# Canada Law Journal.

VOL. XXXIV. JUNE 1, 1898. NO. 11.

We ave received several communications from valued contributors on the subject of County Court Judges in Ontario, and especially in reference to the position of junior judges. Whilst we heartily sympathize with the latter in the unfair position in which they often find themselves, there is no use discussing the matter at present, as the Government would seem to be making some changes, to be referred to hereafter. The whole subject is beset with difficulties on every side. The political situation, and notably that part of it which would, if relief were given, bring in claims from the Province of Quebec, adds to the difficulties in the way of any Government attempting to deal with it as it should be dealt with. No one has yet suggested a solution of any practical value, and none occurs to us. Our judicial friends must also remember that, during the present time of depression and increasing scarcity of legal business, and the large addition to the number seeking it, the profession outside the Bench are much more concerned with their own difficulties in making two ends meet than they are with placing their brethren of the Bench in a better position as regards salaries. In fact the latter, even with their small salaries, are envied by many of those who at one time would have refused a judgeship.

## *CANADIAN BAR ASSOCIATION.*

The Canadian Bar Association held its third annual meeting at Ottawa, on the 18th and 19th of May. The attendance was small, and entirely incommensurate with the importance of the meeting: for there can be no doubt as to the desirability of such an organization, though there may be a question

as to its practicability, owing to the geographical difficulties to be contended with. It is clear that unless a very strenuous effort is made to render the next foregathering of the Association a success there is great danger that so far as the attendance is concerned the movement must eventually come to nought.

After the transaction of general business, Mr. O. A. Howland contributed a very able and carefully prepared paper on "Some Constitutional and International Aspects of the Cuban question." Papers were also read by Dr. Russell, Q.C., M.P., of Halifax, on the legislation of the Dominion Parliament—an instructive criticism which evoked considerable discussion among the members present, and by Mr. J. E. Farewell, Q.C., of Whitby, Ont., on "The usefulness of the office of Coroner." The election of the officers of the Association for the ensuing year resulted as follows: Honorary President, Sir Wilfrid Laurier, Q.C.; President, Æ. Irving, Q.C., Toronto; Secretary, A. Falconer, Montreal; Treasurer, C. B. Carter, Q.C., Montreal; Vice-Presidents, B. Russell, Q.C., Halifax; J. E. Robidoux, Q.C., Montreal; Senator Gowan, Barrie; G. F. Gregory, Q.C., Fredericton; D. A. McKinnon, Q.C., Charlottetown; E. V. Bodwell, Victoria; Hugh J. Macdonald, Q.C., Winnipeg; Senator J. A. Lougheed, Q.C., Calgary. At the conclusion of the meeting the visiting members of the Association were invited by the Ottawa Bar to partake of the luncheon at the Hotel Victoria on the picturesque shores of Lake Deschenes, some nine miles from Ottawa. Mr. W. D. Hogg, Q.C., occupied the chair. In response to various toasts there were short speeches from Senator Power, H. A. Powell, Q.C., M. P., H. J. Logan, M.P., N. A. Belcourt, M.P., Mr. Justice Leverge, Judge MacTavish, Judge Mosgrove, F. H. Chrysler, Q.C., M. J. Gorman, O. A. Howland, H. O'Brien, G. F. Gregory, Q.C., D. A. McKinnon, Q.C., and others.

## *VENDOR'S LIEN.*

An interesting branch of this subject was recently discussed in a case in the Exchequer Court of Canada.

Under the law of England and that of the United States, where lands are taken in invitum, and in the exercise of the right of eminent domain, the owner of such lands has a vendor's lien for the unpaid compensation money. In England, however, it has been held that where the statute authorizing the expropriation declares that, upon the formalities prescribed for the taking being duly executed, the lands shall absolutely vest in the person or corporation expropriating, no lien subsists in such a case (See *Wing* v. *Tottenham and Hampstead Junction Ry. Co.*, 37 L.J. Ch. at p. 655; Browne and Allan on Compensation, p. 228, et seq.). In the United States, on the other hand, the principle is established by the authorities that where the statute permits the title or right to possession to vest before the payment of the compensation money, such title or right is subject to the obligation of making just compensation, which is in the nature of a vendor's lien enforceable in equity in the usual way. (See Lewis on Eminent Domain, s. 620; *Evans* v. *Missouri, Iowa & Nebraska Ry. Co.*, 64 Mo. 453 *Dayton, Xenia & Belpre Ry. Co.*, v. *Lawton*, 20 Ohio 401).

In *Walker* v. *Ware, Hadham and Buntingford Ry. Co.*, 35 L.J. Ch. 96, where the lands had been taken under the Land Clauses Consolidation Acts by the Great Eastern Railway Company, and, before full compensation paid therefor, had passed into the hands of the defendant company, the Court declared that they were subject to the lien of the original owner, and directed a reference to settle the amount of the compensation. Lord Romily said (at p. 96) "I am of opinion that the Acts of Parliament which have been referred to do not deprive the vendor of his lien. The true construction of these Acts was never meant to be that the Company might take any lands upon paying into Court the amount of a valuation, and giving a bond, so as to deprive the vendor of his right to have the lands properly valued, or to deprive him of

his regular lien in the event of the sums paid in being deficient. . . . The vendor's lien is a right inherent in equity independently of contract. As to the public, they could have no right to use, except subject to payment." In *Munns* v. *Isle of Wight Ry. Co.*, L.R. 5 Ch. 414, Giffard, L.J., said (at p. 417): "Look at the case on principle. A railway company acquires land subject to the obligation of paying for it, and dedicates it to the public; the conditions of paying for it not being fulfilled, the land is ordered to be sold. Surely what has to be sold is the estate which the vendor had." (See also, *Cosens* v. *Bognor Ry. Co.*, L.R. 1 Ch. 594; *Bishop of Winchester* v. *Mid-Hants Ry. Co.*, L.R. 5 Eq. 17.)

The case in the Exchequer Court was that of *Yule* v. *The Queen* (post, p. 379), and turned upon the terms of the Act of the old Province of Canada, 8 Vict., c. 90, which empowered one John Yule to build a certain bridge and to take tolls thereon for the period of fifty years, and declared that at the end of said period, the bridge, toll houses, etc., should be vested in Her Majesty, her heirs, etc., and be free for public use; and that it should then be lawful for the said John Yule, his heirs, etc., to claim and obtain from Her Majesty the full and entire value which the same should at the end of the said fifty years bear and be worth exclusive of the value of any toll or privilege. Burbidge, J., held that the language of this enactment excluded the theory of a vendor's lien in respect of the compensation money.

---

## *SOME LIQUOR LICENSE ACT ANOMALIES.*

By section 57 of the Liquor License Act a person found in a bar room during prohibited hours is guilty of an offence and liable on conviction to a fine or imprisonment. By section 59 a person who obtains liquor at a tavern during prohibited hours renders himself liable to the like penalty; but the magistrate presiding at the trial of any complaint against a license holder for selling during prohibited hours "may, having regard to the demeanor of any witness and his mode of giving his evidence, by a certificate in that behalf exempt

such witness from . . . all proceedings and penalties" under this section. Though the obtaining liquor during prohibited hours strikes one as an offence one degree more serious than the mere being found in a bar room during prohibited hours, there is no power conferred upon the magistrate to exempt a witness from the penalty prescribed for the last named offence. The anomaly is partially explained by the fact that both sections were grafted on the Act as amendments, s. 59 in 1885, and s. 57 in 1886. For some now inscrutable reason it appears to have been thought unwise, or perhaps not worth while, in the last named year to give the mere found witness the protection that had the previous year been given to the drinking witness. But for the fact that both sections were, as I am informed, enacted at the request of the temperance people, it might be suggested that the intention of the Legislature in 1886 was to encourage persons being in bar rooms during prohibited hours to convert themselves with as little delay as possible into persons drinking in rooms during prohibited hours, thus entitling themselves to ask the cloak of the magistrate's certificate.

