# Canada Law Journal.

VOL. XXXV. OCTOBER 16, 1899. NO. 20.

By the death of Lord Watson the English judiciary loses one of its most able men. He died somewhat unexpectedly at the age of seventy-one, still in the full enjoyment of all his faculties. In 1851 he became an advocate of the Scotch Bar, but was for some ten years but little known. In 1874 he was appointed by Lord Beaconsfield Solicitor-General for Scotland. In this position his legal gifts were soon recognized, and in 1880 he was created a Lord of Appeal in Ordinary. He held this position for nearly twenty years, rendering most valuable service to his country. Lord Watson had a considerable share in the interpretation of doubtful clauses of the British North America Act, and his judgments on these and other important questions are said to be some of the best judicial deliverances of the Judicial Committee of the Privy Council.

---

The annual report of the Inspector of Division Courts for Ontario is just received. An excuse is made for its tardy appearance, which, however, scarcely seems to meet the occasion. The volume of business done in these Courts may be gathered from the statement that the number of suits entered was 40,686, the claims aggregating $1,519,000. A number of suits are, of course, settled out of Court. Trial by jury does not find much favour in these Courts, the total number for the year being 203. The County of York leads off with 20 out of over 4,000 suits entered. Northumberland and Durham come next with a larger average of 18 out of 1200 suits, followed by Huron with 16 out of over 900 suits. Carlton, on the other hand, with 2,169 suits, troubled with juries not at all. We are not in a position to say whether there is any special reason for these differences or whether they are merely accidental.

---

The question as to how far punctuation may be considered in construing statutes, recently came up for discussion in *Tyrell* v. *City of New York*, 53 N.E. Rep. 1111. The statute in question

was in reference to the salaries of men employed in the street cleaning department of that city, the wording being as follows :— "Of section foremen, $1,000 each ; of the assistant stable foremen, $900 each ; of the hostlers, $720 each, and extra pay for work on Sundays." The plaintiff, who had been a section foreman, performed certain work on Sundays for which he claimed additional compensation, on the ground that the words "and extra pay for work on Sundays" applied to him as well as to the hostlers. The Court of Appeals held that he was not so entitled, the position of the semi-colons indicating that the extra pay referring only to the hostlers. The Court said: "The punctuation of a statute is of material aid in learning the intention of the legislature. While an Act of Parliament is enacted as read, and the original rolls contain no marks of punctuation, a statute of this State is enacted as read and printed, so that the punctuation is a part of the Act as passed. . . . . The punctuation is, however, subordinate to the text, and is never allowed to control its plain meaning ; but when the meaning is not plain, resort may be had to those marks which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear." So far as the revised statutes of Canada and Ontario are concerned, the "printed roll," properly attested as by statute provided, is the law of the land.

---

A correspondent writes as follows: "When we see High Court judges persistently violating the law requiring them to reside in Toronto, one is tempted to wonder whether there is no authority to compel obedience, or whether those who transgress herein consider themselves above the law. The example at all events is not edifying, and may, on occasion, well provoke a retort, of which it would be difficult to deny the justice."

In reference to which we may observe that we have heard it said that the learned judge, who apparently pays the most conspicuous disregard to the statute referred to, claims that he is not bound by its provisions because he was appointed before June 29, 1897, the date of its passage. We assume this must be correct, for although the statute enables the Governor-General in Council to permit a judge to reside elsewhere in the Province for a specified time, yet we presume if such a permission were granted it would be made

public, and so far as we know there has been no such leave granted to the learned judge we refer to. Whatever question there may be as to the law there is none as to the inconvenience resulting from a High Court judge permanently residing outside of Toronto. It is a continual source of annoyance not only to practitioners but also to the other members of the bench. It operates in this way. It is often the cause at the beginning of the week of keeping the bar, solicitors, litigants and witnesses waiting for hours the arrival of the judge, because, to suit his convenience, the Court at which he is to preside cannot be opened at the usual hour. At the other end of the week it has the opposite effect, and the sittings are held at an unusual hour and business is rushed through to enable the judge to catch a midday train for his distant home on Friday, and any business which turns up on Saturday is either neglected or thrown upon one of the judges who live in Toronto. This being so it would seem to be time that some steps were taken to "abate the nuisance." We do not venture to suggest what the remedy should be, but feel in duty bound to call attention to the grievance.

## ENGLISH CASES.

### *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*



**MASTER AND SERVANT**—CONTRACT—DISMISSAL—MISCONDUCT OF SERVANT—WORKMAN—FORGETFULNESS.

*Baster* v. *London & County Printing Works* (1899) 1 Q.B. 901, was a case stated by a magistrate between a servant and his master, who had been summarily dismissed from his employment for a single act of carelessness, which had caused £30 injury to a valuable printing press. The servant claimed two weeks' wages for having been dismissed without notice. The magistrate had held the dismissal was justifiable, and dismissed the claim, and a Divisional Court—Darling and Channell, JJ.—upheld his decision.

**BANKRUPTCY**—PAYMENT BY MISTAKE OF LAW TO OFFICER OF COURT—MISTAKE.

*In re Rhoades* (1899) 1 Q.B. 905, although a bankruptcy case, is nevertheless of interest, as being another instance of money paid to an officer of court under a mistake of law being ordered to be refunded to the person rightfully entitled. In this case, an executrix, having a right of retainer, paid over to the official receiver of the testator's estate the assets collected by her in ignorance of her right. The money being still in the official receiver's hands, she applied to the Court for an order directing the official receiver to refund her the amount she was entitled to have retained in respect of a debt due to herself from the testator's estate; and Wright, J., granted the application, on the ground that an official receiver is an office of the Court, and that, so long as the money remains under the control of the Court, effect will be given to the equitable rights of the parties.

**COSTS**—APPEAL AS TO COSTS—ORDER AGAINST OFFICIAL RECEIVER TO PAY COSTS PERSONALLY.

*In re Raynes Park Golf Club* (1899) 1 Q.B. 961, Wright, J., held that, where an official receiver appointed for the winding-up of a company is ordered to pay costs personally, he may appeal from such order without leave, on the ground that his liability to pay costs personally is a question of law, and not a mere matter of discretion; but he held that so much of the order as deprived him of costs was discretionary, and therefore not appealable without leave. Sed quære, see Ont. Rule 1130 (2).

**NEGLIGENCE**—BREACH OF DUTY—CHARTERER OF SHIP, LIABILITY OF, FOR DEFECTIVE CONDITION OF SHIP.

In *Marney* v. *Scott* (1899) 1 Q.B. 986, the plaintiff, a stevedore's labourer, sued the defendant, a charterer of a ship for damages for injuries sustained by the plaintiff falling down the hold of the ship owing to the defective condition of a ladder. The ship was chartered by the defendant for a single voyage, she being then at sea, and in ballast. The charterparty declared the ship was in every way fit for service, and provided that she should be so maintained by the owners. On the afternoon of 5th April she was put at the defendant's disposal, and he immediately employed a stevedore to load her, and the plaintiff, who was one of the stevedore's men, fifteen minutes later had to descend a ladder

leading to the hold when he fell, owing to the defective condition of the ladder. Bigham, J., held that he was entitled to recover on the ground that, when a man intends others to come upon property of which he is the occupier for the purpose of work or business in which he is interested, he owes a duty to those who come to use reasonable care to see that the property and appliances upon it, which are intended to be used in the work, are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him; and if the parties with whom he so contracts fail to use reasonable care, and damage results, the occupier still remains liable to the injured party. Bigham, J., further held that, notwithstanding the short time the ship had been in the defendant's control, although it was not incumbent on him to have made a thorough inspection of the vessel, yet he was bound to make some examination of it before admitting the stevedore or his men to work thereon; and as the slightest inspection of the ladder would have shown it to be defective, he had been guilty of a neglect of duty. This ruling, however, seems to be double edged, for, if the defect in the ladder was so manifest, it would seem something very like contributory negligence on the plaintiff's part to have trusted himself upon it.

**STATUTE OF LIMITATIONS**—TENANCY AT WILL—MORTGAGE—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 W. 4, C. 27), SS. 2, 7—(R.S.O. C. 133, SS. 4, 5(7)).

*Farman* v. *Hale* (1899) 1 Q.B. 994, was an action of ejectment in which the defendants set up the Statute of Limitations. The facts were, that the plaintiff became entitled in fee to the land in question in 1882. In 1883 he allowed the defendants to occupy the premises, and they had continued ever since to do so. In 1893 the plaintiff mortgaged the property, and in 1894 the defendants had knowledge of the mortgage, and there was evidence that in 1894 they had filled up an income tax paper in which they described the plaintiff as being the owner of the premises, and themselves as being the occupiers, and there was also evidence that they had then, in conversation with third persons, admitted that they were then tenants at will to the plaintiff. In October, 1898, the plaintiff served notice to quit on the defendants, and they, refusing to give up possession, the action was brought in November, 1898. The action was tried by a County Court judge, who

held that the plaintiff was barred by the statute. On appeal, however, his decision was reversed by Darling and Channell, JJ, on the ground that the mortgage, being an alienation of the mortgagor's reversion, had the effect of putting an end to the first tenancy at will, and that it was then competent for the mortgagor to create a new tenancy at will, and that the evidence was sufficient to warrant the finding that a new tenancy at will had in fact been created between the plaintiff and defendants, and that, consequently, the plaintiff was not barred by the Statute 3 & 4 W. 4, c. 27, ss. 2, 7. (See R.S.O. c. 133, ss. 4, 5 (7)). This seems to be a rather technical conclusion, and it is possible that a Court of Appeal might hold that in order to put an end to a tenancy at will by an alienation of the lessor's estate, the alienation must be an absolute alienation, and not a conditional one, such as a mortgage. There can be little doubt that the alleged creation of a new tenancy at will in the present case is a mere fiction, and one which never entered the heads of either of the litigants. The fact being that the defendants continued their occupation after they became aware of the mortgage under the original tenancy. The wisdom or propriety of making imaginary contracts between parties in order to get over the plain effect of a statute, may well be doubted.

**ADMINISTRATION**—LIMITED—GRANT AD COLLIGENDUM—NEXT OF KIN ABROAD.

*In the goods of Bolton* (1899) P. 186, an application was made for the grant of limited administration for the purpose of realizing a part of an intestate's estate under the following circumstances: The deceased was a small shopkeeper supposed to have died unmarried, and his next of kin, who resided in South America, had been communicated with, but had not answered. It was shewn that, if the business of the deceased were sold at once, it would realize £100, but if the shop were closed it would become valueless. The applicant, who was a creditor, applied for a grant ad colligendum, and Barnes, J., granted the application.

