City Solicitor—Newspaper—Comments in, on conduct of—Belief in truth of statements published—Erroneous charge—New trial.

The discussion of the conduct of a solicitor of a municipal corporation in that capacity, is a matter of public interest, and a newspaper is entitled to criticise or make fair comments thereon, but the statements on which the criticism or comments are based must be true, and not merely believed to be true.

Where, therefore, in an action for libel for statements published in a newspaper on which comments were made criticising the plaintiff's conduct as such solicitor, the jury, although they were told that any criticism on the plaintiff's conduct must be based on the truth, were, at the same time told that it was sufficient if the statements on which the criticism was founded were believed to be true, on which there was a finding for the defendant, such finding was set aside and a new trial denied.

MACMAHON, J., dissented.

Shepley, Q.C., for plaintiff. *John King*, Q.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

HENRY, J.] IN RE LAWRENCE H. MILLER.

Collection Act of 1894, c. 4—Warrant for commitment to jail—Where bad, new warrant can not be substituted after jailor's return under R.S., c. 117.

Application for discharge of prisoner under R.S., c. 117. Prisoner was confined in jail under the warrant of a Commissioner under the "Collection Act," N.S., Acts 1894, c. 4. The warrant was in the form schedule H to the Act, and recited "that the said debtor obtained credit for the said debt without having at the time any reasonable expectation of being able to pay the same, and obtaining credit for the said debt by false pretensions or representations." The warrant had previously recited the recovery of the judgment, but did not specifically state that the judgment was recovered for a debt. The jailor having returned the warrant, *Harris*, Q.C., moved for his discharge, citing the decision of RITCHIE, J. in *Re Moore*.

Ritchie, Q.C., admitted the warrant was bad, and asked for an adjournment to file a new warrant, citing *Rex* v. *Rogers*, 1 D. & R. 156, *Rex* v. *Taylor*, 7 D. & R. 622, *Reg.* v. *Lavin*, 12 P. R. Ont. 642.

HENRY, J., adjourned the hearing, reserving the question as to whether that course was proper, and also as to whether a new warrant could be substituted.

The matter coming on for further hearing, and a good warrant having been filed in the meantime,

Harris, Q.C.—The Judge should not have adjourned the proceedings: *In re Timson*, 5 L.R. Exch. 257; Paley on Convictions, 347; Short & Mellor,

357. A new warrant cannot be substituted after return of the jailor: *Ex parte Cross*, 26 L.J.M.C. 201. The Commissioner is functus officio when he signed the first warrant: Acts, 1894, c. 4, s. 9. Assuming that a warrant can be amended where there is a good conviction there is nothing here to amend by, as the commitment and conviction are in one document, and both bad.

Ritchie, Q.C.—The new warrant holds the prisoner, and cannot be ignored. The Commissioner had power to substitute a new warrant at any time before discharge: R.S., c. 117, ss. 5, 10; *In re Phipps*, 11 W.R. 730; *Ex parte Cross*, 26 L.J.M.C. 201; *Ex parte Smith*, 3 H. & N. 227; *Reg.* v. *Turnan*, 33 L.J.M.C. 291; *Charter* v. *Graeme*, 13 Q.B. 216.

HENRY, J., held that the warrant was bad, and that he should not have delayed the discharge of the prisoner. He did not think a new warrant could be legally substituted after the return of the jailor under R.S., c. 117, 5th series. The Commissioner acting under Acts, 1894, c. 4, was functus officio when he made the first warrant. The words of R.S., c. 117, s. 10, refer to a warrant filed in another proceeding, and are not authority for substituting a good warrant for a bad one. The prisoner was discharged.

Province of Prince Edward Island.

SUPREME COURT.

HODGSON, J.] MCPHERSON *v.* MCDONALD. [Sept. 7.

Ca. sa.—Irregularity.

The plaintiff having recovered judgment issued a writ of fi. fa. to the Sheriff of Queen's Co. under which defendant's goods were sold. The Sheriff made return that he had seized and sold certain goods of defendant, but did not state that the defendant had no other goods to levy on. The plaintiff then issued a ca. sa. for the whole amount of the judgment without reference to the previous fi. fa., but in endorsing the amount due on the back of the ca. sa. credit was given for the sum realized under the fi. fa.

The defendant was committed to jail and an application was made to discharge him and set aside the ca. sa. for irregularity inasmuch as it was issued without any entry on the record of the previous fi. fa. and return and award of the ca. sa., and because it did not recite the first writ and the amount levied under it.

Held, that the ca. sa. was irregular.

Stewart, Q.C., for defendant. *McDonald*, Attorney-General, for plaintiff.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] DAY *v.* RUTLEDGE. [June 27.

Tax sale—Mortgagor and mortgagee—Purchase at tax sale by wife of mortgagor—Assignment of tax sale certificate—Purchaser for value without notice—Pleading—Joinder of causes of action—Onus probandi—Assessment Act, s. 186.