Whatever the intention of the Legislature, the practical utility of the sections, except for mischief, is an exceedingly doubtful quantity. Prosecutions under them are rare. But they have an effect that was certainly not foreseen by the good people who promoted them. When a witness against a license holder charged with selling during prohibited hours is put into the box, he, at once, by reason of ss. 57, 59, becomes entitled to the protection given by s. 5 of the Evidence Act, which provides that no person shall be "compellable to answer any question tending to subject him to criminal proceedings or to subject him to prosecution for a penalty," and if he be an unwilling witness, counsel for the defence will not fail to inform him of his privilege and he will not fail to exercise it. Then the prosecution is up a tree, the only escape from which is to adjourn the case, lay an information against the witness under s. 57 or 59, force him to give evidence against himself under s. 9 of the Evidence Act, and then, having convicted him and thus destroyed his privilege, compel him to

give evidence against his friend the publican, all of which will impress the court room yokels as a beautiful exhibition of legal legerdemain and increase their respect for the mysteries of the law.

W. E. RANEY.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**CRIMINAL PROCEDURE**—SUMMARY TRIAL—SUMMARY JURISDICTION ACT, 1879 (42 & 43 Vict., c. 49), s. 17, s.s. 2—(CR. CODE, s. 786).

In *The Queen* v. *Cockshott* (1898) 1 Q.B. 582, a motion was successfully made to quash a summary conviction, on the ground that before proceeding with the trial the magistrate failed to inform the prisoner of his right to be tried by a jury. After the trial had proceeded, the prisoner pleaded guilty and was convicted; but the omission to give him the notice required by the statute, 42 & 43 Vict., c. 49, s. 17, s.s. 2 (see Cr. Code, s. 786), was held by Wright and Darling, JJ., to be fatal, and the conviction was quashed, it being considered immaterial whether the prisoner did, or did not know of his right to be tried by a jury, or whether or not the Court knew before the proceedings commenced that the prisoner intended to plead guilty.

**LUNATIC**—MAINTENANCE OF LUNATIC—EXECUTION CREDITOR OF LUNATIC.

In the case of *In re Clarke* (1898) 1 Ch. 336, the Court of Appeal distinguished the case of *Re Winkle* (1894) 2 Ch. 519 (noted ante vol. 30, p. 684). In this case a judgment creditor of a lunatic not so found, after notice of the pendency of a summons in lunacy for the appointment of a receiver of the lunatic's estate, issued execution against the lunatic, under which the lunatic's goods were seized before the receiver was appointed. On behalf of the lunatic it was claimed that on the authority of *Re Winkle* the goods seized were first appli-

cable for the maintenance of the lunatic, notwithstanding their seizure, but the Court of Appeal (Lindley, Rigby and Williams, L.JJ.) held that the Court had no jurisdiction to deprive an execution creditor of his rights under his execution, and that the mere issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor, and that this is not effected until an order is made showing that the Crown has taken the property under its protection, and that such order cannot be made so as to have a retroactive effect as against an execution creditor of the lunatic; and that the Court had, therefore, no jurisdiction to order a sale of the goods seized for the maintenance of the lunatic in priority of the claims of the creditor. In *Re Winkle* the goods were in possession of the officer of the Court of Lunacy, the goods there were therefore under the control of the Court and withdrawn from legal process, notwithstanding a creditor had an execution in the sheriff's hands.

**MORTGAGE**—CONSTRUCTION—PROVISO FOR "PUNCTUAL" PAYMENT.

In *Leeds and Hanley Theatre* v. *Broadbent* (1898) 1 Ch. 343, the Court of Appeal (Lindley, Rigby, and Williams, L.JJ.) in construing a proviso in a mortgage deed providing that the principal should not be called in for three years, provided the interest should be "punctually" paid, have come to what seems to be the very reasonable conclusion, that "punctually really means "punctually," and does not admit of a delay of nine days, as Kekewich, J., held, nor indeed of any delay whatever beyond the day named for payment. A judicial attempt to make a new contract for the parties therefore failed.

**MORTGAGEE** OF SHARE OF TRUST FUND—RIGHT OF MORTGAGEE TO DEMAND PAYMENT OF WHOLE AMOUNT OF FUND MORTGAGED.

*Hockey* v. *Western* (1898) 1 Ch. 350, was an action by a mortgagee of a trust fund to compel the trustee of the fund to pay the whole amount of it to the plaintiff. The mortgagor had died intestate, and the trustees of the fund objected to paying the fund to the mortgagee except on his first rendering an account showing that there was as much due on his mort-

gage. The plaintiff contended that his receipt would be a sufficient discharge to the trustees, and that they were not entitled to investigate the accounts between the mortgagee and mortgagor. Kekewich, J., however, thought that the trustees were justified by the case of *In re Bell* (1896) 1 Ch. 1 (noted ante vol. 32, p. 146) in taking the course they had done, and on their undertaking to pay the money into Court dismissed the action, and, as the defendants had raised other defences on which they failed, without costs; and his decision was affirmed by the Court of Appeal (Lindley, Rigby, and Williams, L.JJ.), who dismissed the plaintiff's appeal with costs.

**COMPANY**—SALE OF UNDERTAKING—NOTICE OF EXTRAORDINARY MEETING—SUFFICIENCY OF NOTICE—ULTRA VIRES—ACTION TO SET ASIDE SALE—PARTIES.

*Kaye* v. *Croydon Tramways Co.* (1898) 1 Ch. 358: In this case the plaintiffs, who sued on behalf of themselves and all other shareholders of the defendant company, except those who were made defendants, claimed to restrain the defendants from carrying out an agreement for the sale of the undertaking to another company. One of the terms of the agreement in question provided that a part of the consideration for the proposed purchase should be paid to the directors and secretary of the company as a compensation for their loss of office, and in the notice calling the meeting of shareholders of the defendant company for the purpose of ratifying the agreement, no reference whatever was made to this term of the proposed agreement. Kekewich, J., granted an injunction, being of opinion that the notice of the meeting was insufficient, and that the agreement could not be validly ratified so as to be binding on dissentient shareholders. The defendants then appealed, and, after argument in the Court of Appeal, the case was ordered to stand over for the purpose of adding the proposed purchasers as defendants, and enabling the plaintiffs to claim the same relief against them as against the other defendants, which being done, the hearing of the appeal was resumed, when the Court of Appeal (Lindley, Rigby and Williams, L.JJ.) varied Keke-

wich, J.'s order, by restraining the carrying out of the sale until duly sanctioned by a general meeting of the shareholders of the defendant company,—the Court of Appeal being of opinion that the proposal to pay part of the consideration to the directors and secretary was not necessarily ultra vires of the company, and one that might be adopted at a general meeting of the shareholders if due notice were given. In this respect the Court differed from Kekewich, J. A note at the end of the report states that it was arranged that in the event of the agreement being adopted at a further meeting of the company, the money payable to the directors of the selling company was to be paid into Court. Williams, L.J., expressing the opinion that if it should turn out that the money to be paid to the directors was really in the nature of a bonus to them for facilitating the sale, a majority of shareholders could not ratify such an arrangement so as to bind dissentient shareholders.

**PARTNERSHIP**—DISSOLUTION OF PARTNERSHIP—SALE OF BUSINESS TO PARTNER—"ASSETS"—GOODWILL—CANVASSING OLD CUSTOMERS—INJUNCTION—VENDOR AND PURCHASER.

In *Jennings* v. *mings* (1898) 1 Ch. 378, the plaintiff and defendant had been partners, and an action which had been previously brought by the defendant for the dissolution of the partnership had been compromised on the terms that judgment should be entered for the defendant in the present action for £1,200, and that the plaintiff in the present action should retain the "assets," the goodwill not being specifically mentioned. After this arrangement the now defendant began to canvass the former customers of the firm, and this action was brought to restrain him from so doing; and it was held by Stirling, J., that the relations of vendor and purchaser existed between the parties, and the plaintiff as purchaser of the "assets" was entitled to the goodwill, there being nothing in the agreement of compromise restricting the plaintiff's rights in regard to the assets: he therefore granted an interlocutory injunction in the terms of that in *Trego* v. *Hunt* (1896) A. C. 7, (noted ante vol. 32, p. 315.)

**INTERNATIONAL LAW**—FOREIGN MARRIAGE—DOMICIL OF MARRIAGE—CHANGE OF DOMICIL—MOVABLE GOODS—AFTER ACQUIRED PROPERTY—FRENCH LAW—COMMUNITY OF GOODS.

