Canada Law Journal.

VOL. XXXIII. FEBRUARY 1, 1897. NO. 3.

MORTGAGEES AND THE STATUTE OF LIMITATIONS.

The recent decision of the Court of Appeal in *Henderson v. Henderson*, 23 A.R. 577, is an interesting case, and gave rise to a very considerable difference of opinion among the judges before whom it came. The action was brought by executors to recover possession of land alleged to belong to their testator's estate. One of the defences set up, and that on which the case ultimately turned, was the Statute of Limitations. Street, J., who tried the case, and Meredith, J., in the Divisional Court, and Hagarty, C.J.O., and Osler, J.A., decided against this defence. Ferguson and Robertson, JJ., in the Divisional Court, were of opinion that it should succeed, and with this view (but for the existence of a mortgage) Maclennan, J.A., would also have agreed; Burton, J.A., agreed with Maclennan, J.A., as to the effect of the mortgage, but expressed no opinion as to whether, but for the mortgage, the statute would have been a bar. But for the existence of the mortgage, therefore, it would almost seem that the defence of the statute would have been successful, although this, owing to the silence of Burton, J.A., on this point, cannot be confidently affirmed. Although under the circumstances, the views of Burton and Maclennan, JJ.A., as to the effect of the mortgage, may possibly be considered *obiter*, yet as this point virtually proved the rock on which the defendant's case was wrecked, it is deserving of careful consideration, notwithstanding that both the Chief Justice of Ontario, and Osler, J.A., cautiously refrain from assenting to the views expressed by Maclennan, J.A., on that point.

The land in question was purchased by the testator in 1881, and he then gave a mortgage for the purchase money, which was subsequently paid off and discharged in 1886.

Robert, one of the testator's sons, through whom the defendant claimed title, was immediately on the purchase put in possession by his father, and continued in possession till his death in 1892, and since his death the defendant, his widow, continued in possession. There was, therefore, more than ten years possession by the son and defendant before action, and in the absence of the mortgage, Maclennan, J.A., conceded that the Statute of Limitations would have been a bar to the action, but he said, by the 22nd section of the Real Property Limitation Act (R.S.O., c. 111), a mortgagee and any person claiming under him not being barred until ten years next after the last payment of any part of the principal money or interest accrued by his mortgage, the mortgagee in this case was not barred; and the testator, the mortgagor, by virtue of the registered certificate of discharge, is to be deemed to have thereby obtained a conveyance of the mortgagee's estate, and thus claimed under him, and therefore he was not barred either. This view of the law, it is submitted, might, in certain circumstances, result in the practical abrogation of the Statute of Limitations. It would be possible for the owner of the paper title who had been out of possession for nine years and 364 days, to make a mortgage which would serve as a new starting point for the statute, as against a person in adverse occupation of the land, and this mortgage might be kept on foot by payment of interest or principal for 10, 15, 20 years, or indeed for any indefinite period: and at any time within ten years from the last payment, the mortgagee might eject the person in adverse occupation, though he might have been in for 15 or 20, or any number of years, without any acknowledgment of title; and what is more, on the discharge of the mortgage, the owner of the paper title, although the statute had run out against him all but one day when the mortgage was made, might, on the discharge of the mortgage fifty years afterwards, eject the adverse occupant, provided the payments on the mortgage had been regularly made so as to prevent the running of the statute against the mortgagee.

The mere fact that a particular view of the law may lead

to inconvenient results, is not necessarily any proof that it is unsound; but one can well understand that a doctrine fraught with such extraordinary results as that enunciated by Mr. Justice Maclennan and adopted by Mr. Justice Burton, would not be too readily assented to by any judge who did not deem it absolutely necessary for the decision of the case before him. The refusal of the Chief Justice and Mr. Justice Osler to concur in that opinion can therefore be well understood; and in view of their refusal, it may be useful to consider a little more at large the probability of the doctrine being sustained in future cases.

It may be observed that the possession under which the defendant claimed commenced after the execution of the mortgage which was given to secure the purchase money, and this case, therefore, was not one of a mortgagor executing a mortgage while out of possession, and there seems to be no question that the mortgage at the time it was executed was sufficient to carry the legal estate free from any claim of any third party to possession. The possession under which the defendant claimed was therefore acquired originally under the mortgagor after the execution of the mortgage; and while there seems less objection to holding that in such a case the statute would not run in favor of the occupant as against the mortgagee, yet the cases hereafter referred to and to which Mr. Justice Maclennan seems to give his unrestricted assent, seem to go the full length of laying down the doctrine that the mortgage would have been equally effectual to stop the running of the statute as against a person in adverse possession to the mortgagor at the time the mortgage was given, and it is to that particular state of facts that I desire more particularly to direct attention.

It must be conceded at the outset that the opinion expressed by Maclennan, J.A., is amply supported by the decisions of the English Court of Queen's Bench in *Doe, Palmer* v. *Eyre*, 17 Q.B. 366, and of the Exchequer in *Ford* v. *Ager*, 2 H. & C. 279, and *Doe, Baddeley* v. *Massey*, Ib. 373, and by the decision of the Chancery Divisional Court in *Cameron* v. *Walker*, 19 O.R. 212—and it is therefore with some diffi-

dence that I venture to suggest any doubt as to the soundness of the law thus laid down. The words of section 22 (R.S.O. c. 111) are certainly extremely general, viz., "any person entitled to, or claiming under a mortgage"; but in spite of this generality of expression, it is conceded in the cases above referred to, that they certainly do not apply to the case of a mortgagee who takes his mortgage, from a mortgagor whose title is already barred under the statute; but somewhat inconsistently, it seems to me, it is said that if there is only a single day for the statute to run in order to bar the mortgagor, that then the making of the mortgage has the effect of stopping the running of the statute as against the mortgagee, and also in effect as against the mortgagor also. This is certainly a very extraordinary effect to give to an act of the mortgagor done behind the back of the person in occupation, and without any notice to him, and I venture to doubt whether this can really be the true meaning of section 22. The draftsman of that section doubtless had in view the simple case of a mortgage executed by a mortgagor while in possession either by himself, or his tenants, as against whom and all persons subsequently claiming under him it was probably intended to preserve the mortgagee's rights; but it is hardly probable that the mind of the draftsman was directed to the case of a mortgage made by a mortgagor out of possession and as against whom the statute had begun to run in favor of some third person; nor does there appear to be anything in section 22 which, by necessary intendment, can be deemed to cover that case.

If a mortgagor whose title has been barred cannot by executing a mortgage convey any estate, how can it be reasonably said that a mortgagor who is out of possession can nevertheless by merely executing a mortgage convey an estate so as to defeat, or vest in his mortgagee, the rights of a person in actual occupation and claiming adversely to the mortgagor, and who is no party to the transaction? It is quite clear that if instead of a mortgage, the owner out of possession were to execute an absolute deed of the land in fee, the grantee would take subject to the rights of any person in

actual occupation who was no party to the deed; and if the Statute of Limitations had begun to run in favor of such person as against the grantor, it would continue to run as against the grantee. But a mortgage has been said to be a conditional sale, and it is extremely difficult to see why because a proviso for redemption is inserted in the deed, it is therefore to have a totally different effect as regards the running of the statute from what it would have if no such proviso was inserted.

It is submitted that it would be a more reasonable construction of the statute to hold that section 22 applies merely to those between whom the relationship of mortgagor and mortgagee exists, and has no application to the case of a mortgagee and a person claiming adversely both to the mortgagor and the mortgagee, for as to such a person the mortgagee is not a mortgagee, inasmuch as the position of mortgagee implies the correlative right of redemption, and a person in adverse possession to the mortgagor has no such right: therefore it is submitted that toward any such person the mortgagee is in no better position than his mortgagor—and in fact as to such person he is not a mortgagee within the true meaning of section 22. Construing the section in that way, we avoid the apparent violation of that fundamental principle of law, viz., that a grantor can by his conveyance only convey the rights which by law are vested in him, and he cannot convey rights which are vested in others without some express power so to do. A right of possession, or even an actual possession without any legal right, is an interest that is so far recognized by law that it cannot be ordinarily divested without either the concurrence of the party having it, or due process of law, and it must be apparent that it is a plain violation of principle to attribute to the mortgage of a mortgagor out of possession a power and effect altogether different from that of any other conveyance known to the law.

The construction which has been here contended against not only violates the fundamental principle above referred to, but it also violates another equally well settled rule, that when once the Statute of Limitations begins to run, it con-

tinues to run against the legal owner and all persons claiming under him, unless it is stopped by some of those acts of the person in possession which are referred to in the statute; for here the running of the statute is stayed not by any act to which the person in possession is a party, but solely by an act of the person out of possession: and according to the cases above referred to, every time a mortgage is executed a new starting point is given to the statute in favor of the owner out of possession, and if he is astute enough to keep up a constant mortgage of his property, the statute can never run against him, no matter how long the adverse possession may continue. In fact if the statute has all but run out against him, by simply executing a mortgage to another person for say ten dollars, he can at once stop the running of the statute

It is said that in England very few mortgages are given by persons in actual possession, but though a mortgagor is not in actual occupation he ought at least to establish to the satisfaction of his mortgagee, either that he is in possession by his tenants, or at all events that there is no one in adverse possession, and one would think that no prudent mortgagee would advance his money without being satisfied on that point, and while, as has been said before, it may be reasonable to hold that a mortgagee cannot be barred under section 22 as to his mortgagor or any one claiming under him, or deriving possession through him, until the lapse of ten years from the last payment, yet the case seems wholly different as regards persons already in occupation and in whose favor the statute has begun to run at the time the mortgage is given, and who are no parties to it.

GEO. S. HOLMESTED.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PURCHASER FOR VALUE WITHOUT NOTICE—RECITALS IN DEED—NOTICE—ESTOPPEL—NEGOTIATION—POSSESSION—CONVEYANCE BY VENDOR OUT OF POSSESSION—LEGAL ESTATE, RIGHT OF EQUITABLE OWNER TO CONVEYANCE OF—EJECTMENT—EQUITABLE TITLE.