Appeal by plaintiff against the lien for taxes paid given to the defendant Lawlor by the judgment ordered to be entered at the trial before Dubuc, J., noted ante. p. 279, and appeal by the defendant Lawlor who claimed that the action should be dismissed as against him with costs. In allowing the plaintiff's appeal and dismissing Lawlor's appeal with costs, the following points were decided :

1. An objection by Lawlor to the statement of claim for multifariousness on the ground that a separate action should be brought to set aside the tax deed to him, could not succeed : *Cox v. Barker*, 3 Ch. D. 359 ; *Child v. Stenning*, 5 Ch. D. 695. The objection should have been to the joinder of other causes of action to an action for possession of land without leave as required by Rule 251 of the Queen's Bench Act, 1895, if in fact no such leave had been given.

2. The plaintiff was entitled to meet the defendant Lawlor's allegation of a title paramount under the tax deed and its statutory effect as evidence by showing omissions and informalities which invalidate the proceedings and to have an adjudication upon the question of title without any specific prayer for relief against the deed.

3. When the tax sale took place, the wife of the mortgagor was as free as any stranger to acquire for her own benefit any title to or interest in the land paramount to that of the mortgagee, either by using money of her own, if she had any, or by inducing a third party to advance it on her separate account, provided the transaction was not merely colorable and really carried out on behalf of the mortgagor.

4. There was not sufficient evidence of any trust as between the defendant Lawlor and the Rutledges, and for all that appears in the evidence there was an actual sale of the tax certificate and the rights conferred by it by the first assignee to Lawlor for valuable consideration, and the onus was not thrown upon him to prove that Mrs. Rutledge acted on her own account and not as agent for her husband in making the tax purchase.

5. Mrs. Rutledge's conduct after she had purchased, in concealing the fact from the mortgagee, in endeavouring to obtain an extension of time, in executing a new mortgage and in other ways, would have disentitled her to proceed with her purchase and she could not have acquired a valid title as against the mortgagee ; but it does not follow that a person purchasing her apparent rights

under the tax sale certificate, for value and without notice of her special incapacity might not have acquired a title under a tax deed which would have cut out the plaintiff's mortgage.

6. To entitle Lawlor to claim protection as a purchaser for value without notice of Mrs. Rutledge's fraudulent conduct he should have pleaded this as a defence and given evidence of it, although the plaintiff had not in his pleading alleged notice to Lawlor of the concealment by Mrs. Rutledge: *McAllister* v. *Forsyth*, 12 S.C.R. 1; *Attorney-General* v. *Wilkins*, 17 Beav. 285; and as Lawlor had neither pleaded nor proved such want of knowledge and notice the plaintiff was entitled to judgment without being called upon to prove any notice to Lawlor, especially as the Court had not been asked for relief on the ground that such defence was omitted through any error or slip, and that it could be successfully raised, and the Court held that there was nothing to suggest that the defendant had been taken by surprise or misled in any way.

7. The judgment entered should be varied by striking out the clause declaring that Lawlor held as trustee for his co-defendants, and by substituting a declaration that any title to the lands in question which Lawlor took or holds under the tax sale deed is held by him subject to the plaintiff's mortgage.

8. The case does not come within section 186 of the Assessment Act, and Lawlor is not entitled to any lien on the land for the taxes paid as against the plaintiff's mortgage, and the clause in the judgment giving such lien should be struck out.

Culver, Q.C., and *Mulock*, Q.C., for plaintiff. *Ewart*, Q.C., and *Wilson* for defendant.

Full Court.] LAWLOR *v.* NICKEL. [July 9.

Bailment of goods—Sale of goods—Statute of Frauds.

Plaintiff delivered a quantity of wheat at an elevator leased by defendants whose employee agreed to purchase the wheat at "38 cents and the rise," meaning that plaintiff could take his wheat checks at any time, and get at least 38 cents per bushel, but if the market prices were higher, then he could demand the market price of the day. The wheat was received in the elevator, and receipts given for it, stating that it was received in storage for plaintiff, but as a matter of fact it was not intended that the identical grain received from plaintiff should be kept for him, the well understood course of the business being that, unless a price was agreed on, the plaintiff could only require the equivalent amount of wheat of the same grade to be accounted for to him. Plaintiff claimed the value of the wheat as if it had been sold to defendants, but it did not appear that there had been a price agreed on. Defendants disputed the receipt of three out of seven lots of the wheat delivered by the plaintiff, and paid into court a sufficient sum in payment for the other four lots.

Held, following *South Australia Insurance Co.* v. *Randell*, 6 Moore P.C. N.S. 341, that in such a case the contract between the parties is really one of sale and not of bailment, and that whether the vendor is to receive a price

in money or an equivalent quantity of grain, or has an option to do either, it is really a sale, as the property in the goods has passed to the warehouseman, and he is to pay the grain or money.

Held, also, that as the property passed to the defendants upon delivery and acceptance of the grain, it is not like a case in which specific goods are stored, the property remaining in the original holder, with an oral agreement for a subsequent sale to the bailee; and the Statute of Frauds offers no bar to the recovery. Verdict for plaintiff for price of wheat as if sold at 38 cents per bushel affirmed with costs.

Metcalfe and *McPherson*, for plaintiff. *Wilson* and *A. C. Ewart*, for defendants.

Full Court.] REGINA *v.* HERRELL. [July 9.

Liquor License Act, ss. 151, 180, 182, 200, 209, 210—Evidence of former conviction—Amending conviction—Disqualification of magistrate—Certificate of former conviction.

