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The Rules Committee is hard at work revising the Rules of Practice. Up to this writing we understand only about 160 Rules have been dealt with, and as the total number to be revised is in the neighborhood of 1,500, it will take a good many weeks at the present rate of progress before the work before the Committee is accomplished. In the meantime it is to be hoped that all practitioners having views to air, will avail themselves of the invitation of the Committee to submit any amendments they may deem desirable for the consideration of the Committee; and it is to be sincerely hoped that when the revision is complete it may last for a few years to come, without any further amendments or additions. At the present time the practice has got almost into a state of chaos, from which we trust that the labors of the Committee may speedily deliver it.

It has been recently demonstrated that a weekly session of a Divisional Court of the High Court is not under the present state of affairs a real necessity. Those who originally urged that Divisional Courts should sit every week, did so on the assumption that appeals from judgments at the trial of actions would continue to be had to such courts, but the alteration in the practice which has practically sent all such appeals to the Court of Appeal, has practically left the Divisional Courts with very little to do, and even the cases that are on their list are found to be very hard to dispose of, not because the Court is not ready and willing enough to hear them, but because counsel find their other engagements prevent their attendance to argue them. For this reason the Divisional Courts have not found it necessary to sit more than one or two days a week for the last month. But on the other

hand, the Court of Appeal is glutted with business, and unless some arrangement is made to relieve it, any appeal to that Court will soon involve, of necessity, a very great delay before it can be heard. Under section 12 of the Judicature Act there is a power to constitute a second Division of the Court of Appeal, to be composed of two judges of the Court of Appeal, and two judges of the High Court. Whether an Appellate Court so constituted would be a satisfactory substitute for an appeal to a Divisional Court of the High Court, with the further right of an appeal thereupon to the Court of Appeal, is doubtful. The postponement of cases on the list of causes set down to be heard before the Divisional Court in order to suit the convenience of counsel, says a great deal for the complaisance of the bench; at the same time it is a somewhat dilatory method of disposing of cases, and it may not be unreasonably asked, in the interest of the junior bar, who are eager and anxious for briefs, why so much consideration is shown to the leaders of the bar, especially as it prevents dissemination of business among the juniors, who would be only too glad of it.

THE RIGHTS OF ACCOMMODATION PARTIES TO BILLS AND NOTES INTER SE.

The principle of equity that co-sureties are liable to mutual contribution has been firmly established since the decision in the well known leading case of *Dering* v. *Earl of Winchelsea*, 1 Cox, 318. It has its origin not in contract, but in the plain dictates of natural law.

This doctrine applies whether the parties are bound in the same or different instruments, provided they are securities for the same principal and in the same engagement, even though they are ignorant of the mutual relation of co-suretyship: *Craythorne* v. *Swinburne*, 14 Ves. 163, 165. But a person may take himself entirely out of the principle, as where he becomes merely a collateral surety. "In the case of A. undertaking that if the principal does not pay, and if B., who has already become surety, does not pay, he, A., will pay, it seems per-

fectly clear that B in that case, paying the whole debt, would have no claim of contribution against A.": *Hartley* v. *O'Flaherty*, L. & G. temp. Plunk. 217.

The doctrine has been extended to the accommodation parties to bills or notes. Cheeseman drew a bill which Reynolds accepted for his accommodation; Cheeseman's banker declined to discount the bill without having another name to it, and Cheeseman then applied to Wheeler, who indorsed it at his request. At its maturity Cheeseman could not pay it and Reynolds drew a renewal bill; Cheeseman accepted it and Wheeler indorsed it, and it was held that Reynolds and Wheeler each became surety for the same debt or liability of their principal, and that Reynolds therefore clearly had a right to call upon Wheeler for contribution: *Reynolds* v. *Wheeler*, (1861) 10 C.B.N.S. 561.

Lawford was indebted to the Gore Bank, who demanded security, and Lawford asked the firm of J. J. and J. Spettigue to indorse his notes for the amount. Subsequently the bank demanded further security, and Clipperton became a second indorser on the renewal notes. Clipperton on the occasion of a further renewal indorsed the notes in blank, and afterwards discovered that they had been made payable to his order, and that the Spettigues indorsed as second indorsers. Thereafter he indorsed the renewals as first indorser. Held, that Clipperton could enforce the right of contribution from the Spettigues, as in the case of other co-sureties: *Clipperton* v. *Spettigue*, (1868) 15 Gr. 269.

Cockburn indorsed a note for Grey, the maker. Grey took the note with Cockburn's name upon it to Johnson, who then indorsed it. Grey told each of them that he was obtaining his name to the note to enable him to borrow some money of Anderson. Held that Johnson must share equally with Cockburn the loss occasioned by the maker's default: *Cockburn* v. *Johnston*, (1869) 15 Gr. 577.

English indorsed a note on the express stipulation that he should only be liable on default of Hamilton and Hall, prior parties. Held that he was not liable to contribution: *Mitchell* v. *English*, (1870) 17 Gr. 303.

A note indorsed by B. and C. for the accommodation of the maker being over due, the maker, to provide funds for taking it up, procured D. to indorse a new note for his accommodation, and on applying to his former indorsers for their signatures, untruly stated that he had sold goods to D., who would be in funds to take up the note at maturity.

Held that D. was entitled to contribution: *McKelvey* v. *Davis*, (1870) 17 Gr. 355.

In *Ianson* v. *Paxton*, (1874) 23 C.P. 439, it was held, by the Court of Error and Appeal, that the successive indorsers of a promissory note, merely on proof that it was made for the accommodation of the maker, are not necessarily to be regarded as co-sureties, and so liable to contribution; but that, in the absence of any agreement to the contrary, the parties, on such proof, may be considered as having entered into a contract of suretyship in the terms which the note and the indorsements are known to create, and that the first indorser, having paid the note, could not recover contribution from the second. The facts were that the plaintiff had for several years been in the habit of indorsing for the accommodation of one Andrew Paul. In 1870 Paul made his note for $3,500, which plaintiff indorsed for his accommodation, and the defendant gave Paul an introduction or recommendation to a bank at which he tried to discount it. The manager refused to do so, but said he would if defendant himself indorsed it. Defendant did so, and it was protested for non-payment. Afterwards Paul, the plaintiff and defendant met at the bank and renewed the note. Before plaintiff and defendant indorsed it, plaintiff raised the question as to the amount of his liability, and insisted that he was liable for only half the amount due upon the first note, and that he should only be liable for one-half of the renewal and the defendant the other. The defendant refused to agree to this, and at last it was agreed that they should indorse "and leave the thing just as it was." The defendant's connection with the first note seems to have arisen entirely from his having called at the bank to recommend the plaintiff's standing, and the manager remarked if his representations were true he would incur no

risk by indorsing it himself, and that he then did so. It clearly appeared that the plaintiff, when he indorsed the first note, did not expect that there would be any other indorser.

In *Fisken* v. *Meehan*, (1876) 40 U.C.R. 146, defendant made a note payable to the order of and for the accommodation of James Sorley, and Fisken indorsed it also for his, Sorley's, accommodation, to one Metcalfe, who was a holder for value. Fisken was compelled to pay it, and he and his partner then sued defendant upon it. It was held, following *Ianson* v. *Paxton*, that the relation of co-sureties between Fisken and defendant was not established so as to prevent the plaintiff from recovering the whole instead of the half. It seems, however, to have been conceded that the position of defendant and Fisken on the note, one as maker and the other as indorser, would not prevent the application of the rule, if they were really co-sureties, but it was found as a fact, that Fisken knew nothing of the mode in which defendant became a party, but indorsed in the ordinary way, assuming that the maker would be liable to him.

In *Macdonald* v. *Whitfield*, (1883) 8 App. Cas. 733, the facts so far as material to this question were as follows:

Whitfield and Macdonald were directors of a joint stock company carrying on business at St. Johns, Quebec. In July, 1875, the company being in want of funds, the Merchants Bank offered to advance the sum of $10,000, by an overdraft, which was to be collaterally secured by a demand note of the company indorsed by the directors individually. This proposal was accepted by the company, and its acceptance communicated to the bank in a letter signed by the directors individually, except Whitfield. A note for $10,000 was drawn up and indorsed in the following order: (1) Macdonald; (2) Whitfield, and next, two other directors; the fifth director did not indorse it, as he happened to be the manager of the bank in St. Johns. An action having been brought by the bank upon the note against Macdonald, Whitfield and one of the others, Whitfield instituted an action for a declaration that Macdonald as a prior indorser was bound to relieve him of any sum which the bank might recover judgment for. It

was held, on appeal to the Privy Council, that he was not entitled to this relief, but that the directors having mutually agreed with each other to become sureties to the bank for the same debt, they were entitled and liable to equal contribution inter se.

Ianson v. *Paxton* was relied upon by the respondent Whitfield in support of his contention, and Lord Watson, who delivered the judgment of their Lordships, said: "The respondent's counsel referred to the case of *Ianson* v. *Paxton*. With the same view they cited the case of *Macdonald* v. *Macgruder*, 2 Peters 470. These authorities were relied upon as establishing the doctrine that, where several persons mutually agree to give their indorsements on a bill as securities for the holder who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper indorsers, liable to indemnify each other successively, according to the priority of their indorsements, unless it has been specially stipulated that they were to be liable as co-sureties," and his Lordship then went on to dissent from this doctrine.

Text writers have therefore in some instances concluded that *Macdonald* v. *Whitfield* overrules *Ianson* v. *Paxton*. It is submitted that it is not so. The circumstances were distinguishable. Both cases set out with the principle that the liabilities of successive indorsers inter se must, in the absence of all evidence to the contrary, be determined according to the ordinary principles whereby a prior indorser must indemnify a subsequent one. The prior endorser, therefore, who looks for contribution, or a subsequent indorser, who seeks indemnity, has the onus upon him to give evidence to the contrary.