*In re De Nicols, De Nicols* v. *Curlier* (1898) 1 Ch. 403, though dealing with a prosaic question of law, reads a little like a romance. The case concerns the estate of a Frenchman who began business in London as the keeper of a restaurant near Regent street with a capital of £400, in the year 1863, and died in 1897, having accumulated a fortune of £600,000. The action was brought to determine what were the rights of his widow in his "movable goods." The deceased was married in 1854 in France, his wife and himself both being poor and having their domicil in France. There was no marriage settlement or contract as to property. Subsequently they took up their residence in England, where they acquired an English domicil. The deceased left a will whereby he left all his property to trustees (except certain legacies) to hold the proceeds in trust for his wife for life, and after her death upon trust for his daughter and her husband and children. The question submitted to the Court (Kekewich, J.) was this: Did the change of domicil alter the legal position of the parties to the marriage in reference to the movable goods? And this question the learned judge answered in the negative; and as, by the law of France, in the absence of any agreement to the contrary, there is a community of goods between husband and wife, he held that the widow was entitled absolutely to one-half of the movable goods.

**ARBITRATION**—PARTNERSHIP—AGREEMENT TO REFER—POWER TO EXPEL PARTNER—VALIDITY OF NOTICE—STAYING PROCEEDINGS—ARBITRATION ACT, 1889, (52 & 53 VICT., C. 49) S. 4—(R.S.O. C. 62, S. 6.)

In *Barnes* v. *Youngs* (1898) 1 Ch. 414, an application was made to stay the proceedings under the Arbitration Act on the ground that the parties had agreed to refer the matters in dispute to arbitration. The plaintiff and defendants were partners, and by the articles of partnership it was provided that a partner might be expelled for the commission of certain acts therein specified, and that if any question should arise whether a case had happened to justify the exercise of

the power, it should be referred to arbitration. The defendants, in assumed exercise of the power, without any previous complaint, had given the plaintiff notice of expulsion, but gave no details of the particular acts complained of. The plaintiff then commenced the action to restrain the defendants from acting on their notice, and the defendants then applied to stay all proceedings, on the ground of the agreement to refer. Romer, J., to whom the application was made, refused the motion, being of opinion that the preliminary question whether the notice had been validly given, was one more fit to be tried by the Court than an arbitrator, and that as there was a suggestion of the fraudulent exercise of the powers, the Court, in the exercise of a proper discretion, ought not to stay the proceedings. He intimated that in his opinion the notice was clearly bad, not having been preceded by any notice to the plaintiff of any complaint, and without giving him any opportunity to explain his alleged misconduct.

**VENDOR AND PURCHASER**—TITLE DEEDS—EXPENSE OF PROCURING TITLE DEEDS TO WHICH PURCHASER IS ENTITLED.

*In re Duthy and Jesson* (1898) 1 Ch. 419, Romer, J., held that in the absence of any stipulation to the contrary a vendor must bear the expense of obtaining title deeds required by the purchaser, to be handed over to him on completion, and to the custody of which he is entitled, and although such deeds are not in the vendors' possession nor referred to in the abstract. Although the English Conveyancing and Property Act, 1881, provides that the expense of procuring deeds not in the vendor's possession, for the verification of the abstract "or for any other purpose," is to be borne by the purchaser, yet the learned Judge considered that that did not affect the right of a purchaser to call for the delivery of the title deeds, even though they were not in the vendor's possession, and could not be procured by him without trouble and expense. The right of a purchaser would of course be stronger where, as in Ontario, there is no such statutory provision. This case would seem to show that a vendor who wishes to escape from the liability must provide by his conditions of sale, that the expense of procuring deeds not in

his possession, either for the purpose of proving title, or for the purpose of delivery to the purchaser on completion of the contract, shall be borne by the purchaser.

**COVENANT**—PRIVATE RESIDENCE—BOARDING AND LODGING HOUSE.

*Hobson* v. *Tulloch* (1898) 1 Ch. 424, is a decision of Romer, J.; in an action to restrain the defendant from using premises contrary to a covenant whereby the defendant's predecessor in title had covenanted not to use the same otherwise than for a "private residence." The defendant was threatening to use them for the purpose of a boarding and lodging house for scholars attending a school in the neighborhood, kept by the defendant. This, it was held, would be a breach of the covenant, and the injunction was accordingly granted.

**VENDOR AND PURCHASER**—INTEREST ON PURCHASE MONEY—DELAY IN COMPLETION—DEFAULT OF VENDOR.

*In re Woods and Lewis* (1898) 1 Ch. 433, was an application made under the Vendors' and Purchasers' Act to determine the question whether the purchaser was liable for interest on his purchase money. The contract provided for the payment of interest until completion in the event of any delay whatever "other than the default of the vendor." Delay arose in remedying a defect in a deed made by a corporation to the vendor, which the purchaser objected did not appear to have been executed in accordance with the company's private Act. This, however, was held by Romer, J., not to be a delay due to "the default of the vendor."

**WILL**—ABSOLUTE GIFT—SUBSEQUENT GIFT OVER OF PROPERTY UNDISPOSED OF IN LEGATEES' LIFETIME.

*In re Jones, Richards* v. *Jones* (1898) 1 Ch. 438. A testator by his will, subject to the payment of his debts and funeral expenses, gave all his property to his wife—"for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death as to such parts of my . . . estate as she shall not have sold or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give the same" . . . in trust

for other persons. The widow on the testator's death took possession of the estate and paid the debts and funeral expenses; and on her death a considerable portion of the estate still remained undisposed of. The question then arose whether the gift over took effect. Byrne, J., held it to be inoperative, and that the widow took absolutely, and her absolute interest was not cut down to a life interest by anything contained in the will, or by the attempted gift over on her decease.

**COMPANY** WINDING UP—SURPLUS ASSETS, DISTRIBUTION OF.

In *re Driffield Gas Co.* (1898) 1 Ch. 451, Wright, J., discusses the proper method of distributing surplus assets upon a winding up of an unlimited company, and determines that it must be governed by the articles of association when they make provision therefor. In the case of the company in question the deed of settlement provided that upon a winding up, the residue, after paying debts was to be divided between the shareholders for the time being "in proportion to their respective shares." The shares were £10 each. Some had been paid in full, some partly paid, and some had been issued at a premium; and Wright, J., held that the surplus must first be applied in returning the paid up capital, and the balance must be distributed amongst all the shareholders in proportion to the nominal amount of their shares, without regard to premiums paid by any of the shareholders, or the manner in which dividends were payable, or had in fact been paid.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT.

Ontario.] JERMYN *v.* TEW. [May 20.

*Jurisdiction—60-61 Vict., c. 34 (D.), s. 1—Amount in dispute.*

Action by an assignee for the benefit of creditors to set aside as a preference a mortgage given by one member of an insolvent firm, upon his individual real estate, within sixty days before making an assignment for the benefit of creditors. The mortgage was to secure an indebtedness by the insolvent firm, amounting to $2,200. Before the action came on for trial, the real estate comprised in the mortgage was sold to a prior mortgagee, who, after satisfying his own claim, paid the whole surplus, amounting to $270, to the appellant, Jermyn. The action was tried before the Chancellor on the 12th of April 1897, and he declared the mortgage to be void, and ordered Jermyn to pay over the $270 to the respondent Tew. On appeal to the Court of Appeal for Ontario, BURTON, C.J.O., and MACLENNAN, J.A., were of opinion that the appeal should be allowed, OSLER, J.A., and MOSS, J.A., were of opinion that it should be dismissed. The appellant thereupon appealed to the Supreme Court of Canada. Upon the application of the appellant to have the appeal allowed and the security approved under s. 46 of the Supreme Court Act objection was taken that under 60-61 Vict., c. 34 (Dom.), s. 1 (C.), no appeal lay, as the amount in controversy in the appeal did not exceed the sum of $1,000. MACLENNAN, J.A., held that under sub-sec. (f) of the same clause $270 could not be considered as the amount in controversy, and also that the title to real estate or some interest therein was in question, and that an appeal would lie under sub-sec. (a) of the same clause. The appeal was accordingly proceeded with, the appeal case was settled and printed, and factums were delivered by the appellant and respondent, and the appeal entered for hearing. Upon the appeal being called,

*Nesbitt*, for the respondent, objected that under the circumstances there could be no appeal.

*H. Cassels*, for appellant, contra.