Rule nisi to quash a conviction of defendant for a second offence under the Liquor License Act on the following grounds: (1) That there was not sufficient evidence of the commission of any offence under the Act, it being argued that there was no evidence to identify the liquor produced at the trial, and shown to be intoxicating, with the contents of the bottle furnished by the accused. (2) That the former conviction was not proved, there being nothing to show the identity of the defendant with the person named in the certificate produced. (3) That the convicting magistrate was disqualified to sit upon the case, as he was an honorary member of the Women's Christian Temperance Union, which had taken a great interest in enforcing the Liquor License Act, and had provided funds for that purpose.

Held, 1. Although the evidence was not satisfactory, it could not be said that there was no evidence to prove the commission of the offence, and under *Reg.* v. *Granis*, 5 M.R. 153, the finding of the magistrate could not be interfered with.

2. As the prosecution was really conducted by the town authorities, and not by the W.C.T.U., and the magistrate's connection with the society was only nominal, and he had taken no part in the conduct of its affairs, beyond having contributed $1 towards a lecture fund, it could not be said that he was disqualified to adjudicate on the case. *Reg.* v. *Deal*, 45 L.T.N.S. 439, and *Leeson* v. *General Council, etc.*, 43 Ch. D. 366, followed.

3. It was necessary to prove the identity of the defendant with the person named in the certificate of the former conviction, the similarity of names not being sufficient for that purpose: *Queen* v. *Lloyd*, 1 Cox C.C. 31, nor even the personal knowledge of the magistrate; that the conviction must therefore be quashed. *Reg.* v. *Brown*, 16 O.R. 41, distinguished.

4. The evidence of the commission of the offence not being satisfactory, the court could not amend the conviction under sections 209 and 210 of the Act so as to make it a conviction for a first offence, because it could not be understood from it that the penalty or punishment appropriate to the offence

against the Act that had been proved had been imposed; and the powers of amendment given by ss. 883 and 889 of the Criminal Code made applicable by s. 180, of the Liquor License Act, and 56 Vict. c. 32, are to be exercised only if the Court or Judge is satisfied, upon perusal of the depositions, that an offence of the nature described in the conviction has been committed; and whilst there was here evidence to sustain the finding of the magistrate, so that if he had simply convicted as for a first offence, such conviction could not have been quashed for want of evidence, there was not sufficient in the depositions to justify the court in deciding independently that the accused was guilty and convicting him, and this should be the case to warrant an amendment.

Per KILLAM, J.: Although the certificate of the former conviction omitted the word "intoxicating" before the word "liquor" in describing the offence, yet it was not defective on that account in view of ss. 151 and 182 of the Act, and the wording of the form in schedule K. (par. 2).

Per BAIN, J.: The certificate of the former conviction was insufficient because it nowhere stated that it was under the provisions of the Liquor License Act. Rule absolute to quash the conviction.

Maclean, for the crown. *Ashbough*, for defendant.

Killam, J.] FLOUR CITY BANK *v.* CONNERY. [Sept. 22.

Summary judgment—Leave to defend—Application to sign judgment—Promissory note—Delivery of note in fraud of maker—Holder in due course.

This was an application to sign final judgment in an action on a promissory note by the indorsee against the maker. Defendant filed an affidavit stating that the note had been handed by him to one Laurie to hold in escrow until the settlement of certain accounts between him and the payee, and that it had been delivered over to the payee without his consent.

Held, that defendant was entitled to defend without showing that plaintiff was not a holder in due course. Bills of Exchange Act (1890), s. 30, s-s. 2. *Fuller* v. *Alexander*, 52 L. J. Q. B. 103, and *Millard* v. *Baddeley*, W. N. (1884) 96, followed. Application dismissed. Costs to be costs in the cause to the successful party.

Hull for plaintiff. *Dawson* for defendant.

Killam, J.] TAYLOR *v.* CITY OF WINNIPEG. [Sept. 27.

Municipality—Highway—Liability for non-repair—Negligence—Ice and snow on sidewalks.

The plaintiff's claim was for damages for an injury sustained by falling upon an icy slope which had formed on a sidewalk in the City of Winnipeg, adjacent to a public well supplied with a pump, which was daily used by a large number of people. The well was one of about sixty provided by the corporation and maintained at its expense, and a number of men were employed by the corporation whose duty it was to visit the wells from time to time during the winter and remove or reduce the mounds of ice on the sidewalks and

around the pumps caused by the freezing of the water that dripped from them or was spilled from pails while being carried away. One of these employees was on the spot on the very day of the accident and did not consider it necessary to do anything for the purpose of making the place more safe for foot passengers; and other employees of the City, whose duty it was to report unsafe conditions, had passed the place on the same day and made no report upon it. The action was tried without a jury. The evidence for the plaintiff showed that there was a general slope of the ice from the east to the west side of the walk, that there were lumps or raised places in the ice at two different points and that the ice was very smooth and slippery at the place where the plaintiff fell, but the judge thought the witnesses had exaggerated the height of the lumps and the steepness of the slopes. He came to the conclusion also that the ice mounds and slope on the sidewalk had been caused, not from the water that dripped from the pump or was spilled in filling pails there, but by the spilling of water from the pails while being carried along the sidewalk or in the filling of other vessels, and so were the result of negligence on the part of other persons and not of any faulty construction of the pump or its approaches; and that the place where the accident happened was not shown to have been at the time more unsafe than many other spots on the sidewalks are frequently rendered by local conditions where freezing and thawing follow each other at short intervals.