Their lordships in *Macdonald* v. *Whitfield*, construed the bank's offer to make the advance as made upon the condition that the directors should become bound as co-sureties for the company. The bank did not require Macdonald to become surety for the company, that Whitfield should then become surety for him, and so on. What the bank asked for and obtained was the personal guarantee of the directors, and

there was no stipulation that inter se they should become sureties for each other. In *Ianson* v. *Paxton*, however, this was exactly what the manager who made the advance did do. He said in effect to Paxton: "If Iansen is as good as you say, you may indorse the note with safety and will incur no responsibility." He in fact did point out to Paxton that the effect of his indorsement was only to make him liable for the default of parties prior to him upon the note. The Court of Error and Appeal held that Iansen failed under these circumstances to show what is the very foundation of the right to contribution, co-suretyship. The dictum of Lord Plunkett, above quoted, was directly applicable, and the undertaking of Paxton was a collateral or subsequent suretyship, not co-suretyship. The principle eliminated by the decision in *Ianson* v. *Paxton* is that the bare fact alone that the successive indorsers of a bill or note are accommodation indorsers is not sufficient; they are not necessarily to be regarded as co-sureties. That must depend upon all the facts of each particular case. In *Macdonald* v. *Whitfield* their Lordships held the evidence proved the relation of co-suretyship, and in *Ianson* v. *Paxton* the Court held that it did not.

Before the decision in *Ianson* v. *Paxton*, the rule seems to have been that all it was necessary to show to entitle indorsers to contribution was that they were accommodation indorsers. Although the earlier cases in our own Courts may upon the particular facts and circumstances of each have been rightly decided, it is submitted that the dicta of the judges who decided them were too wide. Thus in *Mitchell* v. *English*, 17 Gr. 303, at p. 304, Strong, V.C., says, "It is equally well established that accommodation indorsers of a negotiable security are to be considered as co-sureties, irrespective of the order of their liability on the instrument itself." An opinion which he himself receded from in *Ianson* v. *Paxton*, p. 468.

The principles deducible from the cases are:

(1) That where indorsers have mutually agreed to indorse a bill or note for the same holder for the same debt, co-suretyship exists, and they are inter se liable to mutual contribution: *Macdonald* v. *Whitfield*, 8 App. Cas. 733.

(2) The mere form of the instrument is not to be regarded. It makes no difference what position they are placed in, whether as maker of a note, acceptor, or drawer of a bill and indorsers; if there is co-suretyship, the rule applies: *Reynolds* v. *Wheeler*, 10 C.B.N.S. 561; *Fisken* v. *Meehan*, 40 U.C.R. 146.

(3) Co-suretyship is not established from the mere fact that each of the parties is an accommodation indorser: *Janson* v. *Paxton*, 26 C.P. 439, 464; *Fisken* v. *Meehan*, supra.

EDW. H. SMYTHE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

The Law Reports for April comprise: (1896) 1 Q.B., pp. 253-640; (1896) P. pp. 93-129; and (1896) 1 Ch. pp. 349-572.

TRAMWAY—BY-LAW—REQUIREMENT TO DELIVER UP TICKET OR PAY FARE—REASONABLENESS OF BY-LAW.

Hanks v. *Bridgman*, (1896) 1 Q.B. 253, was a case stated by a magistrate as to the validity of a by-law made by a tramway company in pursuance of statutory authority, which required passengers, when required so to do, to deliver up their tickets or pay the fare legally demandable for the distance travelled. The passenger in this case paid his fare and received a ticket, but inadvertently lost it. He declined to pay the fare over again, and was thereupon summoned for breach of the by-law. The Court of Appeal (Lindley and Kay, L.JJ.), held that the by-law was reasonable and that the defendant ought to be convicted.

TRAMWAY—BY-LAW—REQUIREMENT TO SHOW TICKET—REASONABLENESS OF BY-LAW.

Lowe v. *Volp*, (1896) 1 Q. B. 257, is a similar case to the last. In this case the by-law required each passenger to show his ticket (if any) when required so to do by any conductor or authorized servant of the company. The defendant paid his

fare, recieved a ticket which he refused to show to an inspector of the company; he was summoned for breach of the by-law. The Court of Appeal (Lindley and Kay, L.JJ.), held that the by-law was reasonable and that the defendant ought to be convicted.

In connection with these cases the much litigated case of *Beaver* v. *The Grand Trunk Ry.*, 22 S.C.R. 498, may be referred to.

MUNICIPAL CORPORATION—BY-LAW—REASONABLENESS—USE OF PROFANE OR OBSCENE LANGUAGE.

In *Strickland* v. *Hayes*, (1896) 1 Q. B. 290, the validity of a municipal by-law was in question. It provided that "no person shall in any street or public place, *or on land adjacent thereto*, sing or recite any profane or obscene song or ballad, or use any profane or obscene language." The defendant had been convicted of having used the language complained of on a foot path in a field in the presence of a large number of persons. The facts were admitted, but the defendant contended that the conviction should be quashed on the ground that the by-law was unreasonable and therefore bad. The Court of Appeal (Lindley and Kay, L.JJ.) sustained the objection, holding that the words "or on land adjacent thereto" were clearly too wide, and made the by-law unreasonable, and that even if the by-law were read omitting those words, it would be still unreasonable, as it did not contain any words importing that the acts must be done as so as cause annoyance to some other person or persons.

GAMING—BETTING—PLACE FOR PURPOSES OF BETTING—16 & 17 VICT., C. 119, S. 3—(CR. CODE, S. 197).

Liddell v. *Lofthouse*, (1896) 1 Q. B. 295, was another case stated by magistrates. The defendant had been charged with an invasion of the Betting Act (16 & 17 Vict., c. 119), sec. 3 (Cr. Code, sec. 197). He was proved to be in the habit of going to a certain piece of ground, which was bounded on one side by a hoarding, and on two sides by stays supporting the hoarding, for the purpose of betting with persons resorting thereto. The justices doubted whether this was "a

place" within the meaning of the Act, and declined to convict the respondent. The Court of Appeal (Lindley and Kay, L.JJ.) were, however, of opinion that he ought to have been convicted, and that the piece of ground in question was "a place" within the meaning of the Act: see *Regina* v. *Giles*, 26 O. R. 586; *Regina* v. *Osborne*, 27 O. R. 185.

CRIMINAL LAW—FALSE TELEGRAM—OBTAINING MONEY BY FORGED INSTRUMENT—FORGED TELEGRAM—FORGERY ACT, 1861 (24 & 25 VICT., C. 98, S. 38 CR. CODE, SS. 423, 424, 428, 429).

The *Queen* v. *Riley*, (1896) 1 Q. B. 309, was a prosecution for forgery under the following state of facts: The prisoner was a clerk in the telegraph department of a post office, and sent to a bookmaker a paper purporting to be a telegram offering to bet on a certain horse for a certain race. The telegraph business in England is under the control of the General Post Office, and the pretended telegram was made by the prisoner to appear as if it had been handed in at the receiving office prior to the race, and the bookmaker accepted and ultimately paid the amount won on that understanding. In reality the pretended telegram was a fictitious affair altogether, and had never been transmitted at all, but was drawn up and sent by the prisoner from the head office after the race had been won by the horse in question. The majority of the Court (Hawkins, Mathew and Wills, JJ.), held that the telegram was a forged instrument within the meaning of 24 & 25 Vict., c. 98, sec. 38 (see Cr. Code, sec. 423), but Lord Russell, C.J., and Williams, J., though agreeing that the telegram was a forgery at common law, doubted whether it was a forged "instrument" within the meaning of sec. 38. One other point was submitted for the opinion of the Court, namely, whether a prisoner by pleading guilty admits the facts appearing in the depositions. Hawkins, J., only gives an answer to that question, and he was of opinion that a plea of guilty only admits that the prisoner is guilty of the offence as charged in the indictment and nothing more.

PRINCIPAL AND AGENT—CONTRACTOR—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR—PUBLIC BODY—BREACH OF DUTY—DAMAGE—REMOTENESS.

Hardaker v. *Idle District Council* (1896), 1 Q. B. 335, is an interesting case on a branch of the law of principal and agent, illustrating the rule stated by Lord Blackburn in *Dalton* v. *Angus*, 6 App. Cas. 829, viz., where a person causes something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching on him of seeing that duty performed by delegating its performance to another. In the present case the defendants were a municipal corporation, who having power by statute to construct a sewer, employed a contractor to do the work for them. In consequence of his negligence in omitting to support certain gas mains while making the necessary excavation, the gas main broke, and the gas escaped from it into the house in which the plaintiffs, a husband and wife resided, and an explosion took place injuring the female plaintiff and damaging the male plaintiff's furniture. The action was brought against both the municipal corporation and the contractor. The former claimed to be free from liability, on the ground that there was no relation of master and servant between them and their contractor, and that the explosion was not the direct result of any order given by them or their servants, and that the corporation did not owe any special duty to the plaintiffs. Wright, J., who tried the action, dismissed it as against the corporation, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.), reversed his judgment on this point, on the ground that the corporation did owe a duty in making a sewer to take care not to break any gas pipes which they cut under in order to construct the sewer, and they could not by delegating the performance of the work to another escape responsibility for the breach of that duty, although occasioned by their contractors' negligence. The rule of law applicable to the case was also laid down in *Bower* v. *Peate*, 1 Q. B. D. 321, by Cockburn, C.J., as follows: "A man who orders a work to be executed, from which in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of

that which is necessary to prevent the mischief, and cannot relieve himself of responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." The case proceeds on the same principle, we may observe, as that on which *Black* v. *Christ Church Finance Co.*, 1894, A. C. 48 (see ante, vol. 30, p. 305), was decided by the Privy Council.

REVENUE—PROBATE DUTY—FOREIGN MORTGAGE—LOCAL SITUATION OF ASSETS—(SUCCESSION DUTY ACT, 1892, 55 VICT. C. 6, 58 VICT. C. 7, 59 VICT. C. 5, (O.))

Attorney-General v. *Sudely*, (1896) 1 Q.B. 354, is a case which it seems necessary now to take into account in view of the Ontario Succession Duty Act and amendments above referred to, as bearing on the locality of assets. In this case the testator as died domiciled in England; by his will he bequeathed one-fourth of his residuary, real and personal estate to his wife. His will was proved in England, and while being administered there and before the clear residue had been ascertained, the wife died. The husband's estate included money invested in mortgages in New Zealand, which were unrealized at the wife's death, and no part of them had been appropriated to any particular shares of the ultimate residue. The executors of the wife, in their affidavit made for the purpose of obtaining probate of her will in England, did not include her fourth share of the mortgage securities, and refused to do so, claiming that it was not liable to probate duty. The Crown contested their right to exclude this property, and the Queen's Bench Division decided the point in favor of the defendants: the majority of the Court of Appeal (Lopes and Kay, L.JJ.), however, took a different view, and reversed the decision of the Queen's Bench Division, (Lord Esher, M.R., dissenting) and held that the right of the executors of the wife was not to have a share of the mortgaged securities in specie, but to have the estate of the husband administered, and to receive from his executors a fourth part of the residue; that this was a chose in action, recoverable only in England, and was therefore an English asset and its value liable to probate duty.

