THE CANADA LAW JOURNAL

EDITOR:
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CHAS. MORSE, D.C.L.

VOL. XXXVIII.

FROM JANUARY 1 TO DECEMBER 31,

1902.

TORONTO:
CANADA LAW BOOK COMPANY,
LAW PUBLISHERS,
32-34 TORONTO STREET.

TABLE OF CASES.

Reported and Noted in this Volume.

Canada Law Journal.

VOL. XXXVIII. JANUARY, 1902 NOS. 1 & 2.

We are glad to see that the University of Trinity, has done honour to itself by the election of Mr. Christopher Robinsen, K.C., leader of the Canadian Bar, as its Chancellor in the place of the late Hon. G W. Allan. No better selection could have been made. This appointment, in view of his scholarly attainments, his great learning and ability, his high character and the esteem in which he is held by all, will doubtless prove a source of strength to that institution.

It is interesting to remember that the late Chief Justice, Sir John Beverley Robinson, was Trinity's first Chancellor. It is fitting that his equally learned son, who was a graduate of old King's College University, taking an ad eundem at Trinity, should occupy the position once filled by his illustrious father. It would be instructive if the record of the future might be that Mr. Robinson's son, who recently captured the Wellington scholarship at the same college, followed in the footsteps of his father and his grandfather. At least we may pass on to him, and to all young men entering on their life's work, the exhortation "Aim high and do honor to the old name."

We have on more than one occasion entered a protest against the modern practice of trial by newspaper; and we are glad to see that in England recently effective steps were taken to put down this abuse. Certain persons were charged with offences against children and were eventually committed for trial at the assizes, where they were convicted and sentenced to long terms of imprisonment. During the course of the hearing of the charges before the magistrate, articles dealing with the charges and the past history of the accused appeared in a newspaper, written by a reporter of the newspaper who was styled "Special Crime Investigator." Further articles incriminating the accused appeared in the same newspaper, and were circulated in the assize town where the accused persons were to be tried. The editor of the newspaper and the reporter were indicted for doing acts calculated to prevent the due

course of law and justice, and for conspiracy to do such acts, and upon a case stated by Kennedy, J., the Court for Crown cases reserved (Lord Alverstone, C.J., Wills, Grantham, Kennedy and Ridley, JJ.), held that the publication of the articles in question was an act calculated to prevent the course of justice, and that the editor and reporter might be properly convicted of conspiracy, as without their co-operation the articles objected to would not have appeared. This vindication of the rights of persons accused of crime to fair play is all the more noteworthy, as it is made in a case where the accused were actually found guilty of the crimes charged against them. It is to be feared that in other countries where there is not so scrupulous a regard to keeping pure the fountain of justice, the fact that the accused had been found guilty would be regarded as a sufficient reason for not pursuing those who had violated the law, as the editor and reporter had done in this case.

PAYMENT BY CHEQUE.

In a recent number of the English *Law Times*, vol. 112, p. 49, Mr. G. Pitt-Lewis, K.C., has an interesting discussion of the English law in reference to the legal effect of cheques given in settlement of accounts—in which he summarises the present state of the English law on the point as follows: "Payment in cash of a smaller sum can never be, legally, a valid discharge of a larger amount; but such a payment if made by cheque can be; whether it is, or is not, is in each a case a pure question of fact for a jury, who, however, must find in favour of the defendant if the plaintiff has acted in such a way as to create a belief that the cheque is accepted in settlement, and to induce the sender to act in this view." It may therefore be well to recall the fact, that after the decision of the House of Lords in *Foakes* v. *Beer* (1884), 9 App. Cas. 605, refusing to disturb the rule laid down in *Cumber* v *Wane*, 1 Sm. L. C. 324, the Ontario Legislature not having any superstitious reverence for rules of law whose sole merit is their antiquity, came to the conclusion that the rule established in *Cumber* v. *Wane*, that the payment of a smaller sum in cash can never be a discharge of a larger amount admitted to be due, was one that ought not to be retained, and unceremoniously abolished it altogether, and enacted that "Part performance of an obligation, either before or after breach thereof,

where expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation." This provision is now embodied in the Ontario Judicature Act as s. 58(8). Thus the additional consideration, even though it were only "a tom-tit or a canary," as the late Sir Geo. Jessel remarked, which the common law required, is no longer necessary in Ontario though still a requisite in England, in order to make a payment in cash a satisfaction of a larger sum admitted to be due. The question in Ontario turning now on the fact whether it was, or was not, actually paid and accepted in satisfaction.