Held, following *The City of Kingston* v. *Drennan*, 27 S. C. R. 46, that the mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulations of snow or ice may amount to non-repair, for which the corporation would be liable, but it is in every such case a question of fact whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger.

2. That in the present case it would not be reasonable to hold the City liable, as there are over sixty such wells in the city, usually placed at street crossings and in constant use, and to keep the sidewalks near them completely free from ice or roughened by chopping or sprinkling sand or ashes on them would be well nigh impossible. Action dismissed with costs.

Haggart, Q.C., for plaintiff. *Ewart*, Q.C., and *J. Campbell*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Irving, J.] WAKEFIELD *v.* RIDPATH. [Aug. 31.

Jurisdiction of County Court judges—Receiver.

Application on behalf of the defendants to discharge an order made by a County Court judge in the Kootenay district (acting as a Local judge of the Supreme Court), appointing in a Supreme Court action a receiver of the Le Roi mining property. The order had the stamps of a Court order attached, but otherwise it did not appear whether it was made in Chambers or in Court.

The grounds of the application were that there is no jurisdiction for a County, Court judge to act unless it is shown that the Supreme Court judge for the district is temporarily absent, and even then there is no jurisdiction to make a Court order, and under the practice in the Supreme Court no other than a Court order could be made. It was not shown that the Supreme Court judge for the Kootenay District was absent in the sense apparently contemplated by the Act.

Held, that the order might be treated as a Chamber order, but the County Court judge had no power either under s. 44 of the County Court Act, or ss. 22 and 23 of the Supreme Court Act, or under Rule 1,075 of the Supreme Court, to make either in Chambers or in Court an order appointing a receiver in a Supreme Court action under the circumstances.

Semble, that the Supreme Court judges of Vancouver and New Westminster Districts must be absent from those districts before County Court judges in Yale and Cariboo could act as Local judges of the Supreme Court.

Daly, for plaintiffs. *Bodwell* and *MacDonald* for defendants.

Irving, J.] WAKEFIELD *v.* TURNER. [Aug. 31

Practice—Receivership order—R.S.B.C., c. 56, s. 14—Rules 517, 1,075.

Motion to set aside an order made by Judge Spinks, sitting, or purporting to sit, as a Local Judge of the Supreme Court at Rossland on August 3rd. 1898, whereby he appointed, on the ex parte application of plaintiffs, Wm. A. Carlyle, to be receiver, and to take possession of, manage and control the Le Roi mine at Rossland, and also restraining the defendants until August 13th, 1898, from interfering with the management and control of the mine, and from extracting, or disposing of any ores of the mine, or attempting to exercise any control over the operation of the mine. The operative part of the order ran "it is ordered," etc., and concluded as follows:—

(SEAL) "By the Court." "Wm. Ward Spinks,"
"J. Schofield." "Local Judge of the
"Registrar." Supreme Court."

Under s. 22 of the Supreme Court Act, B.C., and Rule 1,057, the jurisdiction of the Local Judge of Kootenay is limited to such matters as may under the Rules of Court or by statute be dealt with at Chambers. Under s. 14 of the Act, a receiver may be appointed by an interlocutory order of the Court.

Held, that the order was a Chamber order. There being no Judge resident in Kootenay or usually discharging the duties within that district, the proviso authorizing the Local Judge to hear "Court motions" has no application to Kootenay. Owing apparently to a mistake in the rules, the power which is given to the Court or Judge by the English Rules must under the B. C. Rules be exercised by the Court and not by a Judge; and so whether the order were a Court order or a Chamber order it could not be made by a Local Judge under Rule 1,075. Order discharged with costs.

Bodwell and *J. A. Macdonald*, for the motion. *Daly*, Q.C., contra.

Book Reviews.

Canadian Criminal Cases, Annotated: edited by W. J. TREMEEAR, Barrister; Toronto: Canada Law Journal Company, 1898.

The editor is to be congratulated upon the general approbation with which this work has been received by the profession. Parts 2 and 3, which are now before us, fully realize the expectations raised by the initial number. In no other department of law is the necessity for books of ready reference so much felt by the practitioner. This collection of decisions on the Criminal Code, pronounced in the various provinces, is a natural and necessary supplement to the legislation of 1892, and meets the want only partly filled by codification.

Conflict of Laws, by E. LAFLEUR, of the Montreal Bar, Professor of International Law in McGill University. Montreal: C. Theoret, Publishers, St. James St., 1898.

While this work professes to deal particularly with the Quebec law on the subject of Private International Law, yet there is much in it which will be found useful in all the Provinces. The arrangement of the subjects treated and the selection of cases to illustrate the points made are admirable. A perusal of the book recalls the curious rule as to proof of foreign law, namely, in the absence of proof to the contrary, the law of a foreign jurisdiction is presumed to be the same as ours, except as to statutory enactments, which are presumed to be different from the law of the forum.