**ADMINISTRATION**—DE FACTO WILL—CITATION AND NON-APPEARANCE OF ALLEGED LEGATEES.

*In the goods of Quick, Quick, Quick* (1899) P. 187, was an action brought to set aside an alleged will. The legatees named therein were cited and failed to appear. Barnes, J., thereupon ordered

letters of administration to issue in favour of the next of kin of the deceased.

*In the goods of Demis* (1899) P. 191, is a somewhat similar case to the last. In this case the deceased had duly executed a document purporting to be a will. Its validity seems to have been disputed. An agreement of compromise was come to between the executrix named in the will, on the one hand, and the members of the deceased's family on the other. Subsequently, a citation was issued by the next of kin of the deceased, which was served on the executrix and sole beneficiary named in the will, to bring in and prove the will, or show cause why administration should not issue to the applicant as upon an intestacy. The executrix not appearing, the grant was made.

**WILL**—PROBATE—MISNOMER OF EXECUTOR IN WILL—RECTIFICATION OF WILL.

*In the goods of Cooper* (1899) P. 193. In this case the testator had appointed as executor "the said Thomas Cooper." It was shewn that the deceased had no friend, child or relative named Thomas Cooper, but that he had a friend named Thomas Stevenson, who was named in the will as a trustee along with the other two persons properly named as executors. Jeune, P.P.D., ordered the name of "Cooper" to be omitted from the exemplification of the will for probate, so that the name of the executor would appear as "Thomas ——;" and following *In the goods of De Rosaz* (1877) 2 P.D. 66, he granted probate to the applicant, who was directed to be described in the grant as "Thomas Stevenson, in the will described as Thomas ——." This seems a rather roundabout way of declaring that, by the executor described in the will as "Thomas Cooper," the testator meant and intended "Thomas Stevenson."

**MEASURE OF DAMAGES**—HUSBAND AND WIFE LIVING SEPARATE—ADULTERY OF WIFE.

*Evans* v. *Evans* (1899) P. 195, although a divorce case, may be useful to note, inasmuch as it shews that although a husband and wife are living separate, owing to the misconduct of the wife, the husband is entitled to recover substantial damages against a man who, during such separation, has frequently committed adultery with the wife; and the fact that reconciliation with the wife had become impossible owing to the injury complained of was an element for consideration in fixing damages.

**INTERNATIONAL LAW**—FOREIGN JUDGMENT—DIVORCE BY FOREIGN COURT—PROCEDURE—IRREGULARITY.

In *Pemberton* v. *Hughes* (1899) 1 Ch. 781, the plaintiff's right of action depended on the validity of a divorce granted by a Florida Court. The defendants contended that the divorce was invalid, and based their contention mainly on the ground that, according to the rules of practice of the Florida Court, ten days are required to elapse between the issue of process against the defendant and the day on which it was returnable, and that in the proceedings in question only nine days intervened between the issue of the writ and the day it was returnable. Kekewich, J., before whom the action was tried, was of opinion that this defect in the procedure went to the root of the jurisdiction of the Florida Court, and invalidated the divorce; but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) reversed his decision, on the ground that, for international purposes, the jurisdiction or competency of a court does not depend upon the exact observance of its own rules of procedure, and that, where a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings of the foreign court, unless they offend against English views of substantial justice; and Rigby, L.J., was of opinion that the English courts are bound in such cases to assume that the foreign court understood its own procedure and law, and that expert evidence as to the procedure of the foreign court ought not to have been received.

**TRUSTEE**—BREACH OF TRUST—RELIEF OF TRUSTEE FROM PERSONAL LIABILITY—JUDICIAL TRUSTEES ACT, 1896, (59 & 60 VICT., C. 35,) S. 3—(62 VICT., ST. 2. C. 15, S. 1(O)).

*Perrins* v. *Bellamy* (1899) 1 Ch. 797, is a decision under the Judicial Trustees Act, 1896 (59 & 60 Vict., c. 35), s. 3, the provisions of which are embodied in the recent Ont. Act, 62 Vict., st. 2, c. 15. In this case the trustees of a settlement erroneously assumed that they had a power of sale, and under that assumption sold certain leaseholds comprised in the settlement, and thereby diminished the plaintiff's income, who as tenant for life was entitled to half of the rents and profits in specie; but the court came to the conclusion that the sale would have been a proper one

had the trustees, in fact, possessed the power of sale, and as it also appeared that the plaintiff had notice of the intended sale, and, though she objected to it, took no steps to prevent its being carried out; under these circumstances, the Court of Appeal (Lindley, M.R., and Rigby and Romer, L.JJ.) agreed with Kekewich, J., that the statute applied, and the trustees were entitled to be relieved from personal liability for the breach of trust.

**PATENT**—INFRINGEMENT—REPAIR, OR RECONSTRUCTION, OF PATENTED ARTICLE—ARTICLE MANUFACTURED AT REQUEST OF PATENTEE'S AGENT.

*Dunlop Pneumatic Tyre Co.* v. *Neal* (1899) 1 Ch. 807, was an action to restrain the infringement of the plaintiff's patent for pneumatic tyres for bicycles, which consisted of a rubber or elastic tyre lined with canvas, in combination with two wires for securing the same to the rims of the wheels. The defendant, at the request of an agent of the plaintiff's company, placed over the old wires of one of the plaintiff company's tyres a new canvas cover and a new rubber tyre. The agent had been sent by the plaintiff company to find out whether the defendant was infringing their patent, but there was no evidence that the agent was authorized by the plaintiff company to request the defendant to do what he did. North, J., was of opinion that what the defendant had done went beyond fair repair of the tyre, and amounted to its reconstruction, and that he had therefore infringed the plaintiff's patent, and that the plaintiffs were not estopped by the act of their agent in complaining of the infringement. On this point he distinguished the case from *Kelly* v. *Batchelor* (1893) 10 Rep. Pat. Cas. 289, where the plaintiffs had authorized their agent to direct the defendant to construct an article infringing their patent. He also held that although only an act of infringement was proved, and though there was no evidence of any threat by the defendant to infringe again, yet what he had done for the plaintiff's agent it might be assumed he would do for any other applicant and, consequently, the plaintiffs were entitled to an injunction restraining any further infringement by the defendant.

**SETTLEMENT**—VALIDITY—ILLEGAL CONSIDERATION—MARRIAGE WITH DECEASED WIFE'S SISTER.

In *Phillips* v. *Probyn* (1899) 1 Ch. 811, the validity of a marriage settlement made in contemplation of the marriage of the

settlor with his deceased wife's sister was under consideration, so far as it purported to confer a benefit on the intended wife, "so long as she should remain a widow and unmarried." The pretended marriage took place, and the settlor lived with the lady as his wife until he died, and during the life of his son and heir-at-law she received the rents of the property in question, without objection on his part. On the son's death, the trustees applied to the court to determine who was entitled to the property, on notice to the administratrix of the son's estate, and the lady claiming to be the widow of the settlor. North, J., was of opinion that the settlement was founded upon an illegal consideration, marriage with a deceased wife's sister being illegal according to English law, and therefore that the trusts in favour of the pretended wife failed, and the personal representative of the settlor's deceased son, who under the Land Transfer Act, 1897, is his real representative, was entitled to the property.

**SOLICITOR AND CLIENT**—COMMON ORDER FOR DELIVERY AND TAXATION OF BILL OF COSTS—SOLICITOR REFUSING TO CLAIM COSTS—LIABILITY OF SOLICITOR TO RENDER CASH ACCOUNT.

*In re Landor* (1899) 1 Ch. 818, an application was made to commit a solicitor for contempt in not delivering to the applicant a bill of costs pursuant to a common order obtained by his client. Landor had acted as solicitor, and the order, which was in the usual form, was served on 7th January, 1899, and required him to deliver his bill within a fortnight. The order not having been complied with, notice of the present motion was served on 31st January, 1899. On 22nd February, 1899, the solicitor made affidavit, in which he stated that he made no claim for costs. The client swore that the solicitor had borrowed money from him on a bill of exchange, on the understanding that his costs would be deducted from the amount of the bill of exchange, and stated that he believed the reason Landor refused to deliver a bill was because he had purported to pay himself the amount of his bill by means of a set-off against the amount owing by him in respect of borrowed moneys. North, J., was of opinion that if that was the state of the case the solicitor could be compelled to deliver his bill and cash account; but he thought that if the solicitor made affidavit that no costs were due to him, and that he had not paid himself any costs out of his client's moneys, he could make no

order on the present application except that the solicitor should pay the costs. He, however, intimated that even though the solicitor made no claim to costs he might, on a proper application, be summarily ordered to render a cash account; but he thought the common order to tax does not involve the taking of an account of all monetary transactions between a solicitor and his client independently of costs due from the client.

**TENANT FOR LIFE**—COVENANT—REPAIRS—INSURANCE.

*In re Betty, Betty* v. *Attorney-General* (1899) 2 Ch. 821, North, J. has refused to follow the decision of Kekewich, J., in *Re Tomlinson, Tomlinson* v. *Andrews* (1898) 1 Ch. 232 (noted ante vol. 34, p. 224) and has held that an equitable tenant for life. of leaseholds under a will is bound, during the continuance of his interest, as between himself and his testator's estate, to perform the tenant's continuing obligations under the lease, *e.g.*, to repair and insure, arising during his estate. He, however, held that this obligation does not extend to repairs necessary at the commencement of the tenant for life's interest, nor to breaches of covenant which had arisen before the testator's death. It certainly seems more consonant with common sense that the devisee of leaseholds should take the estate cum onere, than the contrary, and we apprehend it will be found should the point ever be taken to an Appellate Court, that the conclusion of North, J., is the correct one.

**FRAUDULENT CONVEYANCE**—VOLUNTARY ASSIGNMENT OF POLICY OF INSURANCE—INVESTMENT OF POLICY MONEYS BY ASSIGNEE—FOLLOWING ASSETS—13 ELIZ. C. 5.