Mr. Pitt-Lewis' observations on *Day* v. *McLea* (1889), 22 Q.B.D. 610, are well founded—that case, as he points out, merely decides that though a cheque is sent in settlement of a larger sum, and is retained by the creditor and cashed by him, it does not constitute an estoppel on the creditor, but that he is at liberty to shew that he accepted it only as a payment on account. Whether that would be the case where the cheque is payable to order, and is expressly on its face stated to be "in full of amount due," we believe has never been decided.

PRIVITY OF CONTRACT.

A agrees with B to pay C, who is not a party to the agreement. To what extent if at all can C enforce the covenant has given rise to much interesting litigation. The authorities are clear that a mere agreement between A and B to pay C, to which C was not indirectly or directly a party cannot be enforced by C. *Re Empress Engineering Company*, 16 Ch. D. 125; *Robertson* v. *Lonsdale*, 21 O.R. 601, and *Henderson* v. *Killey*, 14 O.R. 137. To succeed, C must make out a trust in his favour. "In all cases since *Tweedle* v. *Atkinson*, 1 B. & S. 393, in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule, which confines such an action to parties and privies to seek refuge under the shelter of an alleged trust in his favour:" Street, J., in *Faulkner* v. *Faulkner*, 23 O.R. at p. 258.

Tweedle v. *Atkinson* was an action by plaintiff against his wife's father's estate, to enforce an agreement made between the

plaintiff's father and his wife's father, by which it was mutually agreed that they should pay the sums of £100 and £200 respectively to the plaintiff, and that the plaintiff should have full power to sue for same in any Court of Equity. On demurrer it was held that the action was not maintainable. *Bourne* v. *Mason*, 1 Ventr. 6, was referred to, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. Wightman, J., in referring to this case in giving judgment in *Tweedle* v. *Atkinson*, says: "There is no modern case in which the proposition has been supported. On the contrary it is now established that no stranger to the consideration can take advantage of the contract although made for his benefit." These words, in the opinion of Robertson, J. (*Moot* v. *Gibson*, 21 O.R. 248 at p. 252,) imply that where the party trying to enforce the contract is not a stranger to the consideration that party can enforce such a contract.

In the case of *Gregory* v. *Williams*, 3 Merivale 582, one Parker, who was in possession of a farm belonging to the defendant Williams was considerably indebted to Williams, who also owed a large debt to one Gregory. Parker, as Williams knew, was under an apprehension that Gregory would arrest him. Williams, the landlord and Parker the tenant, entered into an agreement in writing to which Gregory the creditor was neither a party nor privy, to the effect that if Parker would make over to Williams all his property and give up possession of his farm, he would pay the debt due to Gregory. Gregory was subsequently informed of this arrangement by a letter from William's solicitor, and he and Parker filed the bill against Williams to enforce it. Williams paid his own claim, but the property having been sold at a loss, he had not sufficient to pay Gregory as well, but there was sufficient to pay Gregory's claim if Williams had not paid his own first. The Master of the Rolls however, held him liable. This case should be carefully considered, because the facts as set out in the statement of the case are not all supported by the pleadings. It is discussed and explained at length in *Re Empress Engineering Company* and *Henderson* v. *Killey*.

Gandy v. *Gandy*, 30 Ch. D. 57, was a case of a deed by which a husband covenanted with the trustees inter alia to pay them all the expenses of the maintenance and education of the two

youngest daughters. One of the daughters brought suit against the husband and the trustees to enforce the husband's covenant. The trustees had refused to join as plaintiffs. It was held that the plaintiff was not in a position of cestui que trust to maintain the action.

Cotton, L.J., says, after noticing the general rule: "That rule is however subject to this exception; the contract although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say that he has a beneficial right as cestui que trust under that contract, then B would, in a Court of Equity, be allowed to insist upon and enforce the contract." Bowen, L.J., on page 69 says: "It is sufficient to say that in the case of *Tweedle* v. *Atkinson*, to which we were referred, that though the common law doctrine has been laid down, whatever may have been the common law doctrine if the true intent and the true effect of this deed was to give the children a beneficial right under it, that is to say, to give them a right to have these covenants performed and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine and would in a Court of Equity be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right." See also *Touche* v. *Metropolitan Railway Warehousing Company*, L.R. 6 Ch. 671, discussed and explained in *Gandy* v. *Gandy*.

