The Canada Law Journal.

VOL. XXVIII. MAY 2, 1892. No. 8.

IT is not often that counsel have occasion to teach a wholesome lesson to their clients by throwing up their briefs; but when the occasion does arise it is refreshing to see it done with a promptitude and determination calculated to impress the public with the fact that the profession knows what is due to its honour. An occasion of this kind arose the other day, and one of the leaders of the Bar was not slow to appreciate the situation and act accordingly. Mr. S. H. Blake, Q.C., felt that the action of the corporation of the City of Toronto in repudiating what he had done under their instructions (couching it in language imputing unworthy motives) was not merely an insult to himself, but was something which he owed to the profession to mark with strong reprobation. He accordingly returned their briefs and declined to act for them any longer. The Council made an ample apology, and urged him to resume his position as their counsel, which he was persuaded to do. A good lesson was well taught, and well learned.

THE case of *The Trust & Loan Co.* v. *Stevenson*, 21 O.R. 571, discloses the necessity of care on the part of mortgagees in making contracts with third persons for the payment of the mortgage debt. In order to prevent the Statute of Limitations from running against him, a mortgagee must bear in mind that it is not enough for him to be able to show that the interest on his debt has been paid up to a point within the statutory period for bringing an action to enforce his security, but he must also be able to show that the payment has been made by some one who was authorized to make the payment so as to prevent the statute from running in favour of the person in actual possession of the mortgaged premises. Not every payment on account of a mortgage will give a new starting point for the statute in favour of a mortgagee. In the case referred to the plaintiffs' mortgage was made by one Edgar. Edgar became bankrupt; his equity of redemption was sold by his assignee to Stevenson, who held a mortgage subsequent to the plaintiffs'. Stevenson sold the land in 1869 and covenanted against incumbrances, but, so far as appears from the report, made no other contract with his vendees to pay off the plaintiffs' mortgage. Stevenson's vendees went into possession. After Stevenson had sold he, in consideration of an extension of time, made a contract with the plaintiffs to pay them their principal and interest, reciting (contrary to the fact) that he was the owner of the equity of redemption. Under this contract the interest was paid by Stevenson and his representatives down to the year 1890. Stevenson's vendees had in the meantime continued in possession and had never acknowledged in any way the plain-

tiffs' title as mortgagees, and to the plaintiffs' action to enforce their mortgage set up the Statute of Limitations as a defence, upon which they succeeded. The plaintiffs were lulled into a fatal sense of security by the due payment of interest on their debt, but the result of this action has revealed to them the somewhat unpleasant fact that the security of the land on which they were relying for the recovery of their principal money has insensibly slipped from beneath them.

JUDGES: THEIR WORK AND SALARIES.

The remuneration of public or judicial officers is a somewhat delicate subject to discuss, as it is a matter, to some extent, personal to themselves. When a man accepts an office, he knows just what salary he will be entitled to; and if he chooses to give up a more lucrative position for the peace, pleasure, or honour of a public office, that is his own business, and scarcely warrants public criticism as to the terms of the acceptance. It is also to be presumed that an impersonal body, such as a Government, acting for the Crown, will take care to provide sufficient remuneration for those whom it employs, more particularly those connected with an important matter like the administration of justice.

It is, however, admitted that the distinguished occupants of the Bench in Ontario are not sufficiently paid for their services. The question whether they could earn more in the practice of their profession as members of the Bar is not material. A certain amount of work is required of them, and for this work they ought to be liberally rewarded. The salary of a Chief Justice ought to be in keeping with his office, and that of a puisne judge should be quite high enough to satisfy every reasonable ambition, so that the extra allowance to the chief of the division ought not to be an element in the desire of his brethren to fill his chair. Then the increased cost of living in Toronto ought to be taken into consideration. What was fair compensation ten or fifteen years ago is much below what would be adequate now. The cost of houses (and judges are sufficiently mortal to require some degree of shelter) is double what it was a few years ago, and we feel safe in stating that the cost of living, as distinguished from the value or rent of residences, is at least one-third greater than it was when many of the present judges received their appointment. The actual work of our courts has certainly quadrupled in the same period. We refer not only to the large increase in the number of cases which are tried and appealed, but also to the expenditure of mental power in keeping pace with the marvellous growth of case and statutory law. Causes cannot now be tried, as many of them formerly were at *nisi prius*, on the lines of what is commonly known as "horse sense." At every turn, the court is confronted with precept and precedent. In every corner, statutory amendments and enactments lurk, unseen by the casual observer, to entrap the unwary and unread judge. In fact, the judicial life has become one of unceasing toil, and he who would decide cases on "general principles" nowadays would soon discover himself being weighed in the balance of some appellate tribunal and found wanting. We do not mean for a moment to be understood by this as intimating that our judges are either unwary or unread. Far from it. We

merely point out the absolute necessity for the judicial mind to be continuously on the alert and stored with innumerable authorities—the good ones to guide, and the bad to warn against the many pitfalls and uncanny places on the road to judicial conclusions. All this involves extra labor, time, and mental outlay, and for this, we claim, proper compensation should be made. By reason of these things, what may have been reasonable reward for services in the past is much below what would be fair and proper remuneration for the present increased volume of work.

One result of the complex system into which our legal business has drifted, and the consequent addition of great labor to the members of the Bench, is *the want of finality in decisions.* The greater the number of courts by way of appellate jurisdiction and the more easy the means of appealing, the larger will be the volume of business for adjudication. This is evidenced by our law reports as compared with those in England. Considering the population, wealth, commerce, and general business of Ontario, on the one hand, and, on the other, the vast and innumerable interests of the English people, together with their great riches, their complicated domestic and foreign relations, and their numbers, it becomes a curious problem how and why our law reports are annually filled with nearly as many cases as those published by the English reporting staff. The cost of appealing in the first instance here is low. The facility creates the supply, and judges are engaged almost every day hearing arguments and determining appeals which in many cases ought not to go beyond a Division Court judge. The poor litigant is compelled to travel from one judge and a jury to two or, at most, three judges, from these to four judges, and from these to the six judges of the Supreme Court, with perhaps a taste of the luxury of the Privy Council of England, until, as often happens, before a conclusive judgment is reached, the final arbitrament of death is the only definite finding he gets for his trouble; and even then his representatives are forced to carry on the warfare, which too frequently leaves the matter where it began, with the mournful exception that all parties concerned are infinitely worse off than before.

This tramping from court to court, seeking a binding decision and finding none, is surely contrary to the most ordinary business principles. The best business men in the world are the members of the Boards of Trade; they are schooled in all that pertains to business; they conduct their own affairs, and indirectly the vast commercial concerns of a nation, on a basis which is the result of years of experience of the most practical nature. What is their method? When any business dispute arises between the members in relation to their dealings and contracts, a committee decides, and that decision is final. If the dissatisfied party desires to take his grievance further, he can only do so at the price of ceasing to be a member of the board. Now, these men's minds are the product of purely business methods. If, with their knowledge of the world and commercial transactions, they have arrived at the conclusion that this is the only rational way of settling difficulties, what can be said in favour of the legal plan which appears to hold out every inducement to excite appeals from court to court? It is true that we cannot determine legal questions on purely business

principles, but we can safely borrow a leaf from those who are engaged in that class of business out of which arises the most fruitful causes of litigation—the domain of contract.

In such organizations as co-operative institutions, partnership concerns, and in many municipal matters, we find provision is made for settling disputes by arbitration, which, however, we regret to say, is, by the operation of our law, very often rendered a dead letter. Still the tendency is toward arbitration as the best means of adjusting differences, simply because the courts, by the ready facility they afford for appeals, have become too tedious and costly a machine for the ordinary business man to utilize as a means of determining his rights. Courts, by reason of the law and a long line of precedents, do not, after all, determine a man's rights as viewed in the light of strict justice. They deal with questions on legal and technical grounds, not on the moral convictions of right and wrong, or on business principles applied by business men to ascertain what is fair between party and party. What people want is a cheap and speedy method of determining the justice of their claims. They do not aspire to be the means of filling our legal reports with authorities on various phases of the law, to be quoted, perhaps, against themselves on the first opportunity. The courts are, however, not to blame. They are created for the purpose of administering the law as they find it, and our remarks must be construed as referring to the system alone, which is still a technical and tedious system, notwithstanding many efforts to reduce it to a common-sense basis.

As we have already suggested, this travelling from one court to another creates an immense amount of labour for the Bench. Now that the question of salaries is before Parliament, it would be well if the remuneration could be so fixed that a profitable change in the distribution and mode of work might be made at an early date. There can be no doubt that a much cheaper, simpler, and more expeditious way of doing legal business might be devised. We do not desire to lower the incomes of the body of the profession, but, as a matter of fact, under our present system, the cream of the costs of litigation goes to half a dozen leading counsel, with the natural result that the solicitors and younger members of the Bar suffer pecuniary loss. But, outside of this, one unconsciously asks, why should there be so many divisions and courts to reach a conclusion in a case? The technical walls built up between Queen's Bench, Common Pleas, and Chancery Divisions are directly opposed to the spirit of the age, and are certainly inconsistent with the whole tenor and object of the Act by which they are perpetuated. Without at present touching the question of fusion, we may ask, why, for instance, should there be a sitting of an appellate Divisional Court and also a Court of Appeal? If the Court of Appeal is equally divided, the case is just where it was, except that there has been great expense and delay for nothing. Double work for litigants, counsel, and judges has been caused, and every dollar expended has been absolutely thrown away. Why should all this extra work be imposed on the judges when there is so much complaint deservedly made that these gentlemen are overworked? Why is no attempt made to relieve them of that which is manifestly unnecessary?

We have no hesitation in saying that there is no valid ground for the present multiplicity of courts and judgments, and every reason for their simplification and restriction. One High Court, including a Court of Appeal, essentially one in substance as in name, is enough. Fourteen judges now on the Bench would be found sufficient to perform all the duties, and they would find sufficient leisure in their office to make life more pleasant to them than it is now. There is no necessity for sets of judges trying cases over and over again, and making work for themselves without any object whatever. We are not amongst those who believe that one set of men are much better than another, assuming the conditions to be practically similar. The name of the Court of Appeal does not bear in itself any peculiar charm not possessed by any other court. Four judges selected from the High Court are just as likely to be right as four judges selected elsewhere, because our judiciary is, we are proud to say, composed of able, painstaking men. There is no reflection on the Court of Appeal in what we say, and, were the positions reversed, we would humbly, yet firmly, cling to our opinion that in this country, at least, the whole Bench is practically on the same high level. Experience has taught us that it is possible for the Divisional Court, nay, for one judge thereof, to stand the test of the Privy Council as well as the Court of Appeal and the Supreme Court of Canada combined. Having said this, let us see how a change could be made advantageously.

