THE

Canada Law Journal.

VOL. XXX. MARCH 16, 1894. No. 5.

THE recent decision of the Privy Council upholding the Assignments and Preferences Act appears in the last number of the Times Law Reports. We have had an article prepared upon it which, we trust, will be of some interest and value to our readers. We are compelled, however, to hold it over until our next issue.

"IT is always done, but it is rarely that precedents can be found which really coincide with the cases they are quoted to support," is the reported remark of Sir Charles Russell, whose condemnation of the wholesale citation of precedents, relevant or irrelevant, would be concurred in readily by many of our judges, who are so frequently referred to cases that have no application, and merely occupy time in perusal.

WE publish, for the information of those whom it may concern, the very elaborate judgment of Judge McDougall in the question as to whether gas mains, etc., of a gas company are taxable. He holds that they are. Judge Senkler, however, in a judgment which will appear in our next issue, holds that they are not. He considers that "these mains are chattels which the appellants are allowed to place upon the streets, or, at most, an easement, and, in either view, are not assessable as land." This short summary of the views of the learned judge at St. Catharines has much to commend it as a reasonable statement of what a layman, at least, would expect the law to be. All doubts, however, should be set at rest by legislative enactment.

SOME time ago we called attention to some serious charges which were made against Judge Palmer, of the Supreme Court of New Brunswick, in connection with his judicial position. The matter was brought before the Minister of Justice, but, it would seem, not in the manner which he thought necessary to require him to take any action. He seemed to indicate, however, that the judge need expect no mercy should the matter come up in a formal way. The judge has now done the only thing left for him to do, and that is to resign. It is, happily, not often that this country has to deplore unseemly conduct in its judges, and this one exception in many years indicates by contrast the high standing of our judiciary. It is stated in the public prints that a number of other matters have come to light, which would seem to challenge enquiry. The fountain of justice must be kept pure, and the country cannot afford to treat lightly any iniquity in high places.

THE FEE SYSTEM.

The fee system, in connection with the administration of justice, municipal and otherwise, has recently come under discussion. Whilst we might regret that it should necessarily, perhaps, have become more or less a political question, and so outside of our domain, the subject is, nevertheless, one which we cannot ignore, in view of the fact that it is intimately connected with the interests of the legal profession.

We are glad to notice that the Attorney-General has recognized the importance of the question involved, and has promised to consider it in all its bearings, and has, we understand, appointed a commission to collect information, and report. It might, perhaps, be remarked, with reference to this commission, that the information already in possession of the Government should be sufficient to show that the time has more than come when the fee system should, in a great measure, at least, be abolished as a relic of a bygone age—one of those vicious things which the conservatism of officialism has let live, and the supposed necessity of party politics has conserved. One result of it certainly has been that the public has had to pay (and here we speak with special reference to the fee system as applied to the registry law) very large sums for the support of useless officials,

whilst professional men, who alone should be appointed to such office, have been made beasts of burden in the collection, not merely of necessary sums for the administration of justice, but also of unnecessary amounts which go into the pockets of retired politicians for whom it was convenient to provide comfortable incomes at the public expense.

With scarcely an exception, the registrars throughout the Province are perfectly innocent of any knowledge of law, conveyancing, or titles, and many of them know now just as much of their duties as they did when first appointed; the practical work of their offices, in many cases, notably in the city of Toronto, falling on deputies. Such registrars are, in fact, simply figureheads, whose pleasant duty it is to draw their salaries and sign a few returns which have been prepared for them, devoting the rest of their time to their private business, or other pursuits.

As regards the emoluments of those who are paid for doing nothing, one of the registrars received, in one year, over $18,000 to his own use. This was an exceptional case, but it shows the vice of the system. Others receive now, even in these abnormally depressed times, from $2,000 to $3,500, for which some of them do no work whatsoever. The money thus used would very properly go to the reduction of fees which are admittedly excessive. We note, in connection with this, that an Act has been again introduced doing away with the necessity of copying mortgages in full in the registry books, thus reducing the cost of registration. This is a step in the right direction. Searches are now charged for at exorbitant rates. Take, for example, a search on a parcel of land which has been divided into a number of small lots. It is occasionally necessary to search as to the whole block. Fees are exacted for a search on each parcel, though perhaps the whole block remains as originally laid out. The fact is, there should be no charge for searches at all. In making a search, the work of the office is done by a boy handing out a book to the applicant, the boy's services being well paid by the registrar at the rate of $4 a week.

It is, we presume, outside of "practical politics" to expect it, but there can be no question that registrars should, in every case, be professional men of good standing, who would devote their whole time to the duties of their office, and do the work

they are paid for. Their knowledge would enable them to be of service to the public in various ways that at once occur to one familiar with such matters. They would also be able to make suggestions from time to time which would be helpful in the administration of their offices, in perfecting the system of registration. The fact that it was necessary to create the office of Inspector of Registry Offices, and that this office has been filled by the appointment of a professional man of high standing, is, in fact, an admission that there is a necessity for supervision by one familiar with the laws of the country. If the registrars were legal men, there would be little use of an inspector.

Of what benefit to the public, in the position of registrar, can a man be whose occupation, up to the time of his appointment, has been that of a grocer, a doctor, a farmer, an auctioneer, a fish-peddler, etc.? And yet such were some of these.

DECENTRALIZATION OF THE COURTS.

The long-continued agitation arising from the desire of the profession in the eastern and western ends of the Province to have the attendance of judges of the High Court at London and Ottawa to hear motions, which otherwise would be heard in Toronto, has at length resulted, we understand, in a promise by the Premier to introduce a bill on the subject, providing for weekly sittings of the High Court in these cities, for the hearing of certain motions in all cases where the cause of action arises in the counties of Middlesex or Carleton, or in the surrounding counties.

This movement tending towards the general decentralization of the courts has been for a long time strongly urged by many prominent members of the profession, and the seed which has been sown has at length sprung up, and is likely to bear fruit in a way which will, we think, be disastrous to the profession, and injurious to the public interests. It is no new thing for this journal to protest against the evils of decentralization, and, before it is too late, we would again implore those who are urging this change, as well as those who have the power to make the change, fully to consider the results. If there are evils to be corrected, they are, to a large extent, evils which could be remedied

in another way; but in any case let us not introduce greater evils than those sought to be remedied. If judges have, week by week, to travel from Toronto to the two favoured spots already spoken of, why should not other districts receive like favour? What is to be the end of it? Decentralization is not an experiment. If we want a warning against it, we need go no farther than the Province of Quebec. Some of the best men there are already deploring the decentralization that there exists. On the other hand, it does not exist in England, and when that is said a volume is written in favour of retaining our present system. When once a change has been made, and it is found to be a mistake, it will be almost impossible to return.

It would, of course, be very convenient for many members of the profession to have the attendance of judges in the manner proposed; but may we not be permitted to suggest that the thought which inspires the change is somewhat selfish? Such thought should not be allowed to influence the minds of the profession in a matter of this kind. If the Attorney-General should, unhappily, carry out the proposal, it might be suggested that one peripatetic judge should be appointed. It might be possible to find some one on the present Bench who likes railway travelling, and who has been accustomed to spend a considerable portion of his time in this manner. One of the judges has, on the other hand, we are told, stated that he would resign rather than be compelled to make these weekly trips.

UNITED STATES SUPREME COURT.

Some interesting information regarding that tribunal in the United States from which there is no appeal is given by a writer in the last number of the *Albany Law Journal*.

In our own Dominion we often complain of the delay caused to suitors by appeals, but we seem to be well off when we contemplate that court of final resort, the United States Supreme Court, which the writer referred to calls "the great mechanism of procrastination." It is stated that nine out of every ten cases submitted to that tribunal are carried to it, not for the purpose of obtaining a reversal of the decisions of the lower courts, but purely and simply for the sake of delay. Although a speedy

hearing can be obtained by the counsel foregoing argument, and submitting the case on briefs, yet four years usually elapse after a case is filed before it can come up for consideration in the ordinary course, and there are now four thousand cases on the docket awaiting a hearing.

It must not, however, be thereby inferred that the judges of that court are tardy in their work. The annual session lasts for six months, during which time not one of the judges is absent for a day, save on account of serious illness. Five of the nine judges must be present to constitute the court. Once in two years each judge must go out on duty as a circuit judge, the country being divided into nine circuits, one of which must be covered by each of the judges. From the decision of a justice of the Supreme Court acting as circuit judge an appeal can be taken to the Supreme Court, which tribunal can upset any law passed by Congress and signed by the President, if it can detect a constitutional flaw, and from the decision there is no appeal.

An appellant must ordinarily make a deposit of $1,000 to cover printing and fees, so that the expense of obtaining a final adjudication is no small consideration. Except in very important cases, one hour only is allowed for argument on each side, and thus from fifteen to twenty cases are disposed of each week. The Reports of the Supreme Court now cover about 112,000 pages, and of these nearly two-thirds have been published during the last thirteen years.