Trinidad Asphalte Co. v. *Coryat*, (1896) A.C. 587, is a case of "the biter bit," and is the occasion of a very important deliverance of the Privy Council on the effect of notice of a registered deed. The facts of the case were tolerably plain. One Dernier was the grantee of the Crown of the land in dispute. One Alexis built a house on it, having acquired from Dernier a sufficient interest for that purpose. In 1881 one Dulcimore contracted with Dernier and Alexis for the purchase of the land; she paid for it, and entered into possession, but without any conveyance. Dernier died in 1885. In 1888 Dulcimore agreed to sell the land to McCarthy for $30, and executed a conveyance to him, in which a sister of Dernier joined, but she was not his heir. In this deed it was erroneously recited that Dulcimore, in 1881, had purchased the land from the sister, and had been let into possession, but no deed had been executed by the sister, that McCarthy had contracted to buy from Dulcimore and the sister had agreed to join in the conveyance to him, and she thereupon, "as beneficial owner" and at the request of Dulcimore thereby conveyed the land to McCarthy, and Dulcimore did also thereby "convey and confirm" the lands to him. This deed was duly registered; McCarthy went into possession and subsequently conveyed to the Trinidad Asphalt Co. With notice of this deed to McCarthy and of the company's possession, the plaintiff, Coryat, went to the heir of Dernier and for value obtained a conveyance from him and then brought this action of ejectment against the company. The Supreme Court of Trinidad decided in favor of the plaintiff; but the Privy

Council (Lords Watson and Hobhouse, and Sir R. Couch) have found no difficulty in reversing the judgment. The notice of the deed to McCarthy was considered to be notice of the equitable title under which the plaintiff claimed, notwithstanding the misrecitals in that instrument, and it was held that the plaintiffs were not precluded by the misrecital of facts in that deed from showing the true state of facts. The plaintiff's action was therefore dismissed with costs, and the defendants' counter-claim for a conveyance of the legal estate was upheld. One passage from the judgment on p. 593 seems to put the case in a nut shell—"the plaintiff had express notice that the defendants were transferees of Dulcimore's interest, whatever it might be, and an erroneous recital of her earlier title does not preclude her grantee from showing what interest really passed by her grant."

PROVINCIAL LEGISLATURE, JURISDICTION OF—IMMUNITIES OF MEMBERS OF PROVINCIAL ASSEMBLY—ORDER FOR IMPRISONMENT—REV. STAT. NOV. SCOTIA, 5TH SERIES, C. 3—(R.S.O., C. 11, SS. 40, 48).

Fielding v. *Thomas* (1896), A.C. 600, is a case on constitutional law, affecting the power of a provincial legislature to commit for breach of privilege and contempt in disobeying an order to attend before the House in reference to a libel reflecting on its members. The plaintiff, who had been imprisoned under such circumstances by order of the Legislative Assembly of Nova Scotia, brought the present action against certain members of the House who were present and voted in favor of the order for the plaintiff's arrest. The plaintiff recovered a verdict for $200 at the trial of the action for which judgment was directed to be entered, and which the Supreme Court of Nova Scotia refused to set aside, and from that decision the present appeal was brought. The Privy Council (Lords Halsbury, L.C., and Herschell, Watson, Macnaghten, Morris and Davey, and Sir R. Couch) reversed the judgment appealed from, and dismissed the action, holding that, although according to previous decisions of the Privy Council, it is not competent for a provincial legislature to confer on itself the privileges of the House of Commons

of the United Kingdom, or the power to punish the breach of those privileges by imprisonment, without express authority from the Imperial Legislature, yet in this case power to pass the Act in question (which is similar in its terms to R.S.O., c. 11) was conferred by the B.N.A. Act, s. 92, as a necessary part of the constitution of the local legislatures; and independently of that, the legislature had ample power to pass the clause of indemnity to its members, s. 26 (see R.S.O., c. 11, s. 40), which, of itself, constituted a bar to the action.

COMPANY—COMPANIES ACT—SHARES DEEMED TO BE PAID UP—CONTRACT—(R.S.C. c. 119, s. 27).

Smith v. *Brown*, (1896) A.C. 614, is a decision of the Privy Council (Lords Halsbury, L.C., and Herschell, Watson, Hobhouse, Macnaghten, Morris and Davey, and Sir R. Couch), upon an appeal from New South Wales upon an oft occurring point of company law. A syndicate having acquired a mining property and having determined to form a joint stock company, it was agreed between the members of the syndicate that their trustees, in whose names the property was vested, should convey the property to a trustee for the intended company, and that upon the formation of the company the whole of the shares should be allotted to them in proportion to their interests in the syndicate as purchase money for the property, and that 17s. on each share so issued should be deemed to be paid up. On September 6th the memorandum of association was filed by which the terms and conditions of the agreement under which the transfer above mentioned had been made to the trustee for the company were adopted, and the company was completely formed, and the deed to the trustee for the company was registered under the Act (see R.S.C., c. 119, s. 27) on the following day. Afterwards the shares in question were issued. The company having been ordered to be wound up, the liquidator claimed to put an allottee of certain of the shares thus issued on the list of contributories for 17s. per share, being the amount not actually paid on the shares. The colonial

court thought the case was governed by the decision of the Court of Appeal in *Hartley's case*, L. R. 10 Ch. 157; but the Privy Council came to the conclusion that that case was distinguishable from the present, on the ground that there there was a genuine purchase and a genuine bargain to pay the price in paid up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale; but here there was no contract with the company, but nothing more than a resolution of certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public, which did not create, nor was it intended to create, any legal rights, duties or obligations, as between the persons expressed to be parties to it, and was therefore not a contract with the company sufficient to discharge the holder of the shares in question from the liability to pay for them in full.

JUSTICES—SEARCH WARRANT—INFORMATION—(CR. CODE, S. 569.)

Jones v. *German*, (1896) 2 Q.B. 418, is an instance of the extraordinary moral obliquity of the plaintiff in the action, if of nothing else The action was brought against a justice of the peace for trespass for having issued a search warrant under which the plaintiff's goods were searched. The facts as they appear by the report were as follows: The plaintiff had been in the employ of a gentleman named Wood, and as he was about to quit his service, Mr. Wood, suspecting that he was purloining some of his property, laid an information before the defendant, in which he swore that he had reasonable cause to suspect and did suspect that the plaintiff had in his possession certain property belonging to the informant, and that he had requested the plaintiff to be allowed to search several boxes which the plaintiff had packed ready to be taken away, and that the plaintiff had refused to permit the search. Upon this information a warrant was issued, the search made and several articles which Wood claimed to be his property were discovered in the boxes; and the plaintiff was charged with stealing them and committed for trial. It was subsequently arranged between the plaintiff and Wood

that the latter should have back the articles, and that Wood would not offer any evidence against the plaintiff, and that the plaintiff should take no proceedings against Wood, and thereupon the plaintiff was acquitted. He then commenced the present action against the magistrate who issued the warrant, claiming that it was illegally issued because the information did not allege that the goods had been stolen, or show that the informant believed they had been stolen, nor state specifically the goods believed to be in the plaintiff's possession. Lord Russell, C.J., before whom the action was tried, in a considered judgment, held that the information was sufficient as showing reasonable grounds for suspecting that the goods in question were being feloniously dealt with by the plaintiff. He also thought it was unnecessary to specify the goods and dismissed the action. It may perhaps be open to some doubt how far this decision would be applicable under the Cr. Code, s. 569. That section requires the justice to be satisfied by information "that there is reasonable ground for believing that there is in any building, receptacle or place anything upon or in respect of which any offence against the Act has been or is suspected to have been committed." The form J referred to in that section also seems to require a description of the things to be searched for, and also a statement of the cause of suspicion, and winds up with a prayer for a warrant to search "for the goods and chattels so feloniously stolen, taken and carried away." At the same time there is nothing imperative in the Code requiring such forms to be used, and no others. S. 982 merely states that the forms provided "shall be deemed good, valid and sufficient in law."

CRIMINAL LAW—FOREIGN ENLISTMENT ACT, 1870, (33 & 34 VICT., C. 90)—PLEADING.

The Queen v. *Jameson*, (1896) 2 Q.B. 425, is the case arising out of the recent memorable raid on the Transvaal. A motion was made to quash the indictment on the ground that it did not appear thereby that the Foreign Enlistment Act, 1870, was in force in that part of Her Majesty's domin-

ions when the alleged illegal expedition was prepared, and that the Act did not apply to British subjects outside of Her Majesty's dominions. The Court (Lord Russell, C.J., and Pollock, B., and Hawkins, J.) determined both points adversely to the defendants, holding that an allegation that "within the limits of Her Majesty's dominions and after the coming into operation therein of the Act, called 'The Foreign Enlistment Act, 1870,' certain offences against the said Act were committed, was sufficient;" and secondly, that if there be an unlawful preparation of an expedition by some person in Her Majesty's dominions, any British subject rendering assistance is guilty of an offence, even though such assistance is rendered outside Her Majesty's dominions.

RAILWAY—EXPROPRIATION OF LAND—ARBITRATION—AWARD OF LESS COMPENSATION THAN OFFERED—COSTS OF REFERENCE—LAND CLAUSES CONS. ACT, 1845 (8 & 9 VICT., C. 18), S. 34—(THE RAILWAY ACT (51 VICT., C. 29 (D.)) S. 154).

In *Miles* v. *Great Western Ry. Co.*, (1896) 2 Q.B. 432, a railway company claimed to expropriate certain lands of a private owner for the purposes of the railway. The company offered £11,000 for the land—which was refused. Part of the land owner's claim was for damage caused to the residue of his land, by cutting it off from its natural outlet for drainage. An arbitration took place, and in the course of the reference the company agreed to permit the land owner to make a sewer for the purpose of draining the residue of his land, under the land of the company, and consequently no claim for the damage in respect of drainage was submitted to the arbitrator, who fixed the price to be paid by the company at £10,029. The company claimed to be entitled to recover the costs of the reference, but the Divisional Court (Pollock, B., and Bruce, J.) considered that the amount awarded was not in respect of the same subject matter as that in respect of which the offer had been made, and that therefore the company was liable to pay the costs of the reference—and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.)