Let the ten High Court and the four Appeal judges compose a High Court. Five of them should sit in Appeal, and their decision as regards proceedings before provincial courts should be final. Their sittings might be once a month, except during vacation, and there would still be more time at the disposal of every judge on the Bench than there is under our present arrangement. The senior judge of the fourteen, or the one considered most competent for the position, would, we suppose, be the chief of this appellate body, and be free from circuit work. We do not even suggest a word against the erudition, ability, or dignity of the present Court of Appeal when we submit that a judgment of an Appellate Court of five judges, taken from the High Court and Court of Appeal combined, would be as high an authority and entitled to as much respect in every sense as that of any court in the Dominion. The present Appeal judges would be members of the High Court, and litigants would still have the benefit from time to time of the opinion of one or more of them.

Under the system now suggested, there would be no failure in an appeal. The litigant would go from the trial judge to the Appellate Court. The result would be speedily arrived at. The litigation would not in any case be fruitless, as is now often the case, and the cost of an appeal would be less than one-half what it is at present; and, above all, there would be *finality*. This, after all, is the great object; for even if one feels that a judgment against him is erroneous, it is some satisfaction to know there is an end of the matter. To illustrate this position: A. sues B. and obtains a verdict at the trial. B. appeals, not to two judges, who may differ; nor to four, who may be equally divided; but to five. Suppose his appeal to be dismissed; would B., in ordinary cases, take his appeal further, in the face of six judgments against him? But assuming that three only

hold with him, it then becomes an equal division of opinions, one of which, although perhaps entitled to much weight, would not in most cases be a considered judgment, but simply the ordinary verdict at the trial. These are the extreme cases; but if we take an average, these judgments would be four to two, and in many instances five to one. The chances are in favor of the party having the judgment, for the apparent reason that a judge is not likely to be more frequently wrong than right in his opinion. The result we have indicated would have a most desirable effect. The mind of the counsel or solicitor would not be so speculative in appealing. The fact that there is a difference of opinion in the Divisional Court, and that one judge of the Court of Appeal favors the appellant, is an incentive to go higher. It is practically a premium on further litigation. The ordinary chances of war are very great as our courts are constituted, and more than this—under the present system the minority, strange to say, may govern. For instance, the trial judge decides for the plaintiff. The full Divisional Court upholds the judgment. The Court of Appeal stands three to one against. Result: *five* judgments for the plaintiff and only *three* for the defendant, and yet the defendant succeeds! If this incongruous state of affairs does not encourage legal gambling, then we do not know what could have such a tendency.

Coming to the question of remuneration, the circuit allowance ought to be done away with, and a substantial sum added to the salary for expenses. We would then have no Chancery v. Assize in the minds of the profession in entering cases. The question of not holding duplicate courts in each county has, however, been discussed so often that we need not argue it at any length. Suffice it to say that there is no reason, plausible, cogent, or otherwise, why this absurdity should be allowed to continue, except that under the present improper system of paying the judiciary, the evil is somewhat of a necessity and could not be remedied, as matters stand, without grave pecuniary loss to the circuit judges. We take the ground that they are not paid enough; and, until sufficient provision is made, the holding of an extra court in each county, or nearly so, even if there is no pretence of necessity for doing it, is justifiable. Any system is bad which, by virtue of its operation, prevents reforms. The Common Law judges receive, say, $1500 each, and the Chancery judges $1200 each, for circuit allowance, per annum. What possible difference can it make to the Dominion Treasury if, instead of $100 for each court, the judges receive a fixed yearly equivalent for expenses? Were this done, there could then be no possible objection to a complete and effectual consolidation of all the divisions. This matter rests with the Dominion Government. The judges would indeed be foolish to sacrifice a considerable portion of their income for the purpose of rectifying the mistakes of our legislators. The Minister of Justice should see to it that the present highly improper method of remunerating judges is done away with at once, and, at the same time, make provision for a fixed allowance for expenses. We realize that he has to contend with that ever-recurring Quebec difficulty—that for every dollar given to our fourteen overworked judges, a similar sum is claimed for their thirty-six brethren in the Lower Province who have much less work to do. But, if possible, do not let this question stand in the way of a much-

needed and radical reform—much-needed because, if the courts were amalgamated and a fair division of labour made, there would be sufficient judicial capacity to prevent any arrears or delay to suitors. The amount for expenses ought not to be less than $1-00 per annum for each judge. The scheme of allowing $100 for each court up to ten, and six dollars a day over that, is about on a par with the method of paying real estate agents' commissions. *Quantum meruit* would be a better principle than the one contained in the proposed measure before the House. Seriously, it is a great pity that in dealing with such an important matter, legislation should be permitted to descend to the level of political log-rolling for fat contracts. Let the judges have their well-deserved increase of $1000, and at the same time allow them a fixed sum for expenses, so that the Provincial Legislature may be free to consider the question of making the High Court one in fact as well as in name without being hampered by any consideration of judicial incomes. We believe that under an arrangement other than that which exists, whether such arrangement be on the lines we advocate or not, we would see the letter of the Judicature Act made to conform to the spirit which prompted that legislation, and the senseless and utterly useless distinctions which are now in existence would soon become to the public a matter of astonishment that they ever had a place in our system of judicature.

We have perhaps ventured too far on forbidden ground. Our only excuse is that we have the interest of the judges at heart, as well as a regard for the litigant, whose path is now too often beset with difficulties which should not exist, and uncertainties which should be removed. We have no doubt that in the event of proper legislation at Ottawa taking place on this subject, the Attorney-General of this Province, mindful as he his of the people's interests, will do what is right in the matter of consolidating the divisions, although we scarcely hope for such a bold stroke as would include the Court of Appeal in the consolidation. Even conservative and traditional England has dispensed with one of the Common Law divisions, and we have not heard of any fatal results to any of the former Common Pleas judges in consequence, and surely in a democratic Province like Ontario we may safely follow in the footsteps of the mother country, waiting always at a respectful distance before the order to march is given. With many others, we admire the conservative policy of the Attorney-General of Ontario, but a little of the radical spirit of the leader of the Opposition intermingled with it might not, in the case under discussion, be injurious to the best interests of either judge or suitor.

It would serve no good end to discuss the worn-out proposition that so long as the salaries remain as they are now, or approximately the same, the leaders of the Bar will refuse appointment to the Bench. This is not the real issue. If the salaries of judges were double what they are now, the same result would still follow. The freedom and fight of a large counsel practice please many lawyers better than the dignity and restriction of the Bench. The incomes derived by leading counsel could not be equalled by the most reasonable provision a Government dare make for payment of the judges. Besides this, leading counsel are not, by reason thereof, always best fitted, for the impartial and im-

personal discharge of judicial duties. The bias and pugnacity in favor of a client grow into second nature, just as we see in some Crown Attorneys the desire to obtain convictions. The mode of conducting cases is never, or at least rarely, judicial, so far as the conduct of the advocates engaged is concerned. The counsel who does not display great zeal in the interest of his client is set down as weak, and retainers thereafter become less frequent. We must, therefore, look for our judges among that class of lawyers who possess, perhaps, the ability but not the partisanship of counsel. But their remuneration must be commensurate with their work and talents. The sole test seems to us to be that good men ought to be selected, and that the salary ought to be sufficient to enable the public to have the advantage of their ability. Neither should the element of remuneration to the judges of other Provinces enter into the question. There is no comparison in the volume of work actually performed. Every Province should be treated on its merits. The circumstances must govern.

This is not, or, rather, ought not to be, a question of politics. It is a matter of vital importance to the welfare of the country. Good laws may be made; but if the administration of them is weak in a single point, then the laws are, to that extent, made in vain. It is of much greater consequence that the law should be well and ably administered than that the statute books should be filled with the wisest legislation which is not administered in the best, the cheapest, and the most expeditious manner possible. Given the judges we fortunately have in Ontario, and provide them liberally with the "sinews of war," so that their action may be free and full, and we have little doubt that in a few years we would see many radical and beneficial changes in our judicial system, and amongst the foremost agitators in that respect would be found many of the present occupants of the Ontario Bench.

Since the above was written we have read with interest a comprehensive article on the same subject in the English *Law Quarterly Review*, in which the writer takes a view similar in principle to that above expressed. We shall be glad to hear from correspondents and to publish what they may have to say on the subject.

COMMENTS ON CURRENT ENGLISH DECISIONS.

(Law Reports for March—*Continued.*)

EQUITABLE ASSIGNMENT—CONTRACT TO ADVANCE MONEY—BREACH OF CONTRACT—DAMAGES, MEASURE OF—JUDICATURE ACT, 1873, S. 25, S-S. 6 (R.S.O., C. 122, SS. 6-12).

Western Wagon Co. v. *West* (1892), 1 Ch. 271, was an action brought by the assignee of a contract to advance money, to recover damages from the defendant for having advanced money to the assignor after notice of the assignment. The facts were as follows: One Pinfold mortgaged property to defendants to secure £7,500 and further advances up to £10,000, which the defendants contracted to make. Pinfold made a second mortgage to the plaintiffs for £1,000 and further advances up to £2,500, and assigned to them his right to call for and require payment of the further advances agreed to be made by the defendants. The

plaintiffs gave notice of the assignment to the defendants, but after the notice, they, in forgetfulness of it, made a further advance of £500 to Pinfold. The action was brought to recover the sum of £500 as damages for breach of contract. The defendants disclaimed any priority over the plaintiffs' security so far as the £500 was concerned. Chitty, J., dismissed the action on the ground that a contract to make a loan is not one that a court of equity will specifically enforce; that Pinfold could not have maintained an action to compel the defendants to advance the £500, and the plaintiffs were in no better position; and, further, that no fund was bound by the contract, nor was any debt created thereby. The case was therefore reduced to this, that the defendants had made a payment which they could not have been compelled to make, and the plaintiffs were endeavouring to compel them to make it over again. And as regards the breach of contract, that even if the assignment were within the Judicature Act, s. 25, s-s. 6 (see R.S.O., c. 122, ss. 6-12), yet that the assignees were not entitled to sue for damages in their own right, but could only sue for damages in the right of Pinfold, and Pinfold had sustained no damage.

WILL—CONVERSION—TRUST TO INVEST IN LAND.

In re Bird, Pitman v. *Pitman* (1892), 1 Ch. 279, marks the important difference between a power and a trust for sale so far as regards the question of conversion. In this case a testator devised real estate on trust to raise money by sale or mortgage, and subject thereto to pay the rents and profits successively to his widow and son-in-law, Thomas Pitman, and, on the death of the survivor for the children, Thomas Pitman absolutely. The will contained a power to sell the premises, with a trust for reinvestment in freeholds or leaseholds with the consent of the tenant for life, with an interim power to invest in personal estate. The trustee sold the premises and invested the proceeds in consols, and the trust for reinvestment was never executed. One of the children of Thomas Pitman having died, the question arose whether his share devolved as realty or personalty, and North, J., held that it must be regarded as realty. Since the Devolution of Estates Act, questions of this kind are not so likely to arise in Ontario, inasmuch as the succession to real and personal estate is now in most cases the same.