*In re Mouat, Kingston Mill Co.* v. *Mouat,* (1899) 1 Ch. 831. This was an action brought by the creditors of a deceased person for the administration of his estate, and for a declaration that a voluntary assignment of a policy of life insurance made by the deceased in his lifetime to his niece, was void under the statute 13 Eliz. c. 5. The niece had received the moneys payable under the policy, and the plaintiffs moved for an order for the payment into court of the amount so received, to abide the result of the trial. The niece had invested the moneys with other moneys on mortgage, and it was contended that the proceeds of the policy could not be followed. Stirling, J., though conceding that if the policy had got into the hands of a bona fide purchaser for value it could

not have been followed, yet was of opinion that as the fund remained under the control of the assignee, notwithstanding its investment with other moneys, it might properly be secured for the benefit of creditors should they be proved to be entitled, and he therefore restrained the assignee from receiving the moneys secured by the mortgage so far as they represented the policy moneys, and from parting with the mortgage except after notice to the plaintiff, and with the sanction of the Court.

**COPYRIGHT**—MUSIC—SHEET OF MUSIC—PERFORATED ROLL OF PAPER FOR USE IN MECHANICAL ORGAN—INFRINGEMENT OF COPYRIGHT—COPYRIGHT ACT, 1842 (5 & 6 VICT. c. 45), ss. 2 15—(R.S.C. c. 62, s. 32).

*Boosey* v. *Wright* (1899) 1 Ch 836, was an action to restrain the infringement of a copyright. The alleged infringement consisted in the sale of certain perforated rolls of paper for use in an instrument called the Æolian, which were so prepared that whenever a perforation passed under a particular pipe in the instrument the appropriate note was sounded. The tunes thus produced being the subject of the plaintiff's copyright. At the beginning of each roll was printed a statement as to the key in which the music was written, there were also printed on them the words andante, moderato, piano, crescendo, indicating the time and expression, at and with which, the music ought to be played. These words were visible to the player and were intended for his guidance. Stirling, J., was of opinion that "copyright" under the Copyright Act, 1842 (5 & 6 Vict. c. 45) means "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject" to which the word is applied in the Act, including a sheet of music, and does not extend to the perforated rolls in question, which were rather in the nature of parts of a machine, whereas the Act only prevented multiplying something in the nature of a book. He, however, held that the addition of words to regulate the time and expression taken from the plaintiff's music sheets was an infringement of the copyright, and granted an injunction to that extent. It is possible that the Canadian Copyright Act (R.S.C. c. 62) may be found to have the same limited effect. See s. 32, which seems merely to prohibit printing, reprinting, or importing for sale, a copyright musical composition. If the law were to prohibit every reproduction of musical sounds the subject of a copyright musical composition, it might be inconvenient, for in that case every one who ven-

tured to whistle a copyrighted composition without a license might be guilty of an infringement. At the same time the perforated music roll, seems substantially to be an invasion of what might reasonably be considered the legitimate right of the composer.

**PRACTICE** — COSTS OF PROCEEDINGS IN FORMA PAUPERIS — SOLICITOR AND CLIENT.

*In re Raphael* (1899) 1 Ch. 853, is a case to which reference has already been made in this Journal, see ante p. 372. The question was simply whether a solicitor who had carried an appeal to the House of Lords for his client in forma pauperis could recover from his estate the ordinary full costs of the proceedings, and not merely pauper costs as taxable against the opposite party. Kekewich, J. was of opinion that as the solicitor had not been assigned by the Court, but had acted in pursuance of a contract with his client, the latter must be assumed to have contracted to pay the usual costs, there being no evidence to the contrary.

**COMPANY**—GENERAL MEETING—NOTICE CALLING GENERAL MEETING—SPECIAL RESOLUTIONS — SHAREHOLDERS — DIRECTORS PECUNIARILY INTERESTED — NON-DISCLOSURE.

In *Tiessen* v. *Henderson* (1899) 1 Ch. 861, the plaintiff, a shareholder of a joint stock company, sued for an injunction to restrain the company, three of its directors, and its ostensible liquidator, from carrying into effect special resolutions for reconstruction of the company, alleged to have been passed and confirmed at extraordinary general meetings, held on Feb. 16, 1899, and March 3, 1899. The grounds on which the plaintiff relied were (1) that the notice calling the first meeting, though specifying the business to be transacted, omitted to disclose the fact that certain of the directors were pecuniarily interested in supporting one of the schemes proposed; and (2) that the notice of the second or confirmatory meeting was conditional. Kekewich, J. held that on the first ground the plaintiff was entitled to succeed, as the failure to disclose the directors' interest in the proposed scheme, was fatal to the validity of the notice as regards non-attending shareholders. But on the second point, as to the conditional character of the notice of the second meeting, he thought the case distinguishable from *Alexander* v. *Simpson* 43 Ch. D. 139, on the ground that the notice convening the confirmatory meeting was positive, and the

only conditional element about it was that if a certain other scheme were adopted at it the confirmation of the resolution passed at the previous meeting would become unnecessary.

**MORTGAGE**—POWER OF SALE—BONA FIDE SALE UNDER POWER BY MORTGAGEE TO HIS SOLICITOR—ACTION TO SET ASIDE SALE UNDER POWER—LACHES.

*Nutt* v. *Easton* (1899) 1 Ch. 873, was an action by a mortgagor to set aside a sale made by the mortgagee to her solicitor in assumed exercise of the power of sale in the mortgage. The mortgage was of a reversionary interest, and in April, 1877, the mortgagee being anxious to realize the security, offered it for sale by auction but failed to secure a purchaser. In October, 1887, she instructed her solicitor to find a purchaser, and he reluctantly agreed that if neither he nor his client could find a purchaser before Christmas he would buy. No other purchaser being found, the mortgagee in January, 1888, bona fide sold the property under the power, to the solicitor at more than its actuarial value. The solicitor at once gave notice of the sale to the plaintiff, who was the owner of the equity of redemption, and who obtained professional advice that the sale could be set aside, but, to use the classical language of the report, concluded "to let the matter slide" and to wait the course of events. The reversionary interest fell into possession in April, 1897; the solicitor died in 1895, and the defendants were his executors. In December, 1897, the action was commenced. Cozens-Hardy, J. who tried the action, was of opinion that the plaintiff was not entitled to relief, that the recent authorities established that a mortgagee selling under a power of sale in his mortgage was not in the position of a trustee, and that a sale to his own solicitor if made in good faith and without any intention of dealing unfairly with the mortgagor, even though capable of being impeached by the client, would, nevertheless, be valid, and binding as against the mortgagor. The sale, in his opinion, though possibly voidable at the instance of the mortgagee, was not absolutely void, and could not be impeached by the mortgagor; and on the ground of laches also, he held it impossible for the plaintiff to succeed.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT.

N.B.] THE QUEEN *v.* S.S. TROOP CO. [Oct. 3.

*Appeal--Certiorari—Merchants Shipping Act, 1854—Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment.*

Appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule nisi for a certiorari to bring up proceedings before the police magistrate, under the Merchants Shipping Act with a view to having the judgment thereon quashed.

Merchants Shipping Act, 1854, s. 213, makes the expenses of a seaman left in a foreign port and relieved from distress under the Act a charge upon the ship, and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being"

*Held*, affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought.

*Held*, further, that a certificate of the assistant secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act, though the above section does not provide for a mode of proof by certificate.

Notwithstanding the provision in the Imperial Interpretation Act of 1889, that the repeal of an act shall not affect any suit, proceeding or remedy under the repealed act, in proceedings under the Merchants Shipping Act of 1854, proof of ownership of a ship may be made according to the mode provided in the Merchants Shipping Act, 1894, by which the former Act is repealed.

Under the Act of 1894 the copy of the registry of a ship registered in Liverpool certified by the Registrar-General of Shipping at London is sufficient proof of ownership.

*Quære.* Where the Merchants Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will certiorari lie to remove the proceedings into a Superior Court.

*Newcombe*, Q.C., for appellant. *A. L. Palmer*, Q.C., for respondent.

Ont.] TOWNSHIP OF MCKILLOP *v.* TOWNSHIP OF LOGAN. [Oct. 3.

*Ditches and Watercourses Act, 1894 (O)—Owner of land—Declaration of ownership—Award—Defects—Validating award—57 Vict. c. 55; 58 Vict. c. 54 (O).*

A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1094, of Ontario. *Township of Osgoode* v. *York*, 24 S.C.R. 282, followed.

If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction

Sec. 24 of the Act which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings under the Act where the party initiating the latter is not an owner.

*Garrow*, Q.C. and *Thompson*, for respondent.

---

Ont.] ROWAN *v.* TORONTO STREET RY. CO. [Oct. 3.

*Negligence—Trial of action—Contributory negligence—Findings of jury—New trial—Evidence.*

On the trial of an action against a street railway company for damages in consequence of injuries received through negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "Could Rowan, by the exercise of reasonable care and diligence have avoided the accident"? the answer was, "We believe that it could have been possible."

*Held*, reversing the judgment of the Court of Appeal, that this answer did not amount to a finding of negligence on the part of the plaintiff as an approximate cause of the accident which would disentitle him to a verdict.

*Held*, further, that as the other findings established negligence in the defendants which caused the accident and amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record; and as the court had before it all the materials for finally determining the questions in dispute, a new trial was not necessary.

*Aylesworth*, Q.C. and *Ross*, for appellant. *Osler*, Q.C., for respondent.

# Province of Ontario.

## HIGH COURT OF JUSTICE.

Boyd, C., Ferguson, J., Meredith, J.] [Feb. 17, 1896

SKAE *v.* MOSS.

*Trial—Jury notice—Striking out—Duty of judge presiding at jury sittings—Transfer to non-jury list—Discussion—Appeal.*

An appeal by the plaintiffs from an order of MEREDITH, C.J., made by him of his own motion, when presiding at a sittings at Toronto for the trial of actions with a jury, striking out the plaintiffs' jury notice and transferring the action to the non-jury sittings.

*C. Millar*, for the plaintiffs, contended that the Chief Justice was not the trial Judge when he made the order, as the case had not then been called to trial, and he had no power to call up a case out of its turn and strike out the jury notice without the request of either party. The case was one proper for trial by jury, being an action against solicitors for improperly investing money.

*McCarthy*, Q.C., for the defendants.

The Court held that the Judge presiding at the Assizes had power to make such an order under the circumstances mentioned, and, following *Brown* v. *Wood* (1887), 12 P. R. 198, that the exercise of his discretion should not be interfered with.

Appeal dismissed with costs to the defendants in any event. Leave to appeal refused.