RAILWAY—EXPROPRIATION—STATUTORY RIGHT TO TAKE PART OF PROPERTY—RIGHT OF WAY—POWER OF RAILWAY COMPANY TO GRANT.

In re Gouty and Manchester & Sheffield Ry., (1896) 2 Q.B. 439, was also a case arising out of the expropriation of land by a railway company. In this case the company, by virtue of a special Act, had power to take part of houses and buildings specified in the Act, provided the portion could in the opinion of the authority who determined the amount of compensation, be severed from the remainder without material detriment thereto. The company gave notice to treat for a portion of certain property, and undertook to give the land owner a right of way over the property taken, to the remainder of his property. On a special case stated by the arbitrator, to whom was referred the question of compensation, the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.), held that it was competent for the arbitrator in determining whether there would be "material detriment" to the remainder of the property, to take into consideration all the circumstances, including the sufficiency of the proposed access; and that the giving of the proposed right of way over the lands of the company, was not inconsistent with the purposes for which the land was taken, and that therefore the company had power to grant it.

ESTOPPEL—JUDGMENT IN REM—INSURANCE—SALVAGE.

In *Ballantyne* v. *Mackinnon*, (1896) 2 Q.B. 455, the doctrine of estoppel by matter of record is discussed. The action was brought to recover under a policy of marine insurance a sum paid by the plaintiff for salvage which had been awarded against the plaintiff by a judgment of the Admiralty Court. The plaintiff contended that by the judgment of the Admiralty Court the defendant was estopped from disputing that the loss was one covered by the policy. Lord Russell, C.J., who tried the action, gave judgment for the defendant, and the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.) affirmed the judgment, holding that a judgment in rem is merely conclusive as to the status of the res, but not as to any other matter. In the present case it appeared that the

claim for salvage had arisen solely from the fact that the ship insured had gone to sea insufficiently coaled, and this was held not to be a peril of the sea. Without determining whether or not a claim for salvage could properly arise without the intervention of a sea peril, the Court of Appeal was quite clear that even if it could, it would not be covered by a policy against sea perils.

PRACTICE—JOINDER OF DEFENDANTS—ALTERNATIVE RELIEF—AGENT AND ALLEGED PRINCIPAL, JOINDER OF AS DEFENDANTS—ORD. XVI., RR. 5, 7, 11—(ONT. RULES 302, 308, 324.)

Bennetts v. *McIlwraith*, (1896) 2 Q.B. 464, is a practice case concerning the joinder of defendants. The action was brought against the original defendants, McIlwraith & Co., to recover damages for misrepresenting that they had the authority of Burns & Co. to act as their agents in entering into a charter party with the plaintiffs; the plaintiffs also sued McIlwraith & Co. as principals for breach of the charter party, and also for breach of duty as agents. Upon the production of documents for discovery the plaintiffs considered it probable that they could show that Burns & Co. had in fact authorized McIlwraith & Co. to act as their agents in entering into the charter party, and they therefore added them as defendants. From this order adding them as defendants Burns & Co. appealed, relying on *Smurthwaite* v. *Hannay* (1894), A.C. 494 (ante, vol. 31, p. 154), and *Sadler* v. *G. W. Ry. Co.*, (1895) 2 Q.B. 688 (ante, vol. 32, p. 103.) The Court of Appeal (Smith and Rigby, L.JJ.), considered that the case was not governed by these decisions, but by the earlier cases of *Honduras Ry.* v. *Tucker*, 2 Ex. D. 301; and *Massey* v. *Heynes*, 21 Q.B.D. 330, which are not affected by the decision of the House of Lords in *Smurthwaite* v. *Hannay*. As Smith, L.J., says, the redress is sought against two persons, but the right to it arises out of one common transaction, and the joinder of the defendants under these circumstances was held to be justified by Ord. xvi., r. 7 (Ont. Rule 308), which was not in question in *Smurthwaite* v. *Hannay*.

EXPROPRIATION—COMPENSATION—LAND LET FOR PUBLIC PARK—POWER TO RE-ENTER IF COMPULSORILY TAKEN.

In re Morgan & London & N. W. Ry., (1896) 2 Q.B. 469, certain land was expropriated for a railway, and the question of compensation having been referred to arbitration, it appeared that the land in question, with other land, had been sub-let, at a small yearly rental to a municipal corporation for a public park, subject to a provision that if the land or any part of it should be compulsorily taken under any Act of Parliament, it should be lawful for the lessor to re-enter as of his former estate. The lessor did not actually re-enter, but claimed the compensation payable in respect of the land taken. The railway company contended that the proper amount of the compensation was the loss of rent which the claimant would sustain during the residue of the term to the corporation, and the value of the reversion, which was for one day only. The claimant on the other hand contended that the proviso in the lease entitled him to compensation for the value of the land for the residue of his original lease freed from the sub-lease to the corporation. This proviso the railway company claimed was nugatory because it only gave power to determine the lease, which was done ipso facto by the company taking possession, and the claimants had not actually re-entered nor could they, after the company had taken possession. A Divisional Court (Day and Laurence, JJ.), not without some difficulty, decided in favor of the claimant's contention.

PRACTICE—PRESUMPTION OF DEATH—EVIDENCE.

In the Goods of Clarke, (1896) P. 287, Jeune, P.P.D., held that where it is sought to raise a presumption of the death of a party who has disappeared, the evidence in support of the application which referred to letters from the person which had been received, but which were not produced nor accounted for, and which omitted to account for the delay which had occurred, and was unsupported by any corroboration of belief in the death, was altogether insufficient and could not be acted on.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT.

Ontario.] [Dec. 9, 1896.

LAKE ERIE & DETROIT RIVER RY. CO. *v.* SALES.

Railway company—Carriage of goods—Connecting lines—Special contract—Loss by fire in warehouse—Negligence—Pleading.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie & Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere, to be delivered, some to the G.T.R. Co., and the rest to the C.P.R. and other companies, by the said several companies to be, and the same were transferred to the Lake Erie & Detroit River Ry. Co. for carriage to Merlin. It also alleged that on receipt by the Lake Erie Company of the goods it became its duty to carry them safely to Merlin and deliver them to S., but did not allege that they were received to be carried subject to the common law liability of the company as common carriers. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co., at Merlin.

Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G.T.R., to be transferred to the Lake Erie Co. as alleged, if the cause of action stated was one arising ex delicto, it must fail, as the evidence showed that the goods were received from the G.T.R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G.T.R. to the consignors, and if it was a cause of action founded on contract it must also fail, as the contract proved created only a limited liability and was not the absolute unconditional contract set up in the statement of claim.

Held, further, that as to the goods delivered to the companies other than the G. T. R. to be transferred to the Lake Erie, the latter company was liable under contract for storage alleged; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G.T.R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie, and such finding should not be interfered with.

Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

Appeal allowed in part.

Riddell, for the appellants.

Thomson, Q.C., and *Tilley*, for the respondent.

Ontario.] [Dec. 9, 1896.

CITY OF TORONTO *v.* C. P. RY. CO.

Municipal corporation—By-law—Assessment—Local improvements—Agreement with owners of property—Construction of subway—Benefit to lands.

An agreement was entered into by the corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company, ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, a part of which fronted on the company's lands, and which, when made, cut off to some extent the lands from abutting as before on certain streets, and a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property in respect to which the assessment was made being on the approaches to the subway.

Held, that to the extent to which the lands of the company were cut off from abutting on the streets as before, the work was an injury, and not a benefit to such lands, and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

Held, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable.

Notice to a property owner of assessment for local improvements under s. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the Court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result, the judgment of the Court of Appeal (23 A.R. 250) was affirmed.

Appeal dismissed with costs.

Robinson, Q.C., and *Caswell*, for the appellant.

Armour, Q.C., and *MacMurchy*, for the respondent.

Quebec.] [Dec. 9, 1896.

SENESAC *v.* VERMONT CENTRAL RY. CO.

Appeal—Finding of Court below—Absence of proof—Interference with on appeal—Railway Co.—Negligence.

An action was brought by S. against a railway company for damages from loss of property by fire from a woodshed on the company's premises spreading

to the adjoining property of S. The Superior Court and the Court of Review both held that the origin of the fire was a mystery, and that it was not proved to have been caused by any fault of the company. On appeal from the decision of the Court of Review (Q.R. 9 S.C. 319),

Held, that as there was nothing to show that the judgment appealed from was clearly wrong or erroneous, the Supreme Court would not interfere with it.

Appeal dismissed with costs.

Geoffrion, Q.C., for the appellant.

Greenshields, Q.C., and *Lafleur* for the respondent.

Quebec.] [Dec. 9, 1896.

MONTREAL ROLLING MILLS CO. *v.* CORCORAN.

Negligence—Cause of accident—Evidence—Presumptions—Art. 1053 C.C.—Quebec Factories Act (R.S.Q., arts. 3019-3053)—Police regulations—Civil responsibility.

An engineer in charge of the engine and machinery of a rolling mills company was killed by being caught in a belt or a fly wheel while acting in discharge of his duty. He was alone at the time, and no certain evidence could be obtained, in an action by his widow, as to the immediate cause of the accident. It was contended that the fact that the fly wheel and machinery were not securely guarded or fenced, contrary to the provisions of "The Quebec Factories Act" (R.S.Q., arts. 3019-3053) was sufficient evidence of negligence to make the employers of the deceased liable.

Held, reversing the judgment of the Court of Queen's Bench, that it was necessary to prove by direct evidence, or by weight, precise and persistent presumptions, that the accident was caused by the positive fault, imprudence or neglect of the employers, and for want of such proof they were not liable.

Held, further, that the said provisions of the Factories Act are intended to operate purely as police regulations, and do not affect the civil responsibility of employers towards employees as provided by the Civil Code.

Appeal allowed with costs.