PARTNERSHIP—PARTNERSHIP ARTICLES—DETERMINATION OF PARTNERSHIP BY EFFLUXION OF TIME—PARTNERSHIP AT WILL, APPLICATION OF PARTNERSHIP ARTICLES TO.

Daw v. *Herring* (1892), 1 Ch. 284, is a case in which a partnership having expired by effluxion of time, the partners continued to carry on the partnership business. In the original partnership articles a provision was contained enabling one of the partners "within three months after the expiration of the partnership by effluxion of time," on signifying his desire so to do within three months after the determination of the partnership, to buy the other's share. The question which Stirling, J., had to decide was whether this provision of the original partnership articles continued to apply to the subsequent partnership at will, and he held that it did, and that the partner having the option to purchase on giving the required notice within three months after the determination of the partnership

at will was entitled to purchase his co-partner's share, as provided in the original articles of partnership.

INFANT—GUARDIAN—APPOINTMENT OF GUARDIAN BY MOTHER WHILE FATHER OF INFANT LIVING—FATHER OF INFANT, RIGHTS OF—49 & 50 VICT., C. 27, S. 3, S-S. 2; S. 13—(R.S.O., C. 137, S. 14).

In re G—— (1892), 1 Ch. 292, a mother of an infant by her will appointed, "as far as she might be able," a guardian of her infant child, the infant's father being alive and living separate from the mother. The English Act above referred to, from which R.S.O., c. 137, s. 14, was framed, enables the mother to appoint a guardian "to act jointly with the father," and after her death if it be shown to the court that the father is unfitted to be the sole guardian, the court may confirm the mother's appointment or make such other order as may be right. Kekewich, J., though holding the appointment to be wrong in form for not appointing the guardian "to act jointly with the father," was nevertheless of opinion that it must be treated as having been made under the statutory power; and it being shown to his satisfaction that the father was unfitted to be sole guardian, he confirmed the appointment made by the mother.

VENDOR AND PURCHASER—ABSTRACT OF TITLE—RIGHT OF PURCHASER TO RESCIND FOR NON-DELIVERY OF ABSTRACT—NOTICE FIXING TIME FOR DELIVERY OF ABSTRACT—RESCISSION OF CONTRACT.

Compton v. *Bagley* (1892), 1 Ch. 313, was an action by a purchaser of lands against the vendor, claiming a return of his deposit and costs of investigating the title. The contract of sale was entered into on the 25th of August, 1890, and the purchaser was to have possession at the following Michaelmas. An abstract was to be delivered, but the contract fixed no time for its delivery. Some abstracts were sent to the purchaser's solicitors on the 27th of August, but they notified the vendor on the 30th of August that the title to part of the property was not shown thereby. After another request for a further abstract, the deeds in the vendor's possession were sent to the purchaser's solicitors. After further requests for a proper abstract, the purchaser, on the 13th of October, gave the vendor's solicitor a notice in writing that the purchaser would treat the contract at an end, and claim a return of his deposit and damages for breach of contract if the required abstract were not delivered within fourteen days. On the 16th of October another abstract was sent, but, as the purchaser's solicitor pointed out on the 20th of October, it did not refer to the title called for. No further abstract was sent until the 29th of November, and on the 2nd of December all the abstracts were returned to the vendor's solicitor, and shortly afterwards this action was commenced. The sole question at issue was whether the fourteen days' notice was, under the circumstances, a reasonable notice, and Romer, J., held that it was, and that the plaintiff was entitled to recover his deposit with interest and the costs of investigating the title.

MORTGAGE—POLICY OF INSURANCE AS COLLATERAL SECURITY TO MORTGAGE—RIGHT TO POLICY MONEY—FETTER ON REDEMPTION.

Salt v. *The Marquess of Northampton* (1892), A.C. 1, was known in the court of first instance as *The Marquess of Northampton* v. *Pollock*, 45 Ch.D. 190, and noted

ante vol. 26, p. 587, and is a decision of the House of Lords on an appeal from the Court of Appeal. It may be remembered that the Earl Compton had borrowed £10,000 of the defendants, who were trustees of an insurance company, on the security of a reversionary interest to which he was entitled contingently on his surviving his father. As part of the loan transaction, the defendants insured Earl Compton's life against that of his father for £34,500 in the company of which they were trustees, and paid the premiums until his death. Earl Compton by bond charged his reversion with the payment of the premiums. The agreement provided to whom the policy, in certain events, should belong, and declared that in the event of Earl Compton paying the whole debt before the death of his father the trustees should assign the policy to him; and that if he should predecease his father without having paid the debt, the policy should belong absolutely to the trustees. The majority of the House of Lords (Earl Selborne, Lords Bramwell and Morris) agreed with the Court of Appeal that, notwithstanding the latter provision, the representatives of the mortgagor were entitled to have the policy moneys applied in payment of the debt, and to have the surplus paid to them. Lord Hannen dissented. Their lordships considered that the clause purporting to give the trustees an absolute right to the policy was an attempt to fetter the right of redemption, and, as such, invalid.

CONSPIRACY—COMBINATION OF SHIP OWNERS TO KEEP UP FREIGHT—EXCLUDING RIVAL TRADERS BY COMBINATION.

The case of *Mogul Steamship Co.* v. *McGregor* (1892), 1 A.C. 25, has at last received its quietus. In its previous stages, 21 Q.B.D. 544, it is noted *ante* vol. 25, p. 10, and when before the Court of Appeal, 23 Q.B.D. 598, it is noted *ante* vol. 26, p. 9. The action was brought by shipowners to recover damages from rival shipowners who had combined together to exclude the plaintiffs' ships from trading from a certain Chinese port. Lord Coleridge, C.J., dismissed the action, though expressing doubt. His decision was affirmed by the Court of Appeal (Bowen and Fry, L.JJ.), Lord Esher, M.R., however, dissenting. The House of Lords (Lord Halsbury, L.C., and Lords Watson, Macnaghten, Bramwell, Morris, Field, and Hannen) have unanimously affirmed the Court of Appeal. It may now, therefore, be considered as settled law that combinations of traders for the purpose of excluding rivals from any particular market or branch of trade, whether that combination takes the form of "cutting prices," as the phrase is, or offering other inducements to trade exclusively with the members of the combination, cannot be impeached, or form any ground of action by any party who suffers thereby, either on the ground of its being a conspiracy, or an unlawful restraint of trade.

DISMISSAL OF ACTION AS VEXATIOUS—JUDGE, ACTION AGAINST.

Haggard v. *Pelicier* (1892), A.C. 61, was an appeal to the Judicial Committee of the Privy Council from the Supreme Court of Mauritius. The question at issue was whether an action would lie against the judge of a Consular Court for damages for dismissing an action pending before him, as being frivolous and vexatious, without hearing evidence, and their lordships held that a judge of such a

court was entitled to the like privilege as a judge of an English Court of Record —to immunity from liability to an action for anything done by him in his judicial capacity; and that a judge has power to summarily dismiss an action which he believes to be frivolous and vexatious. Their lordships fully adopt the principle laid down by the House of Lords in *Lawrance* v. *Norreys*, 15 App. Cas. 210, as to the power of a court summarily to dismiss frivolous actions. And even where a judge has acted dishonestly, their lordships express the opinion that the remedy against him is not by action, but by representations to the authorities, whose duty it is to see that justice is properly administered. Their lordships expressed regret that the judge in this case did not permit evidence to be adduced; but they nevertheless reversed the decision of the colonial court and dismissed the action with costs.

The Law Reports for April comprise (1892) 1 Q.B., pp. 385-570; (1892) P., pp. 93-110; and (1892) 1 Ch., pp. 321-458.

RAILWAY COMPANY—NEGLIGENCE—DUTY TO PASSENGER—ASSAULT BY FELLOW PASSENGER, LIABILITY OF RAILWAY COMPANY FOR.

Pounder v. *North-Eastern Railway Co.* (1892), 1 Q.B. 385, was an action seeking to make the defendant railway company liable for damages in consequence of injuries inflicted by fellow passengers on the plaintiff while travelling on the defendants' railway. It appeared that the plaintiff had been concerned in the eviction of a number of pitmen, and had incurred the ill-will of this class of men in the neighborhood in which he was travelling, but that when he took his ticket the defendants' servants had no notice that he was exposed to any more danger than one of the ordinary travelling public; but before the train started he was threatened, in the hearing of defendants' servants, with violence by a number of pitmen at the station, and, in order to escape attack, he got into the guard's van, but was removed therefrom and placed in a third-class carriage by the defendants' servants, who at this time knew that he feared violence from the pitmen. Into the carriage in which the plaintiff was put a number of pitmen crowded, and the defendants' servants, though applied to, did nothing to get the pitmen out, or to get the plaintiff a seat in another carriage. During the journey to the next station the pitmen assaulted and injured the plaintiff, and at that station the pitmen got out and other pitmen got in and repeated the assaults upon him; and this happened at each station at which the train stopped, and at each station the plaintiff complained to the guard, but nothing was done for his protection. The County Court judge who tried the case held the defendants liable and assessed the damages at £5, but on appeal the court (A. L. Smith and Mathew, JJ.) reversed the decision and held that there was no evidence of any breach by the defendants of any duty arising out of the contract of carriage and that they were not liable. Mathew, J., says, at p. 390: "The railway company are bound to take reasonable care for the safety of their passengers. The controversy was as to how that reasonable care was to be measured, and I am clearly of opinion that it can only be ascertained by refer-

ence to the ordinary incidents of a railway journey, and by reference to what must be taken to have been in the contemplation of the parties when the contract of carriage was entered into." And again: "The truth is that no obligation is entered into by the railway company with reference to the exceptional and extraordinary circumstances affecting a particular individual. If the railway company were to be made liable for an assault under these circumstances, they would be liable for a murderous attack and for loss of life in consequence, and might be made responsible under Lord Campbell's Act." This does not appear to us to be a very satisfactory conclusion, and we confess we do not see any good reason why a railway company should not be held liable for injuries such as the plaintiff sustained, and which the defendants' servants, by the reasonable exercise of their authority, might have prevented. If the servants of a railway company may supinely stand by and permit one passenger to maltreat another without making the slightest effort for the protection of the person assaulted, as this case appears to decide, then it seems to us the law is very much at fault. A passenger, on entering the train to be carried, is surely entitled to expect that the company will use all reasonable efforts to maintain order and prevent violence and disorder during the journey. In the United States a different view has been taken of the duty which railway companies owe to their passengers, and one more in consonance with what we believe to be the exigencies of society. The rule laid down in *New Orleans, St. L. & C.R. Ry. Co.* v. *Burke*, 53 Miss. 200 (1878), was, that the person in charge of the train was bound to make a fair and honest effort, with the best means in his power, to prevent the wrong, and that if he neglects to do so the company is liable. We may also refer to *Hendricks* v. *Sixth Avenue Ry. Co.*, 44 N.Y. Sup. Ct. 8 (1878), where a street railway company was held liable for injuries caused to a passenger by a drunken fellow passenger.

