Canada Law Journal.

VOL. XXXIV. FEBRUARY 15, 1898. NO. 4.

The Department of Justice has accorded the reporters of the Supreme and Exchequer Courts of Canada the privilege of holding briefs in those Courts. The reporters of the Ontario Courts enjoy a like privilege, and the English custom has always been to allow the reporters to practice as counsel.

Very many there are of the profession in the Eastern Provinces that have flocked to British Columbia. It is therefore of interest to note a decision of Drake, J., on an application by a solicitor of the North-West Territories for an order on the Law Society of British Columbia to compel them to admit him as a solicitor for that Province. The applicant was a solictor in N.W.T., where three years is the compulsory time to study. After having been admitted he complied with the regulations affecting the profession in Manitoba, where five years is the required period, and was admitted as a solicitor there. The B.C. Law Society rejected his application on the ground that having obtained the status of a solicitor in a place where five years study is not compulsory, he could not (by being admitted in Manitoba, where five years is compulsory) claim admittance in British Columbia without completing the full term of five years as a student. The learned judge held, however, that the applicant could select whichever of those variou. admissions most nearly fulfilled the requirements of the Act, and that if it were intended that five years' study should be essential to the application before he could obtain admittance, the Act would have said so. He also considered that the applicant should not be prejudiced by the delay, and said that if he had the power he would order that the notice should be given nunc pro tunc.

At a recent trial at the Assizes in Liverpool Mr. Justice Bruce, in the absence of counsel who had been retained for one of the parties, permitted his solicitor to examine the witnesses and address the jury on behalf of his client; and see 80 L. T. Jour. 156, 157. In 1895 a solicitor claimed the right to be heard before the Irish Privy Council on behalf of his client, but he was refused audience; in that case it did not appear that counsel had been retained: see 100 L. T. Jour. 45. In *Reg.* v. *Maybury*, 11 L. T. 566 it was held that where a party appears in court by counsel and the case is on, and the counsel has been fully seized of it, his authority cannot be revoked by his client so as to give his client the right himself to address the court. But if counsel is not seized, as when upon a motion, the hearing has proceeded no farther than the reading of affidavits, and the counsel has addressed no arguments to the court, he may in that case at the instance of his client, be permitted to withdraw, and the client himself may be heard. In *Newton* v. *Chaplin*, 10 C. B. 356, a plaintiff, who was a barrister, was not allowed to be heard on his own case, after his counsel had addressed the court, and in a recent case in the Supreme Court the counsel for one of the parties having been heard out of his turn and having left the court, his client claimed the right to be heard on points subsequently raised by the counsel on the other side and not touched upon by his own counsel, but his application was refused.

We publish in another place the recent judgment of the Supreme Court of Nova Scotia in *The Queen* v. *Halifax Electric Tramway Co.*, which brought up for consideration the law affecting Sunday observance in relation to the legislation of that province touching the question, the Court holding (the Chief Justice dissenting), that the Provincial Legislature has no power (except possibly in certain particulars) to deal with the question. The case is one of general interest, especially in Ontario, and we therefore publish the judgments in extenso, although it only bears

indirectly upon the law in that Province. In connection with this case an interesiing question may arise, which has only been touched upon in one of these judgments. The principle has now been well settled by the Privy Council, that in many matters which may be dealt with by the Dominion Parliament, under the power possessed by them under s. 91 of British North America Act, so long as the Dominion has not legislated on the subject, the Province may deal with them under clause 16 of s. 92, as matters of a private or local nature. This doctrine was, we think, first hinted at in a judgment given by the late Lord Selborne in *L'Union St. Jacques* v. *Belisle*, L.R. 6 P.C. 31. It has also been spoken of in several other cases, but perhaps most clearly in the prohibition case, (App. Cases, 1896,) where the Ontario local option law was upheld on the ground that so long as the Dominion did not exercise its powers, and cover the whole ground by enacting a prohibitory law or something equivalent to it, the province might pass a local option law, which would be valid, although it would be superseded by any Dominion legislation which might be passed covering the same ground.

THE LIMITS OF JUDICIAL AUTHORITY.

The question incidentally discussed in a former issue as to the right of a court of law to exercise jurisdiction over matters in controversy seems worthy of a little further consideration. It must be conceded that no court has an unlimited and arbitrary right to exercise its jurisdiction at pleasure, but on the contrary that the right of all courts of law to exercise their jurisdiction is governed and circumscribed by common law. In order that any court may properly exercise its jurisdiction, as a general rule, its assistance must be invoked by some person or persons having a right to invoke it, and except in certain exceptional cases, e.g., such as calling upon an officer of the court to answer for his conduct, the court never acts except upon the due and proper application of a suitor —and even then the court does not acquire a general and

unlimited jurisdiction either over the litigants personally, or over the subject matter of the controversy, but its jurisdiction is confined to the adjudication of the matter presented for its decision; and only as far as may be necessary for the purpose of giving due effect to its decision can it properly exercise jurisdiction on the person of the suitor.

The right of a suitor to invoke the jurisdiction of the Court for any specific object is not, however, and ought not to be hampered by the imposition of any liability to submit not only the matter in controversy, but all his other acts and deeds, to the inspection and judicial determination of the court. It is a self-evident proposition that if a man brings an action to recover a promissory note, that gives the court no right, ipso facto, to proceed and enquire whether he has been guilty of libelling the defendant. This may be considered a reductio ad absurdum, but cases of that kind very often serve best to illustrate principles. It is on the principle we have referred to that the court acts when it requires an undertaking to be given by a plaintiff to abide by the order of the court as to damages as a condition of granting him an interlocutory injunction; because without that undertaking the court would have no inherent jurisdiction in a suit brought by the plaintiff to visit him with damages, however much he might be thought to have been in the wrong in his suit; and consequently but for such undertaking the defendant, injured by the granting of the injunction, might be driven to a cross action or counter-claim.

It is for the same reason that in England it has been always customary to insert in orders for the taxation of a solicitor's bill on the application of his client, a submission to pay what is found due, on such taxation, (and see Ont. Rules, Forms 99, 101) because without that submission the court would have no inherent power on the client's application for a taxation to make an order for payment by him, in the absence of any rule or statutory provision, enabling it to do so, and the solicitor would be driven to an action to recover what might be found due to him. It is upon this principle

also that the court sometimes, as a condition of giving costs, requires from a litigant an undertaking not to bring an action. It is always open to the litigant to refuse to accept costs on any such condition, and wherever a suitor is entitled to relief ex debito justitiæ the court has no right to clog the relief with any such conditions.

It was on this principle too that the procedure by counter-claim seems to have been introduced, whereby a defendant is enabled to assume the character of a plaintiff without bringing a cross action; but a counter-claim, for all practical purposes of giving the court jurisdiction to determine the matters in controversy in, or give the relief claimed by, the counter-claim, is a cross action.

It would occasionally seem, however, that there is some danger of this fundamental principle of litigation being lost sight of in Ontario, and, under the growing laxity of practice which prevails under the Judicature Act, thoughtlessly to assume that it no longer exists, and that a court is now competent to adjudicate, and make judgments, against persons who have neither invoked, nor are properly amenable to its jurisdiction, or respecting claims or controversies which have not been presented for adjudication. But we may ask if Smith, having no shadow of title, bring an action against Brown to recover possession of land, on what principle can Brown be thereby involved in an enquiry as to his title as against some third person who is made a co-defendant, but who makes no claim adverse to Brown: and does it make any material difference if it is a fund instead of land which is the subject matter of Smith's action? The jurisdiction of the court is invoked by Smith to determine whether he is entitled to the land or fund, and if he fail to establish any claim, what right has the court, unless a counter-claim be filed, to exercise any other jurisdiction over the subject matter of the controversy than to dismiss Smith's action? The mere fact that Smith has made a wrongful claim does not surely give the court unlimited jurisdiction to deal with the subject matter of the litigation, and the mere fact that there are other claimants who have not invoked the jurisdiction of the

court to determine their rights, can surely give the court no authority voluntarily to assume the right to adjudicate upon them.

It is quite clear that the mere existence of a dispute gives a court of law no the right to step in and adjudicate upon it, nor does the mere fact of the existence of property confer any right on a court to proceed to enquire and adjudicate as to its ownership.

Her Majesty's subjects are entitled to settle disputes without resorting to her courts of law, and it seems almost a self-evident proposition that the making of a wrongful claim to property does not ipso facto give a court a right to adjudicate upon any rights affecting such property except so far as it is called upon to do so for the purpose of determining the claim presented for adjudication.

Two cases of the highest authority in the recent number of Appeal Cases may serve to show the accuracy of the view we have endeavoured to enunciate. *Hood Barrs* v. *Crossman*, (1896), A.C. 172, was a summary application made against the defendant's solicitors in an action, to compel them to repay certain costs which had been ordered to be paid to the defendant by a judgment which had been subsequently reversed. The costs had been paid, under threat of execution, to the solicitors, but without any undertaking on their part to refund. The House of Lords held that the Court had no jurisdiction to order the solicitors to refund. In giving judgment Lord Herschell said: "It is to be observed that nothing is more common than for the court when refusing to stay execution and allowing costs to be received, to require the solicitor who is to receive them to give a personal undertaking to repay them if the Court of Appeal should reverse the order for payment. My Lords, the fact that such undertakings are constantly given, is, to my mind, almost conclusive against the notion that the court has power where no such undertaking has been required and given, to order the solicitor to repay the costs."

Here was the case of an officer of the court who had received money for his client, which the court had ordered to

be refunded by the client, but the court had no jurisdiction to exercise any personal jurisdiction over the solicitor to compel him to return it, he having been guilty of no misconduct, and not being amenable to the jurisdiction of the court.

The other case to which we refer is *Grey* v. *Manitoba & N. W. Ry.*, (1897) A. C. 254, where the Privy Council refused to hear argument upon, or consider certain questions which had not been raised either on the pleadings or evidence, and on which the court below had not adjudicated. Their lordships as to that point say: "They confine themselves to deciding the issues which the courts below were invited by the plaintiff to decide." Thus clearly intimating that the duty of a court of law is to decide the matters presented for adjudication, and not to pronounce judgment on other matters which the litigants have not thought fit to put in issue, or bring into controversy.

'OBITER DICTA.'

Beyond the fact of his visit to this country with Lord Russell of Killowen a year or two ago, Sir Frank Lockwood, Q.C., was so widely known by reputation to the profession in Canada that the news of his untimely death in December was received with profound regret. His handsome presence and charming personality won upon everyone with whom he came in contact here, and he somewhat overshadowed Lord Russell in popularity with the Canadian people. Without being a great lawyer, his admirably balanced professional qualities gave him a standing not measurably behind the leaders of the English Bar. His chief forensic successes were obtained at nisi prius, a congenial sphere for the exercise of his nimble wit; and he leaves behind him many a *mot* and clever turn of advocacy to embalm his memory there. Sir Frank was also well known as a caricaturist, and his humorous drawings have served to while away many a tedious quarter-hour of Parliamentary debate and jury trial. Mr. Justice Darling is under obligation to him for the only real bits of humour in

"Scintillae Juris"—the frontispiece and colophon, both of which are good specimens of the deceased lawyer's remarkable skill with the pencil. His literary endowment was not large, the only exhibit we have of it subsisting in "The Law and Lawyers of Pickwick," a mere brochure, published in 1894. Sir Frank Lockwood died in the prime of manhood, and without realizing his cherished ambition of becoming a Judge, but he has left to his friends the abiding fragrance of the "integer vitæ, scelerisque purus," and that is a memorial far more to be desired than the greatest judicial reputation that ever was made.