McGibbon and *Riddell*, for the appellants.

Guerin, for the respondent.

Ex. Adm.] [Dec. 9, 1896.

SHIP "CUBA" *v.* MCMILLAN.

Maritime law—Collision—Rules of the road—R.S.C. c. 79, s. 2, sub-secs. 15, 16, 18, 19, 21 to 23—Compliance with signal—Negligence.

The steamship "Elliott," from Charlottetown to Sydney, C.B., arrived off Law Point, in Sydney Harbour, about 7.30 p.m. and stopped for a pilot, who came aboard and headed her up channel at full speed on a course towards the northerly side, her proper course in a narrow channel. After proceeding awhile the masthead light of a vessel was seen over the south-east bar moving in a northerly direction across the mouth of the harbor. Presently both side lights became visible also, and all three were seen for about ten minutes a point or a point and a half on the port bow. This vessel was the "Cuba,"

outward bound, and she saw the "Elliott's" red light about two miles off, a point or point and a half on her starboard bow. Each vessel soon made out the other's course.

The "Elliott," seeing that the "Cuba" kept her bearings for some time, with both side lights always visible, further ported her helm, and the "Cuba" went further to starboard. When they were about a quarter of a mile apart, the "Elliott's" helm was put hard to port, and the "Cuba" turned sharply to port, shutting out her red light. When about two cable lengths away the "Cuba" signalled by two blasts of her whistle that she was going to port. The "Elliott" then reversed her engines, but perceiving almost immediately that the bow of the "Cuba" was turned to starboard, instead of to port, set them going again at full speed hoping to cross clear of the "Cuba's" bow. The vessels were, however, too close together, and the "Cuba's" bow struck the "Elliott" a little abaft amidships.

Held, that from the evidence and finding of the local judge in Admiralty, Nova Scotia District (5 Ex. C.R. 135), the vessels were not end on or "meeting" ships, nor "crossing" ships with the lights red to green or green to red, but they were "passing" ships, one side light of the "Elliott" being seen dead ahead of the "Cuba." In such case there is no statutory rule imposed, as unless the course is changed, the vessels must go clear of each other; it is governed by the rules of good seamanship. The "Elliott," therefore, violated no statutory rule in porting her helm, and acted consistently with good seamanship.

Held, further, that the "Cuba" was in fault in persisting, without good reason, in keeping on the wrong side of the fairway; in starboarding her helm when it was seen that the "Elliott's" was hard to port with the vessels rapidly approaching; and after signalling that she was going to port in reversing her engines, whereby her head was turned to starboard.

Held, also, that though the "Elliott" may have violated the statutory rule requiring her to slacken her speed, or stop and reverse if necessary when approaching another vessel, so as to avoid risk of collision, yet as the omission to do so would have led to no injurious consequences if the "Cuba" had acted in conformity with her signal, she was not for that reason responsible for the accident. R.S.C., c. 79, s. 5.

The rule as to steam vessels keeping to their starboard side of a narrow channel does not override the general rule of navigation. The Leverington (11 P.D. 117) followed.

Appeal dismissed with costs.

Mellish, for the appellant.

Harris, Q.C., for the respondents.

Nova Scotia.] [Dec. 9, 1896.

MCLAUGALIN *v.* MCLELLAN.

Will—Execution of—Testamentary capacity—Mental condition of testator.

In proceedings before a Court of Probate to prove a will in solemn form, evidence was offered to show that the testator, when he gave instructions for

the preparation of the will and when he executed it, was not possessed o testamentary capacity.

Held, affirming the decision of the Supreme Court of Nova Scotia (28 N.S.R. 226), that although the testator suffered from a disease that induced drowsiness or stupor, and when he gave the instructions and executed the will was in a drowsy condition, and there was difficulty in keeping his mind in a state of activity so as to ascertain what his wishes were, yet as it appears that he understood and appreciated the instructions he gave and the document itself when read over to him, it was a valid will.

Appeal dismissed with costs.

Mellish, for the appellant.

Laurence, Q.C., for the respondents.

Province of Ontario.

COURT OF APPEAL.

From ARMOUR, J.] [Jan. 12.

IN RE CAUGHELL AND BROWER.

Arbitration and award—Voluntary submission—Motion to set aside award —Time—52 Vict., c. 13 (O.)

A motion to set aside an award made under a voluntary submission must be made before the expiration of the term next after publication of the award, even if three months have not expired.

In re Prittie and Toronto, 10 A.R. 503, considered.

The construction of 52 Vict., c. 13, (O.) discussed.

Remarks as to the necessity of revision of the legislation as to arbitrations.

Judgment of ARMOUR, C.J., affirmed.

Clute, Q.C., and *Crothers*, for the appellants.

Armour, Q.C., and *McLean*, for the respondents.

From MEREDITH, C.J.] [Jan. 12

HARNWELL *v.* PARRY SOUND LUMBER COMPANY.

Master and servant—Contract for defined term—Continuance of employment —Right to dismiss.

Where a book-keeper is engaged for the term of one year and his employment is continued after the expiration of that time, there is no presumption that it is to continue for another year. The employer may dismiss him at any time upon reasonable notice, and in this case, there being no evidence of usage to the contrary, three months notice was held to be reasonable.

Judgment of MEREDITH, C.J., reversed.

Osler, Q.C., and *W. M. Douglas*, for the appellants.

W. K. Cameron, for the respondent.

From STREET, J.] [Jan. 12.

GORDON *v.* WARREN

Husband and wife—Separate property—Covenant—Mortgage.

Personal estate settled upon a married woman for her separate use for life without power of anticipation, and after her death to such uses as she might by deed or will appoint, and in default of appointment then over, is not separate property in reference to which the married woman can be presumed to have contracted.

A married woman may show in answer to an action against her upon a covenant in a mortgage given by her to secure part of the purchase money of land conveyed to her, that she was acting merely as trustee for her husband, and did not take the land as her separate property.

Judgment of Street, J., reversed.

Carey, for the appellant.

Ludwig, for the respondent.

From ROSE, J.] [Jan. 12.

HOPE *v.* MAY.

Bankruptcy and insolvency—Assignments and preferences—Agreement to give chattel mortgage—Bills of sale and chattel mortgages—Change in statute law—Registration of agreement—59 Vict., c. 34 (O.).

An agreement by the debtor to give to his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels," confers no title upon the creditor as against the debtor's assignee for the benefit of creditors.

Kerry v. *James*, 21 A.R. 338, considered.

Judgment of ROSE, J., affirmed.

After judgment in the assignee's favor the Act, 59 Vict., c. 34 (O.), was passed, and the agreement in question was registered.

Held, that this did not validate it.

J. J. Scott, for the appellants.

John McGregor and *R. G. Smyth*, for the respondent.

From BOYD, C.] [Jan. 12.

MCDONALD *v.* DICKENSON—FREEMAN *v.* DICKENSON.

Negligence—Nuisance—Highway—Drain tiles.

Leaving drain-tiles in a pile at the side of a highway while repairs thereto are being lawfully made is not negligence, and does not constitute a nuisance, and no action lies for injuries resulting from a horse taking fright at the tiles and running away.

Judgment of BOYD, C., reversed, OSLER, J.A., dissenting.

J. A. McLean and *W. K. Cameron*, for the appellants.

J. A. Robinson, for the respondents.

From ROSE, J.] [Jan. 12.

PETMAN *v.* CITY OF TORONTO.

Municipal corporation—Local improvements—Increase of cost.

The extension of a street was petitioned for as a local improvement by the requisite number of owners and the petition was acceded to by the Council, the cost being estimated at $14,000 and an assessment for that sum being adopted by the Court of Revision after notice to the persons interested. After some delay the Council purchased the land required at a price much greater than the estimate and passed a by-law levying over $36,000 for the work. No work was done on the ground, and no notice of the second assessment was given.

Held, that an opportunity of contesting the second assessment should have been given, and that the by-law was invalid.

Judgment of ROSE, J., affirmed.

Fullerton, Q.C., and *Caswell*, for the appellants.

W. Macdonald, for the respondent.

From ROSE, J.] [Jan. 12.

SMITH *v.* PEARS.

Covenant—Indemnity—Release—Sale of land.

A covenant by a purchaser with his vendor that he will pay the mortgage moneys and interest secured by a mortgage upon the land purchased, and will indemnify and save harmless the vendor from all loss, costs, charges and damages sustained by him by reason of any default, is a covenant of indemnity merely, and if before default the purchaser obtains a release from the only person who could in any way damnify the vendor, he has satisfied his liability.

Judgment of ROSE, J., affirmed.

E. Taylour English and *A. McNab*, for the appellant.

Snow and *G. H. Smith*, for the respondent.

From DIVISIONAL COURT.] [Jan. 12.

YOUNG *v.* WARD.

Husband and wife—Employment or occupation in which husband has no proprietary interest—Letting lodgings—R.S.O. c. 132, s. 5—Fraudulent conveyance—Attack under claim of third person acquired by person himself estopped.

Where a married woman living in a house furnished by her husband and supporting herself during his temporary absence in search of employment, lets lodgings and supplies necessaries to the lodger, she cannot recover from the lodger the money due as earned by her in an employment or occupation in which the husband has no proprietary interest.

Where a creditor takes the benefit of a conveyance alleged to be fraudulent, and on that ground fails in his action attacking it, the acquiring by him of a small claim and the bringing of another action upon it, is an abuse of the process of the Court.

Judgment of the Divisional Court, 27 O.R. 433, reversed.

J. E. Jones, for the appellant.

Cassels, Q.C., and *Swayzie*, for the respondent

From ROBERTSON, J.] [Jan. 12.

TENNANT *v.* MACEWAN.

Bankruptcy and insolvency—Assignments and preferences—Assignee's commission and expenses—Deputy resident out of Ontario, R.S.O., c. 124, s. 3, sub-sec. 6.

Where an assignment for the benefit of creditors is made by a resident of Ontario to an assignee residing in Ontario, but all the work in connection with the assignment is done by the assignee's partner residing in Montreal, the assignee cannot recover as against the assignor or retain out of his estate any commission or expenses.