Henderson v. *Killey*, 14 O.R. 137, is a leading case in our courts. On the dissolution of the partnership existing between Killey and Muirhead, trading as J. H. Killey & Co., Killey gave Muirhead promissory notes to the extent of $8,000 as Muirhead's share in the dissolved partnership. Killey afterwards formed a partnership with William and Robert B. Osborne, which was afterwards formed into a joint stock company. By the partnership agreement under seal, Killey transferred to the new firm all the assets of his business subject to the deduction of all liabilities of J. H. Killey & Co. Amongst Killey's liabilities known to the Osbornes, were ten of these notes which Muirhead had endorsed to the plaintiff Henderson before they became due. The new firm paid two of the notes with interest on others, and there was evidence of negotiations for an extension of the time to pay the whole.

Killey's assets transferred to the new firm were sufficient to pay his liabilities. Muirhead brought action on the notes against Killey and the Osbornes. Cameron, C.J., who tried the action, gave judgment against the defendant Killey, but dismissed the action as against the defendants the Osbornes, on the ground that they were not parties to the note sued on, and there was no direct liability to plaintiff and their liability was to defendant Killey, who did not require them to make payment. The Divisional Court reversed this judgment as to the Osbornes, on the ground that the circumstances established the relationship of trustee and cestui que trust, following *Gregory* v. *Williams* and *Tomlinson* v. *Gill*, Ambler 330.

Is *the agreement to pay out of property* the keynote of all these cases? Armour, J., in delivering the judgment of the Divisional Court, concludes that the agreement in *Gregory* v. *Williams* was not to pay out of property but to pay generally. On appeal to the Court of Appeal the Court were equally divided as to the result, and the appeal was dismissed: *Henderson* v. *Killey*, 17 A.R. 456. The majority of the Court however held that no trust was established by the agreement in question of the new firm in favour of Muirhead, and that Henderson was not entitled to enforce the payment of the notes against the new firm, but the Chief Justice while agreeing in this, held that the evidence established an independent agreement between the new firm and the plaintiff which could be enforced, and consequently there was an equal division of the Court in the result.

The majority of the judges did not think *Gregory* v. *Williams* governs this case. Maclennan, J.A. says, (p. 478): "It remains out of respect to the learned judges whose judgment is in review, to explain why I think the case of *Gregory* v. *Williams* does not govern the present. The learned judges consider that in *Gregory* v. *Williams* the agreement was not to pay out of property but to pay generally. As to this I respectfully differ from the learned judges. I think that the letters written by Williams when read in connection with the bill of sale make it apparent that the agreement really was to pay out of property. Goods had been assigned to him to sell and apply the proceeds to pay what was due to him, and to pay the surplus to Parker the debtor. These goods were not his, they were the goods of the debtor. Williams held them upon trust, and then he writes saying he will pay another debt of

his debtor. He could, I conceive, mean nothing else than he would pay out of the proceeds of the goods. This is the way in which after careful examination the case is understood by the Master of the Rolls and by the Lords Justices in *Re Empress Engineering Company*, 16 Ch. D. at pp. 129, 130, and also by Strong, V.C., in *Mulholland* v. *Merriam*, 19 Grant 288." The Osbornes appealed to the Supreme Court which allowed the appeal, restoring the judgment of Cameron, C.J., at the trial (sub nom. *Osborne* v. *Henderson*, 38 S.C.R. 698). Patterson, J.A., who delivered the judgment of the Court, follows and adopts the reasoning of Mr. Justice Maclennan in the Court below.