The Science of Law and Law Making, being an introduction to law and general view of its forms and substance, and a discussion of the question of codification, by R. FLOYD CLARK, A.B. LL.B., of the New York Bar; New York: Macmillan & Co., 1898.

The object of the author in this book is to endeavour to make clear to the average reader some of the truths of law and jurisprudence and to introduce laymen to a true conception of the system of law under which they live. As the author states, it is a curious fact that no work exists in which the general outlines of legal systems are explained in popular terms, so as to be intelligible to the ordinary man not versed in technicalities. The book is, firstly, an introduction to the study of the law, and secondly, gives the groundwork on which to build up an argument on codification. It should, therefore, be helpful to those students of the law who desire to be lawyers and not merely practitioners. It exhibits much thought and research, and is written in an interesting style and clear in expression. There is entirely too little thought and time given to the study of foundational truths, such as are presented in this book, and the sooner the student is compelled to know more of the science of law and law making, the better for the profession.

The Living Age, Living Age Co., Boston, U.S.

With the first number for October, this weekly eclectic magazine which for more than fifty years has been a favourite with Canadian readers, begins a new series, and appears in a new and attractive dress. The familiar cover is to be retained, but it has been newly engraved and otherwise modernized. This is an excellent publication.

Flotsam and Jetsam.

A learned counsel in the course of a recent argument before the Court of Appeal for Ontario had occasion to dwell upon the doctrine of *ejusdem generis*, and must have been somewhat surprised on the following day to learn from the columns of a daily newspaper, that he had contended that "the just and generous" canon of construction was not applicable to the case in hand.

A letter to *The New York Evening Post* from Mr. W. R. Riddell of the Toronto Bar, calls attention to the admirable address of Mr. Choate at the meeting of the Bar Association at Saratoga, at which that most able lawyer referred to Sir Alexander Cockburn as Lord Cockburn. The letter says that, "though Lord Chief Justice, he was never a peer. Mr. Choate may plead the inveterate practice of calling Sir Edward Coke, Lord Coke, and Sir Matthew Hale, Lord Hale, but this is never followed in the case of modern judges any more than is the ancient custom of calling judges 'reverend.'"

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1898.

TUESDAY, the 17th day of May, 1898.

Present: The Treasurer and Messrs. Barwick, Bayly, Bruce, Edwards, Guthrie, Hogg, Idington, Martin, Riddell, Ritchie, Strathy, Teetzel, Watson, Wilkes, Osler and Shepley.

Mr. Strathy drew attention to the bereavement sustained by the death of D'Alton McCarthy, Q.C., and M.P., and Messrs. Osler, Idington, Shepley and Riddell were appointed to draft a resolution to record the loss of Convocation and of the profession generally.

The Secretary reported as follows: The Secretary has the honour to report, That Messrs. D. B. Maclennan, Q.C., and Colin Macdougall, Q.C., have failed to attend the meetings of Convocation for three consecutive terms, to wit Trinity and Michaelmas, 1897, and Hilary, 1898. The report was referred to the Committee on Journals and Printing.

Ordered that Mr. Ralph Hubert Dignan, a solicitor of ten years' standing, be called to the Bar in pursuance of R.S.O., c. 173, s. 2, s.s. 2. The petition of Charles Cyrus Grant, that his name be entered as a student-at-law on the books of the Law Society, from which it had been erased by order of Convocation of 4th Dec., 1896, was read. His petition was accompanied by a recommendation of practitioners of the city of St. Thomas.

Ordered, that the Secretary inform Mr. Grant that his petition was not granted.

The complaint of Dr. W. F. Meikle against Mr. J. C. Ross was read. Ordered that the Secretary do inform the complainant that the ordinary proceedings of the Court will afford him redress if he be entitled thereto, the matter complained of not being such as the Benchers can investigate. The complaint of the Fleming H. Revell Company of Toronto against Mr. A. M. Clark of Palmerston was read. Ordered that the Secretary do inform the complainants that Mr. A. M. Clark is dead and that their remedy is by suit (if they have remedy), the matter complained of not being such as the Benchers can investigate. The complaint of Mr. John McDonald of Lindsay against Mr. Hugh O'Leary was read. It appeared that the same complaint had been laid before the Convocation by his solicitor, Mr. George Ritchie, of To-

ronto on 27th June, 1894, and, at the request of Mr. Ritchie, consideration had been deferred. Ordered that Mr. Ritchie be written to and Mr. McDonald asked to account for the causes which led to the withdrawal of the complaint, and also to state in detail what has transpired since the matter came before Convocation on 27th June, 1894. The letter of Mr. Gordon Waldron, of 22nd March, relating to the complaint of Mr. D. D. Reid and Marion Reid, his wife, against Mr. John M. Godfrey, having been read, the report made by the Discipline Committee having been adopted by Convocation on the 18th February, 1898, and six members of the Discipline Committee now being present, it was with their concurrence ordered that the letter of Mr. Waldron be referred to the Discipline Committee for report.