Judgment of ROBERTSON, J.. affirmed.

Geo. Kerr and *N. W. Rowell*, for the appellant.

H. D. Gamble and *H. L. Dunn*, for the respondent.

HIGH COURT OF JUSTICE.

FALCONBRIDGE, J.] [Oct. 28, 1896.

ATKIN *v.* CITY OF HAMILTON.

Railway—Highway crossing—Accident—Damages.

Where a highway in a city was crossed by a railway, the rails being raised some two feet above the sidewalk, the part between the rails being filled in with broken tiles over which loose boards were placed, and the plaintiff, in attempting to get over the crossing to reach her destination at a point beyond the tracks—the street in question being the only mode of access thereto—slipped, and was injured, the railway company were held liable therefor.

Keechie v. *Corporation of Toronto*, 22 A.R. 371, distinguished.

J. W. Nesbitt, Q.C., and *John Greer*, for the plaintiff.

Carscallen, Q.C., for the defendants.

STREET, J.] [Nov. 10, 1896.

SMITH *v.* EAGEN.

Receiver—Share of deceased wife's estate—Execution debtor.

At the instance of execution creditors, who had an unsatisfied judgment against a debtor, a receiver was appointed to receive the debtor's share of his deceased wife's estate, as to which he was the administrator : and an injunction was granted restraining him from transferring, interfering or dealing with his said share until the further order of the Court.

Macdonald, Q.C., for the plaintiffs.

Douglas Armour, for the defendant.

STREET, J.] [Nov. 13, 1896.

PATCHING *v.* SMITH.

Landlord and tenant—Rent payable in advance—Breach of covenant not to assign without leave—Damages.

Where, a couple of days prior to the accruing due of a quarter's rent payable in advance, the lessee assigned without the lessor's leave, in an action for

breach of a covenant therefor contained in the lease, the lessor was held entitled to recover as damages the rent so payable in advance, without any deduction for rents realized during the said quarter under new leases created by the lessor, who, finding the property vacant, had taken possession.

W. M. Douglas, for the plaintiff.

Talbot Macbeth, for the defendant.

Divisional Court.] [Dec. 12, 1896.

REGINA EX REL. BROWN *v.* SIMPSON.

Incorporated company—Carrying on business as chemists—Pharmacy Act, R.S.O. c. 151—Special case under s. 900 of Criminal Code—Right of police magistrate to state—Procedure under R.S.O. c. 74.

An incorporated company, carrying on business as a departmental store, and having a drug department under the management of a duly qualified and registered pharmaceutical chemist, who had obtained his certificate under the Pharmacy Act, R.S.O c. 151, were charged with a breach of s. 24 of the Pharmacy Act, in unlawfully keeping open shop for retailing, dispensing and compounding poisons, etc., before a police magistrate, who dismissed the charge, but at the request of the prosecutor he stated a special case for the opinion of a division of the High Court.

Held, that there was no power to state a case, for the alleged offence being for the breach of an Ontario statute, the procedure provided for by the Ontario legislation applied, which was by way of appeal to the sessions, and not the stating of a case under s. 900 of the Criminal Code.

Osler, Q.C., and *Malone* for the private prosecutors.

Ritchie, Q.C., *Shepley*, Q.C., and *Ludwig*, for the defendants.

BOYD, C., FERGUSON, J. }
MEREDITH, J. } [Dec. 17, 1896.

MCGILLIVRAY *v.* MIMICO REAL ESTATE SECURITY CO.

Covenant against incumbrances—Sale of land—Breach—Measure of damages.

Action for damages for breach of covenant against incumbrances. The mortgage wherein consisted the breach was on the lands in question and other lands, and was for an amount much greater than the present value of the land. It was impossible to apportion it so as to ascertain the incidence of the burden on the plaintiff's land.

Held (MEREDITH, J., dissenting) that the measure of damages was the whole amount due on the mortgage: but judgment should be for payment of the amount into Court, so that, if paid, it might reach its proper destination.

Per MEREDITH, J.: Judgment should be simply for a reference to ascertain what, if anything, the plaintiff was entitled to recover for breach of the covenant sued on, reserving further directions and costs.

C. D. Scott, for the plaintiff.

No one for the defendants.

BOYD, C., FERGUSON and MEREDITH, JJ. [Dec. 17, 1896.

RODGERS *v.* MORAN.

Administrator ad litem—Devolution of Estates Act—Action to set aside tax sale—54 Vict., c. 18, s. 1, (O).—56 Vict., c. 20, s. 3.

Ellen Quirk died possessed of certain lands on January 15th, 1887, intestate. In 1891 the lands were sold at a tax sale, and the deed given in December, 1892. In a certain action of *Fitzgerald* v. *Quirk*, brought for the administration of the estate of Ellen Quirk by one of the next of kin, the present plaintiff was appointed administrator ad litem; and he now brought action to set aside the tax sale.

Held, that he had no locus standi, the title to the lands, assuming the tax sale invalid, being not in him, but in Ellen Quirk's heirs: 54 Vict., c. 18, s. 1; 56 Vict., c. 20, s. 3; the order appointing the plaintiff administrator ad litem at most merely giving him the right to carry on the administration proceedings then pending, or any other proceedings of the like nature that might thereafter be commenced.

Per MEREDITH, J. *Quære*, whether the plaintiff sufficiently represented the estate under the order in question, even for the purposes of the proceeding for which he was appointed.

A. B. Aylesworth, Q.C., for the plaintiff.
Rowell, for the defendants.

BOYD, C., MEREDITH, J. FERGUSON, J. Dec. 17, 1896.

ROSE AND THE CORPORATION OF THE VILLAGE OF MORRISBURG.

Ditches and watercourses—Completion of work by engineer—Time for engineer to take action—R.S.O., c. 220, s. 15.

The Ditches and Watercourses Act provides (R.S.O., c. 220, s. 15; 57 Vict., c. 55, s. 28) that the engineer "at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, and may let the work to the lowest bidder," etc.

Held (MEREDITH, J., dissenting), that on its proper construction this means that if a proprietor of the land through which the ditch goes fails to complete his portion of it within the time limited, then it is open for those interested to bring on the engineer in order to have the whole work properly completed, and the lapse of a year or of even two years, as in this case, is not fatal, where it is plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions by the one who had the first option to do the work.

Marsh, Q.C., for the plaintiff.
Adam Johnston, for the defendants.

BOYD, C.] [Dec. 17, 1896.

CARRIQUE *v.* BEATY.

Promissory note—Alteration after maturity—Signature by new maker—Release—Time—Presentment—Delay—Prejudice—Continuing security.

A promissory note, payable one year after date, was made by two persons, one signing for the accommodation of the other. After maturity the note was signed by a third person as a maker, with the object of giving additional security to the holder.

Held, that the third person was to be regarded as an indorser, and his signature did not constitute an alteration in the note such as would discharge the original accommodation maker; and upon the evidence that there was no agreement to give time for payment which would discharge him, if regarded as a surety.

Kinnard v. *Tewsley*, 27 O.R. 398, distinguished.

Held, also, that, treating the last signer as an indorser on a note payable on demand, it was not shown that he had been prejudiced by non-presentment for payment prior to this action, the instrument having been dealt with as a continuing security, and there having been no unreasonable delay in presentment.

J. W. Elliott, for the plaintiff.

J. C. Hamilton, for the defendant, James Beaty.

E. W. Boyd, for the defendant, John Albert Beaty.

MEREDITH, C.J.] [Dec. 18, 1896.

IN RE HOOPER.

Settled Estates Act—Sale of vacant land—Life tenant—Income—Taxes—Infant—Maintenance.

The Settled Estates Act was intended to enable the Court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction.

Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the Court deeming the sale in the best interests of all parties, and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remaindermen.

J. E. Jones, for the petitioners.

J. Hoskin, Q.C., for the infant.

MEREDITH, C.J.] [Dec. 22, 1896.

TOWNSEND *v.* TORONTO, HAMILTON & BUFFALO RAILWAY CO.

Liquidated damages—Equitable relief—O. J. Act, s. 52. sub-sec. 3.

Where under a covenant contained in a lease granting a right of way over certain lands, to railway company for the purpose of a switch to a gravel pit, the lessees on default in removing the tracks and ties from the land within fifteen days from the termination of the lease, were to forfeit and pay to the lessor five dollars a day as liquidated damages, and not as a penalty for each day after said time that the said lands and premises should remain in any way obstructed, such damages must be treated as liquidated; but that under s. 53, sub-sec. 3, of the O. J. Act, which applies to a case of this kind, the Court is empowered to grant such relief as may be deemed advisable.

Rykert, for the plaintiff.

D'Arcy Tait, for the defendants.

BOYD, C.
London Assizes, [Jan. 13.

STRUTHERS *v.* MCKENZIE.

Co-operative association—Ultra vires.

Action against the manager and directors of a co-operative association for goods sold and delivered to the association.

Held, that under the Act under which the association was incorporated, R.S.O., c. 166 (see s. 13), plaintiff could not recover. Non-suit entered.

Gibbons, Q.C., for plaintiff.

W. J. Hanna, for defendants.

MEREDITH, C.J., ROSE, J., MACMAHON, J. Jan. 13.

REGINA *v.* MCFARLANE.

Summary conviction—Municipal by-law—Regulation of hawkers—Municipal Act, s. 495—Negativing exception—Amendment—Criminal Code, ss. 889, 890—Costs.

Rule to quash a summary conviction of the defendant by two justices of the peace for the county of Halton, for alleged breach of a by-law of the county regulating hawkers and peddlers, in selling fresh meat without a license. The by-law was passed pursuant to s. 495 of the Municipal Act.

The Court held that the conviction was bad upon its face, because it did not negative the exception in s. 495, sub-sec. 3, with regard to "hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this province"; and that it could not be amended under ss. 889 and 890 of the Criminal Code, because the evidence, when looked at, did not show an offence against the by-law; and as to costs, that, as the prosecutor was not discharging a public duty, there was no reason why he should not be ordered to pay costs.