BAILMENT—INJURY TO CHATTEL WHILE IN POSSESSION OF BAILEE—ACTION BY BAILEE—DAMAGES, MEASURE OF.

Claridge v. *South Staffordshire Tramway Co.* (1892), 1 Q.B. 422, is a decision on the law of bailment. The plaintiff was the bailee of a horse which had been entrusted to him by the owner for the purpose of sale, with liberty to the plaintiff in the meantime to use it; while the horse was being driven by the plaintiff, without any negligence on his part, it was injured owing to the negligence of the defendants. The County Court judge who tried the action was of opinion that the plaintiff was not entitled to recover for the injury to the horse, and on appeal his decision was affirmed by Hawkins and Wills, JJ., who held that a bailee under such circumstances could not recover for the depreciation in the value of the horse, but only for the injury to his own interest as bailee, because he was under no liability to his bailor.

DIRECTORS, LIABILITY OF—WRONGFUL ACT OF SECRETARY OF A COMPANY.

In *Cross* v. *Fisher* (1892), 1 Q.B. 467, the defendants were directors of a building society, which was subject to the provisions of a statute which provided that

"if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess." The secretary of the society received deposits in excess of the limit fixed by the Act, and appropriated to his own use a great part of the money deposited, and he so managed the books of the society as to keep the directors in ignorance that the limit had been exceeded. The action was brought by a depositor whose deposit was made after the limit had been reached against the directors, and the Court of Appeal (Lord Halsbury, L.C., Lord Esher, M.R., and Fry, L.J.), affirming Mathew, J., held that every director who was a member of the board when the deposit was made was personally liable for the amount deposited.

TROVER—CONVERSION OF CHATTELS—SALE BY AUCTION ON PRIVATE PREMISES—AUCTIONEER, LIABILITY OF, TO RIGHTFUL OWNER.

Consolidated Co. v. *Curtis* (1892), 1 Q.B. 495, was an action brought against an auctioneer for the conversion of goods of which plaintiffs were the rightful owners, the conversion consisting in selling them by auction and delivering them to purchasers on the premises of the person who had previously assigned them to the plaintiffs by bill of sale, of which the defendants had no notice. The defendants contended that they were not liable, relying on *Turner* v. *Hockey*, 56 L.J. Q.B. 301, where, according to the headnote of the case, the precise point was determined. Collins, J., however, held that the plaintiffs were entitled to succeed, and pointed out that although there are expressions in the judgment of Day, J., which seem to support the proposition stated in the headnote of that case, still it goes beyond the point actually decided, as it would appear from the report that there the defendants, instead of themselves selling the goods in question, merely communicated an offer, which was accepted by the person wrongfully assuming to be the owner of the chattels. He therefore held that case not to govern the present, and followed the decision of Romer, J., in *Barker* v. *Furlong* (1891), 2 Ch. 183 (noted *ante* vol. 27, p. 395).

DEFAMATION—SLANDER—COUNTY COUNCIL—PRIVILEGED OCCASION—NOTICE OF ACTION—"ANYTHING DONE."

Royal Aquarium Society v. *Parkinson* (1892), 1 Q.B. 431, was an action brought against a member of the London County Council to recover damages for defamatory words spoken by the defendant at a meeting of the council concerning an application of the plaintiffs for a license to carry on a place of amusement. The defendant contended that the occasion was absolutely privileged, or if not absolutely privileged it was at all events privileged, in the absence of express malice; and also that he was entitled to notice of action. The jury at the trial gave a verdict for the plaintiff, and the defendant then moved for judgment notwithstanding the verdict, or for a new trial. The Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), refused the motion, and held that the occasion was not absolutely privileged, and that the council was not a court within the rule by which defamatory statements before a court are absolutely privileged; and

that a councillor making a defamatory statement at a meeting of the council is only entitled to the ordinary privilege which applies to a communication made without express malice on a privileged occasion. The court was also of opinion that under a statute which entitled the defendant as a councillor to notice of action "for anything done in the execution of his office," he was not entitled to notice of action; words spoken, as Lord Esher, M.R., says, are not "an act done or fact committed" in the sense intended by the statute. It appeared that the evidence on which the defendant had based his defamatory statement before the council was produced to the jury and that they must have been satisfied that the defendant had no ground for making the statement, and the court upheld their verdict on the ground that there was evidence on which the jury were entitled to infer express malice on the part of the defendant.

JUSTICE, DISQUALIFICATION OF—BIAS.

The Queen v. *Henley* (1892), 1 Q.B. 504, is another case on the question of the disqualification of a justice by reason of bias. The Act under which the prosecution was instituted expressly provided that no justice of the peace should be disqualified from hearing any case by reason of his being a member of a board of conservators. A justice who was a member of the board attended a meeting of the board at which the prosecution of the defendant was authorized by resolution of the board. He subsequently sat with other justices and heard the case. On a motion to quash the conviction on the ground that this justice was disqualified from sitting, the statutory provision above referred to was relied on, but Lawrance and Wright, JJ., were unanimously of opinion that that provision did not remove the disqualification arising from his having taken part in the preliminary steps which led to the prosecution. See *The Queen* v. *Gaisford*, *ante* p. 196.

Legal Scrap Book.

VOLUNTEERS AS JURYMEN.

A proposal in England to release volunteers from jury service has not met with the approval of the Lord Chancellor. It is, however, stated that Lord Halsbury, who is now engaged in preparing a bill relating to jury laws, is in favor of releasing volunteer *officers* from this service. The almost only privilege of the militia of Canada now is exemption from statute labor or its equivalent, and this does not apply to officers, nor where the volunteer is a property owner.

DE MORTUIS.

A singular case was tried at the last Manchester Assizes. Two brothers were joint owners of a grave, and one of them, dying, was buried in it. Later on a third brother, without burial rights, was there laid away. The surviving brother then sued the latter brother's executors—presumably for trespass—and

asked for both damages for the opening of the grave and a mandatory injunction to compel the removal of the corpse. The action of the unfraternal brother was successful.

TEXAN LAW.

It is satisfactory to observe that the State of Texas, of extradition fame, is rapidly acquiring "case" if not "statute" law. In *Hurley* v. *State*, 17 S.W. Rep. 445, it was held that "a dog may become the subject of theft." Previously to this, we may assume that stealing a horse was the only offence recognized as a crime worthy of punishment by either Judge Lynch or the legal tribunals. From the evident tendency to increase the list of crimes, we may hope, in the near future, to hear that even murder is recognized as one. This decision is on a par with *State* v. *Jones*, 29 N.E. Rep. 274, where it has just been held that whiskey is intoxicating. Truly this is a progressive age.

STREET RAILWAY COMPANIES.

With a remembrance fresh in our minds of similar scenes in our own streets, we can appreciate the action of Judge Taylor, of Indiana, in the case of *Fishback* v. *Citizens' Railroad Co.*, in appointing a receiver, at the instance of a private citizen, where the company, operating under a municipal franchise, failed to comply with its contract as to furnishing transportation, by reason of a strike of its employees for higher wages. The court very reasonably considered that the citizens should not be without street car service because of the inability of the company to make terms with its employees, and run the risk of loss of life and property, and went so far as to hold that each citizen has an interest in the city's contract with the company to such an extent that he has the right to have the contract performed. The action of the court had the desired result, and the company's domestic difficulties were immediately adjusted.

VICTIMS OF JUDICIAL ERROR.

If true, a story which comes from Port Dalhousie is a sad one, and illustrates how we, in Canada, may advantageously follow the system of compensation to the victims of judicial error that obtains in some of the countries of Europe. It is said that, five years ago, two men were tried for robbery, and, being convicted, were sent to the penitentiary, from which they have recently been released. They had, from the moment of their arrest, protested their innocence, and it is now stated that a priest has received some conscience money from the man who actually committed the crime.

While under our system of administering justice such a case as this may very infrequently occur, it is known that there have been other cases where, after a miscarriage of justice, innocent persons have been condemned, who, after suffering many years of imprisonment, and wrecked probably in fortune and health, are found innocent and thrust out upon the world.

As long ago as the reign of Grand Duke Leopold I. of Tuscany, in the latter part of the last century, a law was in force which held the State responsible for the errors of the "blind goddess" in criminal affairs. A few months ago the

Austrian Upper Chamber passed an Act to a similar effect, and like in terms to one previously assented to by the Lower House. This measure provides that the Minister of Justice shall examine any claim for compensation and fix the amount, and it is only when the Minister refuses to recognize a claim and admit the petition that the petitioner need apply to the High Court of Justice for indemnity. Very recently, and following not long after the action of the Austrian Chamber of Peers, the French Chamber had under consideration a bill making the reparation as wide as possible, and this measure was carried against the Government by a majority of twenty-seven in a total vote of five hundred and nine. In England the indemnity appears to depend upon the uncertain mood of the Home Secretary, assisted by popular clamour within and without the House of Commons. It is true that among the continental nations justice is administered and witnesses examined by almost inquisitorial means, and that there is not the presumption of innocence recognized by our laws, but this would seem to be no less a reason for providing that where justice has erred reparation should be made to the unhappy sufferer.

A. H. O'B.

Notes and Selections.

"DELIVERY AS REQUIRED."—It has been held in the Nottingham (Eng.) County Court that when orders are given "delivery as required," delivery within a reasonable time is meant and not "delivery as wanted," since with the latter construction the goods might never be wanted.

ELECTRIC RAILWAYS: TROLLEY SYSTEM.—Where a municipal corporation had given permission to a street railway company to put up poles and wires in certain streets and use electric motors by means of the trolley system, as provided by statute, and the company had spent money on the faith of the permission and begun the construction of the apparatus, it was held that an injunction would lie to restrain servants of the corporation from interfering with the work, unless it is made to appear that the method in which it is proposed to use the system is dangerous, and no objections to the system itself will be considered. *Jersey, etc., R.R. Co.* v. *Mayor, etc., of Jersey*, 25 N.J.L.J. 109.