The report of the Legal Education Committee of Nov. 16, 1897, as to Honours at the Law School and compulsory attendance at lectures, which Convocation had ordered to be taken into consideration this day, and of which special notice that the report would be then considered, was then taken into consideration. The report is as follows :—

The Principal reports to the Committee on the subject of Honours in the Third Year. At present, those who compete for Honours read only the same work as pass students, but are required to write at a second examination upon the same work. The Principal thinks that there should be some further differentiation between Honour and Pass men in this year at all events. He suggests two methods: (1) Requiring extra or substituted subjects for Honour men. (2) Requiring from Honour men an essay or thesis upon some legal subject. The Principal favours for the present the latter of these methods, apparently because, without a rearrangement of the School course, the former would add an undue burden to that now borne by Third Year men, and because in his view such rearrangement is not practicable while attendance at the School during the first year is left an optional matter. He points out very forcibly that the student who has not been well grounded in the work of the first year is not only himself insufficiently equipped for the second and third years' work, but operates as a drag upon the whole class and during the whole course. The lecturers are not able to be as progressive as they might otherwise be—the ground work neglected during the first year has to be made good during the second and third years, and subjects spread over three years that might well be disposed of in two, leaving for the Third Year extra subjects now left untouched, or substantial improvement and advance in some direction.

Your Committee invites the attention of Convocation to the whole subject. It reports in favour of a differentiation of honour from pass men in the third year at least. It prefers the scheme of extra or substituted subjects to that of an essay or thesis if such a rearrangement of the course can be made as to render the former scheme practicable. It appears to the Committee that it will be difficult if not impossible to effect such rearrangement if the Principal's advice with regard to attendance during the first year is not accepted. Your Committee thinks, however, that if such an important change is to be made it should originate with Convocation, especially in view of the careful discussion the subject received when Convocation adopted the policy which it is now suggested should be changed.

The Principal's letter to the Chairman of the Legal Education Committee accompanies this report, viz. :

TORONTO, 18th Sept., 1897.

DEAR SIR,—I desire to submit for the consideration of your Committee the following matters in connection with the School :—

1. Honours in Third Year. These are at present gained merely by answering additional questions in the different subjects; the books read by Pass and Honour men are the same. As a practical matter it is often difficult to decide what questions are the hardest, and it is not infrequent to find that the Honour papers are considered by the men to be easier than the Pass; this

not through any want of care on the part of the examiners. In my opinion, the men who get Honours in the final year, certainly those who are awarded medals, ought in some way to be differentiated as to work from "ass men.

This might be accomplished in two ways: (*a*) By requiring extra or substituted subjects for Honour men, such as the important subjects of corporation law or municipal law. (*b*) By requiring an essay or thesis on some legal subject of general interest on which research might be made and individual work done. I find that at Toronto and McGill Universities this is required of candidates for the first degree in law. These essays to become the property of the Law Society and to be published by it, if in the judgment of the examiners worthy of the honour. The subjects to be set, and the essays examined by special voluntary examiners, members of Convocation, or otherwise, so as to give greater importance to the subject.

Of these two plans, I am for the present in favour of the latter. Were it possible to rearrange the subjects, I should prefer the former as being on the whole the more useful to the Honour men themselves; but I shrink at present from adding any extra burden in the way of subjects to the already weighty one being carried by those who take office work in addition to that of the School. Additional subjects ought in fairness to accompany some readjustment of the curriculum, and this would probably not be possible unless my next recommendation be acceded to. In any event, I recommend that some change be made in regard to Third Year Honours.

2. Attendance in First Year. I beg to suggest that the time has now come to make this compulsory on all. In some respects this years work is the most important of all—the foundations are being carefully laid. In such subjects as Real Property and Equity the work of the second year is hampered by the fact that many of the students have not mastered the initial work in the subjects—they are ignorant of the very elements of the subjects, and the lecturers are not able to be progressive.

The effect of the non-attendance of some in the first year has an effect on the whole course; it prevents a progressive system, such as ought to be arrived at, and makes it necessary to work away year after year at the same subjects, whereas some might fairly be got through in two years, leaving for the third year either extra subjects now untouched from the very necessity of the case, or else a deeper discussion of the other important subjects in that year.

It was the unanimous opinion of the American Bar Association, at its recent meeting, that no Law School course should be under three years. We cannot honestly say that ours is a three years' course, as long as attendance is not obligatory on all for that length of time. Many of those who at present are not in attendance during the first year, are precisely the persons to whom the careful elementary teaching of legal terms and principles which is aimed at in the School is most useful and necessary.

N. W. HOYLES, Principal.

It was then moved by Mr. Riddell, seconded by Mr. Bayly: That Convocation approve of the principle that all law students shall attend the Law School for a full course of three years and that it be referred to the Legal Education Committee to formulate a scheme to carry out this principle and report to Convocation. Moved in amendment by Mr. Watson, seconded by Mr. Hogg: That the subject of the letter of the Principal, as to attendance upon lectures, be referred to a special committee consisting of Messrs Martin, Idington, Hogg, Shepley, Guthrie and Strathy, for consideration and enquiry, after reference to such sources of information as they may think proper, and to report thereon to Convocation at the meeting, on the 28th June.

The amendment was lost on the following division: Yeas, Messrs. Idington, Wilkes, Hogg, Watson and Guthrie.—5. Nays, Messrs. Shepley, Martin, Edwards, Teetzel, Bruce, Bayly, Strathy, Riddell and Barwick.—9. The main motion was then carried on the same division.