* * *

Our English contemporaries announce, with sang froid born either of resignedness to the tyrrany of London weather or lack of sympathy for the epicurism of circuit leaders, that Mr. Ambrose, Q.C., M.P., was prevented by fog from attending the recent Northern Circuit dinner to Mr. Justice Bigham at the Hotel Metropole. Having been cruelly buffetted about by surging cabs and derelict omnibuses in the north-western part of the city for upwards of an hour, and finding himself unable to get his bearings, he let his vehicle drift with the tide of traffic and gave up the quest for dinner, realizing to some extent the disasters of Odysseus in his wanderings homeward. Really, renowned London lawyers must not go on losing their dinners in this heart-rending way. It behooves the symposiarch to demonstrate the locus of his feast to the coming guest by some system of fog-signals—say by anchoring an automatic siren in front of the premises, or by sending up rockets at regular intervals. Failing some such precaution as this, it would appear to be his plain duty to issue his invitations subject to the limitation of: "If Clear," or "Weather Permitting." Hungry juniors are common enough, but to have hungry circuit leaders roaming the streets of London is dreadful to contemplate.

* * *

The opinion expressed by the Lord Chief Justice of England in the recent Queen's Bench Division case of *Lewis* v. *Clay* (14 T. L. R. 149) to the effect that where a person is

tricked into signing a negotiable instrument which he did not mean to sign, he is not liable upon it, is one of the greatest importance to business people as well as the legal profession. Lord Russell thinks the bill or note void, notwithstanding that it may be all right on the face of it, the signatures genuine, and the holder a holder in due course. A case of this moment ought not to stop short of the House of Lords, if it be possible to get it there.

* * *

We learn from our English namesake of December 11th, that Mr. Montagu Crackanthorpe, Q.C., will, from the beginning of the new year "practice only before the House of Lords and Privy Council, while continuing to take 'opinion' business as before." Ahem! "Here's richness," as the immortal Squeers puts it. It is not often that we in Canada hear of a lawyer exercising the royal prerogative of choosing one's courts, and we feel that we ought to be pardoned for the following bit of Weggery apropos of the event:

Forgive our freedom, Montagu —
Your luck is rare indeed;
The King, he picks his courts to sue,
While *you*, your courts to plead!

It happened, not more than one thousand miles from Toronto, that one Elizabeth Doe, a married woman, was possessed of separate estate. Richard Roe was advancing to her $1,000 to be secured by a mortgage on her property. A justice of the peace drew up the mortgage. The mortgagee instructed the justice to see that the husband of the mortgagor released any claims he might have against the lands. The husband was therefore made the party of the third part to the mortgage. Elizabeth Doe, the mortgagor, gave the usual statutory covenants. Then the following clause was added: "And the said John Doe, the husband of the said Elizabeth Doe, hereby bars his dower in the said lands."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR.

King v. *Eversfield* (1897) 2 Q.B. 475, although a case turning principally on a statute giving certain outgoing tenants a right to compensation for improvements, may nevertheless be usefully noted, inasmuch as the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) in order to determine the main question, had to place a construction on a lease whereby the premises in question were by agreement let to the tenant from September 29, 1886, at the rent of £19 12s. a year, payable quarterly on the four usual quarter days in every year. This was held to constitute a tenancy from year to year, and a provision enabling the parties to terminate the tenancy by a three months' notice on any day in the year was held not to cut it down to a quarterly tenancy, and the judgment of Day and Lawrence, J.J., to the contrary was reversed.

MUNICIPAL LAW—By-law—LICENSE ON LOCOMOTIVES USED WITHIN THE COUNTY—USER, MEANING OF.

London County Council v. *Wood* (1897) 2 Q.B. 482, turns upon the construction of a statute authorizing a municipal body to pass by-laws inter alia for granting licenses "for locomotives used within the county," and a by-law passed in pursuance thereof, whereby it was provided that "no locomotive shall be used on any highway within the county of London until an annual license for the use of the same shall have been obtained from the council by the owner thereof." The defendants owned a steam roller which was not being used in road making, but was merely passing through the country to a destination outside, and a question was stated by a magistrate whether this was a use of the locomotive within the county within the meaning of the by-law, which was answered in the affirmative by Collins and Ridley, JJ.

PARTNERSHIP—LOAN IN CONSIDERATION OF SHARE OF PROFITS—POSTPONEMENT TO OTHER CREDITORS ON BANKRUPTCY OF PARTNERSHIP.

In re Fort, (1897) 2 Q.B. 495, although turning upon the construction of the English Partnership Act (53 & 54 Vict., c. 39) may probably be nevertheless an authority in Ontario —that Act being regarded in the main as merely declaratory of the common law. The Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) determine that under the Act where one person advances money to another upon an agreement that the lender shall share in the profits of the business of the borrower, in the event of the borrower becoming bankrupt the lender is postponed to the other creditors of the borrower. The agreement in question was by parol, and an argument was made that under the Act it was only where such contracts are in writing that the postponement takes place. Such a question, however, is obviously not open under Ontario law, and the provisions of the English statute requiring such agreements to be in writing in order to protect them from being regarded as constituting the lender a partner, goes beyond the common law and cannot be considered as authoritative here.

CONSENT ORDER, ACTION TO SET ASIDE—MISTAKE—UNILATERAL MISTAKE INDUCED BY OPPOSITE PARTY—SETTING ASIDE CONSENT ORDER

Wilding v. *Sanderson*, (1897) 2 Ch. 534, was an action to set aside a consent order made in a case of *Ainsworth* v. *Wilding*. An unsuccessful motion in that action to set aside the order in question is reported (1896) 1 Ch. 673, (noted ante vol. 32, p. 471.) The Court of Appeal (Lindley, Lopes and Chitty, L.JJ.) affirming Bryne, J., held that an order made on consent in an action may be set aside even after being entered, and partially acted on, and construed by the Court on the same grounds that an agreement inter partes can be set aside. And in the present case the order was set aside on the ground of a mistake by the plaintiff, innocently induced by the opposite party, as to the meaning of its terms, such unilateral mistake constituting an exception to the general rule of equity that a contract cannot be set aside on the ground of mistake where the mistake is unilateral.

PARTITION — OCCUPATION RENT DUE FROM CO-OWNER — SET OFF — MORTGAGEE OF CO-OWNER'S SHARE.

Hill v. *Hickin*, (1897) 2 Ch. 579, was a partition action in which a sale was ordered. One of the co-owners who had mortgaged his share was liable to account for an occupation rent, and in the distribution of the purchase money realized by the sale, the question arose whether this occupation rent could be set off pro tanto as against the mortgagee. Stirling, J., was of opinion that it could not, although it might have been set off against any part of the purchase money payable to the co-owner personally. The ground of the decision is that the liability of a co-owner to be charged with an occupation rent is not a liability which could be enforced at common law, and even if it were it is a claim personal to the co-owner, and does not create any charge or lien on his share, or against his mortgagee, who was held to be a purchaser pro tanto. The learned Judge, we see, throws doubt on the correctness of his own previous decision in *Heckles* v. *Heckles*, 2 W.N. (1892) 188.

TRUSTEE—BREACH OF TRUST—IMPROPER INVESTMENT.

In re Stuart, Smith v. *Stuart*, (1897) 2 Ch. 583, Stirling, J., held that where a trustee invested the trust funds on the faith of a valuation of a valuer appointed by a solicitor who acted for the mortgagor, and which merely stated the amount for which the property was a good security, without giving the value of the property, and the advance made was more than two-thirds of the value stated in the valuation, such an act could not be relieved against under the Judicial Trustees Act, 1893, which enables the Court to relieve trustees against breaches of trust when it appears they have "acted honestly and reasonably, and ought to be excused."

COMPANY—WINDING UP, GROUNDS FOR—"JUST AND EQUITABLE"—ULTRA VIRES—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89) S. 79—(52 VICT., C. 32, S. 4, D.)

In re Amalgamated Syndicate, (1897) 2 Ch. 600, a shareholder presented a petition to wind up a company. The company had been formed with the primary and principal object of taking over the undertakings, assets and liabilities

of three other companies, each of which had as its principal object an adventure in seats for the Diamond Jubilee. A loss had been made on this adventure, and all that remained to be done was to pay debts and distribute the surplus assets among the shareholders. The directors were contemplating embarking on other business which the Court (Williams, J.) held to be ultra vires. Under the circumstances it was held to be "just and equitable" to make the order, as the business for which the company was formed had come to an end. The rule laid down in some of the earlier cases that the Court must restrict the general words in s. 79. (52 Vict., c. 32, s. 4 (e) D.) to cases ejusdem generis with those mentioned in the previous part of the action (see per Lord Macnaghten, 12 App. Cas. 502, and *Re Spackman*, 1 McN. & G. 170) is said by Williams, J., to have been very much relaxed by more recent decisions; e.g., see *Re Brinsmead*, (1897) 1 Ch. 45.

MORTGAGE—MORTGAGOR AND MORTGAGEE—DEED—DELIVERY TO ONE OF SEVERAL GRANTEES — ESCROW — FRAUD — SOLICITOR TO BOTH PARTIES — AGENCY—REPRESENTATION BY AGENT.

London Freehold & L. Co. v. *Suffield*, (1897) 2 Ch. 608, is a case arising out of the fraud of a solicitor. The solicitor was banker and managing director of the plaintiff company. He was also one of four trustees of a settlement, and solicitor of the trust. In 1892 a sum or £9,000 of the trust funds was received by him and paid into his own account at his private bank pending re-investment. The plaintiff company afterwards on advice of the solicitor decided to take up certain mortgages outstanding on its property; by contracting a new loan at a lower rate of interest, and entrusted to the solicitor the mode of raising the money and carrying out the details of the necessary transactions to effect this object. The solicitor then caused to be prepared and executed by the company a mortgage of the company's property to the trustees of the settlement, which was delivered to the solicitor and remained in his possession, but was never registered in the company's register of mortgages, nor in the registry office of deeds. The solicitor caused an entry to be made in his books purporting

to transfer the £9,000 above referred to to the credit of the company, but the money was never actually paid over to the company, he also notified his co-trustees that the £9,000 had been invested on the security of a mortgage made by the plaintiff company. In 1895 the solicitor absconded and was adjudicated bankrupt, and it was then discovered that he had misappropriated the £9,000, and that the mortgages of the company which that £9,000 should have been used to discharge were still unpaid. The company brought the present action claiming a cancellation of the mortgage on the ground that the mortgage was delivered as an escrow, and not intended to become operative until the money purported to be secured thereby was actually advanced, and because the mortgagors never gave, and the mortgagees never got, the mortgage consideration. But the Court of Appeal (Lindley, M.R., and Ludlow and Chitty, L.JJ.) affirmed the judgment of Kekewich, J., dismissing the action, and although conceding that a deed may be validly delivered as an escrow to a party who is to take under it, and that evidence is admissible to show the character in which a solicitor acting for both parties received the deed, and the terms on which it was delivered to him, yet that the circumstances of this case precluded the deed from being regarded as delivered as an escrow, and that the mortgage was valid and binding on the company, because it was sealed, and delivered to the solicitor as a perfect deed, and was immediately operative, and because the company had by its conduct put it into the power of the solicitor, as their manager and banker, to represent to his co-mortgagees that the trust money was invested on the security of the company's property, and the company was therefore now disentitled in equity to dispute the validity of the mortgage.