MORTGAGORS—TENDER.—In the case of *Greenwood* v. *Sutcliffe*, 61 L.J. Rep. Chanc. 59; L.R. (1892) 1 Chanc. 1, we have some instruction in the law of tenders. In that case a mortgagor tendered a sum of money to the mortgagees for principal, interest, and costs, but reserved his right to tax the costs and review the figures. In *Harmer* v. *Priestley*, 22 Law J. Rep. Chanc. 1041; 16 Beav. 569,

Lord Romilly said *à propos* of a tender which had been refused: "I must, therefore, make a decree to take an account of what was due for principal, interest, and costs on . . . the day of the tender; and if the amount does not exceed the £570 tendered, the plaintiffs must have their costs of the suit." In *Greenwood* v. *Sutcliffe* the mortgagees refused the tender, and a redemption action became necessary. Mr. Justice Stirling held that it was in consequence of the reservation referred to above that the litigation had become necessary, and therefore the mortgagor was only entitled to the common redemption order. The Court of Appeal, however, decided that the conduct of the mortgagees had necessitated the action, and that the mortgagor was entitled to an order in the form settled in *Harmer* v. *Priestley*. "I should regard it as remarkable," said Lord Justice Bowen, "if the law was supposed to be unsettled on the question of tenders. A conditional tender is not an effectual tender in law, but a tender under protest is all right." Mortgagors should bear this in mind when they wish to pay off a mortgage.—*Law Journal.*

REVOCATION OF OFFER.—There can be no effectual revocation of an offer until the revocation is brought to the mind of the person to whom the offer was made. So it has been held by the Court of Appeal in *Henthorn* v. *Fraser*, Notes of Cases, p. 54, reversing a judgment of the Vice-Chancellor of the Duchy of Lancaster, and the judgment appears to be perfectly correct. The case was a very curious one. The offer, which was to sell certain house property, was revoked by letter on the day after it was made, but accepted also on that same day, the acceptance being posted after the revocation was posted, but before it was received. How is this consistent with the famous judgment in *The Household Fire Insurance Co.* v. *Grant*, 48 L.J. Rep. Exch. 577, in which a majority of the Court of Appeal (*dissentiente* Lord Justice Bramwell) held, overruling *The British and American Telegraph Company* v. *Colson*, 40 L.J. Rep. Exch. 362, that where a proposal by letter is accepted by letter, the contract is complete at the time of the posting of the letter of acceptance, even although such letter of acceptance has never been, in fact, received? Why should not a revocation take effect from the time of its being posted, just as an acceptance does? We think that there is a clear distinction between the two cases. An acceptance and a revocation are essentially different. When once an offer is made, the revocation of it must be made under the same circumstances as the offer itself; that is, with complete, not only constructive, communication to the other party, whose acceptance, if it can be posted before the revocation is received, will bind the contract.—*Ib.*

Proceedings of Law Societies.

COUNTY OF FRONTENAC LAW ASSOCIATION.

Annual Report of the Board of Trustees for the year 1891.

The Trustees beg to present their Annual Report for the year 1891.

There are twenty-one members in the Association, and the annual fees, amounting to $42, have been paid. This amount has been supplemented by the grant from the Law Society of a similar amount, and by a Provincial grant of $62.50. The whole of these amounts, with the exception of $7.58, has been expended, and the number of books in the library is now 322.

The Treasurer's Report is herewith submitted, giving a statement of the receipts and expenditure for the year.

An advantage resulting from the formation of associations such as yours lies in the increased facility for the discussion of matters directly affecting the profession, and in the unity of action and consequent greater influence which may be had by the different Associations of the Province to secure any changes in the law or practice which may seem generally desirable.

During the year there were submitted from the Hamilton Association proposed amendments to the Devolution of Estates Act, affecting the disposition of infants' estates. These met with the approval of this Association, and further action to secure the proposed reforms is looked for.

It is satisfactory to note the general interest taken throughout the Province in the movement for the more complete fusion of the courts. This Association expressed its concurrence in the suggestions made by the York Law Association as to the abolition of special circuit sittings for the Chancery Division, and the rearrangement of the sittings of the weekly courts in Toronto. Your trustees hope that legislation will be obtained to secure the object desired.

Again has death come to bring us deep regret. The year 1890 saw us mourn the demise of the late Dr. James A. Henderson, Q.C., then and for many years the president of this Association. Last year the death of the Right Honourable Sir John A. Macdonald had a special interest for the members of the Kingston Bar. He received his legal education in our city, and here for years he practised his profession, and from our ranks he entered that public life in which he was to attain so great distinction. With our resolution of condolence, direction was given that a large photograph of the deceased statesman should be obtained and hung in Judge's Chambers. We would recommend that the memory of our late president, Dr. Henderson, be similarly honoured.

(Sgd.) James Agnew, *President.*

Kingston, Mar. 31st, 1892. " Wm. Mundell, *Sec.-Treas.*

DIARY FOR MAY.

1. Sun .....*2nd Sunday after Easter.* St. Philip and St. James.
2. Mon.....J. A. Boyd, 4th Chancellor, 1861.
4. Wed.....Mr. Justice Henry died, 1868.
6. Fri.....Lord Brougham died, 1868, at 90.
8. Sun .....*3rd Sunday after Easter* York vacated by U.S. troops, 1813.
10. Tues....Supreme Court of Canada will sit. Court of Appeal sits. General Sessions and County Court sittings for trial in York.
14. Sat.....First Illustrated Newspaper, 1842.
15. Sun .....*4th Sunday after Easter.*
16. Mon.....Easter Term begins. Q.B. & C.P. Divs. of H.C.J. sittings begin.
21. Sat.....Confederation proclaimed, 1867.
22. Sun .....*Rogation Sunday.* Earl Dufferin Gov.-Gen., 1872
24. Tues ...Queen Victoria born, 1819.
25. Wed.....Princess Helena born, 1846.
26. Thur.....Ascension Day.
27. Fri.. .....Habeas Corpus Act passed, 1679. Battle of Fort George, 1813.
29. Sun .....*1st Sunday after Ascension.* Battle of Sackett's Harbour, 1813.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [April 4.

BARTON *v.* MCMILLAN.

Contract—Deed of land—Evidence—Agency—Statute of Frauds—Parol testimony.

M. owned certain property which was mortgaged, and had been advertised for sale under a power of sale in the mortgage. Before the date fixed for the sale, M. had made an assignment for the benefit of his creditors, and his wife tried to purchase the property. It was not sold on the day named, and the next day M.'s wife went to the solicitors of the mortgagee and arranged for the purchase by making a cash payment and giving a mortgage for the balance. She had some other property on which she wished to raise the money for the cash payment, and B. offered to lend the amount at 7 per cent. interest for a year, he taking the wife's property and holding it in trust for that time. B. and M. went to the office of the mortgagee's solicitors, where a contract was drawn up in the terms agreed, and signed by B., who told the solicitor that he did not know whether the deed would be taken in his own name or his daughter's, but that he would advise him by telephone. On the following day a telephone message came to the solicitors to have the deed made in the name of B.'s daughter, which was done; the deed was executed, the money paid, and a mortgage was given to the original mortgagee as agreed. Subsequently the daughter claimed that she purchased the property absolutely for her own benefit, and an action was brought by M.'s wife against B. and his daughter to have the daughter declared a trustee of the property subject to repayment of the loan from B., and for specific performance of the agreement with B. the action charging collusion and conspiracy on the part of B. and his daughter to deprive plaintiff of her property. The defendants pleaded the Statute of Frauds in addition to denying the alleged agreement.

Held, affirming the decision of the Court of Appeal, and that of the trial judge, STRONG, J., dissenting, that the evidence established the agreement by B. to lend the money and take the property in trust as security; that the daughter was aware of this agreement; and that the deeds executed having been made in pursuance thereof, the daughter must be held a trustee of the property, as B. would have been if the deed had been taken in his name.

Held, further, STRONG, J., dissenting, that the Statute of Frauds did not prevent the said agreement being enforced, notwithstanding it was not in writing.

Appeal dismissed with costs.

Moss, Q.C., for the appellants.

Bain, Q.C., for the respondent.

MCDONALD *v.* MCDONALD.

Title to land—Action against estate for debt of executor—Purchase by executor at sale under execution—Constructive trust—Statute of Limitations.

D.M. was one of the executors of his father's estate, and an action was brought against the estate on a note made by him which his father, in his lifetime, had indorsed for his accommodation. Judgment was recovered in said action, and an execution issued under which land devised to A.M., a brother of D.M., was sold and purchased by D.M., who gave a mortgage to the judgment creditors. D.M. afterwards sold the land to another brother, W.M., who paid off the mortgage; and, it having been offered for sale under execution issued on a judgment against W.M., it was again purchased by D.M. The original divisee of the land, A.M., took forcible possession, and D.M. brought an action to recover possession.

Held, affirming the decision of the Court of Appeal (17 A.R. 192) and of the Divisional Court, STRONG, J., dissenting, that the land having been sold in the first instance for a debt of D.M., he became, when he purchased it at such sale, a constructive trustee for the devisee, and this trust continued when he purchased it the second time.

Held, further, that if D.M. was in a position to claim the benefit of the Statute of Limitations, there was not sufficient evidence of possession to give him a title thereunder.

Appeal dismissed with costs.

McCarthy, Q.C., and *Leitch*, Q.C., for the appellant.

Moss, Q.C., for the respondent.

HOUGHTON *v.* BELL.

Will — Construction — Devise to children and their issue—Estate to be "equally" divided—Per stirpes or per capita—Statute of Limitations—Possession—Trustee.

T.B. by his will made provision for the support of his wife and unmarried daughters, and then directed as follows: "When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may then be living and the children of those of my said sons and daughters who may have departed this life previous thereto." The testator's wife and unmarried daughters having died, and some of his sons having previously died, leaving children, proceedings were taken to have the intention of the testator under the above clause ascertained.

Held, reversing the judgment of the Court of Appeal (18 A.R. 25) and restoring that of the trial judge, RITCHIE, C.J., dissenting, that the distribution should be per capita and not per stirpes.

J. B., a son of the testator, and one of the executors and trustees named in the will, was a minor when the testator died, and after coming of age he did not apply for probate, though leave was reserved for him to do so. He did not disclaim, however, and he knew of the will. With the consent of the acting trustee he went into possession of a farm belonging to the estate some time after he had attained his majority, and had remained in possession for over twenty years when the period of distribution under the clause above set out arrived, and he then claimed to have acquired a title under the Statute of Limitations.

Held, affirming the decision of the Court of Appeal, that as he held by an express trust under the terms of the will the rights of the other devisees could not be barred by the statute.

Appeal allowed with costs and cross-appeal dismissed with costs.

S. H. Blake, Q.C., for the appellants.

McCarthy, Q.C., and *H. S. Osler* for the respondents.

GRAND TRUNK R. W. CO. *v.* SIBBALD.

GRAND TRUNK R. W. C[O] *v.* TREMAYNE.

Railway Co.—Negligence—Construction of road —Interference with highway—Neglect to ring bell.

The Midland Railway Company, in building a portion of its road, left, at a crossing, the roadbed some feet below the level of the highway, and operated it without erecting a fence or otherwise guarding against accident at such crossing. The road was afterwards operated by the Grand Trunk Railway Company, and S. was driving along the road one day, and, as he approached the crossing, an engine and tender came towards him on the track; the horses became frightened and broke away from the coachman, who had jumped out to hold them, wheeled around, and the wagon rolled over the edge of the highway on to the track in front of the train. S. lost his arm, and a lady who had been in the carriage with him was killed. In actions by S. and the administrators of the deceased lady, the jury found that the bell had not been rung as required by the statute, and that the defendant company was guilty of negligence thereby, and also in not fencing or otherwise protecting the dangerous part of the highway.