In *Edmison* v. *Couch*, 26 A.R. 537, the owner of land in consideration of natural love and affection and one dollar, conveyed it to the defendants in fee, subject to a life estate in his own favour, and subject to the payment thereout by the defendants, of certain sums to the plaintiffs, the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments and was executed by the grantor and the defendants. Seven months later the grantee conveyed same land to the defendants in fee, for their own use absolutely, free from all encumbrances, but subject to his life estate. Held, that an irrevocable trust was created by the first deed in favour of the plaintiffs and was enforcable by them, and this trust was not affected or released by the second deed. Maclennan, J.A., at page 542: "The important question, therefore, is whether the deed (the deed of 1894) created a trust for the benefit of the daughters and grand children of the grantor which they could themselves respectively enforce, and I am of the opinion that it did. I think the case is governed by *Gregory* v. *Williams* (1817) 3 Mer. 582, and *Mulholland* v. *Merriam* (1872) 19 Grant 288. The first of these cases has been recognized as good law by the Court of Appeal in England and the other by this Court. I think this is a plainer case than *Mulholland* v. *Merriam*. The conveyance in that case was on condition that the grantee should pay, and then the grantee bound himself, that is, in effect, covenanted to pay certain sums to the children and grand children of the grantor. There was no express charge of the land with the payment. Here, on the other hand the land is conveyed subject to the payment, and in respect of the payment to the daughters, they are expressly to be paid thereout, that is, out of the land. Now,

as I understand those cases the distinction is this: a mere covenant by A with B to pay a sum of money to C, gives C no right of action at law or in equity to enforce the covenant, but if the payment is to be out of specific property then a trust arises in favour of the beneficiary which he can enforce against the property."

In all of the above cases there appears to have been ample property on which the trust was held to attach to pay the plaintiff's claim in full. What would be the result if the trust property were insufficient? It is submitted is that the property would have to satisfy the debt pro tanto, and that there would be no personal liability beyond the value of the property. This seems to be the logical conclusion, because the liability arises only on the equitable doctrine that there is a trust to pay out of the property. When the property is gone you have to fall back on the common law liability of contract and are immediately shipwrecked, there being no privity of contract. For instance, A transfers all his property to B in trust to pay A's creditors 50 cents on the dollar, which B covenants and agrees to pay. B immediately disposes of the property to the best advantage, but realizes sufficient only to pay the creditors 25 cents on the dollar. Is B personally liable at the instance of the creditors for the remaining 25 cents? It is submitted on the above authorities that he is not, there being no privity of contract between the creditors and B. They can enforce B's contract only by virtue of the trust attaching to the property, and therefore only to the extent of the value of the property. When you get away from the property you get into the realms of the common law doctrine of want of privity of contract. When the property is exhausted the trust on which the equitable doctrine is founded is also exhausted.

Take another case, A makes an assignment for the benefit of creditors to B. A secures a composition with his creditors to accept 50 cents on the dollar. B then conveys to C in trust to pay A's creditors 50 cents on the dollar, which C covenants to pay. The property is sold to the best advantage, but C realizes only sufficient to pay A's creditors 25 cents on the dollar. It is submitted that the creditors being interested in the consideration are cestuis qui trustent, and can enforce the covenant but to the extent of 25 cents on the dollar only. There being no privity of contract the trust can be enforced out of the property to which it attaches to the extent of the value of the property only. His interest in the

consideration and the trust for his benefit gives the plaintiff a locus standi. The contract then can only be enforced to the extent of the value of the trust property.

Mortgagees to whom loss is made payable "as their interest may appear" have a right of action upon the policy in their own name against the insurers, and are entitled to enforce payment to the extent of their interest: *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Ins Co.*, 37 C.L.J. 843. Judgment of the Court of Appeal.

The Court in this case apparently applied the underlying principles of the decisions to which I have referred; and, in effect, held that the insurance company were trustees of the insurance moneys for the benefit of the mortgagees. Their contract with the insured, to which the mortgagees would not be parties, would really be to pay the mortgagees *out of the insurance money*. But applying the same principles, the mortgagees, it is conceded, could not, even in case of total loss, recover more than the actual loss, even though the property were insured, and the insurance company had agreed to pay the mortgagees an amount largely in excess of that loss.

JOHN G. FARMER.

Hamilton.

Perhaps there is no more convincing manifestation of the truth of the fact that the law is the hardest of all professions wherein to win assured success, than is to be found in the career of one who has practised at the Bar for a time with small achievement, has then gone into politics and earned the reputation of possessing great talents, nay even those of a statesman, and has eventually come back to his first love as a member of the judiciary, only to sink into obscurity again. And this, notwithstanding that he has all the outward show of qualities which should constitute him a great lawyer. Instances of the kind to which we here allude must be familiar to our readers.

THE LAWYER'S PLACE IN THE EMPIRE— A COSMOPOLITAN PROFESSION.