DISCOVERY—PENALTY, LIABILITY TO—PRIVILEGE.

In *Derby* v. *Derbyshire* (1897) A. C. 550, the House of Lords (Lords Herschell, Watson, Shand and Davey), have affirmed the judgment of the Court of Appeal in *Re County Council of Derbyshire* v. *Derby* (1896) 2 Q. B. 297, (noted ante vol. 32, p. 669). The proceedings in question were taken

under a statute to prevent the pollution of a river, and the Act provided that a penalty might be imposed by the Court in case of disobedience of its order made thereunder. The plaintiffs in aid of their proceedings sought to examine the defendants' officers for discovery, and the defendants contended that they were not liable to discovery because the action was penal in its character by reason of the above-mentioned provision in the Statute. The House of Lords, however, agreed with the Court of Appeal that a power to impose a penalty for disobedience of the order of the Court did not in any way constitute the action a penal proceeding. As Lord Herschell in effect observes, if a power in a Court to punish for disobedience of its order constituted an action a penal action, then every action would be a penal proceeding.

COMPANY—DEBENTURES—TRUSTEE FOR DEBENTURE HOLDERS—RECEIVER—PRINCIPAL AND AGENT—LIABILITY FOR CONTRACTS OF RECEIVER.

Gosling v. *Gaskell* (1897) A. C. 575, was an appeal from the Court of Appeal in *Gaskell* v. *Gosling* (1896) 1 Q.B. 669, (noted ante vol. 32, p. 539). It may be remembered that the action was brought against the defendants, who were mortgagees in trust for the benefit of certain debenture holders of a joint stock company. The mortgage deed empowered the defendants to appoint a receiver of the property of the company, who should carry on the business of the company, and that the receiver so appointed should be the agent of the company, who alone should be liable for his acts or defaults, but the net proceeds received by him were to be applied in payment of the debentures. A receiver was appointed by the defendants who carried on the business until a winding up order was pronounced, and also after it had been pronounced, and in so carrying on the business of the company the receiver incurred a debt to the plaintiffs, which the plaintiffs sought to recover from the defendants as being the undisclosed principals of the receiver. The case was tried before the Lord Chief Justice, who gave judgment in favour of the plaintiffs, which was affirmed by Esher, M.R., and Lopes, L.J., in the Court of Appeal, Rigby, L.J., dissenting. This judgment, the House of Lords (Lords Halsbury,

L.C., and Watson, Herschell, Morris and Davey) have unanimously reversed, their lordships holding that the case was governed by *Cox* v. *Hickman*, 8 H. L. C. 268, and that until the making of the winding up order the receiver was clearly the agent of the company only, and although after the making of the winding up order the receiver ceased to be agent of the company, he did not thereby impliedly become the agent of the trustees by whom he was originally appointed. Lord Herschell in discussing the question as to who in fact became liable for goods ordered by the receiver after the winding up order, seems to come to the conclusion that it does not follow necessarily that anyone became liable on the contract, but that the receiver might possibly incur liability for breach of an implied warranty that he had authority to contract as agent.

DAMAGE—TRUSTEES—INJURY TO TRUST PROPERTY.

Owners of Steam Sand Pump Dredger v. *Greta* (1897) A. C. 596, is a decision of the House of Lords on a point which, but for a contrary judgment of the Court of Appeal, one would hardly have thought to be debatable. The action was brought by harbour trustees to recover damages occasioned to their steam pump dredger by the defendant's ship colliding therewith. The Court of Appeal held that because the plaintiffs were a public body and not entitled to make any profit out of the dredger, they could not therefore recover damages for the time they were deprived of the use of it while undergoing repairs consequent on the collision, their Lordships (Lords Halsbury, L.C., Watson, Herschell, Macnaghten and Shand) were of opinion that the plaintiffs were entitled to recover damages for the loss of the use of the dredger, but Lord Morris dissented, and agreed with the Court of Appeal.

STATUTORY RIGHT OF ACTION—JURISDICTION OF HIGH COURT - DECLARATORY JUDGMENT.

In *Barraclough* v. *Brown* (1897) A. C. 615, the House of Lords has determined that where a statute gives a right of recovery in a court of summary jurisdiction against a person

not otherwise liable, there is no jurisdiction in the High Court to make a declaratory judgment that the applicant is entitled to recover his claim in such court of summary jurisdiction.

TRADE NAME—NAME INDICATING MANUFACTURER — IMITATION OF RIVAL TRADER'S GOODS—FRAUD—INJUNCTION.

In *The Birmingham Vinegar Co.* v. *Powell*, (1897) A.C. 710, the House of Lords (Lords Halsbury, L.C., Watson, Herschell, Shand and Davey) unanimously affirmed the judgment of the Court of Appeal (1896) 2 Ch. 54, (noted ante vol. 32 p. 613) and holding that the plaintiff who had for many years manufactured a sauce according to a secret recipe, which he called and sold by the name of "Yorkshire Relish," was entitled to an injunction restraining the defendants from selling a sauce manufactured by them under that name, or using the words "Yorkshire Relish" in connection with their sauce, without clearly distinguishing it from that made by the plaintiff.

APPEAL TO HER MAJESTY IN COUNCIL IN CRIMINAL CASE, WHEN GRANTED.

In re Caron, (1897) A.C. 719, was an application for leave to appeal to the Judicial Committee of the Privy Council from a conviction in a Consular Court in a criminal case in which their Lordships reiterate the rule laid down in such cases, *In re Dillet*, (1887) 12 App. Cas. 459, viz., that "Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." No such case having been made out, the leave was refused. We may observe that the principal point relied on by the applicant was that she had been tried by a jury of five instead of twelve pursuant to the order in Council establishing the consular Court which the applicant claimed to be invalid, but their Lordships were of the opinion that the Crown had power so to constitute the Court and to provide for the trial of criminal cases therein by juries of less than twelve.

WRIT OF SUMMONS - SERVICE OUT OF JURISDICTION - SUBSTITUTED SERVICE - DEFENDANT LEAVING JURISDICTION AFTER ISSUE OF WRIT—ORD. IX. R. 2 (ONT. RULE 146).

In *Jay* v. *Budd* (1898), 1 Q.B. 12, the majority of the Court of Appeal (Lord Halsbury, L.C., and Collins, L.J., have distinguished the cases of *Fry* v. *Moore* (1889) 23 Q.B.D. 395; and *Wilding* v. *Bean* (1891) 1 Q.B. 100,—and have held that they do not apply where a defendant goes out of the jurisdiction, not for the purpose of evading service, after the issue of the writ of summons; and in such a case, notwithstanding the defendant is actually out of the jurisdiction, substituted service of the writ for service within the jurisdiction may be ordered to be made on some person within the jurisdiction. Rigby, L.J., on the other hand was of opinion that the only case in which substitutional service of a writ for service within the jurisdiction could be ordered where defendant was actually out of the jurisdiction was where defendant had left the jurisdiction after the issue of the writ for the purpose of evading service.

Correspondence.

QUASHING SUMMARY CONVICTIONS.

To the Editor of the Canada Law Journal.

Having noticed a letter of "Subscriber" in your last volume p. 658, on this subject I respectfully suggest this as a remedy. That in place of having recourse to the certiorari and quashing the conviction, the complainant or defendant ought, upon depositing the fine and costs and the sum of ten dollars, to have the right thereupon to give a verbal notice of appeal. or within ten days an appeal in writing for a motion to come up before the Local Judge of the High Court for the county. The notice of motion might be served by registered letter and if given while both parties were still present to be noted by the Justice in the proceedings. This course would give an inexpensive and speedy mode of relief, and

would make a cheap remedy and would save the costs of recognizances, etc. There might also be given an appeal to the Divisional Court from the Local Judge. I would also suggest an amendment to the Criminal Code to permit either party before or after the Justice had intimated what his finding would be to ask the Justice to reserve his decision and send the proceedings to the Local Judge of the High Court for the county, in order that such Judge might review the proceedings and say what the finding should be, and that the finding of the Justice should conform thereto, and that in order to obtain such review the party asking it should deposit the costs and five dollars and postage on the proceedings both ways. Either party having the right to notify the Local Judge of his wish to be heard on the review, and with the privilege to the said Judge to ask either or both parties or the County Attorney to appear before him to be heard generally or on some point to be stated. Also that no conviction or return of conviction, for publication should be made until after the report of the Local Judge, and the result of the appeal therefrom. The latter to have the right to award five dollars costs to the party successful before him, and either party to have a right of appeal from him to a Divisional Court. The effect would be that no conviction would be recorded against a man's good name unless some reasonable ground existed therefor. As it is now, once a conviction has been made, no matter how unreasonable, and although afterwards quashed, the justice must return it for publication, and a man's probably good name is tarnished. The advantage of this is that everyone would have a cheap and speedy remedy against an improper conviction. I only make the suggestion. The details could easily be worked out by the lawmakers.

ANOTHER SUBSCRIBER.

REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

From Official Arbitrator.] [Jan. 11.

IN RE RODEN AND CITY OF TORONTO.

Statute—Construction—Amendment—Retroactive effect—Limitation of actions, 54 Vict., c. 42, s. 16 (O).

Unless there is a clear declaration in the Act itself, to that effect, or unless the surrounding circumstances render that construction inevitable, an Act should not be so construed as to interfere with vested rights. 54 Vict., c. 42, s. 16 (O), limiting the time for the enforcement of claims for compensation by persons injuriously affected by the exercise of municipal powers of expropriation does not apply to a claim existing at the time of the passage of the Act. Judgment of the Official Arbitrator affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *H. M. Mowat*, for respondent.

From Robertson, J.] LUFFMAN *v.* LUFFMAN. [Jan. 11.

Ship—Sale—Unregistered lien—Notice—Merchants' Shipping Act, 1894.

While under s. 57 of the Merchants' Shipping Act, 1894, 57-58 Vict., c. 60 (Imp.) unregistered equitable interests can be enforced as between the parties immediately affected, the effect of section 56 is that a purchaser from the registered owner takes a title free from unregistered equitable interests even though he knows of them. Judgment of ROBERTSON, J., reversed.

W. Nesbitt, for appellant. *C. J. Holman*, for respondent.

From Drainage Referee.] STEPHENS *v.* TOWNSHIP OF MOORE. [Jan. 11.

Drainage—Repairs—"Person injuriously affected"—Mandamus — Drainage Act, 1894, s. 73.

Under s. 73 of the Drainage Act, 1894, (57 Vict., c. 56 (O.)) a ratepayer whose property has been assessed for the maintenance and repair of a drain, as deriving benefit from it, is a person injuriously affected by its want of repair, even though he has not suffered any pecuniary loss or damage by reason thereof, and is entitled to a mandamus to compel the municipality, whose duty it is to keep the drain in repair, to do such work as may be necessary, unless the municipality can show that, even if the drain were repaired, it would, from changes in the surrounding conditions, be useless to the applicant's property. Judgment of the Drainage Referee reversed.

M. Wilson, Q.C., for appellant. *Aylesworth*, Q.C., and *Lister*, Q.C., for respondent.

From Boyd, C.] DAW *v.* ACKERILL. [Jan. 11.

Church—Incumbent's salary– Liability of churchwardens.

The churchwardens of an Anglican congregation which had adopted the free pew system, and in which the only revenue is derived from the voluntary contributions of the members, are not liable to the incumbent for the payment of his salary except to the extent of contributions received by them for that purpose. Judgment of BOYD, C., 28 O.R. 452 ; 33 C.L.J. 73, affirmed.