The Court (Sir HENRY STRONG, C.J., TASCHEREAU, GWYNNE, SEDGEWICK, and KING, JJ.), unanimously allowed the objection and quashed the appeal, but, under the circumstances, with costs only as of a motion before a Judge in Chambers. The Court was of opinion that sub-sec. (f) could not affect the construction of sub-sec. (c), and that as the only possible result of the appeal would be the determination of who should receive the $270, the case was governed by sub-sec. (c), and did fall under sub-sec. (a).

## EXCHEQUER COURT.

Burbidge, J.] IN RE MELCHERS AND DE KUYPER. [March 7.

*Trade mark—Resemblance between—Refusal to register both—Grounds of.*

The object of s. 11 of the Act respecting Trade Marks and Industrial Designs (R.S.C., c. 63), as enacted in 54-55 Vict., c. 35, is to prevent the registration of a trade mark bearing such a resemblance to one already registered as to mislead the public and render it possible that goods bearing the trade mark proposed to be registered may be sold as the goods of the owner of the registered trade mark.

2. The resemblance between the two trade marks justifying a refusal by the Minister of Agriculture in refusing to register the second trade mark, or the Court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade mark to obtain an injunction against the applicant in an action of infringement.

3. It is the duty of the Minister to refuse to register a trade mark when it is not clear that deception may not result from such registration: *Eno* v. *Dunn*, 15 App. Ca. 252; and *In re trade mark of John Dewhurst & Sons, Ltd.* (1896), 2 Ch. 137, referred to.

*T. Brosseau*, for applicants. *A. Ferguson*, Q.C., and *C. S. Campbell*, for opposants.

---

Burbidge, J.] YULE v. THE QUEEN. [April 4.

*Constitu...nal law—8 Vict. (P.C.), c. 90—B.N.A. Act, 1867, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver.*

By the Act 8 Vict. (P.C.), c. 90, Y. was authorized at his own expense to build a toll bridge with certain appurtenances over the River Richelieu, in the parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs etc., for the term of fifty years from the passing of the said Act; and that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth, exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the governor of the province for the time being, another by the said Y., his heirs, etc., and the third by the said two arbitrators. The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs maintained the same and collected tolls for the use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act.

*Held*, that upon the vesting of the bridge and its appurtenances in the Crown, the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was, within the meaning of the 111th section of "The British North America Act, 1867," a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable.

2. That the Exchequer Court had jurisdiction under clause (d) of the 16th section of the Exchequer Court Act, in respect of a claim based upon the said obligation, it having risen under the said provision of the B.N.A. Act, 1867, which, for the purposes of construction of the said 16th section of the Exchequer Court Act, was to be considered a law of Canada.

3. That under the wording of the said Act, 8th Vict. (P.C.), c. 90, no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown.

4. Where both the Governments of Ontario or Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right praying that a fiat thereon be granted, or, in the alternative, that an arbitrator be appointed by the Crown, naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8th Vict. (P.C.), c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown.

*E. Barnard*, Q.C., *W. D. Hogg*, Q.C., *E. Lafleur*, for suppliants. *Solicitor-General* and *E. L. Newcombe*, Q.C., for respondent.

---

# Province of Ontario.

## COURT OF APPEAL.

Second Division.] SEYFANG *v.* MANN [Feb. 14.

*Chose in action—Assignment of—Novation—Set off.*

A firm of G. & P., which had contracted with defendants to supply them with a number of bicycles, was subsequently dissolved, G. retiring and S. taking his place. The notice of dissolution stated that the business would be carried on by S. & P., who would pay the indebtedness of the firm, and who were alone authorized to collect its debts, and by the agreement of dissolution, the partners released each other from all liability, and it was agreed that all the claims of the firm belonged to and would be collected by S. & P. as the owners thereof. The defendants wrote the new firm notifying them of the contracts they had made with the firm before dissolution, on which they said they had a large claim for damages for non-fulfilment, and trusted the new firm had made this a consideration in the change of the firm; that they were ready at any time to settle up their account, but must first have a settlement of their claim for damages. The plaintiffs in answer, disputed the defendants claim for damages, but not on the ground that they, plaintiffs, had not undertaken to pay the liabilities of the old firm.

*Held*, that what took place constituted a novation, and the defendants' were therefore entitled to claim against the plaintiffs the damages which the defendants had sustained through the breach of the contract, but that such damages must be limited to the damages arising from breaches occurring prior to the dissolution.

*Aylesworth*, Q.C., and *Cronyn*, for defendants. *F. D. Gamble*, and *J. F. Hellmuth*, for the respondents.

---

From Street, J.] MOORHOUSE *v.* KIDD. [May 5.

*Principal and surety—Counter security—Right to enforce—Depreciation—Contribution.*

Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled, after the principal debtor's default, to enforce the security without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value, and that the paying surety has refused to take any steps to enforce it. Judgment of STREET, J., 32 C.L.J. 680; 28 O.R. 35, affirmed.

*McCarthy*, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

---

From Boyd, C.] RICE *v.* TOWN OF WHITBY. [May 5.

*Municipal corporations—Highway—Obstruction.*

A house which was being moved from one part of a town to another, was allowed to stand over night upon one of the streets, without a watchman or warning light. The plaintiff's horse while being driven past the house that night took fright and the plaintiff was injured. Some of the town councillors knew that the house was to be moved and that it had been left standing upon the street for the night.

*Held*, assuming that the house was an obstruction to the highway, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation. Judgment of BOYD, C., 33 C.L.J. 691; 28 O.R. 598, reversed.

*C. J. Holman*, for appellant, the third party. *Aylesworth*, Q.C., and *Farewell*, Q.C., for the town. *W. R. Riddell*, for respondent.

---

From Rose, J.] MCMILLAN *v.* MUNRO. [May 5.

*Registry law—Priorities—Mortgage for balance of purchase money.*

The plaintiff agreed to sell a parcel of land, one-half of the purchase money to be paid in cash and the other half to be secured by a mortgage thereon. A deed and mortgage were prepared and executed, the cash payment made, and the deed delivered to the purchaser. The mortgage was delivered to the vendor's agent to be registered. The purchaser had obtained the cash payment from the defendant upon the security of a first mortgage upon the land in question, and this mortgage was prepared, executed and delivered before the execution and delivery of the deed, and was registered before the deed and before the mortgage to the plaintiff. Upon receiving the

deed the purchaser handed it to the defendants' agent, who then registered it, the plaintiff's mortgage having in the meantime been also registered. The plaintiff and the defendant acted in good faith, and each without knowledge or notice of the other's mortgage.

*Held*, that the Registry Act did not apply; that the defendant's mortgage was valid only by estoppel, and was fed by estoppel to the extent only of the interest taken by the purchaser under the deed; that that interest was subject to the claim of the plaintiff for the balance of purchase money, and that the plaintiff's mortgage was therefore entitled to priority. *Nevitt* v. *McMurray*, 14 A.R. 126, applied. Judgment of ROSE, J., reversed.

*E. H. Tiffany*, for appellant. *A. C. Macdonell*, for respondent.

---

From Robertson, J.] WARD *v.* WILBUR. [May 5.

*Vendor's lien—Performance of agreement.*

A lien in the nature of a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited to cases of conveyance for a money consideration. Where therefore upon the partition of a piece of land, held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant. Judgment of ROBERTSON, J., affirmed.

*J. M. Glenn* and *W. Gundy*, for appellants. *J. A. Robinson*, for respondent.

---

From Ferguson, J.] RAINVILLE *v.* GRAND TRUNK R. W. CO. [May 5.

*Railway—Fire—Negligence—Cutting down weeds.*

A railway company is responsible for damages caused by fire which is started by sparks from one of their engines in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation. Judgment of FERGUSON, J., affirmed. (See 33 C.L.J. 691.)

*Osler*, Q.C., for appellants. *M. K. Cowan* for respondent.

---

From Falconbridge, J.] [May 5.

POWELL *v.* TORONTO, HAMILTON AND BUFFALO R. W. CO

*Railways—Lands injuriously affected—Operation of the railway—Dominion Railway Act, 51 Vict., c. 29.*

Under the Dominion Railway Act, 51 Vict., c. 29, compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant, and no compensation can be allowed to the owner of land fronting on a street along which a railway company lawfully constructed its line of railway, there being no interference with access to the land except so

far as that resulted from the passing of trains. *Re Bireley and Toronto, Hamilton and Buffalo R. W. Co.*, 33 C.L.J. 473; 28 O.R. 468, considered. Judgment of FALCONBRIDGE, J., affirmed.