The method of arriving at the opinion of the court is as follows: Every Saturday, during term, the cases which have been heard during the week are discussed by the judges, and, finally, a vote on the merits of the case is taken, beginning with the junior judge, and ascending in order of seniority. These votes are recorded in a locked volume, and the contents are never revealed. The Chief Justice then assigns all the cases which have been thus discussed to some one of the judges for re-examination, distributing them according to the recognized specialty of each judge, who then goes over the case and writes out his opinion. When the proof is returned from the printer, one copy is sent to each of the other judges, who do not hesitate to correct, alter, or even to cut it to pieces, criticizing its law, and even changing the punctuation. The proofs thus corrected are sent back to the author, who revises his own opinion in the light of the sugges-

tions received. On the following Saturday it is again criticized, and at length is made to represent the united opinion of the whole court. Occasionally, though not often, one of the judges will dissent. We heartily commend this system to our own Supreme Court.

Judge Field, the oldest of the judges, is now seventy-seven years of age, and comes next to Judge Fuller, the Chief Justice of the Court. The latter receives a salary of $10,500 a year, while the others receive $10,000 each, a small sum compared to the salaries received by the highest judges in England, and far from representing the incomes which these men would have derived from their practice at the Bar; yet the best lawyers in the United States have been found available and willing to sacrifice their incomes for the honour of being a member of one of the highest judicial tribunals in the world.

CURRENT ENGLISH CASES.

VENDOR AND PURCHASER—SALE BY MORTGAGEE UNDER POWER, AT UNDERVALUE—CONSTRUCTIVE NOTICE—LEGAL ESTATE.

Bailey v. *Barnes*, (1894) 1 Ch. 25, illustrates the importance of the acquisition by a purchaser of the legal estate as a shield against prior dormant equities. In this case a mortgagee of an estate, assuming to act under a power of sale, sold the land at an undervalue. The purchaser immediately mortgaged the land, and about six months afterwards sold the equity of redemption to one Lilley. The plaintiffs, who were judgment creditors of the original mortgagor, commenced an action to impeach the sale under the power, and obtained a judgment declaring it to have been a fraudulent execution of the power, and setting it aside as against them, and obtained the appointment of a receiver. Lilley, the purchaser of the equity of redemption, was not a party to the action, and, on receiving notice of it, he paid off the mortgage and took a conveyance of the legal estate to himself. At the time he had purchased the equity of redemption he had no actual notice of any impropriety in the sale of the original mortgagee, nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to show that the sale had been made at an undervalue. He made no inquiries into the circumstances of the sale. He now intervened in the action as against the receiver; and it was

held by the Court of Appeal (Lindley, Lopes, and Smith, L.JJ.), affirming the judgment of Stirling, J., that Lilley was not affected by constructive notice of the impropriety of the sale under the power, and was protected against the prior equitable interests of the plaintiffs by his acquisition of the legal estate. The case narrowed itself down to the simple point whether the omission to make inquiries into the circumstances of the sale under the power was an act of culpable negligence on the part of Lilley, and the court was unanimous that it was not. And the fact that the legal estate was got in *pendente lite* was held to be immaterial.

WILL—CONSTRUCTION—DEVISE TO TRUSTEES—LEGAL OR EQUITABLE ESTATE—CONTINGENT REMAINDER—FAILURE OF PARTICULAR ESTATE.

In re Brooke, Brooke v. *Brooke*, (1894) 1 Ch. 43, was a case in which it became necessary for Chitty, J., to decide whether or not a devise in remainder was to be construed as passing the legal estate under the Statute of Uses, and therefore within the old technical rule of law which renders devises of contingent remainders void where there is no particular estate to support them; or whether it was to be regarded as merely conferring an equitable estate which would be unaffected by that rule. The testatrix died in 1875, and after directing her debts to be paid by her executors she devised the land in question to her executors, Henry and William, and their heirs in trust, to allow Henry to use and enjoy the same for his life, and after his death upon trust for such of his children as he should appoint, and, in default of appointment, then in trust for such of Henry's children as should attain twenty-one or marry. Henry having died without making any appointment, and having two infant children, the question was whether the remainder to these children was a legal contingent remainder or an equitable remainder. If it were a legal contingent remainder it failed, owing to the children being under age and unmarried on the death of the tenant for life; if, however, the legal title passed to Henry or William, then it would be valid as an equitable remainder. Chitty, J., considered this question solved by the direction to pay debts, which operated as a charge of the debts on the land specifically devised, and therefore manifested an intention on the part of the testatrix that the executors should take the legal title, and not be mere

conduit pipes for transmitting it to the beneficiaries named in the will. It may be mentioned that, the testatrix having died in 1875, the statute 40 & 41 Vict., c. 33 (see R.S.O., c. 100, s. 29), did not apply.

EXPROPRIATION OF LAND—PURCHASE MONEY PAID INTO COURT—COSTS OF PAYMENT OUT—JURISDICTION AS TO COSTS—ORD. LXV., R. 1 (ONT. RULE 1170).

In re Fisher, (1894) 1 Ch. 53, Chitty, J., held that where, in pursuance of a statute, lands are expropriated by a public body and the purchase money is paid into court, and the Act contains no provision as to payment of the moneys out of court, the court has jurisdiction under Ord. lxv., r. 1 (Ont. Rule 1170), to order the public body which pays the money into court to pay the costs of and incidental to a petition for payment out.

POWER OF APPOINTMENT—APPOINTMENT TO TRUSTEE FOR OBJECT OF POWER—TRANSFER OF FUND TO TRUSTEE.

In re Tyssen, Knight-Bruce v. *Butterworth*, (1894) 1 Ch. 56, husband and wife having a power to appoint a trust fund vested in the trustees of their marriage settlement, in favour of their children, executed an appointment of part of the fund to one of their children in trust for another. The trustee so appointed applied to the trustees of the settlement for the transfer of the portion of the fund so appointed, and the trustees of the settlement thereupon applied for the opinion of the court whether they would be justified in making the transfer as asked. North, J., following the decision of Malins, V.C., in *Bisk* v. *Aldarn*, 19 Eq. 16, decided that the fund ought not to be transferred, but should be retained by the trustees of the original settlement.

PRACTICE—ARBITRATION—ACTION—STAYING PROCEEDINGS—"STEP IN PROCEEDINGS," MEANING OF—ARBITRATION ACT, 1889 (52 & 53 VICT., C. 49), S. 4—(R.S.O., C. 53, S. 38).

Ives v. *Willans*, (1894) 1 Ch. 68, was an application to stay proceedings in the action, on the ground that the parties had agreed to refer the matters in question to arbitration. Under the English Arbitration Act, 1889, the defendant must make the application after appearance, but before delivering any pleadings, or taking any other step in the proceedings. The defendant at the time of entering his appearance gave the plaintiffs notice in writing requiring a statement of claim to be delivered, which had

not yet been done. The sole question, therefore, was whether this notice was "a step in the proceedings." Kekewich, J., held that it was not. R.S.O., c. 53, s. 38, requires the application to be made "after appearance and before statement of defence," and the question here decided could, therefore, hardly arise under the Ontario Act.

PARTITION—PARTIES TO ACTION BECOMING PURCHASERS—INTEREST ON PURCHASE MONEY.

In re Dracup, Field v. *Dracup*, (1894) 1 Ch. 59, was a partition action in which certain of the defendants had become purchasers, and had been allowed to set off their purchase money *pro tanto* against their shares; and for the purpose of distribution of the fund, it was held by North, J., that they were chargeable with interest at three per cent. on this purchase money so set off, as if it had been paid into court.

Notes and Selections.

LIABILITY FOR "NERVOUS SHOCK."—A clear and well-considered opinion on the subject of liability for physical injuries ensuing upon "nervous shock," or fright caused by negligence, is to be found in 25 N.Y. Suppl. 744 (*Mitchell* v. *Rochester St. Ry. Co.*, Circuit Court, Monroe County). The plaintiff, a married woman, was about to board one of the defendants' street-cars. A car on the opposite track was driven down the hill towards where the plaintiff stood with such speed that the driver could not check his horses until they had almost run into the plaintiff. She was not actually touched, but the fright and excitement of the occurrence produced unconsciousness. As a result of the shock, the plaintiff suffered a miscarriage, and was ill for a long time. Competent physicians testified that the shock was a sufficient cause for all the physical ailments which followed it. Upon the close of the plaintiff's testimony a nonsuit was granted by the trial court. The Circuit Court set this nonsuit aside, holding that "it would have been competent for the jury, upon the facts which appear, to conclude that the negligence of the defendant was the proximate cause of the injury which befell the plaintiff."

The decision is in accordance with the facts within every

man's experience. The testimony of physicians is not necessary to prove that ill-health may result from shock. Why, then, in this and similar cases, should the defendant be excused from liability for the natural and proximate consequences of his negligent act? No satisfactory reason for excusing him has been advanced. It has been said in the Privy Council and in the Supreme Court of Pennsylvania that a judgment for the plaintiff would open a wide field for imaginary compiaints. But, as the court says in the present case, "the argument *ab inconvenienti* is never of much force, and least of all when it is invoked to enable one to avoid a necessary legal conclusion."