"A foreign nation is a contemporaneous posterity," writes an historian and critic. The British nation must present a wonderful problem to an honest foreigner. "Civis Romanus sum" was no complex statement, for the bounds of Rome and Roman rule were clearly defined, and might was right. But those who can appeal to the protection of British law under the Union Jack are geographically, at least, citizens of the world—for they girdle the earth. Whether their homes be a coaling station, or a metropolis; a fortress city, or a prairie ranch; a prosperous colony, or a gallant ship, they are welded each and all, and many a time, in many a clime, and many a tongue, utter the thought:

"One life, one flag, one fleet, one throne,
And God guard all!"

If we were to judge by the press of Europe, we should conclude that some foreign nations are not merely hostile but malignant towards Great Britain, and we hope that posterity may not judge us with the same Anglophobe acrimony. Part of this feeling may spring from jealousy; but is it not partly because they cannot understand us—because they cannot intelligently follow and keep pace with our progressive development, nor can they realize how a homogeneous empire can possibly be cemented together out of such heterogenous materials. An American boy was asked "Who was the first man?" On promptly replying "Washington," he was reminded of Adam—"Yes," he assented, if you count foreigners." When that boy grows up and becomes a lawyer he will be an able advocate of the Munroe doctrine. The citizen of Greater Britain (not the mere untravelled Englishman who is too often strangely ignorant and unpleasantly insular) knows no exclusiveness, and is all-embracing. The establishment of law and order—the best guarantees of the security of life and property—is the first consideration. Then aliens are welcome, and so long as they observe the law are protected by it. Full citizenship follows. Small or weak and isolated peoples seek protectorates under the aegis of Anglo-Saxon rule and power; and so, by natural accretions, or it may be by manifest destiny, or by fate and fortune, the British Empire grows. British law and institutions and the English language are doing their work. But the

genius of the British people is not to drift but to develop. The best men of the sea-girt isle and her colonies go to the most distant portions of the empire, as vibrations of the national life, and links in the chain, bringing back an intimate knowledge of the varied circumstances and possibilities of the daughter lands, so that the "one and all" may be the object of legislation, of foreign policy and of government solicitude. England, moreover, is a great magnet, and her universities, courts of justice, and concentrated marts of commerce, attract thousands who become, for a time, absorbed into her life, and when they leave cannot fail to be impressed with her power, and imbued with her high ideals.

Lord Curzon is advocating more self-government for India; and the "native-born" there are equipping themselves for practical participation in the successful management of affairs, animated with a new pride of country—a broader nationality. From thence men of dusky hue, but bright in intellect, are passing through Cambridge and Oxford yearly who will return to their homes in the Orient with all the qualifications possessed by the English graduates. It is not only as cricketers they excel (though Prince Ranji has been more in the public eye than others), for they have the adaptability of their race. Their keen reasoning power and subtlety of mind seem specially adapted for mastering the "lawless science of our law, that codeless myriad of precedents, that wilderness of single instances, through which a few by wit or fortune led, may beat a pathway out to wealth and fame."

It has become the custom for thoughtless demagogues and some irresponsible journalists to decry the legal profession in politics, and to endeavour to excite prejudice against the lawyer as a parliamentarian. But where would the empire be without the minds trained in legal principles, in legislation and in statecraft? Sullied as our profession may occasionally be by the few whose greed for gold leads them by devious ways, yet what body of men is more exempt from narrow mindedness, what body of men is more public spirited and progressive than the British Bar? They probably realize their responsibilities in high and representative positions more than any other class of men, and hold on tenaciously to their life work. Their contributions to the wealth of nations have not been confined to the arena of litigation or to the forum of debate. Many have added to the lustre of professional honours the less bright distinctions of literary achieve-

ments and statesmanship—men of life culture by the necessities of their life's work, deep thinkers and scholarly writers, strong in law and strong in letters, and who "hold high converse with the mighty dead." All this makes for peace—for, discredited as some international tribunals have been, yet the whole fabric of international arbitration would fall were it not for the breadth and grasp of the legal representatives of those nations who choose the scales of justice rather than the arbitrament of the sword. Yet the judicial mind of the lawyer, while retaining stable equilibrium, is aroused by the truest patriotism, and none recognizes more surely than he, that sometimes peace would mean pusillanimity, that chains are worse than bayonets, and that "the jingle of the guinea cannot heal the hurt that honour feels."