*Robinson*, Q.C., and *Chisholm*, for appellant. *Osler*, Q.C., and *D'Arcy Tate* for respondents.

---

From Boyd, C.] LEWIS *v.* DOERLE. [May 5.

*Will—Charitable devise—Trust for benefit of citizens of the United States of African descent.*

A devise of lands in Ontario by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights" is a charitable devise and void, and the fact that the trust is to be executed in a foreign country makes no difference. Judgment of BOYD, C., 33 C.L.J. 394; 28 O.R. 412, affirmed.

*W. Barwick*, for appellants. *W. Cassels*, Q.C., for respondent.

---

From Rose, J.] [May 5.

DRAKE *v.* SAULT STE. MARIE PULP AND PAPER COMPANY.

*Water and watercourses — Interference with navigation — Private right of action.*

The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to his fishing grounds in the lake, and was also sometimes employed by neighbors to bring to them in this sail boat supplies and provisions. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that for the whole summer access to the stream was cut off.

*Held*, that the plaintiff had sufficient special interest to enable him to maintain an action for damages. Judgment of ROSE, J., affirmed.

*Wallace Nesbitt*, for appellants. *A. C. Macdonell*, for respondents.

---

From Drainage Referee.] [May 5.

THACKERAY *v.* TOWNSHIP OF RALEIGH.

*Drainage—Land injuriously affected—Appeal to Court of Revision—Claim for damages—Sufficiency of notice—Filing notice—Arbitration.*

Under the drainage clauses of the Municipal Act of 1892, a landowner who is injuriously affected by a drainage work and who is assessed for part of the cost, is not bound to appeal to the Court of Revision for the allowance to him of damages to be set off against his assessment; he has his remedy by arbitration or action. Whether such a claim is made by application for arbitration or by action is immaterial; in either event the Drainage Referee has jurisdiction to deal with it. The provision of sub-sec. 3 of s. 93 of the Drainage Act, 1894, requiring a copy of the notice of claim to be filed with the

County Court Clerk is directory and not imperative, and recovery is not barred where notice of the claim is duly given to the municipality and an action commenced within the time limited, but a copy of the notice is not filed.

A notice that the claim is for damages sustained "by reason of the enlargement and construction" of the drain in question is sufficient to support a claim for damages for interference because of the drain, with access to part of the claimant's farm. Judgment of the Drainage Referee affirmed.

*M. Wilson*, Q.C., for appellants. *W. Douglas*, Q.C., for respondent.

---

From Street, J.] IN RE CURRY, CURRY *v.* CURRY. [May 5.

*Improvement on land—Tenant in common—Allowances—Interest—Practice—Master's office—Accounts.*

A tenant in common who holds possession of and manages the common property is entitled when called on for an account by his co-tenant to his proper and reasonable expenditure for repairs and improvements with interest from the time the expenditures are made. Judgment of STREET, J., affirmed.

Where accounts are brought into the Master's office with the vouchers and the usual affidavit of verification, and no notice of objection is given, the accounts are taken to be sufficiently proved. Judgment of STREET, J., 33 C.L.J. 342; 17 P.R. 379, affirmed.

*McCarthy*, Q.C., and *O. E. Fleming*, for appellants. *S. H. Blake*, Q.C., and *R. F. Sutherland*, for respondents.

---

Practice.] STAR LIFE ASSURANCE SOCIETY *v.* SOUTHGATE. [May 10.

*Judgment—Action on bond—8 & 9 Wm. III., c. 11—Rule 580—Procedure—Penalty—Assessment of damages—Motion for judgment—Rule 593.*

In an action upon a bond conditioned for the payment of a sum of money by instalments, with interest in the meantime on the unpaid principal, by Rule 580, the provisions of 8 & 9 Wm. III., c. 11, as to the assignment or suggestion of breaches, and as to judgment for the penalty standing as a security for damages in respect of future breaches, are in force in Ontario; but in all other respects the practice and proceedings are the same as in an ordinary action, and subject to the Rules. The claim in such an action is not the subject of a special indorsement under Rules 138 and 603, but it is in the nature of a claim for damages. Upon the defendant in such an action making default in delivering a defence, judgment is to be obtained by the plaintiffs by motion under Rule 593, and should be for the penalty, and for assessment of damages for the breaches assigned or to be suggested in such way as may be thought proper under Rules 578, 579. When the action comes for assessment of damages before a Judge sitting for the trial of actions, he can do no more than assess the damages in respect of the breaches of the bond for which execution is to be issued.

*Shepley*, Q.C., *G. C. Campbell* and *Frank Denton*, for the appellants. *Ludwig*, for respondents.

## HIGH COURT OF JUSTICE.

Street, J.] TOWNSEND *v.* O'KEEFE. [April 1.

*Pleading—Slander—Particulars—Names of persons—Times and places—Striking out—Amendment.*

In an action of slander the statement of claim, after alleging that the slanders had been spoken and published to certain named persons, added "and to others at present unknown to the plaintiff."

*Held*, sufficient.

It also alleged that during a period of five months the defendant spoke and published various slanders to certain named persons and to others not known to the plaintiff.

*Held*, bad, and struck out; for it did not show which of the persons mentioned were present when the different statements were made, nor at what times and places they were made.

Leave to the plaintiff to amend by adding further charges within reasonable limits.

*Thurston*, for the plaintiff. *W. H. Lockhart Gordon*, for the defendant.

Rose, J.] SINCLAIR *v.* BROWN. [April 1.

*58 Vict., c. 21 (O.)—R.S.O. (1897), c. 127, s. 12—Construction of—Widow's charge—Quantum of—Foreign estate.*

Under 58 Vict., c. 21 (O.), now s. 12 of R.S.O. (1897), c. 127, the widow of an intestate who left no issue, is entitled to $1,000 out of his estate in Ontario, notwithstanding that she may have received other benefits under the laws of another country out of his estate in that country.

*A. F. Lobb*, for the plaintiff. *Geo. W. Lount*, for the defendants.

Armour, C.J., Falconbridge, J., Street, J. [April 7.

ALDRIGH *v.* HUMPHREY AND YOUNG.

*Justice of the peace—Warrant of commitment—Constable executing in adjoining county—Arrest—24 Geo. II., c. 44, s. 6—R.S.O. (1887), c. 73—Notice of action—Insufficiency of—Direction to juror—Not guilty by statute.*

Plaintiff having been convicted of an assault and fined by a magistrate in the county of H., the magistrate issued a warrant for his arrest for the non-payment of the fine, directed to a constable, who went after the plaintiff and found him in an adjoining county, when he told him he had a warrant of commitment for him for his arrest, at his request allowing him to read it, when the plaintiff said he would go with him, which he did; the constable taking him before the magistrate in the county where he was convicted, where he paid the fine, costs and constable's fees.

*Held*, that what took place constituted an arrest.

*Semble*, that if the constable had merely told the plaintiff he had a warrant of commitment for him without showing it, and the plaintiff on being so told had gone with him, it would have been an arrest.

*Held*, also, that the constable was not entitled to the protection of 24 Geo. II., c. 44, s. 6.

*Held*, also, that as the evidence showed that the constable was acting with the bona fide intention of executing the warrant, he was entitled to the protection of R.S.O. (1887), c. 73, and to notice of action, but that as the notice of action given stated that the arrest took place in a township other than the correct one it was insufficient.

*Held*, also, that as the evidence of both the plaintiff and defendant showed where the arrest took place, the trial judge was right in telling the jury so, instead of leaving to them to find as a fact.

*Held*, also, that the constable was entitled to plead not guilty by statute to the statement which alleged the arrest in the county where it was made.

*Held*, also, that if there had been any evidence to warrant it the plaintiff might have required the jury to be asked to find that the constable did not act in good faith in making the arrest.

*W. W. Osborne*, for the plaintiff. *E. D. Armour*, Q.C., contra.

---

Street, J.] RE GEORGIAN BAY AQUEDUCT POWER COMPANY. [April 16.

*Winding up order—Proof of assets—Unpaid stock—Stock issued as paid up.*

A winding-up order will not be granted where there are no assets, and the petitioning creditor would therefore get nothing by the order.