It was then moved by Mr. Watson: That the Reporting Committee be

asked to report to Convocation as to the time taken by the printer and publishers to print and issue the reports of the Law Society after the same are placed in their hands, giving date of receipt in some cases and date of distribution by the publishers; also to report specially as to the reporting and publication of the decisions of the Master in Ordinary, especially in Winding Up cases under the Dominion Winding Up Act, and to say why these decisions are not included in the regular reports. Ordered accordingly.

The Special Committee appointed in relation to the resolution regarding the death of the late D'Alton McCarthy presented the following report: "That the Benchers of the Law Society of Upper Canada in Convocation assembled desire to express their profound sorrow at the death of their late fellow of the Bench, Mr. D'Alton McCarthy, Q.C., M.P. That Convocation record on the minutes its sense of the great loss sustained by the Benchers, the Bar and the country generally through the death of Mr. McCarthy, whose professional eminence, as well as his fearless and conscientious discharge of public duty, have earned the admiration and esteem of all That a copy of this resolution be engrossed and transmitted to the widow and family of the deceased, with whom the Benchers sympathize in their deep affliction."

The report was adopted and it was ordered that the same be communicated to the widow and family as in the report expressed.

Mr. Bruce from the Committee on Journals presented the following report: The Committee on Journals and Printing having taken into consideration the order of Convocation in Hilary Term, referring to this committee to report on the propriety of establishing a system for giving notice to members of the business to be laid before Convocation, beg to report that there is no necessity for giving such notice unless where specially ordered by Convocation.

The report was received and ordered to be taken into consideration on 28th June next.

Mr. Martin moved that Mr. W. H. Cross be appointed auditor for the ensuing year. Carried.

Mr. Watson, from the Finance Committee, presented the following report: That they have considered the application of Messrs. Jarvis and Vining, solicitors, for a refund of the annual fees paid by them on the 21st of September last on behalf of Mr. W. J. Clark, solicitor, of London, now deceased. The Committee beg to state that as the fees were payable on the 15th November and Mr Clark was then practising and remained practising until the time of his confinement to his house, which occurred on 4th December, they are unable to recommend any refund of the fees, as the rule is against any such being made. The report was adopted.

Mr. Bruce, from the Committee on Journals and Printing, reported: That the Committee confirm the report of the Secretary as to the absence of Messrs. D. B. Maclennan, Q.C., and Colin Macdougall, Q.C, from the meetings of Convocation. Ordered that the report be taken into consideration on the 3rd June next, and that Messrs. Maclennan and Macdougall be notified of the report, and of the time when same is to be taken int consideration.

It was moved by Mr. Bruce, seconded by Mr. Watson, that the committee who had charge of the painting of the portrait of the Honourable Sir George Burton, Chief Justice of Ontario, be requested to communicate with the artist with a view to the improvement of the likeness. Carried. Convocation rose.

SATURDAY, 21st May, 1898.

Present: The Treasurer and Sir Thomas Galt, Messrs. Bayly, Martin, Ritchie, Shepley and Watson.

Mr. Martin moved, seconded by Mr. Shepley, that Mr. Irving be elected Treasurer for the ensuing year. Carried.

Ordered that the Chairmen of the several standing committees for the past year be a Special Committee to report to Convocation list of members to form the standing committees for the ensuing year.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report on applications for relief, and recommended as follows : That Mr. W. D. Henry be permitted to write at the Supplemental Examination of the Third Year. That Mr. G. G. Moncrieff be allowed to write at the Supplemental Examination of the Third Year. That Mr. F. H. Hurley be allowed to write at the Supplemental Examination of the Third Year. That Mr. T. A. Burgess be allowed to write at the Supplemental Examination of the First Year. That Mr. C. H Bradburn be allowed to write at the Supplemental Examination of the First Year in the subject of contracts. That Mr. G. M. Kelley's notice for call, being late, do remain posted until the 3rd June inst. That Mr. G. F. Macdonnell's service under articles be allowed as sufficient. That Mr. J. R. Carling's service under articles be allowed as sufficient. That Mr. J. R. Graham be required to place himself under articles until the first day of Trinity Term. That Mr. C. B. Labatt be admitted as a student-at-law of Graduate Class.

Convocation adopted and ordered the several recommendations.

The Secretary reported that in fulfilment of the order of Convocation of the 17th inst. in the matter of the complaint of J. Macdonald against W H. O'Leary, he had written to Mr. Geo. Ritchie asking him to explain, and then read Mr. Ritchie's reply. Ordered that the further consideration of the complaint be deferred until the first day of Trinity term next. The letters of Mrs. Geo. Kydd to the Secretary, of the 22nd April, 30th April and 18th May, 1898, were read, and no complaint being thereby disclosed, no minute is now necessary.

Mr. Watson moved, seconded by Mr. Bayly, that Mr. Shepley be re-elected representative of the Law Society on the Senate of the University of Toronto for the ensuing year. Carried. The Secretary was directed to inform the Registrar of the University of the election of Mr. Shepley to represent the Law Society on the Senate of the University.

The Special Committee appointed to strike the Standing Committees for the ensuing year reported a list. The Committee further reported that on the following Standing Committees, viz.: Reporting, Discipline and Journals, they had left two vacancies, and in respect to these vacancies asked leave to report on some future occasion.