Held, affirming the decision of the Court of Appeal (18 A.R. 184) and of the Divisional Court (19 O.R. 164), that the Midland Railway Company had no authority to construct the road as they did unless upon the express condition that the highway should be restored so as

not to impair its usefulness, and it or any other company operating the road was liable for injury resulting from the dangerous condition of the highway to persons lawfully using it.

Held, further, that the bell not having been rung as the statute required the company was liable for injuries caused by the horses taking fright and overturning the wagon so that the occupants were thrown on to the track, though the engine and the wagon did not come in contact. *Grand Trunk Railway Company* v. *Rosenberger* (9 S.C.R. 311) followed.

Appeals dismissed with costs.

McCarthy, Q.C., for the appellants.

Burns for the respondents.

Quebec.] [April 4.

BLACHFORD *v.* MCBAIN.

Lessor and lessee—Amount claimed—Arts. 887 and 888 C.P.C.—Jurisdiction.

Held, affirming the judgment of the court below, that where in an action brought by the lessor under Arts. 887 and 888 C.P.C. to recover possession of the premises a demand of $46 is joined for the value and occupation since the expiration of the lease, such action must be brought in the Circuit Court, the amount claimed being under $100. Arts. 887 and 888 C.P.C.—FOURNIER, J., dissenting.

Appeal dismissed with costs.

Duclos for appellant.

Archibald, Q.C., for respondent.

THE QUEEN *v.* MARTIN.

Negligence of servant—Crown—Liability of—50 & 51 Vict., c. 16—Prescription—Arts. 2262, 2267, 2188, 2211 C.C.

Held, reversing the judgment of the Exchequer Court, that even assuming 50 & 51 Vict., c. 16, gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the court expresses no opinion), such act is not retroactive in its effect and cannot be relied on for injuries received prior to the passing of the act.

Held, also, even assuming that under the common law of the Province of Quebec, or statutes in force at the time of the injury received, the Crown could be held liable, the injury complained of having been received more than a year before the filing of the petition the right of action was prescribed. Arts. 2262, 2267, 2188, 2211 C.C.

Appeal allowed without costs.

Robinson, Q.C., and *Ferguson*, Q.C., for appellant.

Belcourt and *Taché* for respondent.

BELL TELEPHONE CO. *v.* CITY OF QUEBEC.

QUEBEC GAS CO. *v.* CITY OF QUEBEC.

Appeal—Action to set aside municipal by-law—Supreme and Exchequer Courts Act, s. 24 (g).

In virtue of a by-law passed at a meeting of the council of the corporation of the City of Quebec in the absence of the mayor, but presided over by a councillor elected to the chair in the absence of the mayor, an annual tax of $800 was imposed on the Bell Telephone Company of Canada (appellant), and a tax of $1000 on the Quebec Gas Company. In actions instituted by the appellants for the purpose of annulling the by-law, the Court of the Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court, and dismissed the actions, holding the tax valid.

On appeal to the Supreme Court of Canada,

Held, that the cases were not appealable, the appellants not having taken out, or been refused, after argument, a rule or order quashing the by-law in question within the terms of s. 24 (*g*) of the Supreme and Exchequer Courts Act, providing for appeals in cases of municipal by-laws.

Varennes v. *Vercheres* (19 S.C.R. 365), *Sherbrooke* v. *McManamy* (18 S.C.R. 594), followed.

Appeal quashed without costs.

Irvine, Q.C., and *Stuart*, Q.C., for appellants.

P. Pelletier, Q.C., for respondent.

ACCIDENT INSURANCE CO. *v.* YOUNG.

Accident Insurance—Immediate notice of death—Waiver—External injuries producing erysipelas—Proximate or sole cause of death.

An accident policy issued by the appellants was payable in case, *inter alia*, the bodily injuries *alone* shall have occasioned death within ninety days from the happening thereof, and

providing that "the insurance should not extend to hernia, etc., nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this contract, or by the taking of poison, or by any surgical operation or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death."

The policy also provided that "in the event of any accident or disability for which claim may be made under this policy, immediate notice must be given in writing, addressed to the manager of this company at Montreal, stating full name, occupation, and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy."

On the 21st March, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued on the 13th of April following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on the 29th April, and the notice was only received at Montreal on the 1st of May. The manager of the company acknowledged receipts of proofs of death which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease and therefore the company could not recognize their liability. At the trial there was some conflicting evidence as to whether the erysipelas resulted solely from the wound, but the court found on the facts that the erysipelas followed as a direct result from the external injury. On appeal to the Supreme Court,

Held, reversing the judgment of the court below, FOURNIER and PATTERSON, JJ., dissenting, that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this respect.

Held, per FOURNIER and PATTERSON, JJ., affirming the judgment of the court below, that the external injury was the proximate or sole cause of death within the meaning of the policy.

Appeal allowed with costs.

Geoffrion, Q.C., and *Cross* for the appellants.

Lafleur for respondent.

NORTH PERTH ELECTION APPEAL.

CAMPBELL *v.* GRIEVE.

Dominion Controverted Elections Act—Appeal—Evidence—Reversal—Loan for travelling expenses—Proof of corrupt intent—40 Vict., c. 3, ss. 88, 91; s. 84 (a)—(e)—Executory contract, s. 131—Free railway tickets.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote, and wanting two dollars for his expenses while away from home, asked for the loan of the money from W., a bartender and a friend. W., not having the money at the time, applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G. to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bonâ fide* loan by S. to W. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the court below, that as the decision of the court below depended on the inferences drawn from the evidence their decision could be reversed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. and within the provisions of s. 88 of the Dominion Elections Act, and a corrupt practice sufficient to void the election under s. 91 of the said Act.

STRONG, J., dissenting, was of opinion that there was no evidence that the loan of two dollars was made to G. with the corrupt intent of inducing him to vote for the respondent.

PATTERSON, J., dissenting on the ground that as the decision of the court below depended on the credibility of the witnesses, it ought not to be interfered with.

Held, also, *per* STRONG and PATTERSON, JJ., affirming the judgment of the court below, that upon the evidence which is reviewed in the judgments, the G.T. Railway tickets issued at Toronto and Stratford for the transportation of voters by rail to the polls in this case were free tickets, and that as the free tickets had been given to voters who were well-known supporters of the respondent or prepared to vote for him and for him alone, if they voted at all, it did not amount to paying the travelling expenses of voters within the meaning of s. 88 of the Dominion Elections Act. *Berthier Election Case*, 9 S.C.R. 102, followed.

Per STRONG, J.: That the tickets issued by the G.T.R. having been furnished with notice that they were to be used as they were in fact, payment for the same could not have been recovered at law; s. 131 Dominion Elections Act.

Appeal allowed with costs.

Osler, Q.C., and *Ferguson*, Q.C., for appellant.

Garrow, Q.C., for respondent.

WELLAND ELECTION APPEAL.

GERMAN *v.* ROTHERY.

Election—Promise to procure employment by candidate—Finding of the trial judges—49 Vict., c. 8, s. 84 (b).

On a charge by the petitioner that the appellant had been guilty personally of a corrupt practice by promising to a voter, W., to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved.

The promise was charged as having been made in the township of Thorold on the 28th February, 1891. The evidence of W., who some time before the trial made a declaration upon which the charge was based at the instance of the solicitor for the petitioner, and had got for such declaration employment in Montreal from the C.P.R. Co. until the trial took place, was principally relied on in support of the charge, and the promise was found by the court to have been made on the 17th of February. Moreover, G., the appellant, although denying the charge, admitted in his examination that he intimated to the voter that he would assist him, and there was evidence that after the elections he wrote to W. and procured him the situation, but the letter was not put in evidence, having been destroyed by W. at the request of the appellant.

Held, affirming the judgment of the court below, that the evidence of W. being in part corroborated by the evidence of the appellant, the conclusion arrived at by the trial judges was not wrong, still less so entirely erroneous, as to justify this court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved.

Appeal dismissed with costs.

Cassels, Q.C., for appellant.

Blackstock, Q.C., for respondent.

NOVA SCOTIA.] [April 4.

MILLER *v.* DUGGAN.

Registry Act—R.S.N.S., 5th ser., c. 84, s. 21—Registered judgment—Priority—Mortgage—Rectification of mistake.

By R.S.N.S., 5th ser., c. 84, s. 21, it is provided that "a judgment duly recovered and docketed shall bind the lands of the party against whom the judgment shall have passed, from and after the registry thereof in the county or district wherein the lands are situate, as effectually as a mortgage, whether such lands shall have been acquired before or after the registering of such judgment; and deeds or mortgages of such lands, duly executed but not registered, shall be void against the judgment creditor who shall first register his judgment."

D. had agreed to mortgage certain properties, one of which had been conveyed to her late husband, through whom she claimed, by four different deeds, three conveying a one-sixth interest each and the fourth a half interest. The conveyancer who prepared the mortgage had before him one of the deeds conveying a one-sixth interest, and by mistake and inadvertence that interest instead of the whole was described and conveyed. On Dec. 3rd, 1887, the property mortgaged was sold under foreclosure and conveyed by the sheriff to M. On the 27th September, 1887, a judgment was recovered and registered against D., and in July, 1889, an execution was issued on said judgment, under which the sheriff attempted to levy on the five-sixths of the property of D. which should have been included in the mortgage. In an action to

have the mortgage rectified and the judgment creditor restrained from levying upon and selling the said property,

Held, affirming the judgment of the Supreme Court of Nova Scotia, STRONG and PATTERSON, J., dissenting, that the parol agreement by D. to give a mortgage of the five-sixth parts of the said property was void against the registered judgment and the action could not be maintained. *Grindley* v. *Blaikie* (19 N.S. Rep. 27) approved and followed.

Appeal dismissed with costs.

Borden, Q.C., for the appellants.

Ross, Q.C., for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l Court.] [Feb. 27.

LANE *v.* DUNGANNON AGRICULTURAL ASSOCIATION.

Equitable assignment—Order for payment of money—Evidence of intention.

One who had contracted to erect a building for the defendants, during its progress gave to various persons orders upon the defendants for sums due them by him in the following form: "Dungannon, Sept. 12, 1890. To the directors of the Dungannon Driving Park Association: Please pay to D. M. the sum of $—, and oblige. (Sgd.) T. F. H., contractor."

Held, per STREET, J., that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants.

Hall v. *Prittie*, 17 A.R. 306, followed.

The evidence, however, showed that there was only one fund out of which the directors could be expected to pay the orders; that the nature of that fund and its origin were well known to all the parties; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and these persons expected to get, orders which were to be paid out of the contract price; and that the directors understood the orders as intended to deal with portions of the contract price, and to be payable only out of that particular fund.

Held, per STREET, J., that the court should look to the real intention of all parties to the transaction and give effect to it by declaring that the contractor did make an equitable assigment to each of the order-holders of a portion of the fund.

ARMOUR, C.J., agreed in the result, but on different grounds.

Hoyles, Q.C., for the plantiff.

Garrow, Q.C., for the order-holders.