The analogies of the law seem to point irresistibly towards the allowance of a recovery in cases of nervous shock where the plaintiff has proved resulting physical injury. If the admitted negligence of the defendant had acted on brute rather than human nerves, and had produced fright which resulted proximately in injury to the plaintiff, she should certainly have recovered. If the driver of the defendants' car had driven so negligently as to frighten a horse attached to a buggy in which the plaintiff was sitting, and if the horse had run away and thrown her out, she would have had a clear right against the defendant (*McDonald* v. *Snelling*, 14 Allen 290). So, where a horse was frightened to death by the defendant negligently exploding a firecracker between his legs, the owner recovered his value (*Conklin* v. *Thompson*, 29 Barb. 218). Now, if the defendant is liable for injury to the plaintiff which is the mediate result of fright produced in the mind of a brute, why is he not liable for injury which is the immediate result of fright produced in the plaintiff's own mind? The law recognizes that a man's mind and nerves may be as effectually surprised and overpowered as a brute's (*Scott* v. *Shepherd*, 1 Sm.L.C. 480; *Holmes* v. *Mather*, L.R. 10 Ex. 261; *Ricker* v. *Freeman*, 50 N.H. 420). So, where a plaintiff has acted to his damage on an impulse of self-preservation arising from a dangerous situation in which the defendant has placed him, he may recover, although he would not have been harmed if he had remained where he was (*Jones* v. *Boyce*, 1 Stark 493; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Coulter* v. *Express Co.*, 56 N.Y. 585). In the present case, if the plaintiff had, in her fright, stepped back from the track to avoid the car, and fallen directly under the wheels of a passing wagon, she would have had a clear case against the defendant.

If the horses, in *Mitchell* v. *Rochester St. Ry. Co.*, had touched the plaintiff, however slightly, her right to recover for her injuries would have been undoubtedly perfect. No intent is necessary to constitute a battery; negligence and unpermitted contact are enough (*Weaver* v. *Ward*, Hob. 134). Actual impact is not essential to an assault; a putting in fear is sufficient to constitute the wrong. If no intent to strike is necessary to make a battery, why should an intent to put in fear be necessary to make an assault? If the law draws a line here between an assault and a battery, upon what reasoning is the distinction to be supported? The action of assault is not in the nature of a criminal proceeding against the defendant. Why, then, is his intent material? What matters it to the plaintiff whether the defendant intended to commit or negligently committed the act which put the plaintiff in fear of his life?

The authorities upon this subject are few, and, unfortunately, divided. The earlier New York case of *Lehman* v. *Railroad Co.*, 47 Hun. 355, is cited by the Circuit Court, and distinguished on the ground that no negligence was alleged in the case as it appears in the report. The opinion in that case was short, and there was no statement of reasons for the decision; but certainly the case does not appear to have proceeded on the ground assigned by the Circuit Court. The case in the Privy Council (*Commissioners* v. *Coultas*, 13 App. Cas. 222) is also cited, and its reasoning disapproved. The Irish cases which serve to counterbalance *Commissioners* v. *Coultas* (*Bell* v. *Railway Co.*, 26 L.R. Ir. 428, and *Byrne* v. *Railway Co.*, Court of Appeal, Ireland, unreported) are not noticed by the court, though the former contains perhaps the best-reasoned discussion of the subject. *Purcell* v. *Railway Co.*, 48 Minn. 134, is directly in point for the plaintiff, unless it be said that the contract duty of the defendant towards the plaintiff influenced the decision. There was a similar duty, indeed, in *Bell* v. *Railway Co.*, though the Irish court does not found its decision upon that fact. In *Mitchell* v. *Rochester St. Ry. Co.*, the court takes pains to point out that no contract duty existed, the plaintiff not having boarded the car. *Fell* v. *Railroad Co.*, 44 Fed. Rep. 248, and *Stutz* v. *Railroad Co.*, 73 Wis. 147, while distinguishable, tend strongly to uphold the plaintiff's contention. The whole subject is discussed, and a conclusion reached favourable to the plaintiff's recovery, in Beven on Negligence, 65, 2 Sedgwick on Damages, 8th ed., 643, and 1 Sutherland on Damages, 2nd ed., 44.—*Harvard Law Review.*

DIARY FOR MARCH.

1. Tuesday.....St. David.
4. Sunday.....*4th Sunday in Lent.*
5. Monday.....York changed to Toronto, 1834.
6. Tuesday.....Court of Appeal sits. General Sessions and County Court Jury Sittings for Trial in York.
10. Saturday.. .Prince of Wales married, 1863.
11. Sunday.....*5th Sunday in Lent.*
13. Tuesday.....Lord Mansfield born, 1704.
16. Friday.. . ..Queen Victoria made Empress of India, 1876.
17. Saturday ....St. Patrick. Sir John Robinson, C.J. Court of Appeal, 1862.
18. Sunday.....*6th Sunday in Lent.* Arch. McLean, 8th C.J. of Q.B.
19. Monday.....P.M.S. VanKoughnet, 2nd Chancellor of U.C., 1862.
23. Friday.....Good Friday. Sir George Arthur, Lieut.-Gov. of U.C., 1838.
25. Sunday... ..*Easter Sunday.*
26. Monday.....Easter Monday. Bank of England incorporated, 1694.
28. Wednesday..Canada ceded to France, 1632.
30. Friday .....B.N.A. Act assented to, 1867. Lord Metcalf, Gov.-Gen., 1843.
31 Saturday.....Slave trade abolished by Great Britain, 1807.

Reports.

ASSESSMENT CASES.

IN THE MATTER OF THE APPEAL FROM THE COURT OF REVISION OF THE CITY OF TORONTO BY THE CONSUMERS' GAS COMPANY.

Assessment—Gas Company's property, plant, machinery, and mains—Taxable interest in land—Easement or hereditament—Gas mains on highway.

On appeal from the Court of Revision of the City of Toronto to the County Judge, it was

Held: 1. Gas mains are assessable as machinery forming an indivisible part of their plant, and appurtenant to the land actually owned.

2. Subsection 7 of the interpretation clause of the Municipal Act is to be read in the Assessment Act, and in that case an easement is expressly named as a taxable interest; and if the Gas Company's interest in their mains is only an easement, it is expressly assessable.

3. Even if the above clause is not read into the Assessment Act, the words "real property" and "real estate" in the Assessment Act cover and include an easement.

4. The interest or estate of a gas company in the mains and soil in which they are laid is a hereditament rather than an easement, and as such taxable as land.

5. Gas mains are not exempt from taxation because laid on a public highway.

6. Exemptions of highways and streets from taxation should be directly construed and confined to the interest of the Crown and municipality therein.

[TORONTO, Dec. 19th, 1893. MCDOUGALL, Co. J.

This was an appeal by the Gas Company from the Court of Revision of the City of Toronto, which had confirmed the assessment for the year 1894 of the property of the appellants, The Consumers' Gas Company, as follows: Land,

$45.750; building and plant, $653,000. It was admitted on the argument before the County Judge that, as to the latter sum, $153,000 was charged on buildings and plant and $500,000 on gas mains under the public streets, and there was no dispute as to the assessment except as to these mains. It was agreed that the buildings and plant instead of being placed at $15,3000, as specified, should be increased by adding to the buildings and plant $64,950, making the total valuation of the building and plant $217,950.

Mulock, Q.C., and *W. N. Miller*, Q.C., for the appeal.

Caswell for the City of Toronto.

The facts and arguments fully appear in the judgment of

McDOUGALL, Co.J.: I have had much difficulty in arriving at a satisfactory conclusion in this case. The mains of the Gas Company are undoubtedly part of their plant and machinery fixed to the land; and to the extent that these mains extend under the soil and land actually owned by the company are land both at common law and under s-s. 9 of s. 2 of the Assessment Act. These mains extend beyond the boundaries of the company's own lands, and into and under the highways and streets of the city; there is no break in their continuity; and they form, with the gas works, one indivisible set of plant necessary for the purpose of their business in order to enable them to convey the gas to their customers.

The particular assessment appealed from has been made at the principal place of business of the company, where the manufacturing of gas is conducted; the estimated value of these mains, $500,000, has been added to the value of the fixed machinery located on the company's own lands; and the whole assessment so levied has been laid upon the land, buildings, plant, and machinery of the company at Parliament street.

This is not an assessment in name, at any rate, upon the portions of the highways occupied by the mains themselves; and there is no legal difficulty that I can discern in levying and collecting the taxes based upon the whole assessment. A warrant directed against the company's property to realize the taxes could be executed upon the company's premises, and, in case a sale should become necessary, their lands, buildings, plant, and machinery could be sold. Under such a sale the treasurer's deed of the whole property would no doubt pass to the purchaser the gas works and the fixed machinery, and would include the mains as part of the general plant.

In the United States the mains and interest of gas companies in public streets have been held assessable as machinery, as being included in and forming an indivisible part of their plant or machinery fixed at its source to the buildings and lands actually owned by the company; and the part of the plant underlying the streets was held to be assessable as appurtenant to the lots upon which their main works were situated: *Capital City* v. *Insurance Company*, 51 Iowa 31; *Fall River* v. *County Commissioners*, 125 Mass. 567. The word "machinery" was held to include the mains laid under the streets: *Commonwealth* v. *Lowell Gas Co.*, 12 Allen 75; see also *The People* v. *Commissioner of Taxe*, 82 New York 459; *Providence Gas Co.* v. *Thurber*, 2 R.I. 15; and *People* v. *Brooklyn Assessors*, 39 New York 81.

But turning to the English cases and our Assessment Act, the right of gas

and water companies to lay pipes under the soil of the highways may fairly be contended to amount to something more than an easement. The Gas Company has exclusive right to the use and possession of the soil occupied by their pipes or mains; and this in itself, it may be argued, confers a right of property of higher grade and nature than an easement or mere right of way. It is different from the right of a street railway to lay rails on the surface of a street, and to use the portion of the street occupied by their rails in common with the general public. With a water or gas company the mains, when laid, cannot be used by any other than themselves, nor can their portion of the subsoil of the highway be invaded by either the public or a rival company.