[This decision is opposed to that of another Divisional Court in *Bank of Toronto* v. *Keystone Fire Ins. Co.*, 34 C.L.J. 356, 18 P. R. 113, rendered on the 4th May, 1898.]

---

Falconbridge, J.] IN RE ASKWITH. [Aug. 24.

*Evidence—Refusal to give self-criminating testimony, right of witness as to, not affected by Liquor License Act, s. 115.*

This was an application for the discharge from custody of a witness for refusing at the hearing of a charge against a hotel-keeper for infringing the Liquor License Act, to answer a certain question, for the reason that it tended to criminate him. It was contended that this rule had been abolished by sec. 115 of that Act which provides as follows: "In any prosecution under this Act the . . . . magistrate trying the case may summon any person represented to him . . . . as a material witness . . . . and if he refuses . . . . to answer any question touching the case, he may be committed to the common gaol of the county, there to remain until he

consents to . . . . answer." It was held, however, that this section, as it appeared to take away a common-law right, should be strictly construed, and that the refusal "to answer any question touching the case must mean any question which might be lawfully put, and which the witness was otherwise bound to answer. From this category all questions which would tend to subject the witness to criminal proceedings were, it was pointed out, expressly excepted by the Evidence Act of Ontario," s. 5, which leaves this common-law protection intact, unless where the witness is the defendant, or the wife or husband of the defendant. *Reg.* v. *Nurse*, ante, p. 35; 2 Can. Crim. Cases, 57, referred to with approval.

*Geo. F. Henderson*, for the applicant. *Glyn Osler*, for the magistrate. *R. J. Lewis*, for the complainant.

---

Falconbridge, J.] IN RE O'REILLY. [Aug. 28.

*Custody of young children, right of mother to, where parents belong to different churches, determined under special circumstances.*

A Roman Catholic married a Protestant woman, the latter agreeing that all children of either sex born of the marriage should be educated in the faith of the father. Dispute having arisen between the sponsors a separation finally took place, and for four years previous to hearing of case, the wife had been maintaining herself and her two children, boys of nine and six years of age without any assistance from her husband. During a period of two years after the separation the husband had continued writing a number of letters, abusing his wife and her mother and her sister, and charging her, in extremely foul language, with the grossest immorality. The evidence showed these charges to be unfounded. The conclusion of the court was that the education of young children ought not to be entrusted to a man capable of writing such letters, especially as there was good reason to doubt his ability to support the children. An order was therefore made, declaring that the mother was to have the custody of the children; that they were to be educated in the faith of their father, and that the father should have access to them at all reasonable times.

*Mahon*, for the father. *Chrysler*, Q.C., for the mother.

---

Armour, C.J., Street, J., Falconbridge, J.] [Sept. 12.

IN RE ROCHON.

*Examination of insolvent debtor—Assignments and preferences Act—County Court judge—Jurisdiction—R.S.O. c. 147, s. 36.*

A County Court judge has no jurisdiction to commit an insolvent debtor for unsatisfactory answers at an examination under the Assignments and preferences Act. The power to commit is by s. 36 (R.S.O. c. 147) given to the High Court or a judge thereof.

*Aylesworth*, Q.C., for the insolvent debtor.

Armour, C.J., Street, J.] [Sept. 19.

CANADIAN BANK OF COMMERCE *v.* PERRAM.

*Bills and notes—Indorser before payee—Liability—Bills of Exchange Act, s. 56.*

*Held*, that when one put his name on the back of a promissory note, before the payees, who now sued him as endorser, had themselves endorsed it, he was not liable under it either as endorser or as surety.

*Jenkins* v. *Coomber*, (1898) 2 Q.B. 168, followed.

*A. W. Anglin*, for plaintiff. *J. Kyles*, for defendant.

---

Ferguson, J.] YOUNG *v.* RAFFERTY. [Sept. 22.

*Mortgage—Several parcels—Rights of owners of equity of redemption—Enumeration of one parcel—Purchaser—Volunteer.*

An appeal by the defendants John Connolly and Catherine Anastasia Hanley from the report of the Master at Berlin in a mortgage action.

The mortgage was made by Cornelius Connolly, since deceased, upon a farm comprising nearly one hundred acres. After the mortgage the defendant John Connolly purchased forty acres of the farm from the deceased, who conveyed to him by a deed containing the usual covenants. The defendant, Catherine A. Hanley, acquired six acres by devise from the deceased, and defendant, Francis Connolly, fifty-three acres by a similar devise. The deceased was the father of John and Francis, and the grandfather of Catherine.

The Master found that the forty acres of the mortgaged lands belonging to the defendant John Connolly and the properties devised to the other two respectively were alike liable for the payment of the mortgage money due to the plaintiff upon his mortgage.

The appeal of the defendant, John Connolly was upon the ground that he, being a purchaser for value, and the others volunteers, their lands were primarily liable for satisfaction of the mortgage debt.

The appeal of the defendant, Catherine Anastasia Hanley was upon the ground that the portion devised to the defendant, Francis Connolly, was liable before hers, but this appeal was not pressed at the hearing.

*Held*, That the Master should have found that the lands devised to Francis and Catherine Anastasia, were in the first place liable for the payment of the mortgage money, and that the forty acres belonging to John were, as amongst these three owners, liable only for the payment of such money in the event of the other two parcels proving insufficient to satisfy the mortgage money, and then only for the deficiency. The lands devisd to Francis and those devised to Catherine Anastasia were in the same position as to liability to satisfy the mortgage, and in the event of a sale these two parcels or a competent part thereof, should be first offered for sale, and

if the purchase money realized should he sufficient to satisfy the claim of the plaintiff for principal, interests and costs, the forty acres need not be sold at all, but in the event of their being a deficiency, such forty acres, or a competent part thereof, might be sold to satisfy such deficiency.

*Barker* v. *Eccles*, 17 Gr. 277, 281, Fisher on mortgages, 5th ed., s. 1350, and *In re Jones*, *Farrington* v. *Forrester*, (1893) 2 Ch. 461, referred to.

*W. H. Blake* for the defendants John Connolly and Catherine Anastasia Hanley. *Du Vernet*, for the defendant, Francis Connolly.

---

Ferguson, J.] REGINA *v.* NIXON. [Sept. 25.

*Criminal law—Procedure—Conviction for being an inmate of a house of ill-fame—Appeal to Quarter Sessions.*

Motion for a mandamus requiring the police magistrate for the city of Toronto, to admit to bail the defendant, Mary Nixon, now serving a sentence of sixty days in gaol under a conviction by the said magistrate for being an inmate of a house of ill-fame, as required by s. 880 of the Criminal Code, 1892, pending her appeal against her conviction to the Court of General Sessions of the Peace for the County of York.

The magistrate was of the opinion that an appeal was not open to the defendant, and the only question upon the motion was whether or not the right of appeal existed. The defendant contended that the prosecution and conviction took place under the provisions of ss. 207 and 208 of the Code, which are in part XV. commonly spoken of as the Vagrancy Act.

*Held*, that the prosecution was under the provisions of s. 783, and the conviction under s. 788, which are in part LV. of the Code. In such a case as this, s. 784 provides that the jurisdiction of the magistrate is absolute and does not depend upon the consent of the person charged to be tried by the magistrate, and that such person shall not be asked whether he or she consents to be so tried.

The right of appeal is given by s. 879, which as well as the sections following it, which point out the manner of conducting the appeal, is in part LVIII. Section 808, which is in part LV., provides that the provisions of part LVIII. shall not apply to any proceedings under part LV.

By 58 & 59 Vict., c. 40, s. 782 of the Code, which shews what the expression "magistrate" in part LV. means and includes, is amended by adding a sub-section providing that when the defendant is charged with any of the offences mentioned in paragraphs (*a*) and (*f*) of s. 783—(*f*) being the one defining the charge in this case—any two justices of the peace sitting together be added to the list of persons falling within the meaning of the expression "magistrate" as used in part LV.; and the amendment also provides that when any offence is tried by virtue of the sub-paragraph an appeal shall be from the conviction in the same manner as from summary convictions under part LVIII. This affords an indication that

Parliament had it in mind that an appeal did not before lie in cases where the prosecution was for an offence defined by s.-s. (*a*) or (*f*) of s. 783; and the appeal in such cases lies now only where the case is heard and determined by two justices of the peace sitting together.

However that may be, this prosecution having taken place under s. 783, and not under the part known as the Vagrancy Act, by reason of the provisions of s. 808 an appeal is precluded.

*Gibson Arnoldi*, for the defendant. *J. W. Curry*, for the magistrate.

---

Trial of actions, Street, J.] CITY OF KINGSTON *v.* ROGERS. [Sept. 28.

*Assessment Act—Seizure for rent—Seizure for taxes—Goods in custodiâ legis—R.S.O. c. 224, s. 135.*

*Held*, that R.S.O. c. 224, s. 135, s-s. 1 (the Assessment Act) which provides that the collector may levy for arrears of taxes "upon the goods and chattels wherever found within the county . . . . belonging to or in the possession of the person who is actually assessed for the premises, etc." does not authorize the collector to levy upon goods which are already in custodiâ legis as goods under seizure by a bailiff for arrears of rent due a landlord.

*McIntyre*, Q.C., and *D. M. McIntyre*, for the plaintiffs. *W. F. Nickle*, for the defendant.

---

Ferguson, J.] STEWART *v.* FERGUSON. [Oct. 5.

*Appeal—Master's report—Time—Cross-appeal—Rule 769—Mortgage—Redemption—Interest post diem—Excessive payment—Application on principal—Mistake.*

According to the true meaning of Rule 769, each party is precluded from appealing against the report or certificate of a Master unless he serves his notice of appeal within the fourteen days mentioned in the Rule; and notice of appeal given in proper time by one party does not prevent the report from becoming absolute as regards another party.

A mortgage having properly borne interest at eight per cent. during its currency, and this having been regularly paid, the parties went on after the mortgage fell due, the one paying and the other receiving the eight per cent. for a long period, in ignorance that the liability was to pay only six per cent. Seven annual payments of interest thus made after maturity at the mortgage rate, and subsequently some payments at a lower rate, the mortgage money not being called in meantime. Both parties were ignorant of the law on the subject, and believed that the mortgage rate would continue until payment of the principal.

*Held*, that the money could not be recovered back by the mortgagor as money paid under a mistake, nor could the excess of interest be applied in reduction of the principal in a redemption action. *Rogers* v. *Ingham*, 3 Ch. D. 351, followed.