COMPANY—MISREPRESENTATION IN PROSPECTUS—FRAUD—PUBLICATION OF FALSE STATEMENTS, TO CONFIRM THOSE OF PROSPECTUS—PURCHASE OF SHARES IN MARKET BY RECIPIENT OF PROSPECTUS.

Andrews v. *Mockford*, (1896) 1 Q.B. 372, was an action brought by the plaintiff against the defendants for conspiring to defraud the plaintiff by inducing him by false representations to purchase shares in a company. The defendants were father and son, and were promoters of the company. They issued a prospectus as to the company containing statements which they knew to be false. One of them was sent to the plaintiff; he did not apply for an allotment of shares, but kept the prospectus by him, and some months after read a statement in the *Financial News* which purported to confirm the statements made in the prospectus, and he thereupon, on the faith of the prospectus and the confirmatory statement, purchased shares in the market. The confirmatory statement was false, and the defendants had procured the same to be published. Shortly after the plaintiff purchased his shares the price of shares declined and the company was ultimately wound up without paying a dividend. The defendants sought to escape liability on the ground that the plaintiff not having applied for an allotment of shares on the faith of the prospectus, could not rely on the misrepresentations therein contained, and that even assuming that the confirmatory statement published in the *Financial News* was untrue, it gave no right of action because it was not shown that it was published with intent that it should be communicated to the plaintiff and acted on by him. None of the previous decisions on this branch of the law seem exactly to cover this case. Lord Russell, C.J., who tried the action, gave judgment in favor of the plaintiff for the amount expended by him in the purchase of the shares in question, and his decision was upheld by the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.,) on the ground that the object of the prospectus was not merely to induce an application for an allotment of shares but also to induce persons to whom it was sent to buy shares, in the market, and that its function was not exhausted by an allotment being made, and that the defendants were therefore liable for the damage sustained by the plaintiff subsequently buying shares in the market on the faith of the

representations therein contained; and that the defendants were also liable to the plaintiff for the damages resulting from his having acted on the publication of the statement in the *Financial News*, confirming as it did the statements in the prospectus previously received by him.

SOLICITOR—PARTNERSHIP—AUTHORITY OF ACTING PARTNER—DEFENCE OF ACTION AGAINST FIRM—SOLICITOR, EMPLOYMENT OF, BY MEMBER OF FIRM—NEGLIGENCE—ORD. XLVIII. A, R. 5.—(ONT. RULE 289).

Tomlinson v. *Broadsmith*, (1896) 1 Q. B. 386, was an action against a firm of solicitors for having entered an appearance for the plaintiffs without authority, and alternatively that if they had authority, for acting negligently. The plaintiff was a member of a firm which had been sued, and the acting partner of the firm had employed the present defendants to defend the action on behalf of the firm. The solicitors had accordingly entered an appearance for each partner individually, as required by Ord. xlviii. A, r. 5, (Ont. Rule 289), and the alleged negligence consisted in their not having subsequently notified the present plaintiff of the recovery of judgment against him, whereby he was prevented from satisfying the judgment, and his goods were seized and his credit injured. The jury found in answer to questions put to them by the judge at the trial, that the defendants had no authority, express or implied, to enter an appearance for the plaintiff, and even if they had they were guilty of negligence in the performance of their duty as solicitors. On an appeal from the judgment in favor of the plaintiff at the trial, the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) dismissed the action with costs, holding (1) that the acting partner in the absence of any express withdrawal of authority, by the plaintiff, had an implied authority to employ a solicitor to defend the action against the firm, and that the solicitor so employed was sufficiently authorized to enter an appearance for each of the partners individually; and (2) that the solicitors having informed the partner by whom they were retained of the fact of the recovery of the judgment against the firm, had sufficiently discharged their duty, and were not guilty of negligence in not having also informed the other members of the firm individually thereof.

EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 VICT., C. 42) S. 3—MEASURE OF COMPENSATION—EARNINGS OF APPRENTICE—(WORKMEN'S COMPENSATION FOR INJURIES ACT (55 VICT., C. 30 [O.]), S. 7).

In *Noel* v. *Redruth Foundry Company*, (1896) 1 Q.B. 453, the question was as to the proper mode of measuring the compensation the plaintiff was entitled to under the Employers' Liability Act (43 & 44 Vict., c. 42), from which the Ontario Workmen's Compensation for Injuries Act (55 Vict., c. 30), is derived. The statute, sec. 3, provides that the amount of compensation under the Act is limited to a sum equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed. In the present case the plaintiff was apprenticed to the defendants, and received a salary of 1s. per week for the first year, increasing 1s. per week each year. In the fifth year, when earning 5s. a week, he was injured. Evidence was given that at the end of the fifth year, when the plaintiff would be out of his apprenticeship, he would be able to earn 14s. to 18s. per week, and the compensation was assessed at £80. But a Divisional Court (Wills and Wright, JJ.), held that the possible earnings of the plaintiff when out of his apprenticeship could not be taken into account, but only the actual amount of his earnings as an apprentice, and the damages were reduced accordingly.

MARRIAGE—VALIDITY OF MARRIAGE—SOLEMNIZATION OF MARRIAGE ON BOARD BRITISH WARSHIP.

Culling v. *Culling*, (1896) P. 116, is the only case in the Probate Division which requires attention. In this case the validity of a marriage ceremony performed on board a British warship at a foreign station by a clergyman of the Church of England, without license and without the publication of banns, was in question, and it was held by Jeune, P.P.D., that the marriage was valid according to the common law of England.

CORRESPONDENCE.

COUNTY LAW ASSOCIATIONS.

To the Editor of the Canada Law Journal.

SIR,—It was disappointing to note that none of the profession have seen fit so far to make any comment upon the proposition contained in my letter in your issue of April 1st, as to forming a Provincial Federation of the County Law Library Associations. Perhaps all agree that it is advisable, and proceeding upon this assumption I would suggest that representatives from the several County Associations, and also from the counties where there are no associations, meet some time next July in Toronto to discuss the advisability of forming such an organization, and if thought expedient, proceed with the formation. Two representatives would probably be enough from each County or County Association. It is said by some that there is not enough cohesion between the members of the profession in this province to organize such an association. If there are any benefits to flow from it there should be enough cohesion. I hope the advisability of holding this meeting in July next will be fully discussed by the profession.

Yours, etc.,

W. C. MIKEL.

Belleville, April 25th, 1896.

THE ONTARIO REPORTS.

To the Editor of the Canada Law Journal.

SIR,—There has been I think for the past few years a decided improvement in reporting the decisions of our Provincial Courts, but are not too many cases reported? Only those cases should be reported that involve what has hitherto been doubtful law, or decisions upon statutes in which the language invites litigation on reasonable grounds. Also, are not especially the decisions of Courts of the first instance too frequently reported?

For example, let us glance at a recent number of the Ontario Reports. Why was it necessary to report *King* v. *Yorston*,

except on the possible point of the abatement of the legacies referred to in the judgment, and nothing novel was decided on that point. *Fisher* v. *Webster*, notwithstanding the seeming absence of any English or Canadian decisions on the particular point raised, should be reasonably free from doubt, for all that was required was a way appurtenant to the principal parcel conveyed, that is, an easement only. In *Babcock* v. *Avers*, the defendant signed the memorandum of indebtedness, and the language certainly implies that this indebtedness should be paid in three equal annual instalments. If A. bequeaths to B., C. and D., the children of E., the sum of $400, is it not obvious that B., C. and D. are each entitled to one-third. Just why the case reached the Court is more of a puzzle, unless the plaintiff had the bump of hope abnormally developed.

Attorney-General v. *Hamilton Street Ry. Co.*, was properly reported and particularly in view of the previous decision of *Regina* v. *Tinning*, but why was *Patterson* v. *King* reported? The law is clearly laid down in *Mitchell* v. *Lee*, 8 B. & S. 92, a case that any careful counsel would know, and the law aside from this case would apparently be obvious. *Regina* v. *Coulson* was properly reported in view of a previous decision of *Regina* v. *Coulson* in 24 Ontario Reports, but why report the facts? Then we have *Ferguson* v. *Township of Southwold.* Was a report of the case needed? The jury found that the highway was out of repair, and certainly there was evidence to sustain that finding, and there are numerous cases deciding that the plaintiff was only bound to exercise his judgment as well as he could under all the circumstances to avoid the accident. The case may have been of some difficulty for the jury, but after the findings of the jury there could be no difficulty in applying the law. The plaintiff had a reasonable belief that by the course he took he would avoid the accident; that belief under the circumstances was not irrational, and the defendants were therefore liable for the plaintiff's damages. *Edgar* v. *Northern Ry. Co.*, 11 A.R. 452, a case involving the same principle, sufficiently enunciates the doctrine. Why again was it necessary to report *Stephens* v. *Beatty*? The defendant indiscreetly wrote a letter to the plaintiff giving an erroneous

date as to when he ceased to be a trustee, but it could not possibly under the facts operate as an estoppel and cadit questio.

The last case, *Henderson* v. *Henderson*, is, to say the least, unsatisfactory. It is clear law that an agreement to make a will in favor of any person is binding where there is a good consideration. The trial Judge and the dissenting Judge in the Divisional Court seemed to think that an agreement was not sufficiently made out, and the majority of the Divisional Court seemed to think that a good agreement had been made out, or one might almost infer as much from the language of the two Judges in the Divisional Court who found in the plaintiffs' favor, and yet the plaintiff was given a larger estate than her deceased husband ever claimed—that is an estate free of any charge, while the agreement, if made out, gave to the plaintiff's husband an estate in fee simple, subject to certain charges. There seems to have been a decided conflict in the evidence. The trial Judge seemed to believe the witnesses of the defence, and the majority of the Divisional Court apparently believed the witnesses of the plaintiff. There is, too, the very important element that the father of the plaintiff's husband did make a will in his favor, which certainly was a pertinent fact in favor of the contention of the plaintiff, but of course in the absence of evidence which is before the Court that element might not have been as important as it would seemingly appear. However, this is one of those cases I think that should not have been reported, particularly in view of the fact that doubtless the case will reach the Court of Appeal.