The report was adopted and the Special Committee further charged to report again as they proposed.

The complete list of the Committees for the year 1897-1898, after filling the vacancies, will be found in the proceedings of Convocation on the 28th June, 1898.

FRIDAY, the 3rd June, 1898.

Present, the Treasurer and Messrs. Aylesworth, Bruce, Clarke, Martin, Osler, Robinson, Shepley and Watson.

Convocation entered into consideration of the report of the Committee on Journals and Printing of 17th May last, and no cause having been shown, the report was adopted. Convocation then ordered a call of the Bench for Tuesday the 28th day of June, to elect Benchers in the place of Messrs. Colin Macdougall and D. B Maclennan. Convocation then ordered that there be a call of the Bench for the same date, 28th June, for the election of a Bencher to fill the vacancy caused by the death of the late D'Alton McCarthy.

Upon the report of the Legal Education Committee, presented by W. Shepley, it was

Ordered that Mr. G. M. Kelley be called to the Bar.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report upon the results of the Third Year Examination held in Easter, 1898, and thereupon it was

Ordered that the following gentlemen who have passed the examination and have duly attended the required number of lectures, be called to the Bar and do receive their certificates of fitness as solicitors :—W. J. O'Neil, W. M.

Griffin, J. Montgomery, W. F. Bald, H. Hartman, C. B. Nasmith, J. Campbell Elliott, A. G. Slaght, H. A. Clark, E. J. Daly, A. A. Bond, Wilson McCue, C. H. Porter, A. M. Chisholm, G. F. Macdonnell, D. R. Dobie, T. A. Hunt, G. L. T. Bull, C. A. Macdougall, J. C. Hamilton, E. H. McLean, W. L. McLaws, J. A. MacInnes, R. W. Eyre, W. M. Charlton, M. J. Kenny, E. H. McKenzie, J. A. Philion, D. P. Kennedy, I. R. Carling, I. E. Weldon.

And that the following gentlemen who have also passed the examination but have failed to attend the required number of lectures, such failure having been certified by the Principal of the Law School to be due to illness or other good cause, also called to the Bar and do receive their certificates of fitness as solicitors:—E. A. Dunbar, G. McCrea, C. W. Cross, T. J. Rigney, J. B. Noble, C. H. Pettit, E. T. Buck.

And further that Messrs. W. J. O'Neail, M. W. Griffin and J. Montgomery be called with honours, and that Mr. O'Neail do receive a silver medal and Mr. Griffin do receive a bronze medal.

The following named gentlemen were then introduced and called to the Bar: Mr. R. H. Dignan, a solicitor of ten years' standing, who had been on the 17th of May last ordered for call, and Mr. G. M. Kelley. Also the following named gentlemen who had been previously reported as having passed the Law School Examination, and had been ordered for Call, were then introduced and called to the Bar: W. J. O'Neail, with honours and silver medal; M. W. Griffin, with honours and bronze medal, and J. Montgomery, with honours, also W. F. Bald, H. Hartman, C. B. Nasmith, J. Campbell Elliott, H. A. Clark, A. A. Bond, Wilson McCue, C. H. Porter, A. M. Chisholm, E. A. Dunbar, G. F. Macdonnell, G. McCrea, C. W. Cross, T. A. Hunt, G. L. T. Bull, T. J. Rigney, J. A. MacInnes, R. W. Eyre, W. M. Charlton, C. H. Pettit, M. J. Kenny, E. H. McKenzie, J. A. Philion, I. E. Weldon.

Mr. Shepley, on behalf of the Legal Education Committee, presented their report on applications for relief and recommended as follows: That Mr. J. D. Ferguson be allowed to write at the Supplemental Examination in September, in place of the Easter Examination. That the notices for admission given by Messrs. W. Cain and E. M. Meighen do remain posted until the half yearly meeting, and if no objection then appear, they be admitted as students-at-law as of Easter Term. That the following gentlemen be admitted as students-at-law of the Graduate Class: E. E. Craig, J. A. Jackson, C. S. Wilkie, W. M. Ewart, W. A. Grange, G. H. Wilmer, and the following of the Matriculant Class: R. S. Colter, J. E Metcalfe, C. A. Irvine and H. A. Rose. Mr. Shepley, on behalf of the Committee, stated that the reports on the first and second year examinations of the Law School had not been considered, the Examiners' reports having not been completed, and asked permission to report on these examinations at the half yearly meeting.

Mr. Shepley read the report of the Principal of the Law School on the work done during the past session; the report was referred to the Legal Education Committee.

Mr. Osler read the quarterly letter of the editor of the Reports upon the state of the reporting:

27th May, 1898.

DEAR SIR,—I have to report that the work of reporting is in a forward state. In the Court of Appeal, in addition to the cases in which judgment was delivered this month, there are eleven judgments of March, all ready to issue. In the High Court Mr. Harman has twelve cases unreported, two of March (revised), nine of April (two of which have been revised), and one of May. Mr. Lefroy has five, of which four are April judgments, and one of May. Mr. Boomer has eight, of which three are of March (revised), and five of April. Mr. Brown has one, of April. There are four Practice cases unreported, all of May.

J. F. SMITH.

(Concluded in next Issue.)