Clute, Q.C., for appellant. *S. Masson*, for respondents.

From Divl. Court] KERVIN *v.* CANADIAN COTTON MILLS CO. [Jan. 11.

Negligence—Evidence—Master and servant.

This was an appeal by the defendants from the judgment of a Divisional Court reported 28 O. R. 73, and was argued before BURTON, C.J.O., OSLER and MACLENNAN, J.J.A., and FALCONBRIDGE, J., on the 10th of June, 1897.

OSLER, J.A., and FALCONBRIDGE, J., were of opinion, agreeing with the majority in the Divisional Court, that there was evidence from which it might properly be inferred that the accident was caused by the negligence of the defendants.

BURTON, C.J.O., and MACLENNAN, J.A., were of opinion that the evidence was equally consistent with the theory that the deceased's own carelessness caused his death.

Appeal was dismissed with costs.

McCarthy, Q.C., and *R. A. Pringle*, for appellants. *Aylesworth*, Q.C., for respondent.

From Rose, J.] HESSELBACHER *v.* BALLANTYNE. [Jan. 11.

Sale of goods—Contract—Loss of goods.

This was an appeal by the plaintiff from the judgment of Rose, J., reported 28 O.R. 182 ; 33 C.L.J. 73, and was argued before BURTON, C.J.O., OSLER and MACLENNAN, JJ.A., on the 17th and 20th of September, 1897.

Appeal dismissed with costs, the court holding that, on the evidence, the plaintiff had accepted and taken possession of the logs, and not dealing with the point upon which the case turned in the court below.

Aylesworth, Q.C., for appellant. *W. M. Douglas*, for respondent.

From Boyd, C.] MAIL PRINTING COMPANY *v.* CLARKSON. [Jan. 11.

Assignments and preferences—Contingent claim—Advertising contract.

Where an estate is being administered under the Assignments and Preferences Act, R.S.O. ch. 124, claims depending upon a contingency cannot rank, but only debts strictly so called. An advertising contract gave the advertiser in consideration of the sum of $1,000 the right to use certain advertising space in a newspaper at any time within twelve months, the advertiser agreeing to pay at the end of each month for the space used in that month and at the

expiration of twelve months, whether the space had been used or not, to pay $1,000 less such sums as might have in the meantime been paid. The advertiser before using any space, and before the expiration of twelve months, made an assignment for the benefit of creditors pursuant to R.S.O. c. 124,

Held, reversing the judgment of BOYD, C., 28 O.R. 326; 33 C.L.J. 289, that the $1,000 would not necessarily become due by effluxion of time, and that the newspaper company could not rank. *Grant* v. *West*, 23 A. R. 533. applied.

Thomson, Q.C., for appellant. *C. J. Holman*, for respondents.

From Street, J.] CERRI *v.* ANCIENT ORDER OF FORESTERS. [Jan. 11.

Benevolent society—Life insurance—Mistake as to age.

S. 6 of the Ontario Insurance Amendment Act, 1889, 52 Vict., c. 32 (O.), does not apply to benevolent societies having an age limit for admission to membership, and where a man who was older than the age limited was, owing to his innocent misrepresentation as to his age, admitted a member and given an endowment certificate, it was held that the beneficiary named therein could not recover.

Judgment of STREET, J., 28 O.R. 111, reversed, MACLENNAN, J.A., dissenting.

Aylesworth, Q.C., and *McWatt*, for appellants. *G. G. Mills*, for respondent.

From Robertson, J.] COLL *v.* TORONTO R. W. CO. [Jan. 11.

Master and servant—Damages—Tort—Wrongful act of servant—Scope of employment.

The master is not liable for the wrongful act of the servant, though done during the course of his employment and intended to promote the master's interest, if it is an act outside the scope of the servant's employment and authority and is one which the master himself could not legally do.

The defendants were held not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the car, pushed off the car, as the jury found, a newsboy who was getting on to sell a paper to a passenger. Judgment of ROBERTSON, J., reversed.

J. Bicknell, for appellants. *Aylesworth*, Q.C., and *L. V. McBrady*, for respondent.

From Rose, J.] [Jan. 11.

RE CANADIAN PACIFIC R.W. CO., AND COUNTY AND TOWNSHIP OF YORK.

Railways—Highways—Crossings—Maintenance of gates—Apportionment of cost—Constitutional law—Railway Committee—Railway Act, 1888, 51 Vict., c. 29 (D).

The Railway Committee of the Privy Council, on the application of the City of Toronto, ordered the Canadian Pacific Railway Company to put up gates and keep a watchman where the line of railway crossed a highway run-

ning from the City of Toronto into the Township of York, the line of railway being at the place in question the boundary between the two municipalities, and ordered the cost of maintenance to be paid in certain proportions by the railway company, the city, the township, and the county.

Held, per BURTON, C.J.O., and MACLENNAN, J.A., that, assuming the validity of legislation conferring jurisdiction on the Railway Committee, their powers were limited to persons or municipalities invoking the exercise of their jurisdiction, and that their order was invalid so far as it imposed a burden upon the township and county.

Per OSLER, J.A., that the legislation was intra vires, and that the township and county were persons interested within the meaning of the Act, and subject to the jurisdiction of the Railway Committee.

Per MEREDITH, J., that the legislation was intra vires, but that the county was not a person interested, not being under any responsibility for the maintenance of the highway in question.

Per Curiam, that the decision of the Railway Committee upon a subject, and in respect of persons, within its jurisdiction, cannot be reviewed or interfered with by the court. In the result the judgment of ROSE, J., 27 O.R. 559, was allowed as to the County of York, and dismissed as to the Township of York.

Aylesworth, Q.C., for the Township of York. *C. C. Robinson*, for the County of York. *Robinson*, Q.C., and *A. MacMurchy*, for the Canadian Pacific Railway Company. *J. R. Cartwright*, Q.C., for the Attorney-General for Ontario.

From Falconbridge.] FAWKES *v.* GRIFFIN. [Jan. 11.

Receiver—Money in hands of—Payment into Court—Default—Attachment—Order for—Motion to rescind—Delay—Irregularities—Specific order for payment—Punishment—R.S.O. 1887, c. 67, ss. 6, 11—Understanding between receiver and solicitor—Claim of receiver upon money in his hands.

On June 27, 1895, an order was made in this action by consent, appointing the defendant's solicitor receiver in the action until Sept. 3, 1895, to collect the rents of the premises in question, and directing that he should pass his accounts before the Master, and pay into court the balance which might from time to time be certified to be in his hands. On August 28, 1895, the plaintiff's solicitor wrote to the receiver, asking that the matter might remain as it was until October. The receiver swore that he thereupon called on the plaintiff's solicitor, and an understanding was arrived at between them by which he was to continue to act as receiver until a motion should be made to dissolve or continue the injunction, and that all moneys which he collected as receiver were to remain in his hands until the disposition of the action, when he undertook to pay them over, and on this understanding he consented to allow the motion to continue the injunction to stand sine die. In Oct., 1895, the receiver passed his accounts, and on the 22nd of that month the Master certified that $266.64 was in the receiver's hands to be paid into court as directed

by the order. The receiver not having paid the money into court, the plaintiff's solicitor, on Nov. 12, 1895, wrote to him requesting him to do so; and the receiver answered on the same day saying that, according to any orders or reports that had been made, he had not ascertained any date within which the money should have been paid into court; that he was waiting a specific order for that purpose, and as soon as such order was made, or at any time, he was prepared to pay into court the money he had received. On Nov. 27, 1895, notice of motion was served by the plaintiff for an order to commit the receiver to gaol for his contempt in not paying into court the sum found due, and on Dec. 10, 1895, no one appearing to oppose the motion, an order was made by Boyd, C., requiring the receiver within ten days to pay the amount into court, and that in default of his doing so a writ of attachment should issue, etc., etc. On Jan. 13, 1896, notice of motion was given by the receiver, by the special leave of Boyd, C., for an order setting aside the last mentioned order, on the ground of the understanding above mentioned between the receiver and the plaintiff's solicitor, and an explanation of the failure of the former to oppose the motion to commit. The understanding was denied by the plaintiff's solicitor. The receiver also swore that the plaintiff and defendant were both indebted to him in large amounts, and he claimed a lien on the money in his hands for costs, and a right of set-off. Upon this motion an order was made by Falconbridge, J., on March 3, 1896, extending the time for payment into court by the receiver until April 30 then next, and directing that in default thereof the motion should be dismissed with costs.

Held, upon appeal, that no sufficient case had been made out for interfering with the orders of BOYD, C., and FALCONBRIDGE, J. There was a great delay in moving, but it was to be assumed in favour of the receiver that a sufficient order to extend the time for doing so was made, and that Rule 1454 of January, 1896, amending Con. Rule 536, as to rescission of ex parte orders, applied, though it did not come into force until after the order of BOYD, C., was made. Neither in the affidavits filed nor in the notice of motion to rescind the first order were any objections taken to the regularity of the proceedings, and the case was not in which the Court should be astute to discover them, or permit them to be raised for the first time on the argument of the appeal: *Treherne* v. *Dale*, 27 Ch. D. 366.

That an attachment lies against a receiver as an officer of the Court for his default in compliance with the order to pay into Court the money found to be in his hands sufficiently appears from *In re Wray*, 36 Ch. D. 138, *In re Gent*, 40 Ch. D. 190, and *In re Preston*, 11 Q.B.D. 553, and other cases applied and followed in *Pritchard* v. *Pritchard*, 18 O.R. 173. The powers of the Court are not invoked nor its process issued for the purpose of recovering or enforcing payment of a civil debt or claim inter partes, but for punishing its officer, who has disobeyed its order; and ss. 6 and 11 of R.S.O., 1887, c. 67, are inapplicable. It cannot be said that an understanding between the receiver and the solicitor of one of the parties ought to be accepted as an excuse for non-compliance with the order, more especially when the authority to waive the order is not admitted or is denied by the parties or either of them. And while there may be cases such as *In re Gent*, 40 Ch. D. 190, where the

Court, in case of the receiver, has relieved him from paying in the whole of a very large sum found to be in his hands, recognizing the fact that he may be entitled to a share thereof and to remuneration, none is to be found where he has been permitted to discharge himself by setting up claims which, had they been put forward in the first instance, would in all probability have prevented his appointment: *Re Bell's Estate*, L.R. 9 Eq. 172. Besides, the receiver's letter of Nov. 12th, 1895, furnished a complete answer to his application for relief, showing as it did, especially when taken in connection with the fact that he was not prepared on Dec 10th to set up the grounds now relied on, that these grounds were a mere afterthought.

Semble, that a specific order to pay over the balance is the proper course in the first instance.

Judgment of FALCONBRIDGE, J., affirmed.

W. R. Smyth, for appellant. *Bradford*, for respondent.

HIGH COURT OF JUSTICE.

Robertson, J.] SAWYER *v.* PARKIN. [Oct. 26, 1897.

Divison Courts—Jurisdiction—Agreement for sale of machine--Ascertainment of amount claimed.

Under a written agreement for the sale of a machine, signed by the defendant, he was to send to the plaintiffs, within ten days after the machine was started, a promissory note, with approved security, for $125, the price thereof, and in default the price was to become forthwith due and payable. The machine, which was by the agreement to be delivered by the plaintiffs f.o.b cars addressed to the defendant to an outside railway station, was received by him and shortly after returned to plaintiffs.