*J. Bicknell*, for the plaintiff. *A. Millar*, Q.C., for the defendant.

Meredith, C.J., Rose, J.] GALLAGHER *v.* GALLAGHER. [Oct. 9.

*Appeal—County Court—Interlocutory order—Order discharging defendant from custody under a ca. sa.*

An appeal by the plaintiff from the order of the Judge of the County Court of Frontenac discharging the defendant from arrest under a ca sa. in an action in the County Court. When the appeal came on for hearing on the 6th of September, 1899, *C. J. McCabe*, for the defendant, asked to have the hearing adjourned.

THE COURT raised the point that the order appealed against was not in its nature final, but merely interlocutory, and therefore no appeal lay.

*Kilmer*, for the plaintiff, contended that the Judge had no power to make an order discharging the defendant except under the Indigent Debtors' Act; *Gossling* v. *McBride*, 17 P.R. 585. The order must, therefore, be taken to have been under that Act, and if so, it was an order in its nature final. Cur. ad. vult.

THE COURT felt bound by *McPherson* v. *Wilson*, 13 P.R. 339, and *Baby* v. *Ross*, 14 P.R. 440, to hold that the order appealed against was not in its nature final; and quashed the appeal with costs as of a motion to quash.

## Province of Nova Scotia.

### SUPREME COURT.

Full Court.] WILKIE *v.* RICHARDS. [May 15.

*Trespass to land—Justification under tenant in dower—Wood cut for firewood and fencing—R.S. (5th series), c. 94, s. 66—Injury to inheritance—Plaintiff out of possession.*

In an action brought by plaintiff as owner in fee in possession of a certain tract of land against defendant for breaking and entering and cutting wood, etc., defendant justified under C.R. the tenant in dower to whom the land where the cutting took place had been assigned.

The learned trial judge having found in defendant's favour as to the boundaries of the land assigned,

*Held*, that his finding on this point should not be disturbed.

*Held*, also, that under the provisions of R.S. (5th series), c. 94, s. 66, where there is in the same parcel both cultivated land and woodland assigned, the timber cut for fencing must be confined in the use thereof to the same parcel of land, but firewood may be taken for the widow's use, even though she may not reside on the identical parcel or tract from which it is taken.

*Held*, also, that plaintiff could not recover on a claim for carrying a

small quantity of wood in the winter time by a wood road across a portion of plaintiff's land not included in the area assigned for dower, the land being at the time in the possession of a tenant-at-will.

Per HENRY, J.—It was not sufficient for the plaintiff to establish that the acts complained of were such as could not be justified by the tenant; he must also show an injury to the inheritance.

Also, that even if plaintiff were entitled to recover on his claim for trespass to land outside of the dower, the court would not set the judgment aside for that purpose, the matter being subordinate to the real matter in dispute.

*F. B. Wade*, Q.C., for appellant. *R. L. Borden*, Q.C., for respondent.

---

Full Court.] FRASER *v.* DREW. [May 15.

*Assignment for the benefit of creditors—Action by assignee against sheriff levying under execution—Finding of fraud sustained.*

In an action brought by plaintiff as assignee of M. against defendant, the sheriff of the County of Queen's, who levied under execution on a portion of the goods covered by the assignment, the defence relied upon was that the deed of assignment was made fraudulently with intent to hinder and delay creditors.

It appearing that the jury had no difficulty in determining the only question upon which they had to pass, and their verdict being in accordance with that finding,

*Held*, that it could not be disturbed upon any reason based upon the circumstances under which it was rendered.

TOWNSHEND, J., dissented on the ground chiefly that the jury were influenced by matters subsequent to the assignment, which they were directed by the trial judge to disregard.

*H. McInnes*, for appellant. *W. B. A. Ritchie*, Q.C., for respondent.

---

Full Court.] DAVIS *v.* COMMERCIAL BANK OF WINDSOR. [May 15.

*Negligence—Dangerous excavation adjoining public thoroughfare—Duty of owner to fence—Proximate cause—Damages.*

In an action brought by plaintiff against defendants for having negligently and improperly suffered an excavation or cellar, adjoining a public thoroughfare in the town of Windsor, to remain open to said street without any fence, railing or other protection, so as to be dangerous to persons lawfully being upon or passing along said street, so that plaintiff fell into said excavation or cellar and was injured, the jury found, among other things, that there was negligence on the part of defendants in not having the cellar fenced, and that a reasonably safe fence would have prevented the accident. They assessed the damages which plaintiff was entitled to recover at $2,500. Defendants' building was destroyed in the fire of

October 17th, 1897. The accident to plaintiff occurred thirty-eight days later, and arose from plaintiff's horse becoming unmanageable, consequence of taking fright at a passing train, and jumping into the cellar, taking plaintiff, who had been standing on the sidewalk holding it, with it.

*Held*—1. The question of negligence was for the jury, and that their finding should not be set aside, even although the court disapproved of it as being extreme under the circumstances.

2. The obligation of the owner of property adjoining a highway, upon which there is a dangerous excavation, to fence it for the protection of foot passengers, applies equally to all persons lawfully using the highway.

3. The point that the proximate cause of the accident was the noise of the locomotive frightening plaintiff's horse was not open to defendants, that point having been abandoned at the trial, and the defence rested wholly upon the ground that defendants were not bound to fence, except for the protection of foot passengers. GRAHAM, E. J., dissenting.

4. The damages allowed by the jury were not excessive under the circumstances.

Per GRAHAM, E. J.—The excavation being an illegal obstruction to persons using the highway, defendants were bound to anticipate the possibility of horses being frightened at the ordinary passing of locomotives at that point.

*C. S. Harrington*, Q.C., and *F. T. Congdon*, for appellant. *A. Drysdale*, Q.C., and *J. A. Chisholm*, for respondents.

---

Full Court.] MEISNER *v.* MEISNER. [May 15.

*Public Instruction Act of 1895, c. 1—Powers of school trustees—Annual meeting—Notice of holding—Presumption as to posting of—Valuation of property for assessment purposes—Clause of act as to procuring from Municipal Clerk held directory only.*

In an action for damages for trespass for taking plaintiff's horse, defendants justified as trustees of School Section No. 40, in the County of Lunenburg, the horse having been taken under a distress warrant issued to recover the amount due by plaintiff for an assessment for school purposes.

At the annual meeting held in September, 1892, a resolution was passed voting the sum of $200 "towards the building of a schoolhouse;" and at the annual meeting held in June, 1896, a resolution was passed that $100 be added to the $200 previously voted. These sums became a charge upon the real and personal property of the school section, and the warrant issued was for the recovery of the proportion due by plaintiff and others. The trustees selected a site for the proposed building, but plaintiff relied in part upon a resolution of ratepayers passed at a meeting called for that purpose, by which it was resolved that the new schoolhouse should be erected on the site of the former building.

*Held*—1. The terms of the first two resolutions were sufficiently comprehensive to include payment of the price of a site for the building.

2. Under the terms of the Acts of 1891, c. 1, s. 24, the choice of the site for the school building was vested in the trustees, subject to the sanction of the inspector.

3. It was competent for the trustees to give notice of the time for the holding of the annual meeting without first filling a vacancy in their number caused by the removal of one of the trustees from the district, and that their action was not invalidated by the fact that the trustee who had so removed was not notified and did not sign the notice.

4. There was a presumption in favour of the required number of notices having been posted up, and that such presumption was not rebutted by evidence of plaintiff to the effect that he had omitted to post up a notice, which was given to him for that purpose.

5. Sec. 28, sub-sec. 3, which provides that for the purposes of the assessment the trustees are to obtain the valuations of the property of the inhabitants of the district from the municipal clerk is directory only, and the assessment was not invalidated by the fact that a copy of the valuation was procured from another official.

6. The assessment was not vitiated by the accidental omission of the property of D. & Son therefrom.

*F. B. Wade*, Q.C., and *W. B. A. Ritchie*, Q.C., for appellants. *A. Drysdale*, Q.C., and *J. A. McLean*, Q.C., for respondents.

---

Full Court.] OXLEY *v.* CULTON. [May 15.

*Registry Act R.S.N.S., c. 84—Equitable titles—Mortgage to trustee—Judgments against trustee personally.*

D., who was trustee for his sister M., invested money of M. on mortgage, taking and registering the mortgage in his own name. The property having been sold under order of foreclosure and sale, and the proceeds paid into court,

*Held*, that plaintiff, the substituted trustee for M., was entitled to the proceeds as against judgment creditors of D.

Per TOWNSHEND, J., and GRAHAM, E.J.—*Held*, that there is no provision in the Registry Act (R.S.N.S., c. 84) for the registration of equitable titles.

*H. Mellish*, for appellant. *R. E. Harris*, Q.C., for respondent.

---

Full Court.] WILLIAMS *v.* WOODWORTH. [May 15.

*Negligence—Suffering dog to go at large—Case for trial judge—Damages.*

In an action brought by plaintiff against defendant to recover the value of a number of sheep, which were alleged to have been killed and injured by defendant's dog, the evidence showed that after a number of

sheep had been killed a watch was kept, when defendant's dog and another, owned by C., were found attacking a sheep, defendant's dog having hold of the sheep at the time, that the two dogs had been heard by defendant barking in the vicinity on several occasions, but were supposed to be chasing rabbits, and that, after defendant's dog was sent away, no more sheep were destroyed.

*Held*—Per MEAGHER, J., TOWNSHEND, J., concurring,

1. There was evidence to support a finding that it was defendant's dog which did the killing.

2. The case was one that was peculiarly for the trial judge, and his conclusion should not be interfered with, except upon clear grounds.

3. The learned trial judge was justified in holding defendant liable for the value of the sheep which his dog was found killing, and for one-half of the remaining damage.

Per GRAHAM, E.J., HENRY, J., concurring, The trial judge was not justified in drawing the inference he did as to the sheep killed previously to the date when the two dogs were found uniting in the attack.

*J. J. Ritchie*, Q.C., for appellant. *W. E. Roscoe*, Q.C., for respondent.

---

Full Court.] BARROWMAN *v.* FADER. [May 15.