Where, however, on a petition for such an order, which was contested on the ground of the alleged non-existence of assets, it appeared that there was an amount of subscribed stock only partially paid up, an amount of stock issued as paid up, the consideration for which did not satisfactorily appear, and also a large issue of bonds, which appeared to have been of very little benefit to the company, and it was impossible to say whether they were held for value or not, an order was granted.

*Clute*, Q.C., for the petitioner. *Aylesworth*, Q.C., and *Ferguson*, contra.

---

Boyd, C.] MORROW *v.* LANCASHIRE INSURANCE COMPANY. [April 18.

*Insurance—Further insurance—Double insurance—Proofs of loss.*

The plaintiff insured his barn in the defendant company for $2,100, and afterwards mortgaged his farm, including the barn, to a loan company for $1,500, assigning the policy to the company as collateral security. The mortgage contained a covenant that the mortgagor would insure the buildings for not less than $1,000; but that the mortgagees might themselves insure the property without any further consent of the mortgagor. Subsequently, without the knowledge and consent of the plaintiff, the policy was cancelled, and the mortgagees effected a new insurance in another company for the sum of $600. The property having been destroyed by fire, the plaintiff notified the company thereof, whereupon they denied liability on the ground that the

policy had been cancelled, and on the plaintiff afterwards writing offering to supply proofs of loss, if required, the company again denied any liability on the ground of cancellation, but said nothing as to furnishing proofs of loss.

*Held*, that the plaintiff did not cease to be the "person insured" within the meaning of the Insurance Act, and that the policy could not be cancelled by the company unless they strictly followed the provisions of the Act.

*Held*, also, that the insurance effected by the mortgagees could not be deemed to be a subsequent insurance within the meaning of sub-sec. 8, s. 168 of R.S.O. (1897), c. 203; nor could it be deemed a double insurance as understood in commercial law.

*Held*, also, there was such a repudiation of liability by the company as relieved the plaintiff from making formal proofs of loss.

*Geo. Wilkie*, for the plaintiff. *Dalton McCarthy*, Q.C., and *C. J. McInnes*, for the defendants.

---

Street, J.] HEWETT *v.* JERMYN. [April 20.

*Will—Construction of grant of probate to one of two executors—Right of such executor to sell—Vendor and purchaser.*

A testatrix devised and bequeathed all her real and personal property to her husband H. and to R. as her executors, to carry out the provisions of the will, with full power and authority, if in their discretion they deemed it advisable, to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband H. during his lifetime, and after his death to sell the property and divide the same equally between her children. R. renounced probate, and on 20th April, 1892, probate was granted to H., who, as sole executor, had since contracted to sell to J. certain of the testatrix's lands to pay debts, etc.

*Held*, that H. had power to make a valid sale, and that s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power.

*Holden* for the petitioner. *Hamilton Cassels* contra.

---

Divisional Court.] REG. EX REL. HALL *v.* GOWANLOCK. [April 29.

*Municipal elections—Concurrent motions in High and County Court—Prohibition—Collusion—R.S.O., 1897, c. 223, s. 227.*

Appeal from order herein for prohibition, noted supra, p. 317.

There is no power in the Judge in Chambers either to prohibit or enjoin the Judge of the County Court, who has equal jurisdiction and authority with him, from proceeding with the trial of the validity of this election. The proper course would have been for the defendant to have moved in the County Court on notice, addressed to the two relators, calling on them to show cause why the motion before the County Court Judge should not be set aside or made returnable before the Master in Chambers, and upon this motion col-

lusion in the first notice of motion could have been tried and disposed of. What was done by the County Court Judge was at most but error in procedure, and as such was not the subject for either prohibition or injunction.

Appeal allowed with costs, STREET, J., dissenting.

*Du Vernet* and *Woods* for the appeal. *A. H. Marsh*, Q.C., and *Lindsey*, contra.

---

Street, J.] IN RE SOLICITOR. [May 11.

*Appeal—Consent order—Denial of consent—R.S.O. c. 51, s. 72.*

An appeal by Henry S. Clarkson from an order of the local judge at Brampton. Clarkson, on the 22nd January, 1898, issued a præcipe order for the taxation of certain bills of costs delivered to him by his solicitor. The latter moved before the local Judge to set aside the order, upon the ground that one of the bills had been delivered several years before the order for taxation was made. Upon the return of this motion an order was drawn up, in the nature of a compromise, providing for the taxation of all the solicitor's bills, irrespective of any special agreements for fixed charges, and binding Clarkson not to set up the Statute of Limitations as to any of the items. This order appeared on its face to be a consent order. The appeal was on the ground that Clarkson did not consent to it. No leave to appeal was obtained from the local Judge.

*Held*, that the appeal could not be entertained; R.S.O. c. 51, s. 72.

*T. J. Blain* for the appellant. *J. H. Moss* for the solicitor.

---

Meredith, C.J., Rose, J., MacMahon, J. [May 11.

RONDOT *v.* MONETARY TIMES PRINTING CO.

*Costs—Taxation—Depositions not used at trial—Counsel fee—Quantum—Review.*

In an action for libel the defendants in support of their defence of justification obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken thereunder for use at the trial. The evidence, however, was not used at the trial, owing to the plaintiff being called as a witness by the defendants, and admitting substantially what was stated by the witnesses in their depositions before the commissioner.

*Held*, that the defendants, having obtained judgment in their favour with costs, were entitled to tax against the plaintiff the costs of executing the commission, the taking of it having been, under the circumstances, not unreasonable, and the fact that it was not used not being sufficient to deprive the defendants of the costs of it.

The practice is not to interfere upon appeal with the discretion of a taxing officer as to the quantum of a counsel fee.

*Swabey*, for the plaintiff. *King*, Q.C., for the defendants.

Boyd, C.] IN RE BENNINGTON. [May 20.

*Devolution of Estates Act—Executors and administrators—Power to mortgage lands—Consent of official guardian.*

*John Hoskin* Q.C., as official guardian, applied under Rule 972 for an order or direction touching certain real estate in which infants were interested, the question being whether executors or administrators had power under s. 9 of the Devolution of Estates Act, R.S.O. c. 127, with the consent of the official guardian, to mortgage the lands in question.

THE CHANCELLOR held that the executors or administrators had such power with such consent.

---

Boyd, C.] NEVILLE *v.* BALLARD. [May 20.

*Solicitor—Charging order—Infant plaintiff—Action for personal injuries—Lien on taxed costs.*

An application by the solicitor for the infant plaintiff, under Rule 1129, for an order charging the amount of the judgment recovered by the plaintiff against the defendant with the costs incurred by the applicant as between solicitor and client.

*Held*, that by Rule 1129 a discretionary power is given to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court, in the exercise of its discretion, to make the charge: *Re Humphries* (1898) 1 Ch. 526. The Rule gives the solicitor an ancillary right—one not intended to displace the liability of the client to pay the solicitor out of his own pocket, but ancillary to his right to be paid on his retainer: *Groom* v. *Cheesewright* (1895) 1 Ch. 730. Here the retainer was given by the father of the infant, and the infant plaintiff was not liable to the solicitor for any of the costs. It was just that the costs taxed against the opposite party by virtue of the solicitor's exertions should be charged or impounded to answer the solicitor's lien. But beyond this, in the case of actions grounded on personal injuries to infants, the Court ought not to go.

Order made directing that the judgment should stand charged to the extent of the taxed costs in favour of the solicitor, and enjoin the infant and next friend from receiving or disposing of the same. No costs of the application.

The Chancellor subsequently refused an application by the solicitor for the plaintiff, to add to the order a direction that the charge should be enforced by the sale of the judgment.

*Mulvey* for the applicant. *J Hoskin*, Q.C., for the infant plaintiffs.

---

Boyd, C.] DAVIDSON *v.* MERRITTON WOOD AND PULP CO. [May 25.

*Settlement of action—Validity of—Trial—Issue—Action—Pleading.*

An assignee for the benefit of creditors under a statutory assignment, having brought an action for damages for breach of a contract made by his assignor with the defendants, made a compromise settlement with the defendants, before the delivery of pleadings, while he was in gaol, and without

reference to the inspectors or creditors. A new assignee appointed in his stead applied for an order directing the trial of an issue to determine whether the settlement was valid.