Held, that there was no jurisdiction in the Division Court to entertain an action for the price of the machine, as the amount was not "ascertained by the signature of the defendant" under s. 70, s.-s. (O) of R.S.O. (1887) c. 51, for in addition to proof of the signature, evidence was necessary to show that the terms of the agreement had been performed by the plaintiffs.

Kirwin Martin, for plaintiffs. *D. L. Walsh*, for defendant.

Boyd, C.] HUYCK *v.* WILSON. [Jan. 13.

Arbitration—Action to enforce award—Publication—Time for moving against award—Interest—Costs of arbitration—Taxation—Judgment—Writ of summons—Special indorsements.

Action upon an award. Appeal by the plaintiff from an order of the local Judge at Picton setting aside his own ex parte order allowing the plaintiff to enter judgment upon a writ of summons specially indorsed in default of appearance, and setting aside the judgment entered pursuant thereto and execution issued upon such judgment.

Held, that publication of an award has one meaning when it relates to the time within which the parties can move against the award, and that was considered in *Redick* v. *Skelton*, 18 O.R. 100, but another meaning when it relates to the completion of the award so far as the arbitration is concerned, in which case it is satisfied by the execution of the award in the presence of a witness or by any other act showing the final mind of the arbitrator, upon which he becomes functus officio: *Brown* v. *Vawser*, 4 East 584; *Brooke* v. *Mitchell*, 6 M. & W. 473.

The indorsement of the writ of summons in this case stated that the award was made and published, and it must be taken to be final as far as the arbitration is concerned. The award being thus completed, an action may be brought upon it forthwith, though it may be open for the defendant, if dissatisfied, to move against it within the usual limits of the time allowed by the practice after publication to the parties. The two proceedings to set aside the award, and to enforce it by action, may go on concurrently. The weight of authority is against any suspension of the right to enforce the award pending the period within which it may be summarily moved against. *Moore* v. *Buckner*, 28 Gr. 606, is not in accord with the other cases: See Redman on Awards, 2nd ed., p. 284, and cases there cited; *Doe* v. *Amey*, 8 M. & W. 565; *Plumner* v. *Mitchell*, 48 Me. 184.

In this case there was no objection to the amount awarded except as to the amounts claimed for interest and costs. Interest would not run if no notice of the award was given to the defendant; and the costs of the arbitration did not form a liquidated sum, as they were not taxed. But as to $660, the sum awarded, and $40, the amount paid to the arbitrators, the judgment should stand, under Rule 575.

Order below modified by allowing the judgment and execution to stand for $700, and letting the defendant in to defend as to the residue, unless the plaintiff abandon it. This order to be without prejudice to any motion by the defendant against the award.

J. H. Moss, for plaintiff. *Swabey*, for defendant.

Armour, C.J., Street, J.] ALEXANDER *v.* IRONDALE, R.W. CO. [Jan. 17.

Discovery—Examination of officer of company—Production of documents—Setting aside subpœna.

Held, reversing the decision of ROSE, J., ante p. 37, that in this case the subpœna for the examination of the defendants' president, as an officer of a corporation, for discovery should not be set aside quoad the books and documents which it called upon him to produce, for the affidavits showed that the accounts of the defendants were kept in the books of the president; and the practice of setting aside a subpœna, as laid down in *Steele* v. *Savory*, (1891) W. N. 195, was one to be followed only in exceptional cases, while in ordinary cases it would be better that the question of production of documents should be raised before the examiner.

A. C. McMaster, for plaintiff. *W. H. Blake*, for defendants.

Armour, C. J., Street, J.] IN RE RIBBLE *v.* ALDWELL. [Jan. 17.

Mechanics' liens—Enforcements—Forum—County Court Judge.

All actions and proceedings to enforce mechanics' liens must be brought and taken in the High Court of Justice under the procedure enacted by 59 Vict., c. 35, as amended by 60 Vict., c. 24. Although by ss. 31 and 32 of the former Act a County Court Judge has complete jurisdiction in such an action or proceeding, in the High Court, yet if the proceedings are intituled in a County Court he has no jurisdiction.

R. S. Appelbe, for plaintiffs. G. C. Campbell, for defendant.

Armour, C.J., Street, J.] IN RE LOTT *v.* CAMERON. [Jan. 19.

Division Court—Action for balance of unsettled account—Liquidated claim—Prohibition.

Decision of MEREDITH, C.J., in Chambers, ante 33, affirmed on appeal.

C. J. Holman, for the defendant. *J. H. Moss*, for the plaintiff.

Armour, C.J., Street, J.] FOLEY *v.* EAST FLAMBOROUGH. [Jan. 29.

Municipal corporations—Highway—Accident—Runaway horses—Control—"Repair" of highway.

An appeal by the plaintiffs, the widow and child of a man named Foley who was killed by being thrown from a wagon on the centre road in the township of East Flamborough, from the judgment of Boyd, C., at Hamilton, dismissing with costs an action brought against the township corporation for damages for the death, which the plaintiffs charged was due to the road being out of repair, there being an obstruction in it in the shape of a stump. Foley was being driven by a friend of his, one Sullivan, in the latter's wagon, to which was attached a pair of spirited horses. The action was dismissed because it was found that Sullivan was drunk, and Foley, if sober, must have known it, and this condition contributed to the accident. The trial Judge not having found specifically whether the road was or was not in a reasonable state of repair, the Court now found upon the evidence that at the time of the accident the road was in a reasonable state of repair, having regard to the requirements of the public using the road in the ordinary way.

The word "repair" as used in the Municipal Act, is a relative term. If the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it.

But for *Sherwood* v. *Hamilton*, 37 U.C.R. 410, it should be held that in this case the running away of the horses and their ceasing to be under control was the proximate cause of the injury. Assuming the facts to be that the driver, in spite of ordinary care on his part, lost control of his horses, and

that they running away, the injury was caused by their running the vehicle against the stump in the highway, the plaintiffs could not recover, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel.

Appeal dismissed with costs.

Lynch-Staunton, for plaintiffs. *W. T. Evans*, for defendants.

Armour, C.J., Street, J.] FITZGERALD *v.* MOLSONS BANK. [Jan. 29.

Municipal corporation—Borrowing powers—Current expenditure—Inquiry by lenders—Repayment of money lent—Action to restrain.

An appeal by the plaintiffs from the judgment of Rose, J., at the trial at Ottawa, dismissing the action, which was brought by certain ratepayers of the Village of Hintonburgh against the bank, the village corporation, and the sheriff of the county of Carleton, to restrain the collection and enforcement of a judgment for $6,000 recovered by the bank against the village corporation, upon the ground that the corporation had no power to borrow from the bank the money for which judgment was recovered. The borrowing of $7,000 from the bank was authorized by by-laws of the village corporation passed in 1895. The amount borrowed was expended in the repair and alteration of certain roads, and in diverting the course of a certain stream within the village limits. These works were within the general powers of the corporation, but no provision had been made for the outlay in the estimates. The by-laws authorized the borrowing of not more than $7,000 to meet current expenditure until the taxes could be collected. The by-law which authorized the levying of the rates for 1895 specified the amounts to be levied for each separate purpose, and these works were not specified. The whole amount authorized to be levied was only $5,179.45. In 1897, after this action had been begun, a by-law was approved by the vote of the ratepayers, and passed, which authorized the issue of debentures for $8,000, reciting the expenditure upon the works referred to.

Held, that, upon the proper construction of s. 413 of the Municipal Act of 1892, as amended by the Act of 1893, s. 10, a bank or individual lending is bound to inquire into the amount of the taxes authorized to be levied to meet, the then current expenditure, and cannot lawfully lend more than that sum, although not bound to inquire into the existence of an alleged necessity for borrowing. It was admitted, however, that the money borrowed from the bank was expended by the council upon works within its jurisdiction upon which money lawfully obtained for the purposes of the council might have lawfully been expended; the by-law of 1897 was also admitted, and that the council had issued debentures and raised money upon them, and were willing to pay back to the bank the money borrowed, and were only restrained from doing so by the proceedings in this action. If the plaintiffs, upon the passing of this by-law, had withdrawn their opposition to the payment of the bank's claim, they would have been entitled to their costs, because they were right up to that point; but they insisted that the council had no right to use the money raised upon these debentures in

repaying the bank, because the by-law did not specifically state that the money was to be paid to the bank. There is nothing in the Municipal Act which prevents a council, with the approval of the ratepayers, from raising money for the repayment of such a debt as this. A municipality, having so borrowed money and expended it for the benefit of the ratepayers, is not to be restrained from being honest enough to pay it back.

O'Meara, for the plaintiffs. *Aylesworth*, Q.C., for the defendants, the Molsons Bank. *W. R. Smyth*, for the defendant Sweetland, the sheriff.

FIRST DIVISION COURT, COUNTY OF ONTARIO.

Denton, Acting Co. J.] ONTARIO LADIES COLLEGE *v.* HODGIN. [Jan. 7.

Division Court—Jurisdiction where cause of action arose—57 Vict., c. 23, s. 12—60 Vict., c. 14, s. 12.

The defendant, residing in the Province of Quebec, subscribed for $100 stock in the plaintiff company. A call was made on the stock payable at the Western Bank in the town of Whitby, Ontario, and the defendant having made default in payment, this action was brought for the amount of the call.

Held, that the cause of action arose partly within the jurisdiction, and that where the claim is for a sum within the jurisdiction the action lies even though the defendant resides out of the jurisdiction.

J. B. Dow, for plaintiff. *Farewell*, Q.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

(Before McDonald, C.J., Ritchie, Townshend, JJ., and Graham, E.J.)

THE QUEEN *v.* HALIFAX ELECTRIC TRAMWAY CO.

Lord's Day observance—Provincial Act amending provisions of old provincial criminal law held ultra vires.

Prior to 1867 c. 159 of the Revised Statutes of Nova Scotia (3rd series) was part of the criminal law of the province.

By the British North America Act the criminal law was placed within the exclusive legislative authority of the Parliament of Canada, which authority was exercised in respect of c. 159 by the repeal of two of its sections.

Sec. 2, which was not repealed, was as follows: "Any person who shall be convicted before a justice of the peace etc., of servile labor, works of necessity and mercy excepted, on the Lord's Day shall for every offence forfeit, etc."

By the Provincial Acts of 1891, c. 32, it was sought to amend this provision of c. 159 by enacting that "a body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act and is liable," etc.

Held, (allowing a writ of prohibition to restrain the stipendiary of the

City of Halifax from proceeding to try and convict the defendant company for a violation of the latter Act) that c. 159 of the Revised Statutes (3rd series) being part of the Criminal Law of Canada, the Legislature of Nova Scotia had no power to alter or amend any of its provisions and that any legislation, such as c. 32 of the Acts of 1891, purporting to have that effect, was ultra vires

Held, nevertheless, that the Provincial Legislature would have power to deal with the subject by legislation coming under the head of property and civil rights.

McDONALD, C.J., dissented.

[HALIFAX, Jan. 11, 1898.

This was an application for a writ of prohibition to restrain the Stipendiary Magistrate of Halifax from proceeding to adjudicate upon a complaint made before him against the defendant company, charging them with a violation of R.S. (third series) c. 159, in that the company directed and permitted a motor man, one of their servants, to perform servile labour in the City of Halifax on Sunday, by operating a tram car owned by the company upon and along the streets of the said city, and by carrying passengers in the car and performing the duties of a motorman in connection therewith, such labour being servile labour within the meaning of the said statute, as amended by c. 32 of the Acts of Nova Scotia, 1891, and not being a work of necessity or mercy within the meaning of such statute.