W. H. M.

On page 206 of the last number of the Ontario Reports, it is stated in the judgment of a learned judge that "the 13 Eliz. as explained by the Act of 1872 (now R.S.O. c. 96, s. 1) was, as pointed out by Osler, J.A., in *Cameron* v. *Cusack*, 17 A.R., at p. 493, passed merely for the purpose of declaring that it had not been properly expounded in *Smith* v. *Moffatt*, 28 U.C.R., 486!" This is one of those delightful bulls of the real old Irish sort. They don't often creep into judgments, and one is therefore all the more welcome when it turns up in such an unexpected place.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

BOYD, C., FERGUSON, J., ROBERTSON, J. [April 8.

MCALLISTER *v.* O'MEARA.

Security for costs—Class suit—Insolvent plaintiffs.

Security for costs was refused in an action brought by four ratepayers of a municipal corporation, on behalf of themselves and all others, against the corporation and reeve for an account of moneys received by the latter from the former, in spite of the financial incompetency of the plaintiffs, and the slight interest they possessed in the properties for which they were assessed, where the action was virtually the plaintiffs' action, and not that of third persons who were alleged to be putting the plaintiffs forward, and there was no contention that the action was frivolous.

Clark v. *St. Catharines*, 10 P.R. 205, distinguished.

Watson, Q.C., for the plaintiffs.

W. H. P. Clement, for the defendants.

BOYD, C., FERGUSON, J., ROBERTSON, J. [April 10.

IN RE SOLICITOR.

Solicitor—Special journey—Authority—Ratification—Bill of costs—Block charge—Taxation—Items—Appeal—Certificate.

The solicitor acted for a municipal corporation as solicitor and sole counsel in a matter in litigation which was contested in the High Court, Court of Appeal, and Supreme Court of Canada. The municipal council passed a resolution authorizing an application for leave to appeal to the Privy Council, a copy of which was forwarded to the solicitor, who thereupon, without specific instructions, proceeded to England for the purpose of obtaining leave, and while there drew upon the treasurer of the corporation a bill for part of his expenses, which was honored.

Held, that the resolution, the payment on account of expenses, and other acts of ratification, without protest as to the solicitor's course, were sufficient authority to him; and he was entitled to tax against the corporation his expenses in transit and in residence in England, an allowance for services rendered in England as solicitor and counsel, and a per diem charge for waiting, having regard to his being absent from his own business.

The solicitor made a block charge of $1,400 for his services, time, and expenses.

Held, that it should be resolved into details, and taxed in items.

An appeal from the certificate of taxation of a bill of costs between solicitor and client is to the Court as if it were an appeal from a Master's report.

Fullerton, Q.C., and *H. L. Drayton*, for the City of Toronto.

Shepley, Q.C., for the solicitor.

ROBERTSON, J.] [January 9.

WRIGHT *v.* BELL.

Costs—Administration—Fixed costs in lieu of commission—Rule 1187—Labor and difficulty of reference.

This was an action for the construction of the will and administration of the estate of Thomas Bell, deceased.

A reference for administration was directed to J. S. Cartwright, official referee, and was begun on the 9th May, 1892.

Interim reports making distributions of the estate to the extent of $31,560.27, were made on the 13th June, 1892, and 10th June, 1893.

By the final report dated 2nd November, 1895, seventeen persons were found entitled to share in the distribution of the estate per capita. These persons were represented by six different solicitors. No infants were in any way interested in the estate.

The whole value of the estate was $41,500.

There were twenty-nine regular sittings in the referee's office, besides over two hundred ordinary attendances in the course of the reference, and two hundred and seventy-five letters written by the solicitors having the carriage of the proceedings.

In the course of the reference an unusual number of special matters of more or less difficulty came up for adjustment and determination, among which were the following :

(1) The expropriation by a municipality of land belonging to the estate.

(2) The opening up of certain streets through land belonging to the estate.

(3) A claim made by a stranger to the action to the ownership of buildings upon the estate, which was contested and defeated.

(4) A claim successfully prosecuted by the estate against such stranger for rents collected by him and for occupation rent.

(5) A question whether the estate had acquired title by possession to certain land, which was carefully looked into, but ultimately dropped.

(6) A claim made by two strangers of the right to remove two houses standing upon land belonging to the estate, which was litigated and resulted in favor of the estate.

(7) The sale of land in Markham and Queen streets, in the city of Toronto, in seven parcels, for $10,367, and the collection of rentals pending the sale.

(8) The sale of fruit growing land in the township of Mersea, in twenty-one parcels, to eleven different purchasers, for over $16,000.

(9) Questions arising upon the title to the lands in Mersea.

(10) An adverse claim to a portion of these lands, which was compromised.

(11) A claim by defendant J. J. Bell for compensation for improvements under mistake of title.

(12) A claim by defendant J. J. Bell to $4,000 of the moneys of the estate

(13) A claim by the solicitor for defendant J. J. Bell to a lien upon his share of the estate in priority to costs awarded against him.

(14) Various assignments of different shares made during the course of the proceedings, which complicated the settling of the final report.

The referee certified to the difficulty and labor of the reference, and that, in his opinion, taxed costs should be allowed in lieu of the usual commission. An affidavit of the plaintiff's solicitor set out in detail all the circumstances above referred to. "In all actions or proceedings instituted for administration . . . unless otherwise ordered by the court or a judge, instead of the costs being allowed according to the tariff, each person properly represented by a solicitor and entitled to costs out of the estate . . . shall be entitled to his actual disbursements . . . and . . . a commission on the amount realized." Rule 1187.

Upon the case coming on for hearing on further directions before ROBERTSON, J., in Court, on the 8th January, 1896, all parties consenting, the plaintiff asked that taxed costs of all parties of the proceedings on the reference and of the interim distributions and further directions should be paid out of the estate.

Lash, Q.C., and *A. H. F. Lefroy*, for the plaintiff, and certain of the defendants, referred to two unreported cases before FERGUSON, J., in which taxed costs were allowed in lieu of commission--*Re Goodfallow*, *Traders' Bank* v. *Goodfallow*, 10th June, 1889, an administration matter, and *McCabe* v. *McCabe*, 14th September, 1892, a proceeding for partition or sale.

W. N. Miller, Q.C., *H. T. Beck*, *McBrayne*, *J. H. Moss*, *and Day*, for the other defendants.

Judgment was delivered on the following day.

ROBERTSON, J.: After reading the numerous papers handed in on the motion for further directions, the affidavit of Mr. Lefroy, and the certificate of the referee, I am of opinion that this is a case in which taxed costs should be allowed in lieu of commission. I think, however, that there was no necessity for the appearance before me of so many counsel on this motion; the whole matter could have been brought to the attention of the Court by one counsel; there was no dispute, no differences to be reconciled; the only question was as to the costs, and the affidavit of Mr. Lefroy and the certificate of the referee make it clear that the case is one for taxed costs. The taxing officer will allow, however, the attendance of each of these gentlemen as solicitors, except in the case of counsel for the plaintiff, who should be allowed an ordinary fee as upon a non-contentious application.

MEREDITH, C.J.] [Feb. 20.

HALSTED *v.* BANK OF HAMILTON.

Banks and banking—Bank Act, 53 Vict., c. 31 (D.)—Assignments as security—Advances—Debts incurred—"Negotiating."

A bank in dealing with a customer discounted certain notes and placed the proceeds thereof to his credit in his general account, at the same time taking assignments of goods to secure the payment of the notes, but under an arrangement no actual advances were made, and by a system of book-keeping the proceeds were transferred to other accounts of the customer in the bank and retained.

Held, that as no loan or real advance was made, or debt incurred when the assignments were taken, they could not be supported under the provisions of the Bank Act.

Held, also, that there was no "negotiating" of the notes within the meaning of section 75 of that Act.

Gibbons, Q.C., for the plaintiff.

J. J. Scott, for the defendants.

ROSE, J.] [March 18.

ATTORNEY-GENERAL *v.* CAMERON.

Succession Duty Act—Present and future interests—Duty payable.

Where a testator divides up his estate so as to create present and future estates or interests, the duty under the Succession Duty Act, 1892, 55 Vict. cap. 6 (O.), is to be assessed on the whole estate at the time of the testator's death, including both the present and future estates or interest, but duty is only to be paid at the death or within eighteen months thereafter on the present estates or interests, that is, those of which there is present possession or enjoyment, the duty on the future estates being deferred until they become estates in possession or enjoyment, and the duty then payable is not the duty fixed at the time of the death, but the duty assessed upon the value of such estates or interest at the time the right of possession or enjoyment accrues.

In computing the duty on annuities payable on testator's death, and of which there is present actual enjoyment, the duty thereon must be assessed on their then value. Duty also must be payable on the capital producing such annuities, when it becomes distributable as legacies or as part of the final distribution of the estate.

J. R. Cartwright, Q.C., for the plaintiff.

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

WINCHESTER, Master.] [March 25.

MCCULLOCH *v.* HAMILTON.

Pleading—Time for delivery of defence—Rule 371.

A defendant has, under Con. Rule 371, eight days from the expiry of the time limited for appearance to deliver his defence, although the appearance may be entered earlier than the time limited for so doing.

Anlaby v. *Praetorius*, 20 Q.B.D. 764, followed.

L. G. McCarthy, for the plaintiff.

W. E. Middleton, for the defendant.

MEREDITH, C.J.] [April 1.

TORONTO GENERAL TRUSTS CO. *v.* IRWIN.

Will—Construction—Devise — Incumbrances—Exoneration—Widow—Dower —Election—Remainder—Acceleration.

By paragraph 3 of his will the testator, who died in 1895, devised house No 35, east of Broadview avenue, in the city of Toronto, with some land in the rear of it, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns forever, free from all incumbrances." This property, together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for $1,200 made by the testator, which was subsequently discharged and replaced by a mortgage for $1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime, and nothing passed to his wife under this paragraph. By paragraph 5 the testator directed his wife to pay off the mortgage for $1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose.

Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother, from the payment of the mortgage, and to cast the burden of the payment of it upon the residuary estate.