The case of *Chelsea Water Works* v. *Bowley*, 17 Q.B. 358, which has been relied upon as establishing that the right acquired from the owner of lands of carrying their pipes through his lands only amounts to an easement, has been much questioned as establishing any general principle of law, and as being of any authority outside of the particular facts of the case itself, and of the terms of the particular statute relating to the waterworks in question.

In the very recent case of *Metropolitan R.W. Co.* v. *Fowler*, L.R., Appeal Cases 1893, 416, Lord Herschell confines *Chelsea* v. *Bowley* to these narrow limits. He says, at page 422, speaking of *Chelsea* v. *Bowley*: "That case was decided upon the terms of the particular statute relating to the waterworks then in question; that the water company, in respect to their right to lay pipes for the purpose of carrying a stream of water through certain lands, had no interest in the lands, but only an easement over them. It is quite unnecessary to inquire whether upon the true construction of the Water Works Act in relation to the facts of that case a correct conclusion was arrived at in determining that the water company possessed an easement only. It is certainly a little difficult to reconcile some of the expressions used in that case with those used in *Regina* v. *East London Water Works Co.*, 16 Q.B. 705."

In *Metropolitan R.R.* v. *Fowler*, a railway company had acquired the right to tunnel under the surface of the streets, which was held to amount to more than an easement, and to confer a right which was a hereditament, and as such liable to pay the land tax.

The Assessment Act, like 58 George III., cap. 5, section 4, contemplates tenements and hereditaments under the surface being liable to taxation, because in subsection 9 and section 2 it uses the words "mines, minerals, and quarries, when the property of private individuals, as distinguished from those belonging to the Crown."

What is the meaning of the word "land" in subsection 9, section 2? It is said that the words "lands," "real property," and "real estate" shall include "all buildings or other things erected upon or fixed to the land," etc.; but, as pointed out by Mr. Justice Patterson in *Toronto Street Railway Company* v. *Fleming*, 37 U.C.R., at page 126, "the section does not define land itself"; yet he holds that "land," as commonly and usually understood, must be taken to be intended to be also the subject of taxation. If we examine some of the prior legislation on the subject, perhaps there may be found an explanation of this apparently singular omission. Section 10 of the Interpretation Act, cap. 1, R.S.O., 1887, reads "The interpretation section of the Municipal Act, so far as

the term defined can be applied, shall extend to *any Act which relates to municipalities.*" I take this to mean that the interpretation clause of the Municipal Acts to affect not only Acts amending the Municipal Act itself (since all such Acts would be read into the Municipal Act, and so become subject to the interpretation clause thereof), but also all Acts which apply to municipalities, the provisions of which affect or purport to deal with the internal economy and affairs of municipal organizations in any of their multiplied relations with the community. The Assessment Act would clearly be an Act of this character. In subsection 7, section 2, of the Consolidated Municipal Act, 1892, "land" is interpreted as follows: "Land, lands, real estate, real property, shall respectively include lands, tenements, and hereditaments, and, except in actions now pending, shall include any interest or estate therein, *or right of easement affecting the same.*" The result of combining this clause with the interpretation clause of the Assessment Act would be to give a very broad and comprehensive meaning to the word "land"; and if this reading of the two clauses together is a correct construction of the intention of the Legislature, every possible interest or estate in lands, including an easement, is brought within the scope of the Assessment Act.

Since the decision in the *Toronto Street Railway Co.* v. *Fleming*, 37 U.C.R. 116, the language of the Assessment Act itself has been altered. Section 7, instead of reading, "all lands and personal property in the Province of Ontario shall be liable to taxation," now reads, "*all property* in this Province shall be liable to taxation." Subsection 8 of the interpretation clause of the Assessment Act declares that "'property' shall include both real and personal property, as hereinafter defined."

If the above definition is intended to be restrictive of the broad meaning which might otherwise be attributed to the word "property," then section 7, read in the light of the interpretation clause, would be, "all real and personal property shall be liable to taxation"; and if the words "real property" are to be confined strictly to the definition given in subsection 9, viz., to include only "all buildings or other things erected upon or fixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land, and land covered with water, and all mines, etc.," "real property," so interpreted, would not include *land* itself (except land covered with water). The word "land," in fact, has been dropped out in section 7 by the amendment in the Act of 1892, and unless real estate be held to be synonymous with the word "land" as used in subsection 9, section 2 of the Assessment Act, land *ex vi termini* is not taxable. Mr. Justice Patterson, in *Toronto Street Railway Co.* v. *Fleming*, held that land was taxable because the words "land" and "personal estate" were used in section 9 of the Act of 1868-9. In other words, in addition to the apparently limited meaning attributed to the word "land" in subsection 9, section 2, of the interpretation clause, land should also have its natural primary and obvious meaning. This was the only construction which did not lead to an absurd conclusion.

Now, if the same common sense construction is applied to the word "property," we will attribute to these words their natural, primary, and obvious meaning, and conclude that the amplification set out in subsection 9 of the

interpretation clause was a definition *ex abundanti cautelâ*; for, had the words used in that clause been omitted, every estate or interest so set out would have fallen within the natural meaning of some one of the terms naturally used, viz., "land," "real property," or "real estate."

In commenting upon the terms used in the Land Tax Act, 38 George III., c. 5, s 4, in the case before referred to, the *Metropolitan R.R. Co.* v. *Fowler*, Lord Herschell, dealing with a somewhat similar difficulty of construction, uses the following language: "It is obvious upon reading the terms of the section to which I have just called your lordship's attention that, for some reason or other, there is very considerable repetition; that some of the expressions—wide expressions—which are used are sufficient to cover some of the narrower and more limited descriptions of property referred to in the later part of the section. Why some such subjects are specially mentioned and others left unmentioned, it is needless to conjecture; but it is quite certain, when one reads the whole of these words, that there is no principle which would justify cutting down the general words used, and warrant the conclusion that property which comes within the description of the more general words is to be exempt from taxation because it is not specifically mentioned."

If these words, "real property," as used in the Assessment Act, are to be interpreted as including the natural and usual meaning of the words, what is that meaning? The words "real property" and "real estate" are said, in Stroud's Judicial Dictionary, to be probably synonymous. They are apparently treated as synonymous in the Assessment Act; the words "real estate" are used in several sections of the Act. Section 5 uses the expression "real estate" speaking of the land of railways; but in s. 29, s-s. 3, lands are referred to as "real property." Section 29 (*a*) uses the words "real estate" referring to land. Real estate, according to Williams on Real Property, comprises all a person's freehold and copyhold lands, tenements, and hereditaments, including therein titles of honour and dignity, and also incorporeal hereditaments, *e.g.*, rights of light, air, and way, but not including leaseholds for years.

There can be no estate or interest covered by the expression "real property" that would not be embraced in the words "real estate." An easement would, therefore, clearly be included in the words "real property" or "real estate." But is not the interest or estate of the Gas Company in their mains and in their land through which they are laid something more than an easement? The Act of incorporation of the Consumers' Gas Company, 11 Vict., c. 14, s. 13, authorizes that company, after two days' notice to the mayor, aldermen, etc., of Toronto, to break up, dig, and trench so much or so many of streets squares, and public places in the city of Toronto as may be necessary for the laying of their mains or pipes to conduct the gas, etc., to their customers. Section 19 makes it a misdemeanour for any person or persons (which word, of course, by the Interpretation Act means corporations, civic or otherwise) "to wilfully or maliciously break up, etc., etc., any main, etc., the appurtenances or dependencies thereof." In other words, it is made a crime to interfere with their mains as laid in the highways or roads. Section 20 reserves to the Legislature the right of repealing, altering, or modifying the powers and privileges or authorities granted; and the Act, by its last section, is declared to be a public Act. By

18 Vict., c. 215, a further Act was passed which, amongst other things, enacted in s. 4 that it shall and may be lawful for the said company to hold *lands* and *real property* and *estate* for the purposes of their incorporation, etc.

The right to use a portion of land to the exclusion of others is more than an easement; it is an interest in land (Goddard on Easements, page 6). The grant of a mere right of way for land does not convey the soil over which the way passes to the grantee, and so the grantee could not prevent another person, even a trespasser, from using the land if such user does not impede him in the exercise of his right of passage: *Rex* v. *Jolliffe*, 2 Term Reports 90.

In *Dyer* v. *Lady James Hay*, 1 McQueen 305, the Lord Chancellor declared that neither by the law of Scotland nor of England can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owners of the land affected.

In *Reilly* v. *Booth*, 44 Chancery Div., page 26, the following language occurs in the judgment of Lopes, J., which is cited with approval in *Metropolitan* v. *Fowler*: "The exclusive or unrestricted use of a piece of land beyond all question passes the property or ownership in that land, and there is no easement known to law which gives an exclusive and unrestricted use of a piece of land." Here the Legislature has give the Consumers' Gas Co. the unrestricted right to dig up and trench and lay the remains in perpetuity under the surface of the streets, squares, and public places in the city of Toronto; and the wilful interference by any persons with these mains so laid is declared to be a misdemeanour. Surely such a right granted by Act of Parliament is a hereditament, and an estate or interest in the land itself.