Hon. J. W. Longley, Q.C., *Attorney-General*, for the Crown.

W. H. Covert, for the defendant company.

GRAHAM, E.J.: Before the British North America Act was passed we had in the Revised Statutes (3rd series) under the part relating to the Criminal Law and the Administration of Criminal Justice, a chapter entitled "Of Offences against Religion." Some of the provisions were repealed by the Parliament of Canada, having found a place in the body of criminal law. Three sections were not repealed or re-enacted. S. 2 is as follows: "Any person who shall be convicted before a justice of the peace of shooting, gambling or sporting, of frequenting tippling houses or of servile labour, works of necessity and mercy excepted, on the Lord's Day, shall for every offence forfeit not less than one, nor more than eight dollars, and in default of payment shall be committed to jail for a term of not less than twelve hours nor more than four days."

There has been legislation purporting to be amendments of this provision passed by the Provincial Legislature, viz.: 1889, c. 5; 1890, c. 22; 1891, c. 32. And by the last of these a natural person or body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act, and is liable to penalty, etc.

The first question, I think, is whether the second section relates to a subject coming within "property and civil rights" under s. 92, or "the criminal law" under s. 91 of the British North America Act. Is it aimed at a public wrong, or is it a "shall not" in respect to civil rights? Of course the imposition of a penalty means little. Both Legislatures may impose penalties for the enforcement of their laws by the express terms of the Act. The applicants for the writ of prohibition contend that the subject of this legislation could

alone be dealt with by the Dominion Parliament and that the original Act could not now, and the amendments as well could not be passed by the Provincial Legislature. Hence that the amendments under which the information is laid are ultra vires.

Statutes of this character are common in the United States, and they are held to deal with Sunday as a civil institution, and to be a proper exercise of the police power of the State to promote the mental, moral, and physical well-being of the people by providing that they shall rest a seventh part of their time from labour, and at regular intervals. I only refer to these laws to ascertain, if possible, what is the proper head to put such statutes under in this country.

Blackstone, vol. 4, p. 63, not only treats of Sunday as a civil institution, but, as would be expected, in England, also from the standpoint of religion or morals. He has a chapter "Of Offences against God and Religion," and, under it, a head, "Profanation of the Lord's Day, vulgarly but improperly called Sabbath-breaking." There he refers to early English statutes, the parent of some of the American statutes as well as our own.

Many text writers follow this classification. In Bishop on Criminal Law, vol. 2, sec. 951, it is even suggested that the violation of the Lord's Day was indictable at common law. In 1 Chit. Crim. Law 20, there is a form of indictment at common law against a Sabbath breaker and profaner of the Lord's Day in keeping open shop. But it proceeds on the ground of nuisance, and would not cover the offences mentioned in this Act. In the Criminal Code of Canada there is a title, "Offences against religion, morals, and public convenience." Of course it is difficult to draw the line in respect to legislation relating to civil rights and relating to public wrongs But if it can be shown to be dealing with public wrongs, then it is removed from the head of civil rights.

It seems to me that there is authority on the point—a dictum in *Russell* v. *The Queen*, 7 App. Cas. 829. I venture to refer to it, although it appears that courts of first instance have generally had the misfortune to misunderstand any citations that they have ever made from that case. "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, 'Property and Civil Rights.' What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but relating to public order and safety. Upon the same considerations the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property to be criminal and wrongful." This is the dictum. "Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to animals though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so

regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs, rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

In *Regina* v. *Wason*, 17 Ont. App. 221, a provincial statute prohibiting under a penalty any person from selling adulterated milk to owners of a cheese or butter factory was held to be intra vires. But Street, J., whose opinion was upheld in the Court of Appeal, said: "Is it an Act constituting a new crime for the purpose of punishing that crime in the interests of public morality, or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law. If under the latter, I think it is good as an exercise of rights conferred on the province by sec. 92 of the B. N. A. Act." This observation was approved of in the Court of Appeal.

Testing this section by it I think it falls within the criminal law. Possibly the Provincial Legislature might approach it by enacting a law about masters and servants, and another about winners and losers in gambling, giving the one as against the other a rest on one day in the week, and so on, and thus bring the legislation under the head of civil rights, as the statute about vendors and vendees of milk was brought. But this provision is not passed about such rights at all; it is dealing with things which the legislature regarded as injurious to the public—not the rights of individuals inter se, but the right of the community not to have its citizens demoralized, whether they are those who engage in shooting, gambling, sporting, tippling, or working on Sunday, or those who are obliged to witness these things. One private citizen has no more interest than another in seeing it enforced. It is aiming at something analogous to public nuisances, and concerns the public.

There is another head to be looked at. If this provision was passed in the interest of the public no reason has been suggested why it is not as suitable or as applicable to the condition of things in other provinces as in Nova Scotia. It would not, therefore, be considered a "matter of a merely local or private nature in the province." The field has been occupied, if this is criminal law in so far as this Province is concerned, and there is no reason for applying provincial Legislation as a temporary expedient, because of any particular local iniquity under the recent doctrine of the Judicial Committee of the Privy Council.

Coming to the amendments, I suppose the Province might pass legislation in regard to this matter, and perhaps secure the same end under the head "property and civil rights" or some other head. But it appears to me that the Act, 1891, c. 32, is not an attempt to do this. It is a bona fide attempt to amend by adding sections to an Act which I have just endeavored to show is a part of the criminal law. The first section expressly says so. Moreover the person who offends by employing, hiring or procuring his employee to

perform servile labour is declared "guilty of performing servile labour on Sunday within the meaning of the second section of this Act," i.e., the principal Act. It is an attempt to deal with the criminal law—to make an offence equal to a crime that the Parliament of Canada alone could create.

In my opinion the prohibition ought to issue to prevent the prosecutor from proceeding under these supposed amendments.

RITCHIE, J.: Previous to 1867, c. 159 of the Revised Statutes (3rd series) was part of the criminal law of Nova Scotia. The whole of that series is contained in one Act, the different chapters being grouped together under specific divisions, or parts, and titles, which are, I think, part of the Act. (See p. 1 and s. 1 of c. 170, at p. 680). In this Act or revision c. 159 is placed with all the other criminal statutes then in force in part 4, which is entitled "Of the Criminal Law, and the Administration of Criminal Justice," and in the subdivision or title xli., which is entitled "Of Offences against the Government."

By the British North America Act the criminal law of this province was placed within the exclusive legislative authority of the Parliament of Canada, and that authority was exercised in respect of this chapter in 1869, when the Parliament of Canada repealed two of its sections. Revised Statutes of Nova Scotia (3rd series), c. 159, being part of the criminal law, the local legislature of Nova Scotia had, in my opinion, no power to alter or amend any of its sections, and any legislation purporting to have that effect is ultra vires the Local Legislature. I wish to be distinctly understood as giving no opinion as to whether the Local Legislature could or could not, by any legislation, prevent the performance of servile or other labour on Sunday, but I think it cannot be done in the way attempted—that is, by trying to amend the criminal law. The stipendiary magistrate for the City of Halifax should be prohibited from convicting the Halifax Electric Tramway Company, Limited, for any breach of the acts of the Local Legislature of Nova Scotia, purporting to amend c. 159 of the Revised Statutes of Nova Scotia (3rd series), or any act in amendment thereof.

TOWNSHEND, J., concurred.

MCDONALD, C.J., after citing B.N.A. Act, s. 129, referred to the sections mentioned in the information, and held that they were not ultra vires the legislative powers of the local Legislature. He then proceeds as follows:

The ground was not taken on the argument that c. 159 was ultra vires, nor can I see how such an argument could prevail, if my view is correct, that the statute, by reason of the legislation I have mentioned is a police or municipal law of the Province and nothing more. It is amendable both as to procedure and the imposition of penalties by the Provincial Legislature. I have been unable to perceive upon what principle the amending Acts I have referred to can be said to be ultra vires the authority of the Provincial Legislature. It is the duty of that Legislature to enforce all the laws of the Province, c. 159 included, and to provide and regulate the machinery and procedure by which that can be done, for without rules of procedure applicable to the courts whose function it is to deal with the question involved, the law itself may be incapable of enforcement. The right of the Provincial Legislature to make such provisions, and to impose adequate punishment by fine or imprisonment under

laws by which they had power to enact has long been settled by the highest authority. I have said that the second section of the amending Act of 1889 was an unnecessary precaution because the Interpretation Act in the third series of the Revised Statutes containing c. 159, contains the same provision in almost identical words. "Persons may include bodies politic and corporate as well as individuals." See also *Pharmaceutical Society of London* v. *L. & P. Supply Association*, 5 App. Cases, at p. 561.

I have endeavoured to show that the Stipendiary Magistrate of Halifax has jurisdiction to enquire into and adjudicate upon a charge of an alleged violation of the principal Act, and that the amendments mentioned do not affect that jurisdiction.

The charge is that this defendant corporation procured and hired persons to do servile work for them and in their interests on the Lord's Day. I think the Stipendiary Magistrate of Halifax has jurisdiction to adjudicate upon that charge, and that, consequently, this application should be refused with costs.

I am not sorry that I feel obliged to come to this conclusion. The Parliament of Canada has made no provision with a view to enforce abstinence from ordinary labour and occupation on the Sabbath, leaving the subject in case of Nova Scotia to be dealt with by the Local Legislature, and I should be sorry to see the sanction which our statute gives to the sacredness of the Sabbath withdrawn.

Prohibition granted.

McDonald, C.J.] BAULD *v.* ROSS. [Dec. 23, 1897.

Registry law—Second deed—Last grantee having notice—Assent.

In 1891 M. conveyed certain lands to P., by deed not recorded. In 1892 M. conveyed by deed the same property to C., P. having knowledge of and assenting to the execution of the deed to C. The second deed was recorded. Subsequently, the plaintiffs recovered judgment against M. and recorded the same. The Registry Act R.S.N.S. 5th series, c. 84, s. 21, provides that a judgment duly recorded shall bind the lands of the party against whom the judgment is recovered as effectually as a mortgage, and s. 18 provides that "deeds and mortgages of lands duly executed, but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such lands." The plaintiffs brought this action claiming a declaration that the deed from M. to C. was void as against plaintiffs, and that the legal title was in P., and that the lands were, under the Registry Act, bound by the judgment of plaintiffs. The action was tried before the Chief Justice at Baddeck, who

Held, that under the Registry Act and the facts in evidence the plaintiff's judgment did not become a lien on the property conveyed to C., and that the law as well as the equities were in favor of the defendants.

D. McNeil, for plaintiffs. *J. A. McDonald*, for defendants.

Full Court.] HOLLOWAY *v.* LINDBERG. [Jan. 11.

Master and servant—Term of hiring—Dismissal without notice—Evidence—Acceptance of employment with person to whom business is transferred.

In an action by plaintiff against defendant for wrongful dismissal without due notice the trial Judge found in defendant's favor on the ground that a weekly had been substituted for a yearly hiring. There was a direct conflict of evidence between the parties on this point.

Held, that the Court should not interfere with the conclusion of the trial Judge, although members of the Court were disposed to think that had the matter come before them they would have found differently.

Assuming that plaintiff was working for defendant under a weekly hiring when the business of defendant was taken over by the H. B. Co., with whom plaintiff continued,

Held, that the trial Judge was right in holding that the relationship between plaintiff and defendant came to an end, and that plaintiff then entered into the employment of the company.