2. That the devisee of house No. 35 was not entitled to have it discharged of the dower of the widow, she having elected to take her dower instead of the provision made for her by the will.

3. Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all 'my said property," and directed that the proceeds of the sale should be invested, and the interest of the investment paid in certain proportions to M. S. and M. J. G. for their lives and the life of the survivor, and for the division of the corpus after the death of the survivor among certain persons named.

Held, that the provisions of paragraph 7 applied only to the devise contained in paragraph 6, and not to that in paragraph 3.

4. That the effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder and make it an estate in possession.

T. W. Howard, for the plaintiffs.

W. Davidson, for the infant defendants.

George Lindsay, for the defendant Richard Irwin.

T. H. Bull, for the defendants Stewart and Glassie.

Skeans, for the defendant Martha Irwin.

MACMAHON, J.] [April 25.

MARTIN *v.* SAMPSON.

Chattel mortgage—Affidavit of bona fides—Money not actually advanced at the time—Invalidity of mortgage.

A chattel mortgage perfectly regular in every other respect was duly executed and filed in the proper office, but the consideration money was not actually paid over until four days after the filing of it, nor was there any binding agreement at the time of the execution and filing between the parties that the money should be advanced. Consequently the affidavit of bona fides was not true.

Held, that the mortgage was invalid.

J. J. Scott, for the plaintiff.

H. Cassels, for the defendant, Sampson.

Waddell, for the defendant, Angus.

ASSESSMENT CASES.

IN RE HAMILTON GAS CO. AND THE CITY OF HAMILTON.

Consol. Assessment Act, 1892, sec. 1 (9) and sec. 34 (2)—Assessment of gas mains and gas meters.

Held, that the mains of a gas company laid under and along city streets, together with the portions of such streets occupied thereby (i.e., the soil displaced and that necessary for the support and protection of the mains) are assessable against the company as "land" under sec. 1 (9) of the "Consolidated Assessment Act, 1892," but that gas meters on the premises of the consumers of gas are personalty of the company, and therefore exempt under sec. 34 (2) of that Act.

Consumers' Gas Co. v. *City of Toronto*, 31 C.L.J. 488, considered and followed.

[HAMILTON, Dec. 3rd, 1895, SNIDER, Co. J.

This was an appeal by the Hamilton Gas Co. against an assessment of $75,000 for the mains, and $100,000 for that portion of soil of the streets occupied by these mains, and $10,000 on meters placed and maintained by them on the premises of consumers.

Edward Martin, Q.C., for the appellants.

Frank MacKelcan, Q.C., for respondents.

SNIDER, Co. J.—I hold that the right to assess the company's mains is settled by the decision of the learned Chancellor in the *Consumers' Gas Co.* v. *City of Toronto*, 31 C. L. J. 488. It is sought now to assess these appellants $100,000 for a certain portion of the subsoil of the street through which the mains run, as distinguished from and in addition to these mains. The city assessor has, he says, assessed the gas company for a stratum of sub-soil lying three feet below the surface of the street six feet in width, of indefinite or imaginary thickness, and 25 miles long, being the length of pipes laid down in the streets. He then turns this into acres, and as the average assessment per acre of the land in Hamilton is, he says, between $4,000 and $5,000 he places this value on the number of acres he has figured out and assessed at $100,000.

The first question I have to determine is whether any of this subsoil of the streets is realty of this company within the meaning of the Assessment Act.

Although this question was not directly raised in the Consumers' Gas Co, of Toronto case, the learned Chancellor in his judgment has clearly stated his views on the point. He says he thinks the better view is to treat the mains, and so much of the soil as is used therewith, as realty of the company, and in this respect assessable. "As to this underground soil," he proceeds to say, "the gas company is both owner and occupier." Even if I were not bound by this portion of the judgment, I should arrive at the same conclusion on the authorities therein referred to, and in the judgment of the learned judge of the County Court of the County of York in the same matter; but I consider this limited to that portion of this underground soil exclusively occupied by the company with their mains, that is, the displaced portion and the soil immediately touching these pipes.

The question then arises as to the proper valuation of this subsoil. It seems to me that, placed where it is, it has no commercial value. Its only value is as a support and protection of these pipes, and is only sufficient to give the nature of realty to these mains. Apart from the mains it is not marketable. The assessor's reasoning whereby he values it at the price of as many surface acres, including the soil under and the space above, is so manifestly wrong that no argument is required to show its fallacy. None of the company's money is invested in it, none of its capital stock is there. It seems to me that any valuation placed upon it beyond a nominal valuation would be purely arbitrary, in fact mere conjecture. The right to break up the surface of the street, to get to it when and where necessary, cannot in my opinion form any proper element in such valuation under the Assessment Act.

It is proved that the value of these second-hand pipes as old iron, for which alone they could be sold, if apart from this "going concern," would be $9,300, less the cost of getting them out of the ground. Their value as part of this company's property as a "going concern" is $75,000. Now what gives this additional value? It seems to me it is made up at least partly, if not entirely, by the support and protection, and the right to the support and protection, of the underground soil to which I have referred. Without this support and protection, which is the only value of this soil to this company, I think this assessment of these old pipes would be excessive. For these reasons I conclude that in confirming the assessment of these mains for $75,000 where they are, and because they have a right to be where they are, I have exhausted the company's whole assessable real estate in these streets. The assessment on these two heads will therefore be reduced to $75,000. I can see no evidence or reasoning on which I could fix upon any certain sum in addition as the "actual cash value, as it would be appraised in payment of a just debt from a solvent debtor."

There remains the question as to whether the meters are in any sense assessable as part of the company's realty. If they are personal property of the company they are exempt under sub-section (2) of section 34 of the Assessment Act of 1892. Where not in use they certainly are not affixed to the company's real estate, they are not then fixtures. When in use they are not on the company's real estate in any sense, nor on real estate occupied by them. They are on the real estate of the consumers. On one side they are

attached to the owner's pipes, on the other to the supply pipe of the company in some cases, and in others the consumer owns pipe each side of the meter. These meters are constantly being removed and replaced according as gas is being consumed, on the consumer's premises or not. They are put on with the knowledge and understanding that they may be removed at any time, and they can be removed easily in a moment of time without the least injury to the premises in which they are or to the company's plant, and without interrupting in the least the company's business. They are only necessary as the means considered best for ascertaining the standing of the account between the company and the consumers, and they may be, and in some 200 cases in this city are, the property of the consumer. On consideration of the numerous decisions referred to, I do not think I am warranted in holding that they are so fixed to the building and mains constituting the real estate of the company as to become part of an indivisible set of plant of this company assessable as real estate.

I hold that the meters are pesonal property and reduce the assessment on this head by $10,000.

Province of Nova Scotia.

SUPREME COURT.

TOWNSHEND, J.
In Chambers.

[April 1.

BARNABY *v.* BARNABY.

Deed of assignment—Authority of assignee to execute on behalf of creditors before expiration of time limited—Right of creditors to execute after expiration of time.

A trust deed without preferences provided for the payment of all creditors who should execute the same within a time limited. Before the expiration of the time two creditors communicated to the assignee by letter and telegram their willingness to sign, and their accession to the terms of the instrument. In the absence of a formal power under seal the assignee did not sign, and when a formal power arrived he refused on the ground that the time had expired. An originating summons having been taken out by the assignee for directions in the execution of the trusts,

Held, that the creditors having done all that was necessary to entitle them to a participation under the deed, the assignee should have executed the deed on their behalf;

Also, that even if the authorization in the first instance were defective, the creditors were not under the circumstances precluded from signing after the expiration of the time and enjoying the benefits of the assignment, unless by their delay the position of the assignee had been so changed as to result in loss to him.

McInnes, in support of summons.

Borden, Q.C., contra.

TOWNSHEND, J.
In Chambers. } [April 17.

KNAUTH *v.* STERNS.

Capias—Foreign firm suing in firm name—Arrest of foreign absconding debtor—Affidavit for order to arrest—Change of solicitor.

Defendant, a foreign debtor absconding from his own country, was arrested upon mesne process at the suit of a foreign firm suing in the firm name. The affidavit for order to arrest was sworn by plaintiff's solicitor at Halifax, and purported to contain the positive knowledge of deponent, though it appeared from a supplementary affidavit used on this application that his "knowledge" was rather of the character of information and belief derived from and based upon the admissions of defendant himself. The cause of action set out was a cheque drawn by defendant and dishonored upon due presentation for payment. Defendant entered a conditional appearance by one solicitor, and after the lapse of several weeks applied by another solicitor to set aside the order for arrest and all proceedings thereunder.

Held, (disposing of the various points raised)

(*a*) That it was not necessary that the individual names of the foreign firm should be severally set forth.

(*b*) That though ordinarily where the parties are foreigners and defendant is temporarily resident within the jurisdiction for the purpose of casual business only, the latter cannot be arrested for a debt contracted abroad, yet the present case came well within the exception treated in *Butler* v. *Rosenfeldt*, 8 P.R. 175—which case afforded a complete answer on this point.

(*c*) That in such a case, provided a cause of action is shown, the Judge will not examine too critically the particular form of procedure.

(*d*) That defendant having appeared by one solicitor, no other solicitor could take a proceeding in the cause without a change duly made on the record.

(*e*) That there was unreasonable delay unaccounted for in making the application.

Summons dismissed with costs.

Fulton, for application.

Whitman, contra.

Province of New Brunswick.

SUPREME COURT.

EN BANC.] [June 12, 1895.

EX PARTE LITTLE.

Slander of clergyman.

A charge that an Episcopal clergyman is guilty of making a false statement is not a charge involving either dishonest or immoral conduct within the meaning of the Church canon, without an allegation that such clergyman knew the statement was false.

McIntyre, and *Currey*, Q,C., for complainant.

Skinner, Q.C., contra.

TUCK, J.] [June 15, 1895.

EX PARTE COULSON.

Canada Temperance Act, 1893—Refusal by witness to answer—Commitment—Title of Court.