*Equitable execution—Receiver—Power of County Court judge—Word "remedy"—County Court Act, Acts of 1889, c. 9, s. 22.*

Plaintiff recovered judgment against defendants in the County Court, and issued execution, but was unable to obtain satisfaction for want of property of defendants upon which to levy. It appeared, however, that defendants were in possession of a lot of land, with a house and barn thereon, under an agreement for purchase for the sum of $2,000, of which $100 was paid on the signing of the agreement, and the balance was to be paid in instalments. Under the terms of the agreement, the defendants were to have possession until the completion of the payments, provided that in default of payment of any of the instalments the vendor should have the option of cancelling the agreement and of resuming possession, in which case any payments made were to be forfeited. Two hundred and fifty dollars in all had been paid in accordance with the terms of the agreement.

*Held*—1. The case was a proper one for the appointment of a receiver by way of equitable execution

2. The judge of the County Court has power to appoint such a receiver.

3. The appointment of a receiver is a "remedy" which must be given effect to when necessary, under s. 22 of the County Court Act.

*A. Whitman*, for appellant. *J. A. Chisholm*, for respondent.

Full Court.] DUNBAR *v.* MCNEIL. [May 15.

*Execution—Irregularity—No return to former execution—Compromise of claim after arrest.*

Where on an application to set aside a writ of execution it appeared that a previous execution had been issued in the same matter, and that defendant had been arrested thereunder, but that no return had been made thereto,

*Held*, allowing defendant's appeal with costs, that the execution moved against was irregularly issued, and that there was clear ground for setting it aside.

It appeared that, after defendant's arrest, steps were taken to secure his discharge under the Act for the relief of indigent debtors; but before the examination took place a compromise was arranged between the agent of plaintiff's solicitor and defendant's solicitor, by which defendant was allowed his liberty on giving promissory notes for the sum of $300, payable in three, nine, twelve and eighteen months, and that, prior to the issue of the execution sought to be set aside, the sum of $150 had been received by plaintiff's solicitor from defendant's solicitor on account of these notes. Plaintiff's solicitor denied that he had authorized the making of the compromise or the acceptance of the notes.

*Held*, that the acceptance of the $150 paid to him seven months after defendant was arrested, with knowledge that he was no longer under arrest, was strong evidence of consent.

*Held*, also, that the statement in his affidavit that, "from the time the execution was issued in 1888 until a few weeks ago, I was not aware that the defendant was able to respond the said judgment, or I would have endeavoured to enforce payment of it," was inconsistent with the belief that defendant was being held under execution.

*D. McNeil*, in support of appeal. *F. T. Congdon*, contra.

---

Full Court.] FISHER *v.* COOK. [May 15.

*Teacher in common schools—Salary attachable for debt—Equitable execution—Discretion of judge—Smallness of amount not sufficient ground for interfering—Chose in action—Right of assignee to sue in his own name.*

Under the provisions of the Public Instruction Act of 1895, c. 1, s. 37, the sum of money specified therein is paid by the Government of the province to teachers employed in the public schools, in proportion to the number of days taught. By s. 39, the distribution of the money so appropriated is made semi-annually through the inspectors of schools.

Plaintiff, who had obtained an assignment from defendant under the provisions of the Collections Act, subsequently applied to a judge at Chambers for and obtained an order for the appointment of a receiver, for

the purpose of obtaining payment of the sum of $50 or $60, which defendant as a teacher in one of the schools of the province was entitled to receive from the inspector of his district under the provisions of the Act quoted. Defendant's contract for the performance of his duties being made with the trustees of the school section in which he was employed, and there being no contract, directly or indirectly, between defendant and the Government,

*Held*, that defendant's salary was not exempt from attachment for debt under the principle of the cases applicable to officers employed in the public service.

*Held*, that the amount coming to defendant, being one that could not be reached by ordinary legal execution or garnishee process, plaintiff was entitled to the equitable relief sought.

*Held*, that whether it was "just and convenient" to grant plaintiff's motion was a matter in the discretion of the judge, with which the court ought not to interfere except for good cause.

*Held*, that the smallness of the amount involved was not sufficient ground for such interference.

*Quære*, whether the amount which defendant was entitled to receive from the inspector was a chose in action assignable, for which the assignee would have a right of action in his own name. *Fraser* v. *McArthur*, 12 N.S.R. 498, referred to. *McKay* v. *The Municipality of Cape Breton*, 18 S.C. 639, distinguished.

*W. B. A. Ritchie*, Q.C., for appellant. *J. A. McLean*, Q.C., for respondent.

---

Full Court.] HEARN *v.* MCNEIL. [May 15.

*Solicitor—Retainer of counsel by—Question of authority—Delegation of duty—Costs and taxation.*

Defendant retained H. to act for him in proceedings instituted before justices of the peace against defendant and others for a violation of the Customs Act.

After an appeal had been perfected from the justices to the County Court, H., who had no authority from defendant for that purpose, retained plaintiff to act as counsel on the appeal.

Plaintiff admitted that he never had any dealings with defendant directly or by letter, and that no one but H. retained him to act for defendant.

*Held*, affirming the judgment of the County Court judge, and dismissing plaintiff's appeal with costs, that the employment of plaintiff by H. was a delegation of a duty which H. himself could perform, and for which he alone was personally liable.

*Quære*, in any case, whether plaintiff could recover for such services as those claimed for without taxation either before or at the trial.

*R. E. Harris*, Q.C., for appellant. *J. A. Chisholm*, for respondent.

Full Court.] GRANT *v.* WOLFE. [May 15.

***Trespass to land—Executrix made a party to continue action—R.S., c. 113, s. 1, held applicable—Continuing cause of action, O. 34, R. 46.***

In an action for trespass to land brought in 1895, where the statement of claim included a claim for erecting and maintaining fences and depasturing cattle, the plaintiff died in July, 1897, and his executrix was made a party in April, 1898.

*Held*, affirming the judgment of the trial judge, that R.S., c. 113, s. 1, in relation to the maintenance of actions of trespass by executors and administrators, applied.

*Held*, also, that the claim was for a continuing cause of action within the meaning of O. 34, R. 46.

*J. A. McLean*, Q.C., for appellant. *F. B. Wade*, Q.C., for respondent.

---

Full Court.] MURRAY *v.* KAYE. [May 15.

***Practice—Summons issued for debt or liquidated demand only—Indorsement—Amendment—Costs—Affidavit for capias, O. 44, R. 1.***

Defendant applied to a judge at Chambers to set aside, with costs, the writ of summons issued by plaintiff, and the service thereof, and also the capias or order for defendant's arrest, and all proceedings thereunder, on the following among other grounds: (*a*) Because the provisions of O. 6, R. 3, of the Judicature Act were not complied with by stating in the indorsement the amount claimed for costs, or that upon payment of the amount claimed to the plaintiff or his solicitor within six days from the service of the writ, further proceedings would be stayed. (*b*) Because the affidavit upon which the capias was issued did not shew that any writ of summons was issued at the time the same was sworn to. The application having been dismissed,

*Held*—1. The plaintiff's claim being for a debt or liquidated demand only, compliance with R. 6, O. 3, was compulsory; and the writ, if not amended, must be set aside as irregular, and the Chambers Judge was wrong in dismissing the application.

2. The English practice should be followed, and the defendant should have leave to amend on payment of costs of the motion at Chambers and of the appeal; the defendant should have six days from the service of the amendment to comply with the terms of the notice; and if the amendment was not made within five days and the costs paid within twenty days, the appeal should be allowed with costs, and the writ and order for arrest set aside, and the bail bond delivered up to be cancelled.

3. The place of residence of the plaintiff was sufficiently shewn in his

affidavit, in which he was described as "of Halifax in the County—Professor in Dalhousie College."

4. The objection taken to the affidavit upon which the capias was issued, that it did not show that any writ of summons was issued at the time it was sworn to, could not be sustained, O. 44, R. 1, not requiring the affidavit upon which the order for arrest is based to contain such a statement.

*E. P. Allison*, for appellant. *W. E. Fulton*, for respondent.

---

Full Court.] NAUGLER *v.* JENKINS. [May 15.

*Statute of limitations, R.S., c. 112, ss. 11 & 21—Judgment registered to bind lands—Acknowledgment in writing within twenty years—Execution—Estoppel.*

In May, 1868, defendant recovered judgment against N. for $253.65, of which a certificate was registered to bind real estate. In March, 1874, N. conveyed to his son, the plaintiff, a portion of the lands bound by the judgment, the conveyance being prepared by and delivered in defendant's presence. In 1889 N. died, having some years previously given defendant an acknowledgment in writing showing that the sum of $182.30 was still due on the judgment. In 1898 defendant obtained an order for leave to issue execution, and issued execution under which the sheriff levied on the land conveyed to plaintiff. The principal contention for plaintiff was that all proceedings on the judgment were barred by the Statute of Limitations, R.S., c. 112, s. 11, more than twenty years having elapsed since the recovery of the judgment.

*Held*—1. The proceeding by the sheriff was not an entry to recover land or the rent thereof, and that s. 11 had therefore no application.

2. The proceeding being one to recover a sum of money secured by a judgment, in relation to which an acknowledgment in writing had been given within twenty years, came directly within the provisions of s. 21.

3. The part taken by defendant in connection with the drawing and delivery of the deed, at the request of C., did not constitute an estoppel.

*F. B. Wade*, Q.C., and *V. J. Paton*, for appellant. *J. A. McLean*, Q.C., for respondent.

---

Full Court.] HART *v.* MCMULLIN. [May 15.

*Millowner—Obligation to keep safely water stored up by dam—Counter-claim against lower proprietor for backing up water—Easement abandoned for seventeen years.*

Plaintiff and defendant purchased their respective mill sites in November, 1892, at an auction sale, which took place under a power of sale contained in a mortgage given by the Nova Scotia Land and Manufacturing

Co., the former owner, to M. and N. The deeds contained no special grants or reservations of easements.

In May, 1897, a dam erected by defendant for the purpose of storing up water for the supply of his mill was carried away, and the water, released by the breaking of the dam, with a large quantity of logs, came down the river with great force and carried away the dam of plaintiff's mill, which was situated a short distance below that of plaintiff.

To the action brought by plaintiff to recover damages for the injury done, defendant counter-claimed damages for the backing up by plaintiff's dam of water on defendant's land in such a way as to interfere with the effective operation of defendant's mill.

The evidence showed that from 1872 until 1875 the two mills were operated by the Nova Scotia Land and Manufacturing Co., but that, in 1875, the dam of the Pulp and Paper Mill was carried away, and was not rebuilt down to the time of the sale by the mortgagees and the purchase by plaintiff.