Per TOWNSHEND, J., that the case was not that of a servant unjustly dismissed, but of a servant accepting employment in the same business upon its transfer to other persons, with full knowledge and acquiescence, and without objection to the new arrangement.

E. P. Allison, for appellant. *C. P. Fullerton*, for respondent.

McDonald, C.J., Ritchie, J., Townshend, J., Graham, E.J. } BIGELOW *v.* DOHERTY. [Jan. 11.

Setting aside judgment in default of plea—Affidavit need not disclose merits—Discretion of Judges—Defence sent by mail—Non-compliance rule—Costs.

By agreement between solicitors defendant was allowed further time for putting in his defence. Before the expiration of the time, and by the same mail, copies of the defence were sent to plaintiff's solicitor and the Clerk of the Court. The latter was shown to have been received in time, and was placed on file, and there was no explicit denial of the receipt of the former. Plaintiff's solicitor having entered judgment for default of plea, the Judge of the County Court on application to him for that purpose, showing the facts and on the usual affidavit of "a good defence on the merits," set aside the judgment with costs, giving leave to defendant to file and deliver his defence.

Held, affirming the judgment with costs that the practice requiring a party seeking to set aside a judgment for default of plea to disclose merits has been superseded by O. 27, R. 14, under which a judgment so entered may be set aside by the court of a judge upon such terms as to costs or otherwise, as such court or judge may think fit, and that in view of the terms of the rule, and the repeal of the former practice, it is not now necessary for the defendant to disclose merits unless the judge to whom the application is made requires it.

Per GRAHAM, E.J., that the case was eminently one in which the judge was justified in exercising his discretion by granting the application, and

Quære whether, although the service was not effected in the mode prescribed, it should not, under the non-compliance rule, be held to be sufficient.

H. V. Bigelow, for appellant. *McDonald* and *Ives* for respondent.

Full Court.] MUNRO *v.* QUIGLEY. [Jan. 11.

Libel—Fair criticism of public official does not justify charge of corrupt motives.

Defendant, one of the councillors of the town of Westville, published a letter commenting upon the conduct of plaintiff, the mayor of the town, alleging that the plaintiff took advantage of some of the employees of the town by withholding the money due them for their labour, and insisting upon their taking goods out of his shop for the amount. The jury having found in favour of defendant, in the absence of evidence to support the charge,

Held, setting aside the verdict with costs, and ordering new trial. (1) That the jury should have found for plaintiff. (2) That the trial Judge would have been justified in withdrawing the case from the jury. (3) That the principle of fair comment or criticism should not be extended to cover or justify a charge of sordid or corrupt motives or disgraceful conduct.

W. B. A. Ritchie, Q.C., for appellant. *A. Drysdale*, Q.C., and *E. M. McDonald*, for respondent.

Full Court.] THE QUEEN *v.* HAMILTON. [Jan. 11.

Assault causing bodily harm—Criminal Code, s. 641—Indictment under authority to prefer—Appointment of prosecuting officer under local Act.

Defendant was committed for trial on a charge of assaulting wounding and doing grievous bodily harm to W., and W. was bound over in regular form to prosecute. At the next term of the Supreme Court the grand jury found an indictment against defendant. W. was not present, and was not examined as a witness. The Attorney-General was not present, and no one had any special directions from him to prefer an indictment. No one had the written consent of a judge, and no order of court was made to prefer an indictment. The point was reserved whether the indictment should not be quashed because it was not preferred by any of the persons authorized by s. 641 of the Criminal Code. Under an Act of the Provincial Legislature crimes such as that for which defendant was indicted are prosecuted by an officer or public prosecutor appointed by the Attorney-General at each term of the court, or in default of such appointment by the Court.

Held, per TOWNSHEND and RITCHIE, JJ., (MCDONALD, C.J., concurring) that under these circumstances the presence of the prosecutor was not necessary, and no special direction from the Attorney-General, or written consent of a judge, or order of the court was necessary to make the indictment valid.

Quære, whether s. 641 of the Code is applicable to the procedure before the grand jury in any county of Nova Scotia, except Halifax.

Per WEATHERBEE, and GRAHAM, E. J., (HENRY, J., concurring), that the indictment not having been preferred in accordance with the provisions of the Code, s. 641, the conviction was bad and should be quashed.

Attorney-General for Crown. *F. T. Congdon* for prisoner.

Full Court.] JOHNSTON *v.* MILLER. [Jan. 11.

Levy under execution on judgment entered prematurely—Excessive damages.

The plaintiff was sued by the defendant, and judgment for default of appearance obtained on the 30th June, 1896. Plaintiff paid $100 on account of the judgment, and agreed to pay the balance in instalments. Subsequently it was discovered that the judgment had been entered prematurely, and proceedings were taken which resulted in its being set aside on that ground. Defendant thereupon brought a second action and obtained judgment for the balance due him, giving credit for the $100 paid on account of the previous judgment.

In the present action plaintiff claimed damages for the levy under the judgment irregularly entered, and the return of the amount paid, and the jury awarded him $1.100 damages. There being no evidence of specific damage, and it appearing that the levy complained of was of a merely formal character, none of the goods having been removed, and no one placed in charge,

Held, that the verdict must be set aside unless the plaintiff consented to reduce the verdict to $50, which amount the court considered sufficient.

J. A. Chisholm, for appellant. *A. Drysdale*, Q.C., for respondent.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.] FOSTER *v.* LANDSDOWNE. [Nov. 30, 1897.

Practice—Demurrer—Queen's Bench Act, 1895—Rules 280, 426, 440.

The defendants in their statement of defence had, under Rule 280 (3) of the Queen's Bench Act, 1895, incorporated a demurrer to the statement of claim, besides raising questions of fact to be tried. They then, under Rule 426, set down the demurrer for hearing on a Wednesday, and after argument the demurrer was overruled. This decision coming before the full court for rehearing, counsel for plaintiff took the objection that under Rule 440 the demurrer should not have been set down for a separate hearing without an order of a Judge, but should be disposed of at the trial along with the issues of fact.

Held, that the objection would have been good if taken at the proper time; but, as the demurrer had been heard and overruled, the defendant could not now raise it at the trial, and that the rehearing must proceed.

Metcalf and *E. E. Sharpe* for plaintiff. *Attorney-General* and *James* for defendants.

Dubuc, J.] CURRIE *v.* RAPID CITY ELEVATOR CO. [Jan. 20.

Vendor and purchaser—Sale under order of court—Possession, effect of taking—Ex parte order.

This was an application, under Rules 685 and 691 of the Queen's Bench Act, 1895, for an order to issue execution against David Milne, who had, in September, 1896, made a written offer for the purchase of the property in

question in this action at $2,700 each—after an abortive sale by auction. The offer contained a stipulation for a clear deed. Milne went into possession pending the completion of the title and made some alterations in the buildings. Great delays occurred in completing the title, and the purchaser, after having several times requested the vendor to make the title good, finally on the 30th August, 1897, notified the vendor's solicitors that unless title was made to him within two weeks from that date, the offer should be considered as withdrawn, and that he would have nothing more to do with the matter. Two weeks afterwards the purchaser accordingly gave up possession of the property and returned the key. The vendor's solicitors, however, procured a report from the Master dated 18th Sept, 1897, approving of the sale to Milne, and on 29th September an order ex parte from the Chief Justice dispensing with payment into Court of the purchase money and that the payment be made to the Imperial Loan and Investment Company at their office in Brandon within ten days after service of a copy of the order and upon the purchaser receiving a conveyance of the property. No conveyance had been tendered to the purchaser before this application; but it appeared that on being served with a copy of the order he stated that he had withdrawn his offer and given up possession of the property and would have nothing more to do with the matter.

Held, that while the order of the Chief Justice remained in force it must be obeyed, although, probably, if all the circumstances had been made known to him, he would have refused it; and that the purchaser must pay the purchase money into Court within two weeks, and in default that the order for execution should go.

Held, also, that the purchaser had not lost his right to call for a good title by going into possession, and that there should be a reference to the Master as to the title.

No costs of the application were allowed.

Clark, for vendor. *Hough*, Q.C., for purchaser.

Province of British Columbia.

SUPREME COURT.

Bole, Loc. J.] BANK OF MONTREAL *v.* HORNE. [Dec. 15, 1897.

Evidence de bene esse—Rule 749—Expediency.

Application to abridge the month's notice required by Rule 749 which provides that "in any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial, although countermanded, shall, be deemed a proceeding within this Rule," and to examine a witness on the ground that he is seriously ill:

Held, on the authority of *Warner* v. *Mosses*, 16 Ch. D. 100, and giving

weight to the consideration that if the application were refused and the Court of Appeal held that such decision was erroneous, there would be irremedial mischief if the witness died; in the meantime the application must be granted.

Irving, J.] RE KOOTENAY BREWING & MALTING CO. [Jan. 25.

Jurisdiction of Judge of County Court sitting as local Judge of Supreme Court in winding up Company.

Judge Forin made an order in December, 1897, directing the winding-up of the above company, and this was a motion on behalf of the Bank of Montreal to set aside the order on the ground of want of jurisdiction.

Held, that a Judge of a County Court in his capacity of Local Judge of the Supreme Court, is not empowered to deal with winding-up proceedings, which is a "matter" distinct from "actions" and "causes" with which the statute gives him power to deal.

Walkem, J.] GORDON *v.* ROADLEY. [Jan. 26.

Appearance—Irregularity—Setting aside judgment.

This was a case in which the plaintiff sued the defendant for $5,000 for slander. The defendant entered an appearance in person to the writ of summons, but omitted to state his address. The plaintiff signed interlocutory judgment, and the defendant took out a summons to set it aside on the ground of irregularity in that an appearance had been entered, and asked for leave to enter a fresh appearance by a solicitor. The preliminary objection was raised to the application being heard at Victoria without leave, the summons having been taken out in the Kamloops registry. This was overruled, and it was

Held: That the appearance having been entered could not be treated as a nullity by the plaintiff, and the proper course was to apply to set the appearance aside.

Order made setting aside the judgment with costs in the cause, and granting leave to the defendant to enter an appearance by a solicitor.

North-West Territories.

SUPREME COURT.

Rouleau, J.] SPRENGER *v.* GRAVELEY. [Dec, 31, 1897.

Interpleader—Chattel mortgage—Description of goods—Future acquired chattels—Power of sale—Time of payment beyond date for renewal.

Interpleader issue tried by Mr. Justice Rouleau, in which one Sprenger, chattel mortgagee, claimed the goods seized by the sheriff, under an execution on a judgment against the mortgagor, in favour of one Graveley, the execution creditor. The mortgage had been duly registered and renewals filed, and no question was raised as to its bona fides. The goods were described as "all cattle and horses of whatever age and sex branded 5 on the left side, and all

increase thereof from time to time until the moneys hereby secured are fully paid." No locality was stated where the cattle were situate. The goods claimed consisted of one bull and seventeen steers. According to the evidence the animals claimed were all branded as above, and they were all the increase from cows so branded, and they were all born and branded during the currency of the mortgage. The time for payment was three years after the date of the mortgage. A power was given to the mortgagor to sell bulls and steers at any time during the three years.

Held, 1. That the description by brand was sufficient without any locality being given, particularly as the cattle were what are known as range cattle, roaming over a large extent of unenclosed country: *Mason* v. *McDonald*, 25 U.C.C.P. 439; *Field* v. *Hart*, 22 Ont. Ap. 449.