Rule absolute quashing conviction with costs to be paid by the private prosecutor.

J. W. Nesbitt, Q.C., for the defendant.

McBrayne, for the private prosecutor.

FERGUSON, J.] [Jan. 13.

HENDERSON *v.* CANADA ATLANTIC R. W. Co.

Discovery—Examination of officer of railway company—Flagman.

A flagman in the employment of a railway company whose duty it is to give notice of danger to persons intending to cross a line of railway at a particular place, he being under the superintendence of the yard foreman, is not an officer of the company examinable for discovery at the instance of the plaintiff in an action against the company to recover damages for injuries sustained through the alleged neglect of the flagman to give notice of danger.

R. McKay, for the plaintiff.

D. L. McCarthy, for the defendants.

MEREDITH, C.J., C.P., ROSE, J., MACMAHON, J. [Jan. 14.

COLE *v.* HALLIDAY.

Division Courts—R.S.O., c. 51, s. 148—Practice—Appeal—Jurisdiction—Costs.

The plaintiff appealed from the judgment of a Division Court judge at the trial.

Held, that under the Division Court Act, s. 148, an appeal does not lie to a Divisional Court until a new trial has been applied for.

That the Court has power to give costs where proceedings are invoked to quash an appeal.

Appeal quashed. Costs as of a motion to quash fixed at $10, to be paid by the plaintiff.

Clute, Q.C., for the plaintiff.

D. Armour, for the defendant.

BOYD, C.] [Jan. 16.

BOYD *v.* SPRIGGINS.

Affidavit—Notary—Seal.

An affidavit sworn before a notary public in Ontario should be authenticated by his seal of office.

(Note.—This decision was not before Street, J., when he decided *Re Ryan, Ryan* v. *Sutherland*, ante 40, and he subsequently expressed his concurrence in the Chancellor's view.)

Province of Nova Scotia.

SUPREME COURT.

GRAHAM, E.J.
In Chambers.

[Jan. 9.

FERGIE *v.* DRUMMOND.

Libel—Motion to strike out paragraphs of defence—Justification of words complained of—Facts insufficiently set out—Amendment—Costs.

Action against defendant as publisher of the Journal and Pictou News, for the publication of alleged libels of, and concerning the plaintiff in his capacity as Manager at Westville, in the County of Pictou, of the Intercolonial Coal Mining Co. (Ltd.). The statements complained of had reference to the discharge of men from the mine, and were to the effect that if the manager had not been so "blindly and bitterly partizan, and had he discharged fairly and honestly," the proportion of discharges would have been different from what it was.

Counsel for plaintiffs moved at Chambers to strike out paragraph 9, 10 and 11 of the defence, on the ground, as to paragraph 9, that it was admitted that the words complained of were used in a defamatory sense, and that said paragraph did not justify the words as so used And, as to paragraphs 10 and 11, that while professing to justify the words complained of, they did not set out with sufficient precision, or definiteness, or at all, facts amounting to a justification, and did not justify all the words complained of, and did not distinguish between the words intended to be justified, and the words alleged to be fair and bona fide comment.

Held, that plaintiff was entitled to an order striking out the paragraphs referred to, but if it appeared when the order was taken out that any fact necessary to raise any legitimate point for the defence could not be proved under the statement of defence as amended, any additional amendment would be allowed necessary to enable it to be proved.

Costs to be plaintiff's costs in the cause.

J. A. Chisholm and *J. McG. Stewart*, for plaintiff.

B. Russell, Q.C., and *J. H. Sinclair*, for defendant.

Full Court.]

[Jan. 12.

CUNARD ET AL. *v.* NOVA SCOTIA MARINE INSURANCE CO.

Marine insurance—Person for whom effected—Finding of trial judge affirmed—Application—Waiver of answer to question in—Disbursements may be insured—Subject matter of insurance—Reasonable certainty in designation of.

Plaintiffs effected a policy of insurance on the SS. "Oakdene," with the defendant company. On the trial the question arose whether plaintiffs applied for the insurance for themselves or for the managing owners, of the ship. The trial judge having found that the application was effective on behalf of the owners.

Held, that his finding should not be disturbed.

Among the questions in the application was "On account of?" followed by a blank, the meaning being, "On whose account is the insurance to be made?"

Held, that an answer to the question was waived by the acceptance of the risk without the blank having been filled up.

The insurance effected by plaintiffs was $3,200 on disbursements on SS. "Oakdene," at and from Halifax, the amount being intended to cover expenditures made in repairing the ship, which had come into Halifax in distress.

Held, that after the repairs were effected and the expenditures made there could be no legitimate objection to effecting additional insurance on the ship to the extent of the expenditure.

Held, following *British America Ass. Co.* v. *Law*, 21 S.C.R. 325, that plaintiffs were entitled to recover.

Held, also, following *Wilson* v. *Jones*, L.R. 2 Ex. 146, that reasonable certainty was all that was required in the designation of the subject matter of the insurance in the application.

W. A. Henry, for plaintiff.

Drysdale, Q.C., and *H. T. Jones*, for defendant.

Full Court.] [Jan. 12.

BANQUE DE HOCHELAGA *v.* MARITIME RAILWAY NEWS CO.

Bill of exchange—Defence that plaintiff is not legal holder—Order for final judgment under—O. 14, R. 1—Discretion of Chambers Judge on facts before him—Held properly exercised—Further affidavits read on argument—Defendant allowed opportunity on new facts shown to substantiate defence—Payment into court required—Costs.

Under O. 14, R. 1, where the defendant appears to a writ of summons specially indorsed under O. 3, R. 5, and the plaintiff on affidavit verifying the cause of action and stating that in his belief there is no defence to the action, applies for liberty to enter final judgment for the amount indorsed, with interest if any, etc., the Judge may, unless the defendant by affidavit or otherwise satisfies him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

In this case the affidavit read on behalf of the defendant before the Chambers' Judge stated: "I have been informed by the agent of the Havana Cigar Co., by whom the bill of exchange sued on herein was drawn, and from such information I verily believe that the plaintiff herein is not and was not at the time this action was brought the holder of said bill of exchange."

Other than this no facts of any kind were stated and there was nothing to satisfy the Judge that the defendant should be entitled to defend. The Judge at Chambers having granted plaintiff the order applied for,

Held, that under these circumstances the question was entirely within the discretion of the Judge, and there was no reason for holding that such discretion had been wrongly exercised.

On the argument further affidavits were read on behalf of defendant, under O. 57, R. 5, to which plaintiff replied.

Held, that under the facts disclosed in the latter affidavits defendant should have an opportunity of substantiating the defence that plaintiff was not the legal holder of the bill, on paying into Court the amount of plaintiff's claim.

Plaintiff to have costs of the motion below. Costs of the appeal to be costs in the cause.

C. H. Cahan, for plaintiff.

W. B. A. Ritchie, Q.C., for defendant.

Full Court.] [Jan 12.

ROBERTSON *v.* MCKEIGHAN.

Husband and wife—Implied authority of wife to bind husband—Revocation of —Statute of Limitations—Payment on account—Sewing machine.

Defendant purchased a sewing machine from plaintiff in August, 1887, and paid $14 on account sometime during the year. The action was brought October 24th, 1895. The Statute of Limitations was pleaded

Held, that a payment of $5 made by defendant's wife in February, 1893, was not sufficient to take the case out of the statute, the evidence showing that defendant had forbidden his wife to make further payments until the machine was put in order, and that this was never done.

Held, also, that any implied authority which the wife may have had previously was terminated by this prohibition.

Harris, Q.C., for plaintiff.

W. H. Fulton, for defendant.

Full Court.] [Jan. 12.

GOURLAY *v.* MCALONEY ET AL.

Attorney and client—Costs as between—Statute of Limitations, R. S., 5th series, c. 112—Runs from date of settlement of action—Registry Act—Acts of 1893, c. 27—Held not to be retroactive in its effect.

Plaintiff was retained September 26th, 1886, to act as solicitor in an action brought against defendants. Defendants subsequently, without consulting plaintiff, entered into an arrangement whereby the action was abandoned, each party paying his own costs. Plaintiff having sued to recover his costs as between solicitor and client,

Held, that the Statute of Limitations, R.S., 5th series, c. 112, as against plaintiff, commenced to run from the date of the settlement, and not from the date of the retainer.

The Acts of 1893, c. 27, required every practising solicitor to obtain from the treasurer of the Barrister's Society before the first day of July, a certificate under the seal of the Society, stating that he had paid the required fees. S. 3 provided that no solicitor should be entitled to recover any charge in a court of law, or tax costs before any taxing master or judge, unless he held a certificate.

Held, that it was necessary for the defendants to aver and prove that when the defence was set up plaintiff was then actually practising.

Held, also, that the statute was not retroactive in its effect, and did not apply to solicitors' bills incurred before its enactment.

H. McInnes, for plaintiff.

S. D. McLellan, for defendant.

Full Court.] [Jan. 12.

THE QUEEN *v.* MCBERNEY.

Speedy trial—Criminal Code, ss. 762-781—Prisoner held wrongly convicted under, where tried on several charges consecutively, and judgment withheld until conclusion of last case—Evidence of acts of like character receivable to show intent.

Defendant was brought before the Judge of the County Court for the County of Halifax under Act relating to Speedy Trials (Code, ss. 762-781), for trial, charged with four distinct and separate offences. On the conclusion of the first trial defendant's solicitor asked for a verdict, but the learned judge, not being prepared to determine the case, proceeded with the trial of the other charges, and when all had been heard, rendered verdicts of guilty in all four cases. On a Crown case reserved,

Held, that the judge had no power to so withhold his verdicts; that, having done so, the prisoner was wrongly convicted in all four cases, and that the verdicts must be set aside and new trials ordered.

Held, also, that on the trial of a prisoner charged with a criminal act, evidence of the commission by him of other acts of a like character, is receivable to show intent.

Longley, Q.C., Attorney-General, for plaintiff.