In a case under the Canada Temperance Act, Coulson, the steward of the Chatham Club, was summoned as a witness. He refused to answer certain questions on the ground that the answers might incriminate himself, and that evidence might be obtained from him of a sale by him to other parties, an information laid against him, and these parties summoned as witnesses. The Commissioner committed witness (Coulson) to jail for eight days for refusing to answer, and adjourned the Court for a shorter period of time. The real name of the Court is "The Chatham Civil Court," while the proceedings were entitled "The Civil Court of Chatham." A habeas corpus order having been granted on the grounds that the witness was justified in refusing to answer; that the period of commitment of a witness for refusing to answer must be co-extensive with the period of adjournment of the Court; and that the title of the Court being incorrect, the Commissioner had no jurisdiction.

TUCK, J., decided against the applicant on all three grounds.

Pugsley, Q.C., and *Bennett*, for applicant.

Currey, Q.C., contra.

EN BANC.] [April 25.

FILLIMORE *v.* CARTWRIGHT.

Demurrer—Plea—Set off.

The form of a plea of set off, given in Con. Stat., c. 37, concludes as follows: "which amount the defendant is willing to set off against the plaintiff's claim," and defendant pleaded, according to the form, omitting the words quoted, and without in any way stating the defendant's willingness to set his claim against the plaintiff's. The plaintiff demurred.

Held, that the plea was bad.

Geo. H. Belyea, supported demurrer.

C. J. Coster, contra.

EN BANC] [April 25.

EX PARTE PECK.

Money belonging to A. deposited with a returning officer under the Dominion Elections Act, for B. a candidate, cannot be attached by a judgment creditor of B.

This was an application for a certiorari to remove an order of County Court Judge deciding the above, to have the same quashed (see ante vol. 31, p. 677). At the return of the rule nisi the application was refused.

A. G. Blair, jr., showed cause.

Dunn, contra.

TUCK, J., In Chambers. [May 5.

EX PARTE MYERS.

Canada Temperance Act—Excessive costs—Habeas corpus.

The defendant was convicted of an offence against the Canada Temperance Act and committed to gaol. The case was undefended and extended over a period of a month, during which time the case was before the magistrates seven different times. The costs taxed against the defendant were $74.

The defendant applied for a habeas corpus on the ground that the costs were prima facie excessive; that the conviction should show how the costs were made up; and that the number of witnesses were unnecessary when the case was undefended.

It was shown by the prosecution that many of the witnesses had to be brought to the Court under arrest in order to get their testimony; that they had to be brought a great distance, and that the costs taxed were not nearly so much as might properly have been taxed under the scale of fees.

Held, that the question as to whether the witnesses were necessary or not could not be gone into on this application; and that the costs taxed, while amounting to a large sum, were not greater than was allowed by the scale of fees.

Held, also, that it was upon the defendant to show that the costs were excessive, and that the conviction need not show how the costs were made up.

Mutlin, for the defendant.

McCully, for the prosecution.

EQUITY COURT.

BARKER, J.] [April 21.

HANIGAN *v.* HANIGAN.

Practice—Joinder of wife of a tenant in common in a partition suit.

One of several tenants in common brought suit for partition, making the wife of one tenant in common a party. This defendant demurred to the bill on the ground that she should not have been made a party.

Chandler supported the demurrer.

Borden and *Allan*, contra.

BARKER, J.: The simple case of a partition presents little difficulty, because the authorities seem to agree that in such a case the wife's right of dower is confined to that portion of the land to which, on partition, her husband becomes seized in severalty.

The power of this Court to order a sale, so as to take away or interfere with the wife's right, is denied. It is contended that if a sale is decreed, such a sale must be made subject to the wife's right, and that there is no authority for selling such right, either with or without compensation. The methods by which Courts of Equity acted in effecting a partition of lands held in common, were essentially different from those adopted by common law courts. It was because of the greater power this Court had of dealing equitably between all parties interested, that its jurisdiction was invoked in such cases. The decree

of the Court of Chancery in partition suits did not originally operate upon the title to the property ; but when it had been determined what portions of the land were to go to each tenant, the Court, in order to complete the title, ordered mutual conveyances to be executed by the parties, which order the Court enforced, as it did any other order it saw fit to make: *Whaley* v. *Dawson*, 2 Sch. & L., 367 ; *Gay* v. *Parpart*, 106 U.S., 679.

This order for the parties to execute conveyances was not made in pursuance of any statutory or special power, but by the authority which is inherent in the Court to do all that is necessary for a complete and effectual exercise of its jurisdiction. And so where a bill is brought for a partition, either by joint tenants or tenants in common, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit, for which proposition an anonymous case is cited.

It is very clear that if such conveyances were being made to strangers, the wife would be a necessary party so as to release her right of dower, for without such release, the title would be defective. And if she is not a necessary, party where the conveyances are to be made mutually among the tenants in order to complete and perfect their titles in severalty, it is because as a matter of law the wife's right of dower in the severance being made attaches solely to that portion of the land decreed to her husband.

The right of partition is one which each tenant in common admittedly has against his co-tenants, and this court, in order to administer that right and make it effectual, will find means to surmount every difficulty in the way ; and in my opinion, where the circumstances exist which warrant the sale, the right to the sale is as absolute as the right to the partition for which, under these circumstances, the estate has substituted the sale. Considering that the object to be accomplished is, in this one case, to vest in each tenant a title free from all dower rights of the co-tenant, and in the other case to give to such tenant the value of that right in money as derived from a sale, it is the duty of this court, I think, to carry out that object. It cannot be doubted that if the land be sold, subject to a right of dower, the marketable saleable value is materially lessened. And in such a case, the unmarried tenant is placed at a great disadvantage. If the statute will bear such a construction as to permit the wife's right to be got rid of by a sale, without violating any recognized principle of equity or canon of construction, the rights of all parties will, in my opinion, be more equitably protected than in any other way. It does not, I think, violate any principle of equity. In the first place, we have the general rule of the court which requires all persons to be parties to a suit where interests in the subject matter of the suit may be effected by the decree. It is said a wife has no interest until, by her husband's death, her right has become consumate, and her dower has been assigned. She has no estate in the land, it is true, but she has an interest.

Kent, in his commentaries, at page 50, says: Dower is a title inchoate and not consummate till the death of the husband, but it is an interest which attaches in the land as soon as there is the concurrence of marriage and seisin: *Allen* v. *Edinburgh Life Insurance Company*, 25 Grant, 314 ; *Miller* v. *Wiley*, 16 U.C. C.P., 529.

If one takes into consideration the difficulties which so often lie in the way of making a beneficial partition, the varied interests often involved, and what, in many cases, in the almost impossibility, those interests by means of a partition, and that a sale was provided to meet these very difficulties, it seems a signal failure in the remedy if it is only applicable to cases where no rights of dower are in question, or, if such rights to intervene the remedy can only be adopted by an unmarried tenant in common by his submitting to a substantial pecuniary loss. In my opinion both reason and convenience favor the jurisdiction and practice as laid down in the cases I have just cited. Bearing in mind the subject matter and the evils intended to be remedied by the sale, I cannot see anything in the act which prevents it being construed in the way proposed. The right of petition at the instance of a co-tenant and the right of a sale when a petition cannot be made beneficially, are among the incidents, and by the latter course the husband's title is directed. She is prevented from the enjoyment of her dower consummate, but that is a right which depends upon her surviving her husband, and she is getting a compensation for her interest in the accrued price of the land, and the court has ample means of securing that compensation to her. Such are the principles upon which the court acted in *Weaver* v. *Gregg*, 6 Ohio State Rep. 547, referred to in *Cameron* v. *Doner*, 176, and also in *Jackson* v. *Edwards*, 7 Paige 410, and in appeal in 22 Wend. 498.

I am unable to see any principle which would prevent this Court compelling a married woman to become a party, so that in common with her husband her right derived through him, and therefore subject to the incidents attaching to his estate, of which a sale is one, should be sold and divided so as to realize the full value of the property and give to the purchaser the title of the tenants in common and those claiming through or under them. It is said that this course took a right from the wife without compensation. This is not so. The compensation is included in the proceeds of the sale coming to her husband, as representing his interest in the property, and it only becomes a question between her husband and herself what proportion she is entitled to receive. If they cannot agree, the Court has ample means of settling the question, for I see no greater difficulty in ascertaining the value of a wife's inchoate right of dower than in determining the value of a widow's dower under section 250, sub-section 4. When that question arises it will be found that the powers of the Court are ample for the protection of the interests of both husband and wife. Although in cases where a partition and not a sale is asked for, it is not necessary, for reasons which I have above stated, to make the wives having inchoate rights of dower parties to the suit. It involves an inconvenient practice to omit them in cases where a sale might be asked for, and in cases where the circumstances are such as to render a partition incapable of being beneficially made. Married women having such inchoate rights should, I think, be made parties to the bill. This demurrer must be overruled.

Province of Manitoba.

QUEEN'S BENCH.

FULL COURT.] [May 4.

BERTRAND *v.* HEAMAN.

Evidence—Garnishment—Assignment for creditors.

In this case the Full Court on appeal from Mr. Justice Bain, whose decision is noted, 30 C L.J. 278,

Held (DUBUC, J., dissenting), that the evidence of the admissions of the judgment debtor was not admissible as against the garnishing creditor, either on account of any privity between them or as evidence of declarations made by a party against his own interest (there being no proof of his death); and as there was no other evidence to show that the money in question was part of the estate of the insolvent, the verdict should be entered for the claimant with costs.

Prosser v. *Gwillim*, 1 C. & K. 95; *Richards* v. *Johnston*, 4 H. & N. 660; and *Richards* v. *Jenkins*, 18 Q.B.D. 451, followed.

Machray, for plaintiff.

Bradshaw, for defendant.

DUBUC, J.] [April 13.

MALCOLM *v.* BROWN.

Nuisance—Action for damages.

This was a case tried at the last assizes at Portage la Prairie. The plaintiff kept a dry goods store on the ground floor of a building there, and had her dwelling apartments and millinery work rooms on the second floor. The defendants in September last rented the cellar under the plaintiff's store, and put in a large quantity of vegetables of different kinds. The plaintiff proved to the satisfaction of the judge that in December and January following a strong and offensive odor came from the vegetables in the cellar and pervaded the store and work room of the plaintiff, and caused illness to her and some of her employees, and damaged her business, because customers would not come to the plaintiff's store on account of the noxious odors.

Held, that the defendant was liable for the damages suffered by the plaintiff.

The exercise of a person's particular right is limited by the general right of the public, and he cannot in the use of it infringe upon, or interfere with, the legitimate right of his neighbor. The maxim: "Sic utere tuo ut alienum non laedas" has its full application in matters of this kind.