2. That the cattle claimed were the increase of the cattle mortgaged, the mortgagor having the legal and the mortgagee the equitable interest therein, and although a bona fide purchaser for value from the mortgagor could have held these cattle free from the mortgage, an execution creditor was not in the same position and he could only take the legal interest charged with the mortgage. See *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Eyre* v. *Macdonald*, 9 H.L.C. 618; *McAllister* v. *Forsyth*, 12 S.C. 1; *Jellet* v. *Wilkie*, 26 S.C. 288; *Coyne* v. *Lee*, 14 Ont. Ap. 512; *Canada Permanent Co* v. *Todd*, 22 Ont. Ap. 515.

3. That the power given to the mortgagor to sell bulls and steers, did not render the mortgage void, nor did this raise any presumption of fraud, as it was no more than the implied power to sell in the ordinary course of business, and there was no evidence of any fraudulent intention established: *McAllister* v. *Forsyth*, supra: *National Bank* v. *Hampson*, 49 L.J. Q.B. 480; *Walker* v. *Clay*, 49 L.J. C.P. 560.

4. That the fact that the time for payment extended beyond the time within which a renewal should be filed under the N.W.T. Bills of Sale Ordinance, did not render the mortgage void: *O'Neill* v. *Small*, 15 C.L.J. 114, not followed.

Muir and *Jephson*, for plaintiff. *Lougheed* and *Bennett* for defendant.

Scott, J.] IN RE TAYLOR. [Jan. 26.

Dominion Land Act, R.S.C.C. 54, ss. 42, 59—Patent issued same day as a conveyance made—Certificate of ownership.

Land was conveyed to one Taylor under the Dominion Lands Act, R.S.C., c. 55, s. 42. The patent for this land was issued to the assignor as of the same date as the assignments, which, therefore, could not be registered in the Department of the Interior, as provided by s. 59. Application was made to the registrar of the South Alberta (N.W.T.) Land Registration District to issue certificate of ownership to assignee by virtue of the assignment made under s 42 of the above Act. The registrator refused, and a reference was made to a Judge of the Supreme Court.

Held, that the transferor evidently intended to transfer all his interest and that certificate to transferee should issue.

C. E. D. Wood (Macleod), for applicant.

Book Reviews.

Manual of Medical Jurisprudence, by ALFRED SWAINE TAYLOR, M.D., F.R.S., revised and edited by THOMAS STEVENSON, M.D., London, 12th American, edited with citations and additions from the 12th English edition, by Clark Bell, LL.D.: Lea Brothers & Co.: New York and Philadelphia. 832 pp.

The wonderful developments of medico legal science has made a new edition of this standard work a necessity. A number of new subjects are presented and discussed. The increasing frequency of accidents, resulting in actions for damages, renders the department devoted to surgery of growing importance, whilst the increased knowledge of chemistry and kindred sciences requires constant attention to keep abreast of the times. This work, as is well known, is a favourite text book in schools of medicine and law, and is as useful to physicians in practice as it is to lawyers in the preparation of briefs. No lawyer, who is engaged in criminal practice, can afford to be without it.

A Treatise on the Law in relation to Promoters and the Promotion of Corporations, by ARTHUR M. ALGER; Boston: Little, Brown & Co., 1897. Toronto: Canada Law Journal Co.

This is a timely treatise on a subject which has become very prominent of late years in this country. We notice that the cases cited are largely from the English Reports, which is accounted for by the fact that the promotion of companies has been a more fruitful source of litigation in England than in the United States. The cases cited are not numerous, so that there has been all the more scope for the author to give them individually a fuller treatment than would otherwise be the case. Mr. Alger is a lawyer of eminence, and especially familiar with company law, and he appears to have done his work excellently well. This book is one which should find a large sale in this country. The book is produced by publishers of high reputation, and the typographical execution does full credit even to them.

A Treatise on the Law of Bailments, including Carriers, Innkeepers and Pledge. By JAMES SCHOULER, LL.D., Professor in the Boston University Law School, and author of treatises on the "Law of the Domestic Relations." Third edition. Boston: Little, Brown & Co., 1897. Price, $6. Toronto: Canada Law Journal Co.

This is the third and an enlarged edition of a book which was written in 1880. As our readers are aware, Mr. Schouler is a recognized authority on the subjects of which he treats. It was not the intention of the author to present any exhaustive collection of cases upon the various branches of law treated upon, but rather to treat the subject from a modern standpoint, and classify the cases so as to give a general and accurate view on the subject of bailments. There has been a large growth of authorities on the old common law doctrines affecting the various matters coming under the general terms bailments, and this especially applies to transactions in reference

to the rights of common carriers, owing to the development of railways, etc. It will be to the more extended treatises on the various subdivisions of the law of bailment that the practising lawyer must refer for brief-making purposes, but there is no work more valuable than the one before us for students and others desiring information as to principles.

Commentaries on the Law of Trust and Trustees as administered in England and in the United States of America, by CHARLES FISK BEACH, Counsellor-at-Law; in two volumes: St. Louis: Central Law Journal Co., 1897. Toronto: Canada Law Journal Co.

To prevent mistakes, it is well to state at once that the book before us is written by the father of Charles Fisk Beach, jr., and we mention this as the name of the latter appears as author of numerous legal treatises, of which it is said others have been mainly the authors, and the son has acquired a not entirely enviable reputation as being a "book maker."

There has been of late years a good deal of vicarious book making. We are aware, for example, of a valuable book, which bears the name of a prominent lawyer in New York, who has taken almost word for word the labours of another probably more competent than himself for the task, and gives the matter to the public as his own, without reference to or acknowledgment of another's brains. A very contemptible proceeding, truly.

It may not be to the detriment of the book before us that the author is largely indebted to the assistance of Mr. E. F. White of the Indianapolis Bar, who, however, is here generously given full credit for his share in the production of the work. However this may be, and whether the work is principally that of Mr. Beach or of Mr. White, we must say it seems to have much merit in its composition, and will be a valuable addition to the literature of this complicated and obscure branch of modern jurisprudence. That it is a work of great industry is manifest, as it contains over 1,800 pages, and refers to over 16,000 cases, gathered from various sources on both sides of the Atlantic. The style is pleasant, good and gives pleasant reading, and the matter itself seems to indicate that it will become a favourite book of reference on this most important branch of the law.

The Law Quarterly Review for January, 1898. London: Stevens & Sons, 119, 120 Chancery Lane.

This opens with the editor's usual budget of apt and pungent comment upon recent decisions. The essays which follow deal with topics the diversified character of which will be realized when we say that they carry us half round the globe, and from the palmy days of ancient Roman jurisprudence, through the twilight of the middle ages, to the most recent stages in the development of the equitable principles in the United States. The first article is "A Prologue to the History of English Law," in which Professor Maitland has extracted from the vast stores of information recently accumulated by painstaking Continental jurists a very readable account of the salient events connected with the growth of modern European law during that period which is covered, for general purposes, by Gibbons' great work. The second article

is a paper upon the "Wage of Law Teachers," by Professor Gregory, of Wisconsin University. Mr. Griffith discourses upon the fascinating topic of "Wills in Ancient Egypt," a department of archæology which, although the materials for research are still scanty, promises to furnish much entertainment hereafter to students of legal history. Mr. Labatt, (to whom our readers are indebted for an article which appeared in our last volume on certain phases of actions of tort, ante vol. 33, p. 713) analyses in an article headed "Preferential Debts of Railway Receivers," the remarkable series of decisions in which the courts in the United States have by judicial legislation introduced into the law of mortgages a new body of rules, the effect of which, in certain cases, is to postpone secured to unsecured creditors in the disquisition of assets of railway companies, whose property is placed in the hands of a receiver pending foreclosure proceedings. This is an excellent article, and decidedly the most useful one in the number to the practising lawyer. We strongly commend this, the best of all law reviews, to the attention of our readers.

Flotsam and Jetsam.

During the days of duelling in the South a certain distinguished lawyer, who was a rapid shot and successful duellist, was said by his friends to have "shot into" celebrity. He evidently was also quite a wit, for, being a small man, he was engaged for a duel with a very large man, whereupon he insisted that, to make the match even, the size of his own figure should be chalked on the body of his adversary, and that any shots striking outside the chalked lines should not count.

A judgment of much interest on both sides of the water, because it constitutes a precedent in the law of railway seats, was recently delivered in London. It appears that a gentleman travelling from London to Hastings had occasion to leave the carriage at Tunbridge Wells, and took the usual precaution to reserve his seat by leaving therein his umbrella and newspapers. While he was absent another passenger seized his place and refused to vacate it until forcibly ejected. The ejected passenger brought an action against the original owner of the seat, and the latter entered a counterclaim for similar damages. The claim for damages for ejectment was dismissed and the counterclaim allowed, the Court holding, in effect, that the universal mode of retaining a seat in a railway carriage is a most reasonable and convenient one. By no means the least important point in the judgment referred to is the Court's assertion that the holder of a seat is privileged to use reasonable force to eject an intruder.—*Albany L.J.*

In the Westminster County Court, England, the case of *Nutt* v. *Hughes* was tried by his Honour Judge Lumley Smith, Q.C., in which a claim for £11 19s. 4d. was made by Mr. David Nutt, the publisher, the defendant being Mr. G. Hughes.

Mr. Sills, solicitor, represented the plaintiff.

The plaintiff, it was stated, published a book for the defendant called "Dvorak, Abu Fernus," and now sought payment of it after giving credit for nine books sold.

Defendant: I have an equitable defence. I applied for a special jury.

His Honour: Yes, you demanded a special jury of four publishers, four authors, and four professors of Arabic, and if possible, a laureate. (Laughter). Where would we get the latter from?

Defendant: Mr. Swinburne, perhaps.

His Honour: We have only ordinary juries here, and if you had had one you would have had one a tailor, another a lodging-house keeper.

Defendant: I wanted a special jury.

His Honour: I will adjourn it for a common jury to be summoned.

Defendant: I do not want a common jury. He went on to protest that the action was premature. His counter-claim had not yet matured. He objected to the plaintiff having sent a copy of the book to the Royal Asiatic Society.

His Honour said he might bring his action, and asked, "Have you any more to say?"

Defendant: Yes, I have a great deal more to say. (More laughter.) It's a great hardship I cannot have a special jury.

His Honour: I am always afraid when people have odd ideas like this——

Defendant: Odd ideas! I have no odd ideas. (More laughter.)

His Honour: Do you want a jury?

Defendant: Not a common jury.

His Honour: Judgment for the plaintiff.

Defendant: I have more to say. I wanted 1,000 copies, and they have only printed 250. That is most damaging to an Orientalist.

His Honour: Mr. Nutt, was any number mentioned?

Mr. Nutt: No number was mentioned.

Defendant went on to complain that at first Mr. Nutt exhibited a copy of the book in the window. Why did he remove it?

His Honour: Have you anything more to say?

Defendant: Yes; a great deal more. (Laughter.)

His Honour: Then fire away. (More laughter.)

Defendant, in reply to his Honour, said he was at Magdalen College, Oxford, before he went to India. He held an Indian diploma in Arabic, and this book would no doubt be used as a key in the Arabic-English schools in India.

His Honour: You are liable for the £11. 19s. 4d.

Defendant: I insist upon being heard.

His Honour: I have heard you at great length.

Defendant: I have a few odd notes here (exhibiting a sheet of paper).

His Honour: Do you want time to pay?

Defendant (with great emphasis): I will not answer such questions until you have heard my case.

His Honour: Stand down.