F. T. Congdon, for defendant.

WEATHERBE, J.
Chambers. [Jan. 15.

HAMILTON ET AL. *v.* STEWIACKE VALLEY AND LANDSDOWNE R'Y CO.

Company—Order for examination of officer in aid of execution—Order 40, Rule 44—Does not apply to person who is not an officer at time of making of order—Order 40, Rule 46—Construction of word "otherwise"—Making of order not authorized by.

Plaintiffs having obtained a judgment for the payment of money against the defendant corporation, obtained an order from a Judge at Chambers for the examination of A.D. before a Master of the Court, under Order 40, Rule 44, for the purpose of ascertaining whether there were debts due to the defendant, and whether the defendant had any and what other property or means of satisfying the judgment. A.D. had been an officer of the defendant company ten years previously to the making of the order for his examination, but was not so atthe time of the making of the order, and had no notice of the application for the order. He now moved to set it aside.

Held, that A.D. was not an officer of the company within the meaning of the rule and was entitled to have the order rescinded.

Order 40, Rule 46, provides that "in case of any judgment or order other than for the recovery or payment of money, if any difficulty shall arise in or about the execution or enforcement thereof . . . . the Court or Judge may make such order . . . . for the attendance and examination of any party or otherwise as may be just."

Held, that there was no ground for the contention made on the part of the plaintiff that the word "otherwise" in the latter rule authorized the making of the order sought to be set aside.

Drysdale, Q.C., in support of the application.

Harris, Q.C., contra.

Province of New Brunswick.

COUNTY COURT.

FORBES, J. In Chambers. [Jan. 2.

IN RE KELLY.

Assignments and preferences Act, 1895 (58 Vict., c. 6), s. 12—Remuneration of assignee—Attendances upon solicitor—Right to employ solicitor.

This was an application to the Judge of the St. John County Court by the sheriff of St. John, under the above Act, as assignee of an insolvent estate, to increase the sum allowed him as remuneration by the creditors of the estate, from $300 to $500, on the basis of an itemized account of $823.40. Among the items were about fifty personal charges from $2 to $5 each, for attendances upon a solicitor engaged by the assignee, to advise him in administering the estate.

Held, that the charges must be disallowed.

Semble, an assignee possessed of a legal training is not entitled to employ a solicitor to advise him in his duties at the expense of the estate, without the consent of the creditors.

L. A. Currey, Q.C., for the assignee.

W. Watson Allen, *J. R. Armstrong*, Q.C., and *Scott E. Morrill*, for the creditors.

Province of Manitoba.

QUEEN'S BENCH.

TAYLOR, C.J.] [Dec. 31, 1896.

IN RE TAYLOR AND CITY OF WINNIPEG.

Municipality—By-laws—Dairy inspection—Quashing by-laws—Ultra vires.

This was an application under section 385 of the Municipal Act for an order to quash on the ground of illegality a by-law passed by the City of

Winnipeg assuming to exercise the powers conferred by the Municipal Act, as amended by 57 Vict., c. 20, s. 17; 58, 59 Vict., c. 32, s. 16, and 59 Vict., c. 15, s. 16, providing for the inspection and regulating of dairies and stables, and licensing of vendors of milk, and for preventing the sale or use of milk, or other food products, until compliance with regulations.

The Chief Justice held, following Dillon on Municipal Corporations, s. 91, and *Merritt* v. *Toronto*, 22 A. R. 205, that all such by-laws should be construed strictly, and that any ambiguity or doubt as to the extent of the power conferred on municipalities to make by-laws is to be determined in favor of the general public as against the grantee of the power, especially where such by-laws affect the rights of liberty or property of a citizen, and he found that the by-law in question was in some matters unreasonable, and in others exceeded the powers given by the Act.

The following are the objectionable provisions referred to in the judgment: (1) The by-law is so worded that some carriers of milk from points outside the city, as railway companies, might be required to procure licenses as vendors of milk, or otherwise they would be subject to the penalties imposed.

(2) In case any animal is found to be affected with disease, it is to be separated from all others, and kept apart until it is proved by inspection that the animal has recovered, and in the meantime the owner is prevented from selling the milk from the other cows in the dairy until a further inspection shows that they have not contracted the disease. This further inspection is to be made not less than two weeks, nor more than eight weeks after the first, which puts it in the power of the inspector arbitrarily to keep the dairy closed for eight weeks by mere neglect or delay, which seems most unreasonable.

(3) The by-law further provides for an inspection of dairies and a report as to whether the regulations have been complied with or not, but a license is to be issued only if the Market, License and Health Committee gives no contrary order to the health officer, which puts it in the power of that committee arbitrarily to deny a license even when there is a favorable report.

(4) The by-law further provides that in no case where the regulations have not been complied with shall the health office issue a license, but contains a provision that the Council may override all that and direct a license to issue, which opens a wide door to favoritism and makes the by-law unequal in its provisions.

(5) The by-law imposes a special tax, charging so much for licenses and a further fee of fifty cents for every cow, contrary to the provisions of ss. 333 and 334 of the Municipal Act.

(6) It is further provided that if a licensee adds any cow to his stable he must bring it to the inspector's stable to be inspected, and pay a fee of fifty cents, whether he intends to sell her milk or not.

(7) The by-law further provides that the inspector may inspect any cows or cattle in the city, whether the owner is or is not selling milk or any other food products of these cows or cattle, and may collect from the owner a fee of fifty cents per head for such inspection, which is ultra vires of the Act.

By-law quashed with costs.

Martin and *Mathers*, for applicant.

Isaac Campbell, Q.C., for the city of Winnipeg.

TAYLOR, C.J.] [Jan. 9.

POCKETT *v.* POOL.

Boundary lines—Survey—Re-survey—Dominion Lands Act, s. 129—52 Vict., c. 27, s. 7 (D.)—Ratification—Road allowance—Dominion lands.

This was an action to recover possession of a piece of land containing about 13½ acres which the plaintiff alleged to be part of the south-west quarter of sec. 2, township 16, range 16 west, in Manitoba, of which he was the grantee of the Crown. The defendant claimed that the land in question was part of the south-east quarter of sec. 3, immediately adjoining the plaintiff's land on the west, and he had a good title thereto, and was in possession thereof. The plaintiff's claim to the land in question was based upon a re-survey of a portion of said township 16 made in February, 1895, under instructions from the Minister of the Interior, followed by an order-in-council ratifying the action thus taken. This re-survey was assumed to have been made under s. 129 of the Dominion Lands Act as amended by the Act 52 Vict., c. 27, s. 7. By the new survey thus made the defendant's part of sec. 3 was encroached upon, but he objected to its validity and refused to give up possession of the land.

Held, that the proceedings for making the new survey were wholly irregular, as an order-in-council providing for it should first have been procured, and there was no power given by the Act to ratify by order-in-council a new survey previously made without such authority.

Held also, that the new survey was invalid, because no new survey could be made under the Act so as to affect anylands which have ceased to be Dominion Lands, and a number of the parcels affected were no longer such.

The road allowance between the two sections had became the property of the Province of Manitoba, by virtue of the Act 58 & 59 Vict., c. 30, s. 1, and for that reason alone it would be improper to change the boundaries by a new survey not authorized by Provincial legislation.

Non-suit entered with costs.

Caldwell, Q.C., for plaintiff.

C. H. Campbell, Q.C., for defendant.

[NOTE.—In *Reg. v. Douglas*, ante p. 89, for "conviction quashed" read "conviction affirmed."]

Province of British Columbia.

SUPREME COURT.

DRAKE, J.] [Dec. 20, 1896.

STUSSI *v.* BROWN ET AL.

Mineral claim—Partnership—Record—Notice.

In July, 1894, the plaintiff and the defendant, Joseph Brown, entered into a partnership for the purpose of holding, acquiring, developing and disposing of mineral claims in Trail Creek Mining Division. Plaintiff advanced Brown

$40 and some provisions, in consequence of Brown informing him that he knew of some claims not taken up and would locate them in their joint interest. Brown located and staked out two claims, the Sunday Sun and Pittsburg, and recorded them on August 13th and 16th, 1894, in plaintiff's name, plaintiff finding fees therefor. As to these claims there is no dispute, except as to a counter-claim for damages put in by Brown, on which no evidence was offered. On August 13th, 1894, the St. Louis was recorded by defendant Brown in his own name, the plaintiff as before paying recording fee. The plaintiff claims an undivided half interest in the claim. The first dispute commenced here; Henry Allis claims that he was the discoverer of the claim and had staked it out, and was on the ground when Brown arrived, but Allis being uncertain whether his miner's license had been issued, because he had not received any reply to his application for the granting of a license, agreed that Brown should stake the claim in his own name and give him a deed of the undivided half. As a matter of fact a license was in existence at the date of staking. Brown in his pleading admits this allegation of Allis. Brown sold to McConnel an undivided half of the St. Louis claim for $1,200 and gave him an option on the other undivided half which never was exercised. This sale and transfer is not questioned. On October 5th, 1895, a bill of sale of one-quarter of the claim was made by Brown to McLeod. On McLeod taking his claim to be recorded he discovered that J. A. Stussi, the plaintiff, claimed an undivided interest in the claim.

On October 23rd, 1895, the plaintiff commenced an action in the County Court of Kootenay to have it declared that Brown and McLeod were trustees for him of an undivided one-half interest in the St. Louis mineral claim. On this action coming on for trial the judge ordered that the defendant, Mr. Allis, who had also commenced an action against Brown for an undivided one-half interest in the same claim, should be added as a defendant to the plaintiff's action, and his own action struck out, which was accordingly done.

Before judgment was given by the County Court Judge in the action of *Stussi* v. *Brown*, *et al.*, namely, on the 7th of March, 1896, an order was made by Mr. Justice Walkem, prohibiting all further proceedings in the action.

On May 22nd, 1896, Mr. Spinks, the County Court Judge of Kootenay, gave judgment in the action of *Allis* v. *Brown*, in favor of the plaintiff. This was the action which had been struck out of the docket.