In the opening up of new Crown Colonies, in the settlement of conquered communities, in the adjustment and consolidation of old and local laws with British law, so as not to stir antagonism and yet to make the bounds of freedom wider yet, the lawyer statesman plays an important part; and the soldier will not be the only one who will do good service in South Africa. The Imperial motto is good—"Be just—Rule well—Hold strong"—and the Imperial spirit is an active power in the legal mind. Lawyers are by training "all round men," for their life is contact; they are not cribbed, cabined or confined by little Englander ideas or by local prejudices, and their opportunities are more than those of other men, for what Coke called "the gladsome light of jurisprudence" shines in the remotest quarters of the globe, and lawyers are ubiquitous in mind and person and "in evidence" everywhere!

Some pages of the *Weekly Notes* of November 9th, ult., will repay the perusal of those who are interested in the empire which has long ceased to be insular and has become world-wide, and which is now as "composite" in the nomenclature of its subjects as it is in its language. The study of the names of those students of Gray's Inn, Lincoln's Inn, Middle Temple and Inner Temple, who have just passed their examinations, will shew that our profession gathers to the heart of that empire (to which they owe allegiance either by birth or by adoption) men of all climates and tongues, and emphasises the patriotic and poetic truth that "her veins are million but her heart is one." In first class honours the first man is a Scotchman named Kerr, and the second is Nagappa Baddipalli. Looking down the published list we find Rudolph

Moritz, Kroenig, and Hartog, evidently Swiss or German; Considine O'Gorman, Timothy Darcy Hutton, and others, evidently Irishmen; Lloyd, Cyril Williams, Llewellyn Gower, and others, Welshmen; Scott, Dunbar, Dalzell, Moncrieff, and others, patently Scotchmen; Ponsonby, Smith, Ashmead-Bartlett, and others, evidently Englishmen; Ismail Mohammed, presumably, an Egyptian; Le Mesurier, suggesting old Norman descent; Jules Louis Le Conte and Eugene Marais, clearly Frenchmen; Ezekiel, probably a Hebrew; Pereira and Paschal Lobo, Spanish or Portuguese; Wijeyekoon and Launspach, Sandbach and Borckenhagen, apparently Boers or Dutchmen, while no less than thirty-one others (a large percentage of the whole) are evidently East Indians, only a few of whose names space will allow me to quote, such as Raj, Ram, Singh, Khosla, Subhedar, Qureshi, Heidar Azhar (Syed Ali), Subhedar, Bomanji, Vaidya (Vishvanath Prabhuram), Nanavutty, etc., and perchance among them may be a chancellor in embryo.

Of course in the study of such a philosophical and exact science as law, there can be no Tower of Babel, no polyglot scintiliæ juris at the Inns of Court, and it must be taken for granted that all these representatives of various races speak and write well, and think and reason also in the English tongue. Each man going from that centre of education and commerce will, through his influence, spread the use of that language in distant parts of the world where his future life will be lived, and will radiate from his intellectual centre, the advanced civilization and development with which he has been brought into vital contact in the great governing heart of that Great Britain in whose future each has become a factor and an empire builder. A few years ago this suggestive thought was not possible, but now our great assimilating empire is cohesive as well as expansive, and men learned in the law, even though "not in the camp their victory lies nor triumph in the market place," have contributed—are contributing—their share towards making the future parliament of man at least possible, and the federation of the world (in the sense of universal peace) less theoretic and visionary.

"What constitutes a state?
Men who their duties know,
But know their rights, and, knowing, dare maintain.
And sovereign law, that state's collected will,
O'er thrones and globes elate,
Sits empress, crowning good, repressing ill."

The flag that flies over every court house is emblematic of the power of the nation and identifies the administration of the law with the national life and government as significantly as do the colours of a regiment or the trophies of an army stand for the heroic history, the humane conquests and its glorious victories. But martial prowess alone is not power, even though British soldiers can truthfully say, "We conquer but to save." Nor is trade alone the life of a people, even though her arteries of commerce determine the pulse of the world; nor do resources alone consist of national wealth and territory; but all these things are ours if we live up to the legal maxim, Sic utere tuo ut alienum non lodas, and to the Divine command "Fear God. Honour the King." The gist and quest of law is truth, and only "he is the freeman whom the truth makes free." English law (writes Hooker) claims homage from all, "the very least as feeling her care, and the greatest as not exempted from her power." The chronicles of the drum record few disloyal soldiers; the chronicles of Bench and Bar record fewer disloyal lawyers. Our work is toward stability permanence, construction, unification; and now we are establishing co-operative connections, assimilating law and language, and spreading knowledge and thought among those liege subjects of Edward VII., Emperor of India and Sovereign of the British Dominions beyond the Seas, all of whom (what matter if brown, or white, or black) "feel the touch of British brotherhood."