*Held*, that it was not necessary to bring another action to vacate the settlement, and it was more convenient to revive the action in the name of the new assignee as plaintiff, and let him continue it, leaving the defendants to move summarily to stay it, or to plead the settlement in bar, than to direct the trial of an issue. *Rees* v. *Carruthers*, 17 P.R. 51, distinguished. *Johnson* v. *Grand Trunk R. W. Co.*, 25 O.R. 64, and *Haist* v. *Grand Trunk R. W. Co.*, 22 A.R. 504, followed.

*S. B. Woods*, for the applicant. *R. McKay*, for the defendants.

---

# Province of New Brunswick.

## SUPREME COURT.

Full Court.] EX PARTE MCELROY. [April 23.

*Malicious destruction of fence on highway--Excessive costs.*

The applicant and two other young men were convicted separately of breaking down a fence, enclosing certain school grounds. A portion of the fence so broken was on the highway, and it was sought to set aside the convictions on this ground, and also on the ground of excessive costs taxed by the convicting magistrate, the costs of the three cases aggregating upwards of $100.

*Held*, that inasmuch as the evidence indicated that the fence was destroyed wantonly and not in the assertion of any right as regards the highway, the conviction should not be disturbed for this reason, but the rule was made absolute for a certiorari on the ground of the excessive costs, with directions to the convicting magistrate to return an itemized statement of the same.

*F. B. Carvell*, for the applicant. *G. F. Gregory*, Q.C., and *J. R. Murphy* contra.

---

Full Court.] EX PARTE KILLAM. [April 23.

*Insolvent—Orders for payment of judgment debt by instalments—Future income—Civil servant.*

59 Vict. c. 28, s. 53, providing for orders for the payment of judgment debts by instalments applies only to present ability to pay and does not contemplate future earnings or income that may be uncertain, LANDRY, J., dissenting.

*Held*, also, per TUCK, C.J., and HANINGTON, J., that civil servants and all persons in the employ of the Federal Government are, so far as their incomes as such are concerned, exempt from such orders. Rule absolute for certiorari.

*J. D. Hazen*, Q.C., *A. A. Stockton*, Q.C., and *D. Grant*, in support of rule. *O. S. Crocket* and *C. A. Stockton*, contra.

Full Court.] EX PARTE WOODSTOCK ELECTRIC LIGHT CO. [April 23.

*Summary conviction against a corporation.*

A corporation cannot be proceeded against under the Dominion Summary Convictions Act. Rule absolute for certiorari to remove conviction for not registering.

*A. B. Connell*, Q.C., in support of rule. *E. H. MacAlpine* and *W. Pugsley*, Q.C., contra.

---

Full Court.] WOODSTOCK WOOLEN MILLS CO. *v.* MOORE. [April 23.

*Deed—Description by plan only.*

A plan or sketch inserted under the description in the body of a deed without any reference thereto by words in the deed is as much a part of the deed as if there were such reference.

*A. B. Connell*, Q.C., and *A. A. Stockton*, Q.C., for plaintiff. *G. F. Gregory*, Q.C., for defendant.

---

Full Court ] LABELLE *v.* MCMILLAN. [April 23.

*False imprisonment – Evidence as to offence for which imprisoned.*

Plaintiff was convicted before one magistrate of violation of Liquor License Act, of 1896, and imprisoned for want of distress, from which imprisonment he was discharged on habeas corpus, on the ground that one magistrate had no jurisdiction to try offences under the Act. In an action for false imprisonment plaintiff offered evidence, which was admitted, to prove that he was not guilty of the offence for which he was thus convicted. Defendant objected on the ground that only the evidence taken before the magistrate could be used.

*Held*, on motion for a new trial, that the evidence was properly received.

*A. A. Stockton*, Q.C., and *John Montgomery*, for plaintiff. *H. F. McLatchy*, for defendant.

---

Full Court.] EX PARTE PASCAL HEBERT. [April 23.

*Attachment for non-payment of costs—Demand by chairman of a corporate body—Not sufficient for attachment.*

A demand of the payment of costs by the chairman of a board of Liquor License Commissioners, to whom the same were payable on the discharge of a rule for a mandamus to compel them to issue a license to the applicant, is not sufficient to support a motion for an attachment for their non-payment. The demand must be made by all three members of the Board, or by some one authorized by resolution to make the demand in their behalf.

Rule refused, MCLEOD, J., dissenting.

*H. B. Rainsford* for the application.

---

Full Court [ EX PARTE LAWRENCE. [April 23.

*Two arrests—Splitting of claims—Certiorari*

The applicant, having been arrested twice on the same day on separate capiases, issued out of the city of Fredericton Civil Court at the suit of the

same plaintiff, and having been bail in each case, sought to set aside the second arrest on the ground of the splitting of claims, and moved for a rule for certiorari to bring up the proceedings on the second arrest.

*Held*, that certiorari would not lie. HANINGTON, J., dubitante.

*F. St. John Bliss* for applicant.

---

Full Court.] GORMAN *v.* URQUHART. [April 23.

*Slander—Certificate for costs.*

In an action of slander in the Supreme Court plaintiff obtained a verdict for $120, being $60 on each of two counts for words accusing her of adultery. The Court en banc subsequently disallowed the assessment on the second count, on the ground that the occasion was privileged, and plaintiff consented to a reduction of the verdict by this amount. On an application to the trial Judge for a certificate for Supreme Court costs the latter referred the same to the Court en banc.

*Held*, HANINGTON and LANDRY, JJ. dissenting, that a certificate should be granted.

*Wm. Wilson*, in support of the application. *G. F. Gregory*, Q.C., contra.

---

Full Court.] EX PARTE ANDERSON. [April 23.

*Canada Temperance Act—Witness not tendered with conduct money.*

The applicant was summoned as a witness, and, not having attended as commanded, was fined for disobedience, and subsequently committed. No conduct money was tendered.

*Held*, on motion for certiorari to remove the commitment, that a witness is entitled to conduct money in all proceedings under the Summary Convictions Act, and that, the applicant in this case not having been tendered with such, the fine and commitment were unlawful.

*M. G. Teed*, in support of rule. *J. W. McCready*, contra.

---

## SAINT JOHN COUNTY COURT.

Forbes, J.] BARNES *v.* WEBBER. [May 11.

*Disclosure—Affidavit—59 Vict., c. 28, s. 36.*

On an application for disclosure under 59 Vict., c. 28, s. 36, the plaintiff's affidavit set out that a judgment had been obtained and that it was unsatisfied. It was moved that the application be dismissed on the ground that the affidavit should disclose that a writ of fi. fa. had issued, to which a return of nulla bona had been made, or that the sheriff should make affidavit that he had made search, and could discover no assets available to execution. Defendant's argument was that under a bill for discovery of property in aid of an execution it had to be alleged that a return of nulla bona had been made by the sheriff, or the bill was demurrable, citing *Angell* v. *Draper*, I. Vern. 399, and that the remedy given by the Act was merely substitutionary for the remedy in

equity, and could not be had except under the like circumstances. *Ontario Bank* v. *Trowern*, 13 P.R. 422, was also referred to as an express decision upon the point. Application withdrawn, though not to be taken as assenting to the defendant's contention.

*A. P. Barnhill*, for the application. *W. H. Trueman*, contra.

---

# Province of British Columbia.

## SUPREME COURT.

Irving, J.] McNERHANIE *v.* ARCHIBALD. [April 27.

*Mineral Act—Free miner's license—Partnership—Effect of expiration of license.*

In 1895 plaintiff and defendant entered into partnership as prospectors. In June, 1896, the defendant staked a mineral claim called the Dorothy Morton. Plaintiff claimed an interest in this by virtue of the partnership, and at the trial the jury found there was a partnership, and that it applied to the Dorothy Morton. Plaintiff had a valid free miner's certificate at the time the partnership was entered into and at the time the Dorothy Morton was staked out, but permitted it to lapse in July, 1897, renewing it in August of the same year. Defendant's counsel asked for a non-suit, relying upon ss. 9 and 84 of the Mineral Act.

*Held*, that the existence of an unexpired free miner's certificate is a conditional limitation (see *In re Machu*, 21 Ch. D. 838), providing for the termination of the miner's estate, or for its abridgment by operation of law. The Act declares that the defaulting person's rights and interests in or to any mineral claim shall be absolutely forfeited—that is, to the Crown—provided, however, in the case of co-ownership (s. 9) or in the case of partnership (s. 84), the failure shall not cause a forfeiture, or act as an abandonment of the claim, but the interest of the co-owner, or the partner making default, shall, ipso facto, become vested in the continuing co-owner or partner. This amounts to an absolute statutory declaration that the plaintiff forfeited to the Crown his right in the claim, and that thereupon the claim became vested in the defendant.