Held, 1. That this judgment was void, as it was given without jurisdiction and without trial.

Held, 2. That the plaintiff was entitled to an account from Brown of the proceeds of the sale of such portion of the St. Louis claim Brown had sold and converted into money, and a judgment for one-half of such proceeds when ascertained, and that the plaintiff was entitled to a declaration that the remaining quarter of the first claim was partnership property, the same to be sold for the benefit of the partnership.

Wilson, Q.C., for plaintiff.

Davis, Q.C., for defendant.

DRAKE, J.] [Dec. 22, 1896.

HJORTH *v.* SMITH.

Crown grant—Action to set aside deed—Escrow.

This action was brought to set aside a Crown grant of a tract of land on Th...lo.. Island.

The plaintiff was a pre-emptor and had a store on the land in question. The defendant proposed a partnership with the plaintiff, and on the 26th of May, 1896, a memorandum was drawn up and signed by both parties. By that memorandum the plaintiff agreed to deed a half interest in the pre-emption claim therein described, the defendant to pay $160 to the Government for the price of the land, and to put in a full line of goods into the store, each to share and share alike in all business and property transactions in Shoal Bay, a formal agreement to be drawn up. On the 8th of June following, a more complete agreement was prepared by Mr. Brydone-Jack, as solicitor for both parties, but such agreement contained material variations. The defendant was apparently to have the whole land conveyed to him at some future time, and the land to be sold for the joint benefit and the net profits divided on the 1st of July, 1897, and any land unsold at that date to be divided together with the profits arising from the business. The defendant was to erect such buildings as he thought necessary for the business.

At that time Mr. Brydone-Jack pointed out that under the Crown Lands Act it was illegal to convey a pre-emption claim until the Crown grant was issued, and the deed was accordingly signed without a date, and Mr. Brydone-Jack stated he was authorized by the plaintiff to retain the deeds, fill up the date and deliver it after the Crown grant was made.

The defendant paid the $160 in order to obtain a Crown grant and also expended a considerable sum of money in putting up buildings for the business.

Held, 1. A partnership agreement as to land is valid and in no way conflicts with s. 26 of the Land Act, Con. Stat. B.C., c. 66.

2. That a deed to be held in escrow until it could have legal effect is valid, notwithstanding s. 26 of the Land Act.

McPhillips, Q.C., and *Magee*, for plaintiff.

Davis, Q.C., and *Brydone-Jack*, for defendant.

BOLE, J.] [Jan. 13.

TOLLEMACHE ET AL. *v.* HOBSON.

Commission to examine plaintiff.

Application herein was made to issue a commission to examine Mr. Parker, a plaintiff, now in England, one of the grounds relied on being that he had to return to India to attend to important business there. Mr. Parker himself had not made any affidavit.

Held, following *Light* v. *Anticosti Co.*, 58 L.T. Rep. 25, that plaintiff Parker should himself have made an affidavit setting forth the above grounds in order to warrant granting the application.

BOLE, J.] [Jan. 14.

LILLOOET, FRASER RIVER & CARIBOO GOLD FIELDS *v.* RICHEY.

Injunction—Mineral claim—Location by agent.

A motion was made to dissolve the interim injunction granted in this cause to restraining the defendant from selling, assigning or otherwise disposing of a certain mineral claim known as the "Hazel," situate in the Lillooet District. The plaintiff corporation alleged that in May last the defendant being then in the employ of the company as a miner, located on the 5th and recorded on the 6th of that month said "Hazel" claim in defendant's name, but for and on behalf of the company, the defendant having no personal interest therein, and that the company paid all expenses of staking and recording said claim.

The defendant alleged that he (the defendant) was from June, 1895, until April 27th, 1896, working as foreman on the company's mineral claim "Vancouver," at the rate of $3 per day. That he ceased to work for the company from April 27th, 1896, to May 15th, 1896 (during which period the "Hazel" claim was recorded), when he resumed work as foreman for the company on the "Dandy" mineral claim, and continued to do so till August 9th, when he ceased work on account of illness; that on October 14th, 1895, he took out a free miner's license, and renewed same on October 14th, 1896, besides paying all expenses of staking out and recording said claim.

Held, that there being an important question to be tried and decided between the plaintiffs and the defendants, namely, who is the owner of the "Hazel" claim, and the utility of an injunction being to prevent the destruction or disappearance of the property in question, pending trial, its dissolution would inflict irreparable injury on the plaintiffs, within the rule laid down in *Attorney-General* v. *Hallett*, 16 M. & W., p. 581, and *Mogul Steamship Co.* v. *McGregor*, 54 L.J., Chy. 540, and must be refused.

North-West Territories.

SOUTHERN ALBERTA JUDICIAL DISTRICT.

SUPREME COURT.

SCOTT, J.] [Dec. 29, 1896.

PATTON *v.* ALBERTA RAILWAY & COAL CO.

Practice—Sheriff's poundage—Judicature ordinance

This was an appeal by the defendants from a taxation by the Clerk of the Court of the sheriff's costs under a writ of execution to levy against defendants' goods, $4,000, the amount of plaintiff's judgment.

The sheriff seized a locomotive engine, when proceedings were stayed, pending an appeal to the Court in banc to set aside the judgment by an order which directed the defendants to pay the sheriff's costs. The only item com-

plained of was one of $85 poundage allowed by the clerk on taxation on a value of six thousand dollars placed on the locomotive. The application was under ss. 356 and 358 of the Judicature Ordinance. It was contended on behalf of the sheriff that the defendants having proceeded by way of taxation could not now apply to a Judge to have the costs reduced, and that such reduction could not be made by way of appeal from taxation.

Held, that the defendants had not, by submitting to taxation, waived their right to apply for a reduction, and that a reduction could be made on this application, that under the provisions of ss. 356 and 358 an application can be made to a Judge without any taxation, or after taxation by way of appeal therefrom.

Held, that there being no English rule similar to s. 356, the English practice allowing poundage only on amounts realized does not apply.

Held, however, that the sheriff should not be allowed full poundage but only a reasonable amount according to the circumstances, and order made reducing the amount to be allowed to $40.

Wadsworth v. *Bell*, 8 P.R. 478 (decided under the Ontario rule, similar to s. 356) cited and approved.

Short, for sheriff.

Muir, Q.C., for defendants.

BOOK REVIEWS.

Blackstone's Commentaries, by HON. WM. DRAPER LEWIS, Ph.D. Philadelphia, 1897, Rees, Welsh & Co. Canada Law Journal Co., Toronto, Canadian agents.

The first of the twelve numbers of this new Blackstone series, which will be complete by December, 1897, has just appeared, and covers the first volume of the original Blackstone text, which is reprinted complete, copious and well selected notes being subjoined. The succeeding three numbers are to conclude the text, after which will follow a complete analysis of English and American law in eight numbers. So far the work is admirable, and it is safe to predict its entire success from the well known reputation of the author, who has already edited Greenleaf on Evidence, and Notes to Wharton's Criminal Law. Dr. Lewis is the well known Dean of the Law Department of the University of Pennsylvania.

The Law of Evidence in Civil Cases, by BURR W. JONES, of the Wisconsin Bar, Lecturer on the Law of Evidence, etc., in the Law School of Wisconsin University, in three volumes. San Francisco: Bancroft Whitney Co., Law Publishers, 1896.

This book in its scope and shape is in some respects a new departure. The object of the author is to furnish a convenient text book for trial lawyers, stating tersely the rules of law which govern in the trial of civil cases. It follows the general style of Roscoe, and seems to be an up-to-date practical, and, within its compass, a full summary of the law which it lays down. It is divided into three volumes, thereby being convenient for counsel for carriage in modern brief bags.

The writer does not pretend, and it would, of course, be impossible in a book of this kind, to discuss the law of evidence at all in the manner in which it is approached by such books as that of Mr. Taylor and other exhaustive treatises, but, so far as our examination goes, the author has done his work with much care and research. His own experience, and that of others who will use the work, will doubtless enable him to add largely to its value on the second edition.

We are glad to see the following sentences in his preface, and to notice that he has sought to carry it out in the body of the work: "It is well known that some of the ablest discussions of mooted questions are to be found in the law reviews and journals and in the various series of annotated cases which have lately come into extensive use. In this part of the literature of the law there will be found a more elaborate review of particular subjects in the law of evidence, and a more extended collection of the authorities than in the elementary works or judicial decisions. I have, therefore, taken pains to cite quite fully these articles and discussions." This is a new departure and well worthy of imitation.

Manual of the Law of Landlord and Tenant for use in the Province of Ontario, by R. E. KINGSFORD, M.A., LL.B., Barrister, Toronto; The Carswell Company, Ltd., Law Publishers, 1896.

This is a manual for the use of persons outside of the legal profession, drawn up with the intention of imparting elementary information on a subject which the writer thinks every man should know something about. We are not in love with this class of literature, nor is it of much value to the practising lawyer, but—in addition to the classes for which it is intended—it would be useful to law students in the beginning of their studies. Reference is made to some leading cases, and appropriate sections of statutes bearing on the subject, and we have no doubt Mr. Kingsford has done his work with usual care and accuracy.

With the number bearing date January 2nd, *The Living Age* begins its two hundred and twelfth volume. This sterling magazine loses none of its interest or value, but rather grows in excellence as its years increase—adding the experience of the past with full appreciation of the needs of the present.

The first number of the new year has the following table of contents:—"The Olney Doctrine," by Sidney Low; "The Duel of the Period in France," by James Pemberton-Grund; "Bandi Miklos," from the Hungarian, by Selina Gaye; "A Modern 'Morality,'" by Jules Lemaitre, from the French; "The Puritan in History," by Principal Fairbairn; "Recollections of Coventry Patmore"; "Catholic Mystics of the Middle Ages," and "A Winter's Walk," with poetry and fiction.

This, the first weekly issue of the new year, is a good one with which to begin a new subscription. For fifty-two numbers, aggregating about 3,600 pages (300 pages a month), the subscription price ($6.00) is very low.

The Living Age Co., Boston, are the publishers.