In *Rex* v. *The Governor & Co. of the Chelsea Water Works Co.*, 5 B. & Ad. 156, a water company was held to have such an interest in the soil where the pipes were laid, though they were only in possession at the will of the Crown, as constituted them occupants, because it was held that their occupation was exclusive, though for a limited purpose only. *Rex* v. *Brighton Gas, Light & Coke Co.*, 5 B. & C. 466, was to the same effect as to gas mains laid in public streets.

It is quite true that these decisions turned upon the meaning and force of the words "occupant" or "occupation," but to determine that the defendants in these cases were liable to be rated as occupants of the land it was held that their rights or interest were more than mere easements, for it was freely admitted that the possession of a mere easement would not render the person entitled to the easement rateable as an occupant.

In *Reg.* v. *The Company of the Proprietors of the West Middlesex Water Works*, 1 E. & E. 716, a case decided in 1859, and after *Chelsea* v. *Bowley*, Wightman, J., gives the judgment of the court (composed of Lords Campbell, Earl, Hill, and himself). He said "the first question is whether the company are rateable for their mains which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company? We think they are. These mains are fixed capital vested in the land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill for a purpose beneficial to itself. The decisions are uniform in holding gas com-

panies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the lands where the mains lie by force of some statute."

But it is said that as these mains are laid in public roads and ways, and as these by the Assessment Act, section 7, subsection 6, are declared to be exempt from taxation, all rights or other interests on, below, or above the surface are equally exempt from taxation. Section 525 of the Municipal Acts vests in Her Majesty the soil and freehold of all highways and roads altered, amended, or laid out according to law, unless otherwise provided for. Section 525 gives the exclusive jurisdiction over the original allowance for roads, highways, and bridges in municipalities, subject to any exceptions or provisions contained in the Municipal Act. Section 527 states that every public road, street, bridge, or other highway in a city shall be vested in the municipality, subject to any rights in the soil which the individuals who laid out such streets, etc., reserved.

As to those roads the soil of which is vested in Her Majesty (and these would appear to be those laid out originally by public authority: *Sarnia* v. *Great Western*, 21 U.C.R. 64), they would be within the exemption provided for by section 7, subsection 1, of the Assessment Act; and, as to such, subsection 2 of the same section 7 expressly declares that *the occupant of such shall be liable for the tax, but the property itself shall not be liable.*

As to other roads not laid out by public authority, and stated to be vested in the local municipalities, it has been held that they only took a qualified interest in them, not as owners or proprietors, but simply as trustees for the public: *Sarnia* v. *Great Western*, 21 U.C.R. 62; and their title or interest was not such as would enable them to bring an action of ejectment. They would not, therefore, be covered by the exemption of "property of the local municipality" contained in subsection 7, section 7. In order, therefore, to formally exempt the streets, to the extent that they were used by the public and the municipal corporation, subsection 6 would appear to have been thought necessary, for otherwise the municipal corporation in cases under subsection 1 would be liable to taxation as occupants, and in the second case under subsection 7, section 7, might be held to be taxable because they were not owners of the highways, but entitled to the possession and exclusive jurisdiction over them only.

The very probable cause of their exemption, then, was to cover the corporation's interest or occupation. It certainly could never have been intended, in my humble judgment, to exempt the interests of third parties acquired under or above the surface of the streets, for the clear intention of the statute, as now worded, is to tax all property in the Province. As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. It is also a very just rule that when an exemption is found to exist it shall not be enlarged by construction; on the contrary, it ought to receive a strict construction. (Cooley on Taxation, 204 & 205, second edition.)

The exemptions in the Assessment Act that are clearly pointed out are lands of the Crown, lands of the municipal corporation, and the interest of

both Crown and municipalities in the streets where such are used by the public and not beneficially enjoyed by tenants or occupants. The construction which it appears to me, then, that should be given to the exemption of public roadways and public squares ought to be limited to an exemption of those portions of the street open and used by the general public, and by the works and improvements built, made, and owned by the local municipality; but that as to such portions of the subsoil or the space in the air above the said roads, an exclusive use and possession of which has been vested by Acts of Parliament in third parties, to become to them a source of profit, the very clear intention and spirit of the Assessment Act, as evidenced by the express terms of subsections 2 and 7 of the exemption clause, section 7, is to make all tenants or occupants, whether under the Crown or municipality, liable to assessment and taxation.

In support of this view, I may point to the language of Mr. Justice Patterson in the *Toronto Street Railway Co.* v. *Fleming*, page 127, where he remarks that if the general law was that all property should be assessable, then he would have held the Street Railway Co.'s interest or property in public streets to be assessable. But it is said that you cannot assess such an interest in land (if it is an interest in land) because you cannot sell it, since it is a part of the public highway. Subsection 2 of the exemption clause is expressly framed to meet this difficulty, so far as lands vested in the Crown are concerned, by declaring that in such cases the occupant shall be liable for the rate, but the property itself shall not be liable. In the other class of cases, where the streets are vested in the municipality, I think section 131 of the Assessment Act can be relied upon as indicating the intention of the Legislature to provide for all special cases where it would be either unadvisable, or difficult, or impossible to proceed to a sale of the land or interest in the land liable to taxes. It enacts that "where the taxes payable by any person cannot be recovered in any special manner provided by the Act, they may be recovered, with interest and costs, as a debt due the local municipality."

To summarize. I think The Consumers' Gas Company are liable to the assessment made on the following grounds:

(1) Their mains may be well assessed as machinery forming an indivisible part of their plant, and appurtenant to the lands actually owned by them.

(2) Subsection 7 of the interpretation clause of the Municipal Act is to be read into the Assessment Act, and in that case an easement is expressly named as a taxable interest; and if the Gas Company's interest in their mains amounts only to an easement, it is expressly assessable.

(3) That even if this clause of the Municipal Act is not to be read into the Assessment Act, the words "real property" and "real estate" now used in the Assessment Act cover and include an easement.

(4) That the interest or estate of the Gas Company in the mains and soil in which they are laid is more than an easement; it is a hereditament, and, as such, is taxable as land.

(5) That though laid in the public highways the mains are not exempt, for the property so conferred is created by Act of Parliament; and in the absence of express words of exemption, their property or estate, like that of other companies, must be taken to be liable to taxation. The exemptions of highways and

streets from taxation should be strictly construed, and confined to the interest of the Crown and municipality therein.

The assessment is confirmed as follows:

Lands	$ 45,750
Buildings and plant (other than mains)	217,950
Mains under public streets or roads as part of whole assessment	500,000
Total assessment as confirmed	$763,700

Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Feb. 16.

BRESSE *v.* GRIFFITH.

Partnership—Sale of goods to—Dissolution of—Agreement to look to remaining partner for price—Evidence of.

Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up, in an action for the price of the goods, that the plaintiff had agreed to discharge him, and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others, for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only.

Held, insufficient to show an agreement such as was set up; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity.

Clute, Q.C., and *N. McCrimmon* for the plaintiffs.

Moss, Q.C., for the defendant Henry Griffith.

Div'l Court.] [March 3.

SANGSTER *v.* EATON.

Negligence—Injury to buyer in shop—Invitation—Child of tender years—Accident—Active interference—Contributory negligence.

A woman went with a child two and a half years old to the defendants' shop to buy clothing for both. While there, a mirror fell on the child and injured him.

Held, in an action for negligence, that it was a question for the jury whether the mirror fell without any active interference on the child's part or not. If it fell without such interference, that in itself was evidence of negligence; but if it fell by reason of such interference, the question for the jury would be whether the defendants were guilty of negligence in having the mirror so insecurely placed that it could be overturned by a child; and if that question were answered in the affirmative, the child, having come upon the defendants' premises by their invitation and for their benefit, would not be debarred from recovering by reason of his having directly brought the injury on himself.

Hughes v. *Macfie*, 2 H. & C. 744; *Mangan* v. *Atterton*, 4 H. & C. 388; *Bailey* v. *Veal*, 5 Times L.R. 20, commented on and distinguished.

Semble, that the doctrine of contributory negligence is not applicable to a child of tender years.

Gardner v. *Grace*, 1 F. & F. 359, followed.

Semble, also, that if the mother was not taking reasonably proper care of the child at the time of the accident, her negligence in this respect would not prevent the recovery by the child.

Pedley for the plaintiffs.

Shepley, Q.C., for the defendants.

STREET, J.] [Jan. 4.

RAY *v.* ISBISTER.

Partnership—Promissory notes—Action against maker—Action against same person as indorser—Res judicata—Judgment against firm—Action upon judgment against members—Conduct—Election—Estoppel.

The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he endorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others, as a partner in the firm who were the makers of the notes, along with the other partner.

Held, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Nor were the plaintiffs debarred, by the recovery of a judgment against the partnership, from bringing an action upon the judgment against the individual members of it.

Clark v. *Cullen*, 9 Q.B.D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner.

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing showing an election not to look to him, and he had no right to

assume an election from what they did, nor to act as if such an election had been made.

Aylesworth, Q.C., and *W. K. Cameron* for the plaintiffs.

Osler, Q.C., and *R. G. Code* for the defendant James Isbister.

STREET, J.] [Jan. 8.

MCDONELL . MCDONELL.

Will—Devise—Life estate—Remainder—Vested estate—Period of vesting—Trust—Conversion into personalty—"Pay or apply."

Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper, for the general benefit and purposes of his estate; and, upon her death, devise of such part of land as may remain undisposed of to trustees, to stand seized and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors.

Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work, a conversion of realty into personalty.

Wallace Nesbitt and *R. McKay* for the plaintiff.

Moss, Q.C., and *H. J. Wright* for the defendant McWilliams.

Osler, Q.C., and *J. Hoskin*, Q.C., for the infant defendant.

Watson, Q.C., and *Masten* for the defendant McDonell.

C. C. Robinson and *T. H. Lennox* for the defendant Robinson.

H. T. Beck for the defendant Harrison.

ROSE, J.] [Jan. 29.

IN RE CHRISTIE AND TOWN OF TORONTO JUNCTION.

Arbitration and award—Interest of arbitrator—Employment as counsel—Bias—Disqualification.

Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's Counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had, from time to time, acted as Chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or for the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation.

Held, that there was no such relation between him and the corporation as might give rise to bias or show an interest which would invalidate the award.

Vineberg v. *Guardian Fire and Life Assurance Company*, 19 A.R. 293, distinguished.

Wallace Nesbitt and *A. C. Gibson* for the claimant.

Going for the corporation.

STREET, J.] [Feb. 5.

CRAM *v.* RYAN.

Negligence—Fire by sparks from tug—Reasonable precautions—Liability for acts of master of tug—River—Navigable waters—Grant of land to shore—Waters covering land granted—Rights of licensee—Rights of public.

Land granted by the Crown was described in the patent as extending to the shore of a certain river, which was shown to be navigable by large vessels. The patent reserved free access to the shore of the land granted for all vessels, boats, and persons, and also the free use, passage, and enjoyment of and over all navigable waters that should be found on or under, or be flowing through or upon, any part of the land granted. The defendants had a license from successors in title of the patentee to take sand from the land so granted. In 1892 they took so much sand as to materially change the shore line and form a deep bay, the waters of which covered a portion of the land so granted.

In 1893 the plaintiff, without any authority, placed a scow used as a boarding-house upon the waters of this bay, and moved it to the shore, and when it had been there some weeks a tug, having in tow a sand scow of the defendants, was moved to the shore alongside the plaintiff's scow, and began using her furnace and boiler to supply steam to work a sand-pump on the tow. The men on the tug had pushed the soot from the flues of the boiler into the back of the furnace before the engine was set working. A fresh breeze was blowing across the bow of the boarding scow, and there was a strong draught through the furnace, which carried burning soot from the back of it, through the smoke-stack, to the roof of the boarding scow, setting it on fire and completely destroying it.

The tug was not owned by the defendants, but was hired by them to draw their sand and furnish steam to work their sand-pump. The defendants supplied the fuel for the tug, and the master hired and paid the men employed in working her. The defendants had a foreman on their scow, under whose directions the master of the tug acted. Upon the day in question, the foreman ordered the master to lay the tug alongside the boarding scow just as she was laid.

Held, (1) that, though the plaintiff had a right to use the waters for the purpose of navigation, and the shore as a landing place, it was not a proper user of either to occupy them as a permanent resting place for the boarding scow, to the prejudice of other persons claiming under the owner of the soil and shore, and the plaintiff had no right to have his scow there; while the defendants' scow and the tug were lawfully there, for the defendants, in addition to the public rights of navigation and landing, had the right to use the shore and the bay for any purpose which did not interfere with those public rights.

(2) But, while the defendants were entitled to proceed with their work, they were bound to omit no reasonable precaution to avoid injuring the plaintiff's property; and the evidence showed that they did not do all that they might have done for the plaintiff's protection, and the fire was the result of negligence on their part.

Davies v. Mann, 10 M. & W. 546, applied, and followed.

(3) That the acts which caused the fire were the laying of the tug and the working of her furnace and boiler in dangerous proximity to the boarding scow; and, as this was done by the master of the tug in accordance with the express order of the defendants' foreman, the defendants were liable for the results.

M. McFadden and *C. F. Farwell* for the plaintiff.

Lount, Q.C., and *W. H. Hearst* for the defendants.

Chancery Division.

Chy. Div'l Court.] [Jan. 22.

HAIGHT *v.* THE WORKMAN & WARD MANUFACTURING CO.

Workman's Compensation for Injuries Act—Knowledge of the danger—Risk to be run—55 Vict., c. 30 (O.).

To disentitle a workman to recover under The Workman's Compensation for Injuries Act, 55 Vict., c. 30 (O.), he must not only have a knowledge of the danger he incurs, but a thorough comprehension or appreciation of the risk he runs.

The judgment of FALCONBRIDGE, J., affirmed.

I. F. Hellmuth for the appeal.

E. R. Cameron, contra.

Chy. Div'l Court.] [Feb. 15.

IN THE MATTER OF ROBERT H. HUNTER'S LICENSE.

Intoxicating liquors—License to sell—Application for—Certificate of the electors—Shop license—Liquor License Act—56 Vict., c. 53, s. 1 (O.).

Held, (reversing MEREDITH, J.) that on an application for a shop license s-s. 14 of s. 11 of the Liquor License Act, 56 Vict., c. 53 s. 1 (O.), the petition must be accompanied by a properly signed certificate of the electors, and the Act does not authorize the granting of a license contrary to the provisions of that section.

Maclaren, Q.C., for the County Attorney.

E. F. B. Johnston, Q.C., for the licensee.

Div'l Court.] [Feb. 15.

MOORE *v.* KANE ET AL.

Vendor and purchaser—Consideration—Mining lands—Notice—Equitable interest.

M., having arranged with K. to buy and sell some mining property, conveyed it to him for that purpose by deed showing a consideration of $750. K., being indebted to E., conveyed the property to him, the consideration being getting credit for $25 on his indebtedness.

In the action by M. to set aside both conveyances.

Held, (reversing FALCONBRIDGE, J.) following *Johnston* v. *Reid*, 29 Gr. 293, that the debt of $25 which was cancelled between the defendants was a sufficient valuable consideration, although no money passed.

Held, also, that the property being mining land, and not being proved to be of any substantial value at the date of the impeached transaction, and as conveyances of such do not always show the true consideration, and as E. relied upon the deeds as showing the dealing with the land, in the absence of notice, proved, notice will not be imputed if the purchaser has not been guilty of fraud, or such gross negligence as a court of justice would treat as evidence of fraud.

Held, also, that the fact that the interest dealt with being an equitable one, the fee being still in the Crown, is not such a circumstance as lets in "all the equities" as regards a purchaser for value without notice.

Rowell for the appeal.

English, contra.

Chy Div'l Court.] [Feb. 15.

SOUTHWICK *v.* HARE ET AL.

Arrest and imprisonment—Before endorsement of warrant—Detention—Subsequent endorsement—Trespass—Damages—Measure of.

A warrant for the arrest of the plaintiff, who had made default in paying a fine on a conviction for infraction of the liquor license law, was sent from the county of O. to the city of T. Before it was endorsed by a magistrate in that city, he was arrested and confined. Some hours after the arrest the warrant was endorsed.

In an action of trespass for the arrest, the trial judge charged the jury that the only damage they could take into consideration was the time between the arrest and the endorsement of the warrant, and that the subsequent detention was legal.

Held, (affirming MACMAHON, J.) that the defendants who arrested without warrant were liable in trespass down to the time when the warrant was endorsed, and that the measure of damages was rightly limited to what occurred during that period.

Du Vernet for the motion.

H. M. Mowat, contra.

FERGUSON, J.] [Jan. 26.

WORTHINGTON ET AL. *v.* PECK.

Principal and surety—Extension of time—By renewal of note by some of the sureties—Payment by them—Right to contribution.

Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence, and without the consent or approval, of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution.

Held, they could not recover.

Beck for the plaintiffs.

Marsh, Q.C., for the defendant.

FERGUSON, J.] [Feb. 14.

CONFEDERATION LIFE ASSOCIATION *v.* CITY OF TORONTO.

Assessment—Insurance company—Reserve fund—Interest on investment of—55 Vict., c. 48, s. 34; s. 2, s-s. 10.

Where the County Court Judge of the County of York had decided, as reported 29 C.L.J. 151, on appeal from the Court of Revision, that the plaintiffs were liable under s. 34, and s. 2, s-s. 10, of the Consolidated Assessment Act, 55 Vict., c. 48, to be assessed upon the interest arising upon investments of their reserve fund, although such interest was always added to the said reserve fund and re-invested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal;

Held, that the judge of the County Court had full jurisdiction, and the matter was, therefore, *res judicata*.

Semble, that the County Court Judge's decision was right. Although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but the necessary increase might be made with any money whatever.

S. H. Blake, Q.C., and *Snow* for the plaintiffs.

Biggar, Q.C., for the defendants.

FERGUSON, J.] [Feb. 22.

MEHR *v.* MCNAB.

Negligence—Landlord and tenant—Fall of verandah—Injury to daughter of lessee—Covenant to repair.

Where one had leased premises and had covenanted with the lessor to keep them in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building;

Held, that the daughter had no right of action for damages, on account of the accident, against the lessor, nor could she be considered as standing in the position of a stranger.

Johnston, Q.C., for the plaintiff.

E. T. English for the defendant.

FERGUSON, J.] [Feb. 22.

EMPEY *v.* CARSCALLEN.

New trial—Jury—Right of challenge—Mistrial—R.S.O., c. 52, s. 110—Motion for a new trial.