W. N. PONTON.

Belleville.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CROWN PREROGATIVE — CONTRACT — SERVANTS OF CROWN INCORPORATED— LIABILITY TO BE SUED.

Graham v. *Public Works Commissioners* (1901) 2 K.B. 781, was an action brought by a contractor against the Public Works Commissioners to recover the price agreed to be paid for the erection of a public building. The defendants were incorporated, and it was contended on their behalf that the action would not lie on the general principle that they were servants of the Crown, and had contracted on behalf of the Crown, and could not be sued on the contract This point of law was argued before the Divisional Court (Ridley and Phillimore, JJ.,) and determined in favour of the plaintiffs, on the ground that in this case the defendants must be deemed to have contracted for themselves, and not merely as agents of the Crown, and though the act of incorporation did not expressly confer power to sue or be sued, yet the incorporation being without reservation, conferred the privilege of suing, and the liability to be sued.

INSURANCE — (MARINE) — CONSTRUCTION OF POLICY — COLLISION—COLLIDING WITH ANCHOR.

In re Margetts, & Ocean Accident and Guarantee Co. (1901) 2 K.B. 792, was a case stated by an arbitrator. A claim was made upon a policy of marine insurance upon a tug, inter alia against damage "owing to actual collision between any such tug and any vessel, bridge, wharf, mooring pier or similar structure." The damage proved was occasioned by the tug insured coming into collision with another vessel's anchor at which such vessel was riding attached by a chain—and the question stated was whether this was a collision within the meaning of the policy. The Divisional Court (Ridley and Phillimore, JJ.,) held that it was, and that the anchor was according to the decision of the House of Lords in *The Niobe* (1891) A.C. 401, to be deemed part of the vessel to which it was attached.

EXPROPRIATION OF LAND - COMPENSATION—RISE IN VALUE OF EXPROPRIATED LAND AFTER NOTICE TO TREAT—COAL MINE.

In re Bwllfa and M.D.S. Collieries, & Pontypridd Waterworks Co. (1901) 2 K.B. 798, was also a case stated by arbitrators. The defendant Waterworks Co., under statutory powers, gave notice to treat for the expropriation of the surface of certain land under which was a coal mine; and the effect of the expropriation would be to prevent the owners of the mine from working the mine beneath the surface expropriated. After notice to treat had been given, and before an award had been made of the compensation to be paid, a material rise in the price of coal took place, so that if the compensation were to be fixed as of the day on which the notice to treat was given it would amount only to £2,950, but if the subsequent increase in the price of coal was to be taken into account the compensation would amount to £5,650. For the coal owners it was argued that there was no contract until the award; and that the expropriators did not become owners until the award was made, and that the value must be assessed as from the date of the award. On the other hand, the expropriators claimed that they were entitled to the land at its value on the day the notice to treat was given. The Divisional Court (Ridley and Phillimore, JJ.,) while conceding that the price to be ascertained was the value at the time the notice to treat was given, yet, nevertheless, decided that for the purpose of ascertaining that value, the arbitrators were entitled to take into account what had subsequently happened, in reference to the price of coal, for the purpose of ascertaining and fixing the real value at that time; in other words, that the arbitrators were entitled to proceed "on the basis of the knowledge of such value which was subsequently acquired" after the notice to treat.

CONTRACT — ASSIGNABILITY OF CONTRACT — INCREASE OF BURDEN ON CONTRACTOR BY ASSIGNMENT OF CONTRACT BY CONTRACTEE.

In *Tolhurst* v. *The Associated Portland Cement Manufacturers* (1901) 2 K.B. 811, the question discussed is whether a contract can be assigned where the effect of the assignment is to impose a greater burden on the contractor than was contemplated by the parties to the contract. The contract in question was for the supply of at least 750 tons of chalk a week, *and so much more as the contractees* might require for their manufacture of cement upon a certain piece of land, the chalk to be delivered in quantities daily

as required by the contractees, by written notice given on the preceding day. The original contractors were a company with a small capital, and doing a comparatively small business. This company had gone into voluntary liquidation, and transferred all its business to the defendants, a powerful company with large capital and doing a large business. They claimed the benefit of the contract; but Mathew, J., who tried the action, held that as the effect of the assignment of the contract would be to impose an additional liability on the contractor, the assignment was invalid as against him, and that he was entitled to recover for chalk supplied to the defendant company at its market value and not at the price mentioned in the contract, of which the defendants claimed to be assignees.