Robinson v. *Kilvert*, 41 Ch. D. 88; and *Reinhardt* v. *Montasti*, 42 Ch. D. 685, quoted with approval.

Verdict entered for plaintiff for $336.

Anderson, for plaintiff.

Cooper, Q.C., for defendant.

TAYLOR, C.J.] [April 15.

NOTT *v.* IMPERIAL LOAN COMPANY.

Sale of lands for taxes – Place of sale—Conducting sale in a fair and open manner.

This was an issue under the Real Property Act as to the validity of a sale of lands by the Municipality of Winchester to the plaintiff for arrears of taxes. A good many of the proceedings connected with the assessment and levy of taxes were shown to be defective and irregular, but in addition to the provisions of the Assessment Act, secs. 190 and 191, as amended by the statute of 1892, chap. 26, secs. 6 and 7, there had been special legislation validating and confirming the assessment and levies of taxes in that municipality.

Sec. 154 of the Act, however, provides that the sale shall take place at such place as the council shall by resolution or by-law appoint, or in the absence of such appointment, at such public place in the assize town or city of the judicial district wherein the municipality is situated as may be chosen by the treasurer.

The council did not appoint any place for the holding of the sale, and the treasurer appointed the sale to take place at a small hall in the municipality and not at the assize town or city of the Judicial District, which is Brandon. Moreover, the sale began at 11 o'clock in the morning, was continued for about an hour, and then the auctioneer, officials and audience all went away to dinner, and were absent about an hour, during which time no one was left in charge of the hall, which was locked up, nor was any notice put up at the door with reference to the sale, and the land in question was sold after the sale was resumed in the afternoon, and for just the amount of the taxes.

Held, that under these circumstances it could not be considered that the sale had been conductcd in a fair and open manner, and that under sec. 190 of the Assessment Act, the tax sale should be set aside and a verdict entered for defendants as mortgagees.

Henderson, for plaintiff.

A. D. Cameron, for the defendants.

TAYLOR, C.J.] [April 29.

LONDON AND CANADIAN LOAN COMPANY *v.* CONNELL.

Exemptions—Judgments Act, R.S.M., c. 80, sec. 12.

Plaintiffs recovered a judgment against the defendant as surviving executor of the estate of one William Kines, and then under Kule 804 of the Queen's Bench Act, 1895, applied for an order for the sale of a parcel of land vested in the defendant as such executor. The widow and minor children of Kines were living on the land, and on their behalf an attempt was made to prevent the sale of the land, on the ground that it was exempt from proceedings under a registered judgment, under sec. 12 of the Judgments Act, R.S.M., c. 80.

This section provides that no proceedings shall be taken under any registered judgment against the land upon which the judgment debtor or his family actually resides, or which he cultivates.

Held, that the land in question was not exempt from the operation of the judgment, as neither the judgment debtor nor his family resided upon or cultivated it, and that it was impossible to extend the operation of the Exemptions Act beyond the strict construction of its language.

Perdue, for plaintiffs.

McKercher, for defendant.

TAYLOR, C.J.] [April 29.

FOULDS *v.* CHAMBERS.

Garnishment—Landlord and tenant—Setting aside order—Parties—Amendment—Notice of assignment under 4 & 5 Anne, c. 16, sec. 10

One Henry Foulds, in 1893, leased a parcel of land to the defendant, and on the 1st of April, 1895, $90 was due for rent of the premises. Henry Foulds, however, had in 1893 assigned the reversion to trustees for the plaintiff, and defendant, as the learned Judge found, had notice of the assignment.

After the rent fell due a judgment creditor of Henry Foulds obtained an order attaching the rent due by defendant, and in May following an order was made for the payment of the $90 to the judgment creditor; no one appearing to show cause, so far as the order showed. Thereupon the defendant paid the rent as required by the order. The plaintiff then brought this action to recover the $90. To her claim it was objected:

1. That the payment was a good defence so long as the order stood. This objection was overruled, and *Re Smith*, 20 Q.B.D. 321, upon which defendant relied, distinguished.

2. That plaintiff before suing should have taken proceedings under Order 425 of the Queen's Bench Act, 1895, to set aside the attaching order. This objection was also overruled.

3. That the plaintiff was not entitled to bring this action, and that it should have been brought by the trustees.

Held, that this contention was correct, but that leave to amend by adding the trustees as plaintiffs, should be allowed under Rule 338, Q.B. Act, 1895. *Gandy* v. *Gandy*, 30 Ch. D. 57; *Woodward* v. *Shields*, 32 U.C.C.P. 287; and *McGuin* v. *Fretts*, 13 O.R. 699, followed.

4. That notice of the assignment should have been given by the trustees, as required by the statute 4 and 5 Anne, c. 16, sec. 10.

Held, as to this objection, that, as defendant had notice of the assignment, it should not be given effect to *Lumley* v. *Hodgson*, 16 East 99.

Ordered that upon plaintiff filing within a week the written consent of the trustees to be added as co-plaintiffs, the statement of claim be amended accordingly, and judgment entered for the plaintiffs for the amount sued for and costs, except any costs of making the amendment.

Howell, Q.C., and *Machray*, for plaintiff.

Hagel, Q.C., and *Howden*, for defendant.

KILLAM, J.] [May 4.

CHARLEBOIS *v.* G. N. W. C. R. CO.

Railway company—Receiver—Working expenses of railway—Death of parties to suit—Abatement.

This was an application by the defendant company for payment by the receiver and manager appointed in the cause, or out of the moneys paid into the Court by him, of the salary of the secretary of the company, directors' fees, expenses of an office for the company, and of meetings of directors, etc., which it was contended came within the meaning of the expression, "working expenditure of the railway."

By the order appointing the receiver his duties were to receive and manage the railway property and assets, to operate, carry on and superintend the said railway, and to receive the receipts, tolls and dues arising therefrom, to pass his accounts from time to time, and pay into Court whatever balances should be found due from him after paying the expenses of operation and management of the said railway, and by a subsequent order it was directed that "except as to such proceedings as may be necessary in connection with the management of the company's railway by the receiver and manager appointed in the cause, all proceedings herein be stayed until further order of this Court."

It was objected that the application now made would be a violation of this latter order, but the learned judge held that as it was an application to determine to some extent what payments were to be made by or allowed to the receiver and manager pending the hearing of the cause, it was a proceeding necessary in connection with the management of the railway by the receiver, and therefore the Court might entertain the application.

It was also objected that the suit had become abated by the death of a number of the defendants, but as these defendants were only parties who had claims against the plaintiff, or liens and charges upon his claim in this suit, they and their estates were fully represented by him, and having been held (9 M.R. 1) not to be necessary parties to the suit, there was no abatement, and the application might be heard.

On the merits of the application, however, it was

Held, that the expenses now sought to be paid were not part of the working expenditure of the railway, and that the receiver should not be authorized to pay them, and the application was dismissed with costs.

Culver, Q.C., and *Bradshaw*, for defendants.

Howell, Q.C., and *Phippen*, for plaintiff.

Nugent, for defendant Macdonald.

Province of British Columbia.

SUPREME COURT.

DAVIE, C.J., MCCREIGHT, J.
WALKEM, J.

[April 20.

CRANSTANN *v.* BIRD.

Deporting of political prisoners—Redress for expulsion.

C. was an American citizen living in Honolulu; J. a British, and M. a German subject living in the same place. They were regarded as dangerous individuals and said to be dynamiters. A rebellion had broken out in the Island of Oahu. The Habeas Corpus Act had been suspended and the island placed under martial law. The Schutzen Club, of which C., J. and M. were prominent members, sent a letter to the Hawaiian Government threatening that if government offices were not given to members of said club, that they as individuals, and the club as a whole, would consider that the Schutzen Club owes no allegiance in any shape or form to the present government, and would so announce publicly in papers published in the English and Hawaiian languages in the town of Honolulu and other prominent places.

C., J. and M. were arrested on a charge of conspiracy against the Hawaiian Government, and by order of said government they were forcibly placed on board the S.S. *Warrimo* bound for Vancouver, B.C., and kept under guard until they were out on the high seas. Before leaving port, however, J. saw the British Consul and admitted that he was "too far concerned in it" (i.e., in the anti-government plots).

C. and M. also saw the Consuls of their respective nations, and an agreement was made that they should offer no resistance to expulsion, and that their Consuls should make formal protest against it to their department. The Hawaiian Government assured Captain Bird of the *Warrimo* that they (the Government) took all responsibility of the deporting on themselves, and would indemnify him against all loss and damage.

On their arrival in Vancouver, B.C., C., J. and M commenced an action against Captain Bird and Jas. Huddart (Manager of the Canadian-Australian S.S. Line) to recover $50,000 damages each.

A commission was issued to Honolulu to take evidence.

The case coming on for trial before DRAKE, J., the plaintiffs were nonsuited on the ground that Bird's actions were as agent of the Hawaiian Government, and therefore no cause of action would lie.

This judgment was now reversed by the Divisional Court, but with leave to appeal to the Privy Council.

Wilson, Q.C., for plaintiffs.

Davis, Q.C., for defendants.

WALKEM, J.
McCREIGHT, J.

CLARK *v.* KENDALL.

Assignment—Interpleader—Constructive notice.

On the 29th May, 1894, plaintiff entered into a contract with the city of Vancouver to supply crushed rock to the said city for road making purposes on certain terms therein set out, for a term of five years. Subsequently, and while contract was in existence, with the concurrence of the "city," plaintiff entered into negotiations with one K., with the intention that K. should assume contract in her place. Consequently an agreement was made on December 29th, 1894, between plaintiff and K., by which plaintiff retired from her contract with the city, and a new contract made between the city and K. on practically the same lines as the agreement of May, 1894. By this agreement K. was to pay plaintiff $11,000, $5,000 cash and $6,000 as follows: Twenty cents for every cubic yard of rock delivered and paid for by the said corporation in cash, under the terms of the contract between the party of the 2nd part (i.e. K.) and the said corporation, on the basis of the city engineer's reports of quantities, until the whole of the said sum of $6,000 is fully paid and satisfied.

There was a further provision as follows: "And it is hereby agreed that should the party of the second part (K.) make default in payment of said balance as set out in the preceding clause, then the party of the second part (K.) hereby authorizes the corporation to pay to the party of the first part (plaintiff) the said sum of 20 cents per cubic yard as aforesaid."