At the trial of this case, where the defendants delivered separate defences and were separately represented at the trial, and claimed to be entitled under, the Jurors' Act, R.S.O., c. 52, s. 110, to four peremptory challenges each, which right was conceded by the judge, and they challenged six jurors between them, in spite of the remonstrances of the plaintiff's counsel, and the trial proceeded, resulting in a verdict for the defendants;

Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial.

Under the above section the defendants were only entitled to four peremptory chalienges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial.

Aylesworth, Q.C., for the motion.

Clute, Q.C., *contra.*

Common Pleas Division.

Div'l Court.] [June 24, 1893.

NUNN *v.* BRANDON.

Libel—Defendant claiming privilege for fear in incriminating himself—Evidence of publication.

In an action for libel, it was claimed that the defendant had, as a correspondent of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery, defendant, while admitting he was a correspondent at T., could not say whether he was the only one; that he did not remember sending any of the items, but might possibly have sent some; but did not think he had sent the one complained of; that he had, since the publication, an interview with the editor with reference thereto, but refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he said he had since ascertained that there were other correspondents at T.; and on being pressed as to the item complained of, after some hesitation, said he did not furnish it.

Held, this did not constitute any evidence of publication to go to the jury.

The trial judge, in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the trial answer would have been.

Held, misdirection and that no inference adverse to the defendant should have been drawn from his refusal to answer.

G. H. Watson, Q.C., for the plaintiff.

Wallace Nesbitt for the defendant.

Div'l Court.] [Dec. 30, 1893.

SOLMES *v.* STAFFORD.

Foreign judgment—Motion to enter judgment under Rule 739—Variation of judgment in foreign tribunal after motion—Right to enter judgment as varied—Judgment entered under Rule 757.

After a motion was made to enter judgment, under Rule 739, in an action on a judgment recovered in British Columbia for a breach of covenant to convey certain lands, the endorsement on the writ herein claiming the amount found to be due by the judgment and interest from the date of the finding an appeal

against the judgment was made to the full court in British Columbia, and the judgment varied by reducing the damages, giving some additional costs, and directing the land to be reconveyed on payment of the judgment, judgment in accordance therewith being entered in the British Columbia court. The Master who had stayed the motion pending the appeal thereupon made an order directing judgment to be entered for the plaintiff for the amount of the judgment as varied, and interest from the date of the commencement of the action here, which was affirmed on appeal to a Judge in Chambers.

Held, on appeal to the Divisional Court, that the order to enter judgment could not be supported, because it was an order to enter judgment for a debt not claimed by the endorsement on the writ; but as no defence was shown, the court permitted the application to be turned in a motion for judgment, under Rule 757, and directed judgment to be entered for the plaintiff.

The right to claim interest as liquidated damages considered.

An objection raised that the defendant was not bound by the proceedings in the British Columbia court was overruled. It appeared that the defendant had entered an appearance there and defended the action.

Aylesworth, Q.C., for the plaintiff.

Allan Cassels for the defendant.

Div'l Court.] [Dec 30, 1893.

WILSON *v.* FLEMING.

Covenants—Dependent or independent—Mortgage.

The proviso for payment in a mortgage made by defendant was that the mortgage was to be void on payment of $3,250 and interest. Then followed the usual printed short form covenant for payment, to which was added in writing the words, "But before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and that the mortgagor shall then be liable only to the amount of $600, or such lesser sum as will, with the net proceeds from the lands, make the $3,250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed $600."

Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result showed a deficiency, and then only to the extent of $600.

W. Douglass, Q.C., for the plaintiff.

E. D. Armour, Q.C., for the defendant.

Div'l Court.] [Feb. 9.

REGINA *v.* LATHAM.

Municipal corporations—Express wagons—By-law licensing, authorizing rates fixed thereby to be altered by agreement—Ultra vires—55 Vict., c. 42, s. 436 (O.).

A by-law passed under s. 436 of the Consolidated Municipal Act, 1892, 55 Vict., c. 42 (O.), for licensing express wagons, authorized the alteration by agreement of the rates fixed thereby.

Held, beyond the powers conferred by the statute; and a conviction under a by-law was therefore invalid, and must be quashed.

DuVernet for the applicant.

No one *contra*.

Div'l Court.] [Feb. 10.

REGINA *v.* HOWARTH.

Practising medicine—Apothecary—R.S.O., c. 141—R.S.O., c. 151.

A person went into a druggist's shop, stated he was sick, describing his complaint, which the druggist said he understood to be diarrhœa, when the druggist told him to live on milk diet, and gave him a bottle of medicine, for which he charged fifty cents. The druggist said he had several kinds of diarrhœa mixture, and had to enquire sometimes in order to decide what mixture to give.

Held, that this was practising medicine for gain within s. 45 of the Medical Act, R.S.O., c. 145.

Held, also, that the fact of the druggist being registered under the Pharmacy Act, R.S.O., c. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practise of medicine.

The meaning of apothecary considered.

Allan Cassels for the applicant.

B. B. Osler, Q.C., *contra*.

Div'l Court.] [Feb. 12.

REGINA *v.* WHITAKER.

Conviction—Merry-go-round—No offence under statute or by-law—Prohibiting exhibitions—Consolidated Municipal Act, 1892, s. 489, s-s. 25—Six days' notice of application for certiorari—Waiver.

A city by-law passed under s-s. 25 of s. 489 of the Consolidated Municipal Act, 1892, 55 Vict., c. 42 (O.), prohibited exhibitions of waxworks, menageries, circus riding, and other such like shows, usually exhibited by showmen.

Held, that this would not support a conviction for exhibiting a machine called a merry-go-round, as constituting no offence under the by-law or statute.

A preliminary objection, that the magistrate had not six full days' notice of the application for the writ of *certiorari*, taken on the return of the motion to make absolute the order *nisi* to quash the conviction, was overruled, it being held that the magistrate, on the facts appearing in the case, waived the objection.

Glenn for the magistrate.

Tremeear and *N. McDonald* for the applicant.

Div'l Court.] [Feb. 21.

REGINA *v.* ROBINET.

Recognizance—Sufficiency of.

Where a recognizance filed on a motion for a *certiorari* to return a conviction did not negative the fact of the sureties being sureties in any other matter,

and omitted to state that the sureties were worth $100, over and above any amount for which they might be liable as sureties, it was held insufficient.

The rule in force as to recognizances prior to the passing of the Criminal Code is still in force, and therefore there is no necessity for passing a rule under s. 892 of the Code.

Aylesworth for the motion.

MACMAHON, J.] [March 2.

NEILSON *v.* TRUSTS CORPORATION OF ONTARIO.

Life insurance—Benefit certificate—Change of direction as to payment—Trust revocation—Will—Executors—R.S.O. c. 136—51 Vict., c. 22—53 Vict., c. 39.

In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will, dated in July, 1888, he left all his estate to his children in equal shares.

Held, that under the powers conferred by R.S.O., c. 136, even as amended by 51 Vict., c. 22, the insured had only a limited authority to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife.

Mingeaud v. *Packer*, 21 O.R. 267; 19 A.R. 290, followed.

By virtue of 53 Vict., c. 39, s. 6, he might, when he made the indorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, deprive his children of all benefit in it, and so render the Act nugatory.

Northrup for the plaintiff.

Hoyles, Q.C., and *N. F. Davidson* for the defendants.

ROSE, J.] [March 12.

CUTHBERT *v.* NORTH AMERICAN LIFE ASSURANCE COMPANY.

Annuity—Apportionment—R.S.O., c. 143, ss. 2, 5—Construction of contract—Annuity bond—Policy of assurance.

In consideration of $12,000 paid by M. to the defendants, they, by an instrument in writing, agreed to pay him $1800 every year during his natural life, in equal quarterly payments of $450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the $12,000, but "the application for this policy and the statements and agreements therein contained,

hereby made a part of this contract"; and it was provided that upon certain conditions "this policy shall be void."

Held, in an action by the executors of M., that the instrument was not a policy of assurance within the exception in R.S.O., c. 143, s. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within s. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of M.

D. D. Grierson for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

ROSE, J.] [March 12.

REGINA EX REL. MOORE *v.* NAGLE.

Quo warranto—Information—High School trustee—Civil proceeding—Courts—Single judge—Motion—Notice.

A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a High School trustee.

Askew v. *Manning*, 38 U.C.R. 345, 361, followed.

Such proceeding is a civil, not a criminal, one; and is properly taken before a single judge in court by way of motion upon notice.

W. F. Riddell for the relator.

Aylesworth, Q.C., for the respondent.

Practice.

MACMAHON, J.] [Nov. 29, 1893.

MCALLISTER *v.* COLE.

Venue—Change of—County Court—Cause of action—Convenience—Witnesses.

County Court action for damages for breach of contract. The breach was at Pembroke, which the plaintiff named as the place of trial. The defendant moved to change it to Toronto.

Held, that the action could be more conveniently tried at Pembroke, and the plaintiff should be allowed to retain the venue there, although the defendant swore that he had a much larger number of witnesses there than the plaintiff had at Pembroke.

J. H. Moss for the plaintiff.

C. Millar for the defendant.

C.P. Div'l Court.] [Dec. 8, 1893.

HOGABOOM *v.* GRUNDY.

Interpleader—Order entitled in two actions—Appeal—Divisions of High Court.