W. H. Blake for the other creditors.

TOLTON *v.* CANADIAN PACIFIC R. W. CO.

Watercourse—Diversion of, by railway company—Equitable easement—Bona fide purchaser for value—Registered deed—Actual notice—Prescriptive right—Damages—51 Vict., c. 29, s. 90, s-s. h (D.)—Compensation.

Where the defendants in 1871, without authority, diverted a watercourse on certain land and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title,

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bona fide* purchaser for value without actual notice, the defendants having shown no prescriptive right to divert the watercourse; and the diversion was wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C.P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U.C.R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U.C.R. 551; and *Partridge* v. *Great Western R. W. Co.*, 8 C.P. 97, distinguished.

The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict., c. 29, s. 90, s-s. h (D.).

Elgin Meyers for the plaintiff.

G. T. Blackstock and *Angus MacMurchy* for defendants.

MCGEACHIE *v.* NORTH AMERICAN LIFE ASSURANCE CO.

Insurance — Life — Premium note — Non-payment of—Forfeiture—Election—Conditions of policy—Conduct of defendants—Evidence.

The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, one of the renewals was overdue and unpaid. During the currency of one of the renewal notes, the insured wrote to the defendants asking them what they would let him off with by cancelling the policy, and they answered him that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote to him that they had expected to hear from him with a remittance, and asked him to kindly give the matter his immediate attention. After the death the amount of the note and interest was tendered to the defendants, but they refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and indorsed on the policy was a provision that if any premium note should not be paid when due the policy should be void and all payments made upon it forfeited to the defendants.

Held, that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants; that, upon the evidence, the defendants had elected not to forfeit it, but to continue it, and had treated it as subsisting up to the time of the death; that the policy was in force at the time of the death, and no subsequent act of the defendants could affect the plaintiff's claim.

Held, also, upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the policy and nevertheless insisting upon the payment of the note, as they might have done under the provision in the application above mentioned.

Aylesworth, Q.C., for the plaintiff.

Wm. Macdonald for the defendants.

VILLAGE OF NEW HAMBURG *v.* COUNTY OF WATERLOO.

Municipal corporations — Bridges — R.S.O., c. 184, ss. 532, 534—Counties and villages—Rivers and streams — Width of, how ascertained.

Upon the proper construction of ss. 532 and 534 of the Municipal Act, R.S.O., c. 184, the county council is by the former provision given exclusive jurisdiction over all bridges, by whomsoever built, crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county, and is by the latter provision compellable to build such bridges only where necessary to connect any main public highway leading through the county.

Regina v. *Wellington*, 39 U.C.R. 194, not followed.

The place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses, and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest ordinary state.

W. R. Meredith, Q.C., for the plaintiffs.

King, Q.C., for the defendants.

DENISON *v.* MAITLAND.

Landlord and tenant—Action for arrears of rent and recovery of demised premises—Election to forfeit lease—Retraction of—Payment of rent and costs—Implied request to be relieved from forfeiture—R.S.O., c. 143, ss. 17-22—Vacant land—Evidence.

Rent under a lease made pursuant to the Short Forms Act becoming in arrear, the landlord served the statutory notice of forfeiture and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs.

Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease, which could not be retracted by him. To enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture, and the mere payment, after the forfeiture, of rent which accrued due before would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying, and the payment of the rent and costs in this case could not operate by force of R.S.O., c. 143, ss. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises. Had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenants intended to seek to be relieved from the forfeiture; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession.

Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture.

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it

Decision of BOYD, C., reversed.

W. H. Blake for the plaintiff.

Alan Cassels for the defendants.

Chancery Division.

Full Court.] [Mar. 29.

O'BRIEN *v.* SANFORD.

Employer's liability—Employment of infant in elevator.

Action against employer.

The plaintiff, a lad under twelve, was hired to work an elevator for the defendant company. A larger boy who had been in charge before was detailed for a few hours one afternoon to go up and down with the plaintiff, so as to show him how to raise and lower the hoist. The elevator was worked by ropes on the outside of the cab or frame, which were handled by the person standing within through a square opening cut in the framework. The plaintiff was cautioned by the bigger boy against putting his head out at this place when the hoist was going.

The elevator stopped when going up, and the plaintiff put his head out of the aperture to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited.

Held, that the nonsuit should be set aside, and a new trial ordered.

Per BOYD, C.: The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factory Act; and for this reason the employer has to exercise more than ordinary precautions for the well-being and safeguarding of minors who have been put into factory work contrary to the prohibition of the Legislature.

Lynch-Staunton for the plaintiff.

Blackstock, Q.C., and *McKay* for the defendant.

RE MARRIOTT, MARRIOTT *v.* MCKAY.

Will—Husband and wife—Election.

A testator by his will devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed; and he gave the rents, until the real estate was sold, to his widow

Held, that the widow was put to her election. She could not claim dower and to be tenant of the freehold at the same time.

Hoyles, Q.C., for the widow.

J. A. Robinson for the next of kin.

THOMPSON *v.* WRIGHT.

Employer's liability—Knowledge of employer of danger of employee.

The plaintiff, a lad of 17 years of age, worked at a stamp machine in the defendant's factory. Part of his duty was to clean the upright part from oil which ran down from oil holes over the shafting. There was a space of about twelve inches between this upright and the cogwheel, and to clean when the wheel was in motion was very dangerous. Being refused cotton waste and even rags for this work, he finally took to using pieces of bagging, as the only thing he could get. On the occasion of the accident, he had wrapped a piece about his hand, but one end, flapping loose, got caught in the cogs and the plaintiff lost his hand.

The evidence showed that the employer was daily in the workshop and saw him cleaning the machine under the same circumstances in which he was hurt, and did not forbid him. The jury found that there was no contributory negligence, and awarded a verdict of $1400. It appeared that a cheap and simple guard would have prevented the accident.

Held, (1) that as the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factory Act, the failure to furnish such a guard was *per se* evidence of negligence on the part of the defendants.

(2) That the employer was also chargeable with personal negligence in seeing this lad, a minor, working with improper appliances in a dangerous place and not making proper provision for his safety by supplying him with waste, or without having the machinery stopped while the cleaning was going on.

Judgment in the plaintiff's favour for the $1400 affirmed with costs.

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

Staunton for the plaintiff.

SCANLON *v.* SCANLON.

Will—Construction—Devise of lot facing on two streets by description of house facing on one.

In 1867, M.S. purchased a strip of land in Toronto with a frontage of twenty-six feet on A. street, by a depth of two hundred feet to a lane twenty feet wide. In 1882 the city converted this lane into a street. At the time of the purchase by M.S. there was on the land a house facing A. street known as No. 32, and also a house facing P. street, known, after it became a street, as No. 21. They were always occupied as separate and distinct tenements. Each house had a fence in the rear, and between the fence was some land which had been, in a way, used in common by the occupants of the two houses. In 1886, M.S., by his will, devised to J.S. "all that real estate now owned by me being numbered 32 on the north side of A. street for and during his life," and afterwards over, and then made a general residency devise of the rest of his land.

Held, that the specific devise was confined to No. 32 A. street and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it.

DuVernet for the plaintiff.

Armour, Q.C., for the defendant.

LANGSTAFF *v.* MCRAE.

Negligence—Overflowing of land—Bursting of timber boom—Right to erect booms in rivers.

Action for damage caused by overflowage of the plaintiff's land.

It appeared that the defendants had a quantity of timber boomed in the S. river, and the boom broke by reason of the heavy floods; and to prevent the logs floating down the river into the lake at the mouth, the defendants constructed another boom lower down near to a certain bridge. But so great was the force of the water and the quantity of logs and débris brought down by it, that this boom also broke and the logs became massed against the bridge.

The jury found that the injury of the plaintiff was caused by excess of rain and from the jam at the bridge, by which the water was raised. They did not find negligence on the part of the defendants, but said they were guilty of a wrongful act in throwing a boom across the river.

Held, that the defendants were entitled to judgment.

Per BOYD, C.: According to English law, a man may lawfully adopt precautions to defend his property against what may be described as the extraordinary casualty of a great flood; and this is not actionable though injury result to his neighbour from this "reasonable selfishness." And, again, this use of a boom being lawful by statute, R.S.O., 1887, c. 121, s. 5, and no negligence in its construction being pretended, it was impossible to say that what is thus expressly legalized can be made the ground of action of tort.

J. S. Fraser for the defendants.

Hoyles, Q.C., for the plaintiff.

FORWOOD *v.* THE CITY OF TORONTO.

Negligence—Street railway—Driving over man in daylight—Neglecting to stop a car—Contributory negligence.

The plaintiff having hailed a westward bound car, crossed over from the south side of King

street to get into it. When he started to cross to it, the eastward bound car was coming along at a fast trot, but was some hundred feet away to the west. The plaintiff was somewhat intoxicated. While he had hold of the westward bound car to board it, the eastward bound car ran over his foot, which was on the rail. It was broad daylight.

The jury found a verdict for the defendants.

Held, that there must be a new trial.

Although it might be said that the plaintiff did not, by direct evidence, show any specific act or omission on the part of those in charge of the eastward bound car on which to rest his action, yet the happening of the accident and the attendant or surrounding circumstances were sufficient to raise the presumption that there was negligence on the part of those in charge of the car, the consequence of which was the happening of the accident. There was reasonable evidence, in the absence of any explanation by the defendants, that the accident arose from want of care on their part. Assuming that the plaintiff was guilty of some negligence himself, the defendants did not prove that his negligence was such that the accident could not have been avoided by due diligence on their part; that is, they did not prove that his negligence was the *proximate* cause of the accident, and therefore did not establish their defence of contributory negligence.

Per ROBERTSON, J.: Another ground for a new trial was the injustice done in this case by counsel for the defendants appealing to the jury on the ground that, as they were ratepayers, they would be giving damages against themselves if they gave the plaintiff a verdict; by which appeal they appear to have been influenced.

McCullough for the plaintiff.

C. R. W. Biggar, Q.C., for the defendants.

Common Pleas Division.

Div'l Court.] [Feb. 27.

MCLEAN *v.* CLARK.

Partnership—Whether party member of firm—Evidence.

C., who had been carrying on a general store and hardware business, in May, 1887, sold out to M. the general business, retaining the hardware portion, taking from M., to secure payment of the purchase money, a chattel mortgage. The business continued to be carried on on the same premises as before, a partition separating the hardware from the general business, but with a door leading from the one to the other, generally kept open. A certificate was registered stating that M. was carrying on the general business alone, under the firm name of C.M. & Co. It was ostensibly carried on under the firm name, which was the name on the sign over the door, and in the bill-heads and advertisements. The plaintiffs, who supplied goods to C. prior to the sale to M., continued to supply goods, which were charged to the firm, no notice being given them that C. was not a member thereof, while the circumstances led to the belief that he was such member.

Held, that C. was liable for the goods so supplied to the firm.

McCarthy, Q.C., for the plaintiff.