*Held*, that there was no continuous easement apparent and visible to anyone inspecting the property.

*Held*, also, that nothing was to be assumed in plaintiff's favour from the existence at the time of the purchase by him of a small portion of the framework of the old top of the dam.

*Held* (per RITCHIE, J., following *Rylands* v. *Fletcher*, L.R. 1 Ex. 279, 3 H H. 330) that a millowner who causes water to be stored up by the erection of a dam is responsible for its safe-keeping.

*W. B. Ross*, Q.C., and *H. McInnes*, for defendant (appellant). *R. L. Borden*, Q.C., and *R. E. Harris*, Q.C., for plaintiff (respondent).

---

Full Court.] MILLER *v.* CORKUM. [May 15.

*Trespass to land—Death of plaintiff—Survival of action, R.S., c. 113, s. 1—Order requiring plaintiff's executrix to appear and obtain leave to carry on proceedings, O. 17, R. 8.*

On the 30th January, 1897, M. commenced an action of trespass against defendant claiming damages for various acts of trespass, including the erecting and maintaining of fences.

On the 20th July, 1897, M. died, having appointed G. his sole executrix. On the 8th March, 1898, counsel for defendant applied under O. 17, R. 1, and obtained an order, permitting him to sign judgment for his costs of defence, when taxed, in the event of the failure of G. to appear within twenty days after the service of the order, and obtain leave to continue and proceed with the action.

G. failed to appear, having been advised that the cause of action was not one that survived and that it was not necessary for her to do so; but ultimately an application was made to the learned judge, on behalf of G., to rescind and set aside the order, and for a stay of proceedings.

The learned judge refused to set aside the order, on the grounds that the application was not one to alter the order on the ground of slip or oversight, and that the order had been drawn up and represented the real opinion of the Court, and that in such case he had no jurisdiction to alter it; but he gave leave to appeal from the order, notwithstanding that the time for appealing had elapsed, and he directed a stay of proceedings.

*Held*, that the cause of action being one that under the provisions of R.S., c. 113, s. 1, survived, in part at least, to the executrix, defendant's counsel was entitled to the order under O. 17, R. 8, requiring her to appear and obtain leave to carry on the proceedings, and that the order was rightly made.

*Held*, also, that the learned judge was right, for the reasons stated by him in refusing to rescind and set aside the order.

*V. J. Paton*, for appellant. *J. A. McLean*, Q.C., for respondent.

---

Full Court.] ROSS *v.* SUTHERLAND. [May 15.

*Solicitor and client—Misappropriation by solicitor of money entrusted to him to pay off mortgage—Foreclosure—Agency—Estoppel.*

Defendant, who was desirous of purchasing from C. land of which C. was owner, subject to a mortgage for $1,000, held by F., was referred by C. to M., as his solicitor, through whom the negotiations could be carried on. When the negotiations were completed, defendant paid to M. the sum of $1,600, which represented the whole price of the property, including the amount of the mortgage held by F. M. absconded from the province without having paid over to F. the amount due her. The evidence showed that F. executed a release of the mortgage and delivered it to E. C., with instructions not to allow it to go out of her hands until she received the money, and that E. C. placed the release for a time in the hands of M., to whom she communicated her instructions, and that the release was finally returned to E. C. by M. It appeared, however, that M. was never employed in any capacity by F., and that F. was not aware that the release was in his hands.

In an action by plaintiff, as executor of F. for the foreclosure of the mortgage,

*Held*, affirming the judgment of GRAHAM, E. J., and dismissing defendant's appeal with costs, that plaintiff was entitled to the foreclosure sought.

*Held*, also, that plaintiff was not estopped by statements made by E. C. to defendant, after the payment of the money by defendant to M., from which it was claimed defendant was led to believe that F. had been made aware that the money had been paid over to M., and that she looked to him for payment, it not appearing that E. C. made the statements in question, intending that defendant should act upon them, or that the statements were of such a character that any man of ordinary intelligence

would be likely to believe them to be true, and that they were meant to be acted upon. Plaintiff could not be estopped from showing the real facts by other statements made by E. C. to a third party, and, without authority, repeated to defendant.

*W. B. A. Ritchie*, Q.C., for appellant. *H. Mellish*, for respondent.

---

Ritchie, J.] MICHAELS *v.* MICHAELS. [August 24.

*Married Woman's Property Act of 1884—R.S.N.S., 5th series, c. 94—Action will not lie by married woman against her husband on promissory note —Words "payable to the order of."*

In June, 1892, defendant purchased from L. all her interest in the firm of L. & M., and, as part of the consideration for the purchase, gave her a promissory note, which was made payable to her order. Very shortly after the note was given, L. gave the note to her sister, the plaintiff, as a present, indorsing and delivering it to her at the time. In an action by plaintiff against her husband, the maker of the note, to recover the amount due thereon,

*Held*—1. The words "payable to the order of," indorsed on the note, imported an intention to transfer the note, and constituted a sufficient indorsement.

2. But the plaintiff could not recover on the note as against her husband, the Married Woman's Property Act of 1884, R.S.N.S. (5th series), c. 94, which was in force when the note was indorsed to plaintiff, containing no express authorization of such a contract, and s. 81 of the Act providing that nothing in the Act contained should authorize any married woman to make a contract with her husband otherwise than in the Act expressly mentioned, and it being clear that at common law no such contract could be made.

3. The Married Woman's Property Act, 1898, under which plaintiff might have recovered, did not apply, not having been in force when the note sued on was transferred to plaintiff.

*J. M. Chisholm* and *H. Mellish*, for plaintiff. *W. B. A. Ritchie*, Q.C., for defendant (the Bank of Nova Scotia, which was permitted to intervene).

---

Townshend, J., in Chambers.] [September 13rd.

IN RE RYAN.

*Interpleader summons—Service out of the jurisdiction.*

One Cornelius Ryan, who was insured in the Mutual Life Insurance Co., of New York, died and the insurance was claimed by a party in Nova Scotia and a party of Montreal. The insurance company issued an interpleader summons in Nova Scotia and obtained an order ex parte directing service of same on the Montreal claimant. After service, the Montreal

claimant entered a conditional appearance to the summons and moved to set aside the order and service in Montreal.

*Held*, that in the absence of a statute or rule of Court having the force of a statute authorizing service the order and service out of Nova Scotia must be set aside.

The following authorities were referred to: *Credits Gerundense* v. *Van Weede* 12 Q.B.D. 171: *Re Lusfield*, 32 Ch.D. 131; *Le Campagnie Generale d'Eau Minerales* (1891) Ch D. 451; Piggott on Service out of the Jurisdiction 145.

*Joseph A. Chisholm*, for the motion. *A. A. MacKay*, contra.

## Province of New Brunswick.

### SUPREME COURT.

McLeod, J.] DIXON *v.* WALLACE. [August 30.

*Arrest—Capias—Defendant previously served with writ for service abroad.*

Defendant may be arrested on capias without Judge's order on coming within the jurisdiction though previously served with a writ for service abroad.

*M. B. Dixon*, Q.C., for plaintiff. *W. B. Wallace*, Q.C., for defendant.

Barker, J., in Equity.] CRONKITE *v.* MILLER. [August 30.

*Practice—Parties—Husband and wife.*

A suit relating to a wife's separate property must not be brought in the name of herself and husband, but in her own name alone or by her next friend. Since the Married Woman's Property Act, 1895, such suit may be brought in her own name.

*F. St. John Bliss*, for defendant.

### EXCHEQUER COURT—ADMIRALTY DISTRICT.

McLeod, Loc. J.] WYMAN *v.* DUART CASTLE. [June 14.

*Jurisdiction—Action for personal injury done by ship—Endorsement of claim on writ.*

The Admiralty Court has jurisdiction under Act 54-55 Vict., c. 29, in an action against a ship for personal injury done by such ship to a person employed on board.

By Rule 5 of the Admiralty Rules, 1893, it is provided that the writ of summons shall be endorsed with a statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed. The plaintiff's claim endorsed on the writ of summons was for damages for personal injuries caused to him by the defendant steamer. The Court negatived the action. The plaintiff then asked expenses incurred by him at hospital, under s. 207 of the Merchant's Shipping Act, 1894.

*Held*, that the claim could not be assessed under the the endorsement of the writ of summons.

*A. A. Stockton*, Q.C., and *C. J. Coster*, for plaintiff. *J. R. Armstrong*, Q.C., for defendant.

---

# Province of Manitoba.

## QUEEN'S BENCH.

Dubuc, J.] IN RE SOLICITOR. [July 5.

*Costs—Taxation—Solicitor and client—Agency terms to solicitor abroad—Appeal from Master's finding as to facts.*

This was a taxation under an order of reference of bills of costs between solicitor and client. The solicitor had rendered his bills at $769.59 being $414.25 for fees, and $355.34 for disbursements. He remitted one-half the fees or $207.15 to the Toronto solicitors of the client through whom the solicitor had been employed, under an arrangement by which he was to allow them agency terms, and kept the balance of the bill, $562.49, out of the money of the client in his hands. The taxing master deducted $221.40 from the bills as rendered and certified that the solicitor should pay the costs of the reference, and should also pay the client the amount taxed off, namely $221.40. On appeal from the report;

*Held*. 1. The rule of law requiring the solicitor to pay the costs of the reference if one-sixth or more is taxed off the bill is still in force in Manitoba.

2. Although the solicitor had remitted $207.15 of the total bills to the Toronto solicitors of the client and only demanded the allowance of the balance, $562.49, whereas the Master allowed him $548.19, the bills to be taxed, for the purpose of the rule as to one-sixth, must be considered to be the full amount as rendered, and that the solicitor was liable for the costs of the reference, but not of the order of reference.

3. The Master's finding as to charges of negligence and mistakes on the part of the solicitor should not be interfered with.

4. The solicitor should have credit for the amount remitted to the Toronto solicitors as against the amount taxed off the bills, as they were

the agents of the client in employing him, and the money sent them should be considered as paid to the client, the solicitors not being entitled to it for themselves.

*Metcalfe*, for solicitor. *Mulock*, Q.C., for client.

---

Killam, C. J.] DICK *v.* WINKLER. [August 10.