In August, 1895, K. assigned to defendant all moneys owing by the city to him. The agreement between K. and the city was drawn up by K.'s solicitor, who also acted for defendant, and was taken to defendants' house. Defendant knew it was there, and was told by H. what it was, and was given permission to read it. Default was made in the payment of the 20 cents per cubic yard by K. to plaintiff, and plaintiff commenced an action against the city to recover the sum of $891.40, claimed to be owing by K. to her under an agreement in writing, dated 29th December, 1894, by which certain moneys afterwards to be earned by K. under contract to be entered into with the "city" were assigned to her (plaintiff). The city admitted owing $538.22 under contract with K., and as money was claimed by both plaintiff and defendant, an interpleader was directed to determine to whom the money belonged.

Bole, Co.J., decided in favor of defendant. This was an appeal from his decision.

On the trial it was claimed by counsel for defendant that the city had prior notice of the assignment of K. to defendant, and that defendant had no notice of the assignment by K. to plaintiff of the money owing, or to be owing when earned from the city to him (K.).

Counsel for plaintiff contended that constructive notice had been given by reason of the agreement between plaintiff and K., and that contract between K. and the city.

The appeal was allowed and the judgment appealed from reversed, and judgment entered for plaintiff for the amount in dispute and costs.

Held, (1) per McCREIGHT, J.: That the provisions of the contract between

the city and K. stated above, create a trust in respect of the 20 cents per yard to be paid on the contract price per yard when the same should be paid by the city: *Gregory* v. *Williams*, 17 Revised Reports 136, explained in *Re Empress Engineering Company*, 16 Ch. D. 129, C. A., and see *Re Flavell*, 25 Ch. D. 89, C. A.

(2) That this gives plaintiff an equity to the fund, which had not been displaced, and that defendant had not an equal equity.

(3) That constructive notice had been given by the fact that agreement between K. and the city had been in defendant's house, and that K. had told her what it was, and had given her permission to read it if she wished.

(4) Per WALKEM, J., that plaintiff was entitled to that sum (amount paid into Court), as being part of a particular fund out of which, according to the agreement of the 29th December, she was to be paid.

MacNeill (Harris & MacNeill), for plaintiff.

Davis, Q.C., for defendant.

COUNTY COURT, VANCOUVER, B.C.

DAVIE, C.J.,
Sitting as C.C. Judge.

CUNNINGHAM *v.* ALTAS CANNING CO.

Validity of actions of directors of companies not passed at a general meeting —Agent for unknown principal—Liability of principal.

This is a case in which two persons in the employ of a company, but who were also managing directors of the company, made an agreement without the knowledge, it is claimed, of the President and of the Financial Manager, with the plaintiff, who is a livery stable keeper, to supply rigs to convey them to Steveston, as they required during the fishing season. At the end of the season plaintiff rendered his account first to those two persons, then on finding out the principals for whom they were acting, to the defendants; defendants refused to pay account, and action was commenced.

Held, that as managing directors acting on the company's business, those men had a right to hire rigs at the expense of the company, and that the plaintiff, not knowing the principals, was right in charging the agent, but when principals became known he was right in charging them. That defendants should pay the bill and costs of the action.

R. W. Harris, for plaintiff.

J. G. Godfrey, for defendants.

The right of one who kills his ancestor to inherit from the latter, is sustained in *Carpenter's Appeal*, 170 Pa. 203, 29 L.R.A. 145, following the Nebraska case of *Shellenberger* v. *Ransom*, 25 L.R.A. 564, against the New York case of *Riggs* v. *Palmer*, 115 N.Y. 506, 5 L.R.A. 340; but the Pennsylvania case was based in part on a constitutional provision against attainders working corruption of blood and forfeitures of estate.

LAW SOCIETY OF UPPER CANADA.

PROCEEDINGS OF HILARY TERM, 1896.

MONDAY, Feb. 3.

Present: The Treasurer and Messrs. Hoskin, Riddell, Moss, Bayly, Osler, Teetzel, Watson, Douglas, Shepley, Barwick, Aylesworth and Robinson.

Ordered that Mr. C. R. Atkinson, jr., a solicitor of ten years standing, be called to the Bar.

The annual report of the librarian on the state of the library was presented, and it was ordered that it be distributed with the next number of the reports.

A letter was read from the chairman of the Legal Education Committee, enclosing a petition from the students-at-law for the establishment of a gymnasium. The petition was referred to the Finance and Legal Education Committe.

Mr. Osler gave notice of motion for the appointment of a committee to consider the alteration of the days of the meetings of Convocation.

Ordered that a petition of Mr. Robert Tennant against the conduct as unprofessional of Mr. P., a member of this Society, be referred to the Discipline Committee to report thereon.

Ordered in the matter of charges preferred by Mr. Aytoun-Finlay against Mr. B., that the complaint be referred to the Discipline Committee, to report as to whether a prima facie case had been shown.

TUESDAY, February 4th.

Present: The Treasurer, and Messrs. Macdougall, Magee, Idington, Martin, Strathy, Bayly, Moss, Shepley, Riddell, Robinson, Barwick, Ritchie, Osler, Britton and Kerr.

Mr. C. R. Atkinson, jun., was called to the Bar, and it was ordered that he be presented to the Court.

Pursuant to R.S.O., c. 145, sec. 6, Messrs. Huson, Murray, and J. E. Robertson were appointed to act as scrutineers, and Dr. Hoskin was appointed to act for and as the treasurer in case he should be absent during the counting of the votes at the next election of Benchers.

Mr. Barwick moved the following Rule: "The Supreme Court Reports shall be furnished to all solicitors who issue their annual certificate during Michaelmas term." The draft Rule was by unanimous consent read three times and passed.

Mr. Barwick moved that Rule 58 be amended so as to read, "In case of the removal of any officer by the Society, his salary shall cease immediately upon his removal." The draft Rule was by unanimous consent read three times and passed.

The report and annual financial statement of the Finance Committee for the year ending the 31st December, 1895, was presented, and it was ordered that the statement be distributed pursuant to the statute.

FRIDAY, Feb. 7.

Present: The Treasurer, Sir Thomas Galt and Messrs. Guthrie, Osler, Bayley, MacKelcan, Britton, Barwick, Riddell, Aylesworth and Shepley.

Mr. Osler moved that the chairmen of the standing committees be a Committee to consider an alteration of the days of the meetings of Convocation, and that the said committee be requested to report on the last Convocation during Easter Term. Carried.

The petition of the Honorable Arthur Rupert Dickey, Minister of Justice and Attorney-General of Canada, showing that he is a member of the Bar of the Province of Nova Scotia, and was appointed one of Her Majesty's Counsel on the 25th June, 1890, and appointed Minister of Justice of the Dominion of Canada on 15th January, 1896, and praying that he might be admitted to the Bar of Ontario pursuant to the rules of the Society, was read. Ordered that the prayer of the petition be granted, and that upon the production of proof of his call to the Bar of Nova Scotia, the Honorable Arthur Rupert Dickey be

called to the Bar of this Province, and that the fees payable upon such call be remitted by the Society.

A letter from the Secretary of the County of York Law Association, referring to the providing the Profession with copies of the statutes at a reduced rate, was read and referred to the Finance Committee to report thereon.

A petition of Mr. F. N. Kennin, a solicitor of five years standing, was read and referred to a special committee, with instructions to subject Mr. Kennin to an examination in pursuance of the statute, and to report thereon.

FRIDAY, Feb. 14.

Present: The Treasurer, Sir Thomas Galt and Messrs. Martin, McCarthy, Hoskin, Barwick, Bayly, Strathy, Magee, Bruce, Moss, Kerr, Guthrie, Robinson, MacKelcan, Aylesworth, Britton, Riddell, Watson and Shepley.

The Honorable Arthur Rupert Dickey having produced satisfactory evidence of his having been called to the Bar of the Province of Nova Scotia, also his commission under the great Seal as one of Her Majesty's counsel in all the Courts of Canada, was, in pursuance of the resolution of 7th February instant, called to the Bar, and retired for the purpose of being presented to the Court.

The chairman of the Discipline Committee reported in the matter of Mr. Aytoun-Finlay's complaint against Mr. B., that a prima facie case had been shown. Ordered that the complaint be referred to the Discipline Committee for investigation and report.

A report was read from the Discipline Committee in the matter of the complaint of M. J. Reid against Mr. R., recommending that the complainant be informed that her proper course is to proceed at law.

The report of the Discipliue Committee in the matter of the complaint of Jeannie McDonald against Mr. R. and Mr. G. was received. Ordered that the same be taken into consideration on the first Saturday of Easter Term next ensuing.

The Honorable Arthur Rupert Dickey after having been presented to the Court, returned to Convocation and took his seat as an ex officio Bencher.

The chairman of the Journals and Printing Committtee submitted a draft of the new consolidation of the Rules of the Society. The draft was considered, and after certain amendments the report was adopted as amended.

Mr. Barwick having obtained leave, moved the reading of the Rule adopting the draft consolidation submitted to Convocation as the Rules of the Society, and that it be referred to the journals and Printing Committee to secure the approval of the visitors thereto in so far as such approval is necessary, and to superintend the publication of the Rules. By unanimous consent the Rule was read three times and passed.

Mr. Martin moved that the new quinquennial Digest be issued gratis to every member of the profession entitled to receive the Reports. Carried.

The chairman of the Finance Committee presented the estimates, receipts and expenditures for the year 1896.

Mr. Watson, the chairman of the committee to which had been referred the petition for the establishment of a gymnasium, reported that the committee had met and had considered the petition of the students and had obtained a report from Mr. Burke, the architect upon the matter, and that the result of Mr. Burke's report was that it would be impossible to use any part of the present Law School Building as a gymnasium without seriously interfering with the use of the rest of the building for purposes of study, and that the committee did not deem it proper or expedient to permit the use of any part of the building for a gymnasium, and further that the committee could not recommend the expenditure of such an amount as is estimated for the cost of the gymnasium.

The report as read was adopted.

The special committee appointed for the examination of Mr. Frank N. Kennin for call, reported that he had satisfactorily passed the examination. Mr. Kennin was called to the Bar, and it was ordered that he be presented to the Court.

Convocation then rose.