Britton, Q.C., for the defendant.

REGINA *v.* MCGIBBON.

Conviction—Trespass to land—Invalid by-law closing road—Defendant acting under bonâ fide belief of right—Reviewal of decision of magistrate.

On a motion to quash a conviction for trespass it appeared that in 1834, under the laws then in force, the land in question had been laid out as a road, extending back from the lake shore through a certain lot; that in 1860 the then owner of the lot petitioned the municipal council for leave to close the road by erecting a gate at a named point in the centre of the lot, as otherwise, it alleged, the petitioner would have to erect some two miles of fencing to enclose the lot, and the same day a by-law was read and passed through the three readings without any publication of the notice of the passing of the by-law, as required by s. 308 of the Municipal Act, 22 Vict., c. 99. The by-law also was not merely for the erection of the gate, but, after reciting that the by-law was necessary for the closing up the road leading from the centre of the lot to the lake shore, enacted that the said road was thereby closed. Evidence also was given showing that the complainant, the present owner, had himself got permission to perform his statute labor on the road.

Held, that the conviction could not be supported and must be quashed.

Per GALT, C.J.: The by-law, under the circumstances, was invalid.

Per ROSE, J.: The evidence disclosed that the defendant acted under a fair and reasonable supposition that he had a right to do the act complained of, and that in such cases the decision of the magistrate will be reviewed.

Aylesworth, Q.C., for the applicant.

W. R. Meredith, *contra*.

REID *v.* SHARPE.

Fraudulent conveyance—Setting aside—Ranking on estate—Costs.

At the instance of th plaintiff, an execution creditor of T., an attaching order issued against M. attaching a debt due from M. to T., and on non-payment thereof an execution was issued against M.'s lands, whereupon M. assigned to S. for the benefit of his creditors. M., with the connivance of S., concealed from the creditors the existence of certain land belonging to M., which M. procured S. to transfer to M.'s wife. The learned trial judge held that the conveyance to the wife was fraudulent and void under statute 13 Elizabeth, c. 5, and must be set aside, and directed the land to be sold and the proceeds paid into court, out of which the plaintiff's costs as between solicitor and client were to be paid and the balance paid over to the assignee for distribution amongst the creditors, among whom the plaintiffs were to rank.

Held, on motion to the Divisional Court, that the decree declaring the conveyance fraudulent and void, etc., and that the plaintiff should rank on the fund, was valid, and the motion was dismissed with costs, to be paid by S. personally; but, *quære*, whether the direction as to the plaintiff's costs was proper, the point not having been raised by the notice of motion, no judgment was pronounced on it.

C. Millar for the plaintiff.

Hughson, *contra*.

GALT, C.J.] [March 7.

LEMESURIER *v.* MACAULAY.

Revivor—Lapse of time—Agreement of solicitors—Effect of.

In 1867 an action of ejectment was brought by L., and notice of trial given for, and the case entered for trial for 15th October following. On 21st October, L. conveyed the lands to I. On 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an *ex parte* order was obtained by the plaintiff from the local registrar reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the said plaintiff's intention of reviving the action and they gave notice of trial for the ensuing assizes, whereupon it was agreed between the solicitors that on the then plaintiff's solicitors refraining from reviving and proceeding to trial the defendant's solicitors would abide by the result of another named suit, which, if in favor of the plaintiff, an order of revivor might then issue and judgment be entered for the plaintiff.

Held, that the original action terminated on the 21st October, when the plaintiff conveyed to I., and therefore, after such a lapse of time and the plaintiff's rights being barred by the Statute of Limitations, no order of revivor should have issued, and that the court would give no effect to the agreement made by the solicitors, for to do so would be an injustice to the client.

Marsh, Q.C., for the defendant.

Hilton for the plaintiff.

MACMAHON, J.] [Feb. 17.

RODGERS *v.* CARMICHAEL.

Will—Construction of—Children—Legacy, period of vesting.

A testator devised and bequeathed his real and personal estate to his wife for life or until remarried, with certain powers of disposal, and by a residuary clause devised the residue—not specifically devised or bequeathed, and not sold or disposed of by his said wife—immediately after the death or remarriage of his wife, whichever should first happen, to his executors to sell and convert same into money, and out of the proceeds pay $500 to each of his five sons, and to divide the balance, share and share alike, between his three daughters, and if said daughters should die before him or before said distribution, leaving issues, the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters

living at the time of said distribution, so that the issue of any of the said daughters who may be dead shall receive her or their parent's share. The widow survived the testator and died without having remarried. A son, C.K.R., and a daughter, M., also survived the testator, but died prior to the widow, the former leaving no issue and the latter a son, F., and a daughter, M.C., the said last named daughter also having died leaving two children.

Held, that the word *children* here must be taken in its primary sense, *i.e.*, the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share, to the exclusion of the children of the daughter M.C., and that the legacy to C.K.R. became vested on testator's death, payable on the widow's death, and so his personal representatives were entitled thereto,

W. N. Miller, Q.C., for the plaintiff.

John Hoskin, Q.C., for the infant defendants.

D. E. Thomson, Q.C., *Bowlby*, Q.C., and *D. H. Williams* for the other defendants.

Practice.

Q.B. Div'l Court.] [Feb. 27.

ROSS *v.* EDWARDS.

Staying proceedings—Vexatious action—Abuse of process of court.

H. & Bro., being the owners of certain lumber in the hands of the defendants as warehousemen, sold it to L., who gave his promissory note for the purchase money, and pledged the lumber to the plaintiff's testator for an advance of money, and the defendants agreed to hold it to the order of the testator. L. having become insolvent, H. & Bro. notified the defendants not to deliver the lumber to L. or to the testator, and the testator demanded the delivery of the lumber to him. The defendants then interpleaded, and an order was made upon consent of the testator directing a sale of lumber and payments of proceeds into court and the trial of an issue between the testator and H. & Bro. to determine which of them was entitled to the lumber or the proceeds thereof. That issue was determined in favour of H. & Bro. The plaintiff then brought this action for conversion of the lumber, the alleged conversion being the non-delivery by the defendants to the testator of the lumber which they agreed to hold to the order of the testator.

Held, that this action was vexatious and an abuse of the process of the court, and an order was made staying it with costs.

A. Ferguson, Q.C., and *W. M. Douglas* for the plaintiff.

Robinson, Q.C., and *Shepley*, Q.C., for the defendants.

Chy. Div'l Court.] [March 29.

MILLAR *v.* MACDONALD.

Judgment debtor — Unsatisfactory answers — Rule 932—Order refusing to commit — Appeal from—Partly appearing in person—Costs.

An appeal lies to a Divisional Court from an order in Chambers refusing an application under Rule 932 to commit a judgment debtor for unsatisfactory answers; but, as the liberty of the subject is at stake, the appellate court will not reverse the order unless the judge below has erred in principle or is almost "overwhelmingly" wrong.

And under the circumstances of this case the court refused to interfere.

Graham v. *Devlin*, 13 P.R. 245, approved and followed.

The judgment debtor appeared in person and argued his own case on appeal.

Held, that he should be allowed to set off against the judgment debt his disbursements and a moderate allowance for his time and trouble on the argument.

W. R. Smyth for the plaintiff.

The defendant in person.

BRYCE *v.* KINNEE.

Sheriff's interpleader—Form of issue—Jus tertii Rejection of evidence — Amendment — New trial.

An interpleader issue as to goods seized by a sheriff was directed to be tried between the claimants, as plaintiffs, and the execution creditor, as defendant. The form of the issue was whether the goods at the date of seizure were the property of the claimants as against the execution creditor. The claimants' contention was that the goods were not owned by or in

possession of the execution debtor at all, but in possession of his wife; and if they were not actually owned by the claimants themselves, they were owned by the wife, and that there was between her and them a bargain such as to give them an equitable right to the goods. The trial judge ruled that under the form of the issue the claimants could not give evidence to show that the property was in the debtor's wife.

Held, that the ruling was too strict; that the claimants should not be shut out from adducing in evidence the whole facts about the transaction; and that the issue should be amended so as to let in the question of the *jus tertii* for the benefit of the claimants and their privity therewith, and also the claim of the wife, and that there should be a new trial.

Per BOYD, C.: Not the form of the issue, but the substance is to be looked at. It is competent for the claimant to show any facts warranting him in interfering with the process of execution, even if the property in the goods be in another; provided that this will not work a surprise upon the execution creditor, and that the claimant appears to be in privity with or claiming under the real owner.

Per FERGUSON, J.: The reasoning of some of the cases that the claimant, having caused the issue by asserting his right to the goods, ought not to be allowed to set up a case showing that the goods belong to a third person, who has not interfered in the matter at all, can only apply to a case in which the claimant does not profess to claim title under the third person.

Aylesworth, Q.C., for the plaintiffs.

Shepley, Q.C., for the defendant.

FERGUSON, J.] [April 20.

IN RE CANNON, OATES *v.* CANNON.

Reference—Delay—Rule 51.

The object of Rule 51 is to protect the court and its officers from undue delay in the prosecution of references.

Where there has been undue delay in the prosecution of a reference, the party having the conduct of it should not be refused a warrant to proceed if he applies therefor before any action has been taken by the Master under Rule 51, and there is nothing but delay to interfere with the granting of it.

Arnoldi, Q.C., for W. P. Howland & Co.

Flotsam and Jetsam.

EXTRACTS FROM OLD STATUTES.—No person shall put to sale any pins, but only such as shall be double-headed, and have the heads soldered fast to the shank and well smoothed; the shank well shaven; the point well and round filed, canted, and sharpened. (34 and 35 Henry VIII., cap. 6.) . . . . All persons above the age of seven years shall wear upon Sabbaths and holidays, upon their heads, a cap of wool, knit, thicked, and dressed, in England, upon pain of forfeit for every day not wearing, three shillings and fourpence. (13 Eliz., cap. 19.)

THE following anecdote of a minor light of the Irish Bench, though not precisely a "bull," pure and simple, belongs more or less to that fertile family. A wife had suffered untold cruelties at the hands of a barbarous husband, and in self-defence she "took the law of him"; but just before the time she relented, and told the judge she wished to leave the punishment and the case to God.

"I regret, my good woman," replied the great official, "that we cannot do that; the case is far too important."—*Green Bag.*

AN incident that is certainly uncommon, if not unprecedented, occurred in South Wales recently. In the County Court at Bridge End, before Judge Williams, a case was heard involving £50 ($250), which was claimed as compensatory damage for injury caused by careless driving. Judge Williams was compelled to leave by train at the regular hour for the adjournment of the court, and could not therefore postpone the case until the next day. As the case was not ended at that time, at least one important witness remaining to be examined, Judge Williams, with the lawyers and other witnesses, took the train and travelled to Llantrissant. During the journey the case was proceeded with, the remaining witnesses being examined. On arriving at Llantrissant, the party adjourned to the station-master's office, where Judge Williams gave a verdict for the plaintiff in the amount claimed.—*Green Bag.*