*Landlord and tenant—Distress for rent—Rent payable in kind—Distraining after six months from end of term—Liability of landlord for illegal act of bailiff.*

The plaintiff's claim was for damages against defendant for wrongful seizure and sale of his goods and chattels under color of distress for rent, under a seven months' lease, terminating 1st October, 1898. Plaintiff by way of rent was to deliver all the wheat grown upon the demised premises to defendant, as soon as it should be threshed, and defendant was to sell it and retain one-half the proceeds for himself and pay over the balance to plaintiff. Default having been made by plaintiff in delivering the wheat as agreed, defendant, on 3rd March, 1899, gave a distress warrant to a bailiff to remove what was claimed to be one-half the value of the wheat grown.

The bailiff did not make the seizure until the 3rd of April, and although plaintiff remained in possession, nothing had been done by way of extending the tenancy or creating a new lease.

*Held*, that the rent reserved might lawfully have been distrained for, but that the distress was illegal under 8 Anne, c, 18, ss. 6, 7, having taken more than six months after the determination of the tenancy; also that defendant should be held liable for the acts of his bailiff, although no evidence was given to show that defendant knew the date of the seizure, because he had learned of the fact of the distress before the sale took place, and took advantage of the proceedings by receiving the proceeds, and it is proper to infer in the absence of evidence to the contrary that he either knew of the illegality or meant to take upon himself without inquiry the risk of any irregularity the bailiff might have committed, and to adopt all the bailiff's acts. *Lewis* v. *Read*, 13 M. & W. 834, followed. Verdict for plaintiff for the value of the goods seized, and costs of the action, and set-off allowed to defendant for one-half the value of the wheat grown on the premises.

*Forrester*, for plaintiff. *Elliott*, for defendant.

# Province of British Columbia.

## SUPREME COURT.

Full Court.]

HORNBY *v.* NEW WESTMINSTER SOUTHERN RAILWAY COMPANY.

*Railway—Water and watercourses—Flooding of adjoining land caused by construction of railway embankment—Damages—Negligence—B.C. Stat. 1887, c. 36.*

The plaintiffs were the owners of land having a slope and natural drainage towards the sea. The defendants under authority of an Act of Parliament had constructed a line of railway through this land (which was then owned by the plaintiffs' predecessors in title) and had thereby cut off the ditches which had been constructed on the lands in question for the purposes of drainage. The defendants for the purpose of protecting their line cut a ditch parallel with the embankment on which the line was built, and cutting across the ditches on the plaintiff's lands which thereafter emptied into the defendants' ditch. The defendants constructed a flood gate for their ditch, and the flood gate being insufficient to carry off the water accumulated in the defendants' ditch, the plaintiffs' lands were flooded.

*Held*, that under the defendants' special Act (incorporating section 16 of the Railway Clauses Consolidation Act, 1845) the construction of the embankment and ditch were authorized by the Legislature and that the plaintiffs could not complain of the flooding of their lands caused by the construction of the embankment.

*Held*, also (reversing the judgment of IRVING, J.), that no duty or obligation was imposed on the defendants to see that the plaintiffs had an outlet through their ditch for the water which collected on their lands.

*Wilson*, Q.C., and *Reid* for appellant. *Davis*, Q.C., and *Corbould*, Q.C., for respondents.

---

Martin, J.] DUNLOP *v.* HANEY. [August 11.

*Mineral Acts—Adverse proceedings—Overlapping—Measurements—Abandonment and re-location—B.C. Stat. 1898, c. 33, s. 11.*

Action (tried at Vancouver) under the Mineral Acts to establish plaintiff's title to the Legal Tender mineral claim which it was alleged was overlapped by the boundaries of the Pack Train and Legal Tender or its re-location the Legal Tender Fraction mineral claim.

*Held*, that in adverse proceedings if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title and wait till

rebuttal. The plaintiff must show the measurements of the ground in dispute in order to prove overlapping of claims. An affidavit by a re-locator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim. Action dismissed.

*Davis*, Q.C., for plaintiff. *Wilson*, Q.C., and *John Elliot*, for defendant Haney.

---

Full Court.] KIRK *v.* KIRKLAND. [June 27.

*Land Registry Act—Tax Sale—Certificate of title based on—Whether ousts a prior certificate in hands of former owner or not.*

Appeal by defendant Mary M. Johnson, from judgment of IRVING J., in favour of the plaintiff. The plaintiff, who was the owner of certain lots in Vancouver, entered into an agreement for the sale of one of them and then discovered that a conveyance (dated 20th July, 1898) of the lot from the defendant Kirkland, the assessor of taxes, to the defendant Johnson, had been registered. Plaintiff sued to have the deed set aside, and for a declaration that she was the owner of the property. The defendant Johnson pleaded that the said lots were on 15th July, 1896, duly offered for sale by public auction by the defendant Kirkland for arrears in taxes thereon, and were purchased by one S. K. Twigge, whose certificate of purchase and interest thereunder were subsequently transferred to her, the defendant Johnson.

*Held* (Martin, J., dissenting), that a certificate of title based on a tax deed does not, ipso facto, oust a prior certificate of title outstanding in the hands of the former owner, and the holder of such later certificate must affirmatively shew the regularity of all the tax sale proceedings in order to make good his title.

*Martin*, Q.C., A. G., for appellant. *Wilson*, Q.C., for respondent.

## Book Reviews.

*The Common Form Draftsman*, a new book of Forms in use in the Queen's Bench Division of the High Court of Justice in England, by ERNEST EDWARD WILD, B.A., LL.M., and FRANK SHEWELL COOPER, M.A., Barristers-at-Law, London: Butterworth & Co., 7 Fleet Street, E.C., Law Publishers, 1899.

As the compilers point out this is not intended to compete with any extensive work such as Chitty's Forms, but merely aims at furnishing in a compendious form a collection of the precedents most frequently required in a Solicitor's office in proceedings in the Queen's Bench Division, and it is prepared on the assumption that such books as the "Yearly Supreme Court Practice," or the "Annual Practice," are in the hands of its readers. Whilst this book is of special interest to the profession in England, there are some forms in it which, owing to the similarity of practice, may usefully be examined, and more or less used in the proceedings in our Court.

## Flotsam and Jetsam.

The following lines were recently noticed as having been written on the back of an appeal book when in the possession of one of the judges of the Ontario Court of Appeal a few years ago. Our "poet" not being at hand we cannot say whether the lines are original, or written down from memory to relieve the tedium of an argument. If the former they should be preserved:

"MONICA'S LAST PRAYER.

O could my grave at home, at Carthage, be!
Care not for that, but lay me where I fall;
Everywhere heard will be the judgment call:
But at God's altar, O remember me!
Thus Monica: and died in Italy.
Yet fervent her longing, through all her course,
For home at last and burial
With her own husband by the Libyan Star,
Had been—But, at the last to her pure soul,
All ties with all beside seemed vain and cheap,
And union before God her only care,
Creeds change, rites pass, no altar standeth whole,
Yet we her memory, as she prayed, will keep,
Keep by this—Life with God and union there."

A GREAT LAWYER.—A truly great lawyer is one of the highest products of civilization. He is a master of the science of human experience. He has outlived the ambition of display before courts and juries. He loves justice, law and peace. He has learned to bear criticism without irritation, censure without anger and calumny without retaliation. He has learned how surely all schemes of evil bring disaster to those who support them,

and that the granite shaft of a noble reputation cannot be destroyed by the poisoned breath of slander. A great lawyer will not do a mean thing for money. He hates vice and delights to stand forth a conquering champion of virtue. The good opinions of the just are precious in his esteem; but neither love of friends nor fear of foes can swerve him from the path of duty. He esteems his office of counsellor as higher than political place or scholastic distinction. He detests unnecessary litigation, and delights in averting danger and restoring peace by wise counsel and skillful plans. The good works of the counsel-room are sweeter to him than the glories of the forum. He proves that honesty is the best policy and that peace pays both lawyer and client better than controversy. In a legal contest he will give his client the benefit of the best presentation of whatever points of fact or of law may be in his power; but he will neither prevent the law nor falsify the facts to defeat an adversary. The motto of his battle flag is;—Fidelity to the law and the facts; Semper fidelis. C. C. BONNEY.

## *APPOINTMENTS.*

*From the Ontario Gazette of October 7.*

PROVINCIAL SECRETARY'S DEPARTMENT,

TORONTO, October 2nd, 1899.

His Honour the LIEUTENANT-GOVERNOR-IN-COUNCIL has been pleased to appoint the following Barristers-at-Law to be Her Majesty's Counsel learned in the Law for the Province of Ontario, and to direct that the said Barristers do take precedence in the Courts of Ontario, as between themselves, in accordance with the dates of their being respectively called to the Bar, but next after Her Majesty's Counsel learned in the Law for the Province of Ontario, appointed by His Honour the Lieutenant-Governor on the 31st day of December, A.D. 1889: Henry O'Brien, William R. Riddell, Walter Barwick, Wallace Nesbitt, Charles J. Holman, Oliver A. Howland, Elias Talbot Malone, Samuel C. Biggs, William Macdonald, Thomas G. Blackstock, George G. S. Lindsey, Louis F. Heyd, Herbert H. Dewart, Francis B. Denton, James W. Curry, John M. Clark, Herbert McD. Mowat, William Roaf and William M. Douglas, Toronto; Napoleon A. Belcourt, Angus W. Fraser and Francis R. Latchford, Ottawa; John J. Scott, George Lynch-Staunton and S. Frederick Washington, Hamilton; Albert O. Jefferey, Thomas T. Macbeth and Thomas H. Purdom, London; John L. Whiting, Kingston; Robert Bird, Woodstock; James Harley and Willoughby S. Brewster, Brantford; William H Biggar, Belleville; George G. McPherson and James P. Maybee, Stratford; Dennis J. Donahue and James M. Glenn, St. Thomas; Robert F. Sutherland, Windsor; Hon. James T. Garrow and Philip Holt, Goderich; John B. Rankin and John A. Walker, Chatham; Edmund J. Reynolds, Brockville; Elihu B. Edwards and William A. Stratton, Peterborough; James Liddell, Cornwall; John B. Jackson, Ingersoll; Charles F. Farwell, Sault Ste. Marie; John Birnie, Collingwood; William M. German, Welland; Walter S. Herrington, Napanee; James R. O'Reilly, Prescott; David B. Simpson, Bowmanville; Charles W. Colter, Cayuga; T. H. A. Begue, Dundas; James Craig, Renfrew, William A. Dowler, Tilsonburg; Alexander Stuart, Glencoe.

E. J. DAVIS, Provincial Secretary.