Where an interpleader order is entitled in two actions, in different divisions of the High Court, there being two executions in the sheriff's hands, an appeal

from the order may be entertained in either division, although one of the execution creditors has been barred by the order, and there is no appeal on that ground.

A. D. Cartwright for the claimant.

C. Millar for the plaintiff

Q.B. Div'l Court.] [March 3.

HOGABOOM *v.* GILLIES.

Interpleader—Sheriff—Security for goods seized—Failure of—Barring claimant.

The wife of an execution debtor had in her possession certain goods, which were seized by the sheriff under the execution against her husband and claimed by her. Upon the sheriff's application, an interpleader order was made in the usual terms, and the claimant, having given security thereunder by an approved bond for the forthcoming of the goods, the sheriff withdrew from possession. Before the interpleader issue came to trial, the goods were sold for taxes, and the surety on the claimant's bond became insolvent.

Held, that the security had nothing to do with the determination of the claimant's rights, but only with the preservation of the property pending the litigation; and the court had no right to make an order barring her claim in default of her giving fresh security.

J. A. Macdonald for the claimant.

W. R. Riddell for the execution creditor.

Q.B. Div'l Court.] [March 3.

TINNING *v.* BINGHAM.

Parties—Adding new plaintiffs Rule 445 "Action commenced" "Real matter in dispute"—New cause of action.

The original plaintiff was a daughter of a deceased insured, the defendants were another daughter and two insurance companies, and the writ of summons was indorsed with a claim to have the assignment of two policies by the deceased to the defendant daughter set aside. After appearance by the defendant daughter, the administrator of the estate of the deceased was added as a plaintiff, as such administrator, by an *ex parte* order obtained by the original plaintiff upon no other material than the administrator's consent. The plaintiffs then delivered a statement of claim alleging fraud and undue influence in the obtaining of the assignment, and also alleging that, at the time of the assignment, the deceased was largely indebted and unable to pay his creditors in full, and that the assignment was a fraud upon his creditors; and the plaintiff daughter claimed to have the assignment set aside as being obtained by fraud, and the plaintiff administrator to have it set aside as being a fraud on the creditors.

After the action had been entered for trial, the plaintiffs applied, under Rule 445, for an order to add certain creditors of the deceased as plaintiffs, upon an affidavit of the plaintiff's solicitor, which stated that the plaintiff administrator was appointed at the request of the creditors, and was prosecuting the action

on their behalf, and that the deponent had thought, up to that time, that the administrator had a sufficient status to maintain the claim to set aside the assignment as a fraud on creditors, but now believed it was necessary that creditors should be added as plaintiffs; and upon the consent in writing of certain creditors to their being so added.

Held, that the administrator was a necessary party to the action so commenced; if it was intended to join him as a plaintiff for the purpose of proceeding with a new action, he was improperly added as a plaintiff; but it must be assumed that he was properly added, and, if so, he was added only as a party to the "action commenced."

The allegation in the statement of claim that the deceased was insolvent and the assignment a fraud on his creditors was immaterial and irrelevant to the "action commenced," and was not maintainable by either of the plaintiffs, neither being a creditor.

The plaintiffs sought by the application to introduce new plaintiffs not necessary "for the determination of the real matters in dispute," which words, in Rule 445, mean the real matter in dispute in the "action commenced," and a new action altogether distinct from the "action commenced," and one which the plaintiffs to the "action commenced" could not maintain.

And therefore the application should be dismissed.

Worrell, Q.C., for the plaintiffs.

C. Millar for the defendant Bingham.

Q.B. Div'l Court.] [March 3.

CAIRNS *v.* AIRTH.

Writ of summons—Extending time for service—Rule 238 (a)—Ex parte order—Motion to set aside—Time—Rule 536—Material on motion—Merits—Statute of Limitations.

An action upon a promissory note payable on the 4th November, 1885, was begun on the 31st October, 1891. The writ of summons not having been served, an order was made on the 28th October, 1892, on the *ex parte* application of the plaintiff, under Rule 238 (*a*), that service should be good if made within twelve months. The writ, together with this order, and an order of revivor—the original plaintiff having died in the meantime—was served on one of the defendants on the 2nd August, 1893. On the 12th September, 1893, the defendant, who had been served, moved before the local judge who made the order of 28th October, 1892, to set it aside, which he refused to do.

Held, reversing the decision of GALT, C.J., in Chambers, that the local judge was right; for the time for moving under Rule 536 had expired, and had not been extended; and certain correspondence relied on as showing an agreement to extend the time had not that effect.

The validity of the *ex parte* order did not depend solely upon whether the affidavit upon which it was made was sufficient to support it; the motion to set it aside was a substantive motion supported by affidavits; and the plaintiff was at liberty to answer the motion by showing new matter in support of the original order.

And upon the material before the local judge, his refusal to set aside his order was right upon the merits.

W. H. P. Clement for the plaintiff.

Cavell for the defendant Eliza Airth.

IN RE CLARKE AND HOLMES, SOLICITORS.

Costs—Solicitor and client—Taxation—Interlocutory costs—Set-off—Discretion.

Decisions of the Master in Chambers and ROSE, J., 15 P.R. 269, refusing to order a set-off of certain interlocutory costs against the amount alleged to be due to the solicitors upon bills in course of taxation, affirmed on appeal.

Held, that as the taxation had never been completed, and the solicitors declined to proceed with it, they were not entitled to the set-off.

If the taxation had been completed, the fact of the interlocutory costs being ordered to be paid forthwith after taxation would not have prevented their being ordered to be set off; but it raised an inference that it was not intended by the orders awarding such costs that they should be set off.

Whether the costs in question should be set off or not was in the Master's discretion, and, having regard to the fact that they had been assigned, and to the other circumstances before the court, it could not be said that an improper discretion had been exercised.

S. R. Clarke for the solicitors.

G. G. Mills for the client.

MCALLISTER *v.* COLE.

Venue—Change of—County Court action—Rule 1260—Appeal from Master in Chambers—Judge in Chambers—Divisional Court.

Where an application is made to the Master in Chambers, under Rule 1260, to change the place of trial in a County Court action, no appeal lies from his order thereon to a Judge in Chambers; and no appeal lies from the decision of a Judge in Chambers to a Divisional Court.

Aylesworth, Q.C., for the plaintiff.

C. Millar for the defendant.

C.P. Div'l Court.] [March 3.

DAVIS *v.* NATIONAL ASSURANCE COMPANY OF IRELAND.

Pleading—Rule 423—Denial of liability—Tender and payment into court—Prejudice—Costs—Rules 632-640.

In an action upon an insurance policy the defendants pleaded denying their liability, and also tender before action and payment into court. The plaintiff replied that there was due to him a larger sum than that paid in.

Upon a motion to strike out the defences in denial;

Held, that they did not tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of Rule 423.

Discussion as to the effect of the defences of tender and payment into court upon the question of costs and otherwise.

Rules 632-640 considered.

W. H. P. Clement for the plaintiff.

Aylesworth, Q.C., for the defendants.

Appointments to Office.

CORONERS.

County of Huron.

William James Milne, of the Village of Blyth, in the County of Huron, Esquire, M.D., to be an Associate-Coroner in and for the said County of Huron.

District of Parry Sound.

Herbert Leslie Barber, of the Village of Emsdale, in the District of Parry Sound, Esquire, M.D., to be an Associate-Coroner within and for the said District of Parry Sound.

POLICE MAGISTRATES.

County of Haldimand.

John Taylor, of the Village of Dunnville, in the County of Haldimand, Esquire, Police Magistrate for the said Village of Dunnville, and the Townships of Camborough, Dunn, and Moulton, in the said County of Haldimand, to be Police Magistrate in and for the Townships of Sherbrooke and South Cayuga, in the said County of Haldimand.

DIVISION COURT CLERKS.

County of Halton.

Reuben John McNabb, of the Village of Acton, in the County of Halton, Gentleman, to be Clerk of the Fourth Division Court of the said County of Halton, in the room and stead of George Havill, resigned.

DIVISION COURT BAILIFFS.

District of Nipissing.

Edward J. Smith, of the Village of Mattawa, in the District of Nipissing, to be Bailiff of the Second Division Court of the said District of Nipissing, in the room and stead of N. Ranger, resigned.

County of Haldimand.

Daniel T. Hind, of the Village of Caledonia, in the County of Haldimand, to be Bailiff of the First Division Court of the said County of Haldimand, in the room and stead of E. J. Wigg, resigned.

COMMISSIONERS FOR TAKING AFFIDAVITS.

Victoria, Australia.

H. F. A. Gourlay, of the City of Melbourne, in the Colony of Victoria, Australia, Esquire, Barrister-at-law, to be a Commissioner to administer oaths and to take and receive affidavits, declarations, and affirmations, in the Colony of Victoria, to be used in the Supreme Court and in the Exchequer Court of Canada.

State of Illinois, U.S.

Frederick William Monro, of the City of Chicago, in the State of Illinois, one of the United States of America, Esquire, to be a Commissioner for taking affidavits within and for the said State of Illinois, and not elsewhere, for use in the Courts of Ontario.

New South Wales, Australia.

Francis Bede Freehill, of the City of Sydney, in the Colony of New South Wales, Australia, Gentleman, Solicitor, to be a Commissioner for taking affidavits within and for the said Colony of New South Wales, and not elsewhere, for use in the Courts of Ontario.