*Macdonell*, for plaintiff. *Davis*, Q.C., for defendant.

---

Irving, J.] IN RE TOM HONG GREW. [April 30.

*Practice—Interpleader—Originating summons.*

A tenant of certain property was requested severally by his landlord, by the assignee of the landlord, and by the mortgagee of the premises to pay the rent to them respectively. He thereupon took out an ordinary summons in Chambers calling upon said several parties to interplead.

*Held*, that the summons should have been an originating summons, and the application was dismissed.

*Spencer* for applicant. *Marshall* for mortgagee. *Macdonell* for assignee.

Walkem, J.] TURNER *v.* JEWEL. [May 4.

*Life insurance—Benevolent society—Change of direction as to payment—Revocation—Rev. Stat. B.C., 1897. c. 13 & 104.*

Interpleader issue. E. F. being a member of the Ancient Order of United Workmen, received a certificate from the order dated 23rd July, 1886, which entitled his infant daughter to payment of $2,000 at his death. He placed his daughter in 1887 under the care of the plaintiffs, J. T. and his wife, and handed the certificate to them, together with his will, on the understanding that they should maintain and educate her. E. F. died in 1897, and by his will the plaintiffs were appointed trustees and executors of his estate, and also guardians of his infant daughter with directions to collect and invest for her benefit the $2,000. E. F. shortly before his death had a new certificate issued to him upon his formally agreeing in writing that the first one should be cancelled or revoked. It was revoked, and in the fresh certificate the $2,000 originally directed to be paid to his daughter is cut down to $1,500, and the balance of $500 made payable to E. F.'s sister, since deceased, and whose personal representatives now claim it.

Associations like the present one are organized under the Benevolent Societies Act (R. S. 1897, c. 13), and their policies are subject to the provisions of the Families' Insurance Act (R. S. 1897, c. 104), by s. 8, of which a certificate may be raised by an instrument in writing attached to or indorsed on, or identifying the policy by its number or otherwise, so as to restrict or extend, transfer or limit the benefits of the policy to the wife alone or to children, or one or more of them, as beneficiaries, or a beneficiary, or sole beneficiary, although the policy is expressed or declared to be for the benefit of the wife and children alone; he may also by his will make or alter the apportionment of the insurance money; and an apportionment made by his will shall prevail over any other made before the date of the will. No such instrument in writing was produced in this case.

*Held*, that the revocation of the certificate was illegal, and the second or substituted certificate was a nullity; and the provisions of the will in respect of the first and valid certificate apply to it. The plaintiffs, as trustees, appointed by the testator to receive and invest the money in question, are entitled to it.

*R. T. Elliott*, for plaintiffs. *Thornton Fell*, for defendant.

---

Irving, J.] IN RE MCGILLIS. [April 29.

*Will—Probate—Affidavit of execution.*

This was an application for probate of a will, and the affidavit used was drafted from Form 14 in Howell's Probate Practice.

*Held*, that the affidavit was insufficient, inasmuch as it did not state that the will was subscribed by the witnesses in the presence of the testator, but leave was given to file a sufficient affidavit, which would be considered without requiring a fresh motion.

*Marshall*, for the application.

# Book Reviews.

*Canadian Annual Digest* (1897), by CHARLES H. MASTERS, Esq., Barrister-at-Law, Reporter of the Supreme Court of Canada, and CHARLES MORSE, Esq., LL.B., Barrister-at-Law, Reporter of the Exchequer Court of Canada: Toronto, 1898. Canada Law Journal Company.

The second annual digest, by the authors above named, will need no recommendation with those who have tested the usefulness of the volume for 1896. To others we would say that it covers all the reported cases of the year in the Dominion and Provincial Courts, and that the arrangement of the cases are most satisfactory. The work should be found in the office of every practising lawyer. A valuable feature is the table of cases affirmed, reversed and specially considered, and there is included in the digest the cases published in the CANADA LAW JOURNAL, *Canadian Law Times*, and *La Revue de Jurisprudence*, not officially reported.

---

*Canadian Criminal Cases* (Annotated); a series of reports of criminal and quasi-criminal cases in the Courts of Canada and of the provinces thereof. Edited by W. J TREMEEAR, of the Toronto Bar. Toronto, 1898. Canada Law Journal Company.

The first number of the above series has just been published, and a perusal of its 128 pages shows its great utility, and gives promise of the volumes of the series becoming the standard work of reference for Canadian practitioners on the branch of law to which it pertains. The annotations show great care and accuracy in their compilation, and reflect a large measure of credit upon the editor, a well known member of the Toronto Bar. The concise arrangement of the head-notes in numbered paragraphs, setting forth the points of law decided, without the repetition from the case itself of the statement of facts, is a marked improvement upon the method in vogue in many of the provinces. These reports, covering as they do the criminal decisions throughout the whole Dominion, whether officially reported or not, will be exceedingly valuable alike to judges, lawyers and magistrates, and it is hoped that this publication may assist in forwarding the ever growing movement towards the formation of a uniform Canadian jurisprudence, by collecting together the many cases which would remain practically unknown, except in the locality or province in which they arose. The typographical part of the work is of the very best.

---

*A Treatise on the Law of Indirect and Collateral Evidence*, by JOHN H. GILLETT, Judge Thirty-first Judicial Circuit of Indiana; Indianapolis and Kansas City. The Bowen-Merill Co., 1897.

The raison d'etre of this book is not very evident. The preface does not much help us; it is there claimed to be a work of original investigation, but we have no further assistance in this regard, except that it is stated that the chapter on Collateral Evidence is a contribution to a subject which has never received systematic discussion, and that it has been the author's endeavour to

put the topics of res gestæ, and the allied topic of declarations denoting subjective conditions, upon a scientific basis. This preface does not, at the start, impress the practical lawyer at all favourably, and one is rather appalled by such a sentence as the following, wherein the author compares his efforts to that of a workman who feels "as he gazes upon a noble cathedral, shimmering in beauty, a very type of spiritual aspiration, from tesselated pavement to lofty spire, that he helped to build that structure, for did not his faithful back carry mortar to the skilled workmen." The authorities cited are almost entirely from the United States Reports. To the extent that there is a collection of these under the various heads into which the matter is divided, the book will be useful in this country, but it may be doubted whether it gives to the profession that which is promised on the title page.

## Flotsam and Jetsam.

A recent number of the *English Law Times* contains an instructive article under the head of "Merger of Trespass in Felony," and says the profession is frequently confronted with the question whether an action is maintainable to recover damages for an act or set of circumstances which reveal a felony in another person, who has not been brought to book for his crime, or whether the defendant can take any steps to stay such an action. The writer doubts whether there really ever existed a practical rule of law that such an action is not maintainable until the criminal has been tried. Those desiring information on this subject will find the matter fully discussed in the number of that periodical for April 2.

Payments endorsed on the back of a note before its transfer to the payee are held, in *Farmers' Bank* v. *Shippey* (Pa.), 38 L.R.A. 823, to be insufficient to destroy its negotiability. The other cases on the subject are collected in a note to this case.

The loss of a draft in the mails during transmission to a correspondent for presentment is held, in *Bank of Gilby* v. *Farnsworth* (N D.), 38 L.R.A. 843, to discharge the drawer from liability, where the payee who sent it failed for nearly six months to declare the loss, although having in its possession a report from the correspondent disclosing the fact that it had not been received.

A Swede came into a lawyer's office one day, says the Cincinnati *Enquirer*, and asked: "Is hare ben a lawyer's place?" "Yes; I'm a lawyer." "Well, Maister Lawyer, I tank I shall have a paper made." "What kind of a paper do you want?" "Well, I tank I shall have a mortgage. You see, I buy me a piece of land from Nels Petersen, and I want a mortgage on it." "Oh, no. You don't want a mortgage; what you want is a deed." "No, maister; I tank I want mortgage. You see, I buy me two pieces of land before, and I got deed for dem, and 'nother faller come along with mortgage and take the land; so I tank I better get mortgage this time."