ADULTERATION—BUTTER—MIXING MILK WITH BUTTER—INCREASED PERCENTAGE OF WATER—SALE OF FOODS AND DRUGS ACT (38 & 39 VICT., C. 63) S. 67—(R.S.C., C. 107, SS. 2, 6.)

Pearks v. *Knight* (1901) 2 K.B. 825, was a prosecution for selling adulterated butter. In the ordinary process of making butter a large proportion of the water in the milk or cream, from which it is made, is eliminated. The appellants in this case, had, after the butter in question had been made in the ordinary way, mixed milk with it for the purpose of increasing its weight, by a process by which an extra quantity of water was retained, and causing an excess of 6 per cent. of water in the butter beyond what was usual or necessary. The magistrate found this to be an adulteration of the butter within the meaning of the Sale of Foods and Drugs Act 1875 (38 & 39 Vict., c. 63). (see R.S.C., c. 107, s. 24), and his decision was affirmed by the Divisional Court (Wills and Kennedy, JJ.)

PARTNERSHIP—ASSIGNMENT OF CHOSE IN ACTION—CHOSE IN ACTION—SAME DEBT ASSIGNED TO DIFFERENT PERSONS—DEBT DUE TO FIRM—ASSIGNMENT OF SAME DEBT BY DIFFERENT PARTNERS—NOTICE—PRIORITY.

In *Marchant* v. *Morton* (1901) 2 K.B. 829, there was a contest between two assignees of the same debt as to priority. The debt in question was due to a firm, of which one partner had assigned the debt to the defendants by writing, and subsequently another partner assigned the same debt to the plaintiff by deed without notice of the prior assignment. The plaintiff gave notice to the

debtor before the defendants did so, and this fact was held by Channell, J., who tried the interpleader issue between the parties, to entitle the plaintiff to judgment.

SOLICITOR - BILL OF COSTS—TAXATION—THIRD PARTY—ARBITRATION—COSTS OF UMPIRE - SOLICITORS' ACT 1843 (6 & 7 VICT., C. 73) SS. 38, 41. (R.S.O., C. 174, S. 45).

In *re Collyer* (1901) 2 K.B. 839, one of the parties to an arbitration having paid the costs of the umpire, as fixed by him, applied as a third party for a taxation of the bill. Phillimore, J., affirmed the order of the master, ordering a taxation, and the Court of Appeal (Williams and Stirling, L.JJ.,) affirmed the order of Phillimore, J.

INSURANCE—DECLARATION OF WAR - PROPERTY IN BELLIGERENT COUNTRY—SEIZURE BY ENEMY OF PROPERTY INSURED—PUBLIC POLICY.

In *Vigel Gold Mining Co.* v. *Hoade* (1901) 2 K.B. 849, the plaintiffs, a company registered in Natal, but owning a mine in the Transvaal, sued on a policy of insurance covering the product of their gold mine in the Transvaal. The policy was made before October 1899, when war was declared, and the perils insured against included "enemies" and "arrests, restraints and detainments, of Kings, princes and people." A few days after the declaration of war the Transvaal Government seized and carried away some of the property insured. The plaintiffs had shut down their mine when war was declared, and there was nothing to shew that they intended to continue their business during the continuance of hostilities. The defendants claimed that the plaintiffs could not recover on the policy, because, when war was declared, it ceased to be effective because it was against public policy to allow a British subject to protect by insurance the property of the subjects of a country with which war was being waged. Mathew, J., held that there was nothing in this contention, and gave judgment for the plaintiffs, holding that the proper view is that where the subject of one country is surprised by the declaration of war in the country where he has a commercial domicil, he must be allowed time to free himself from his commercial engagements in the enemy's country, and to effect a removal of his property, and that, therefore, the gold products in question were not to be deemed at the time of the seizure as enemies' property merely by reason of the commercial domicil of the insured.

COLLISION — FOG — MODERATE SPEED — REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1897, ART. 16.

In *The Campania* (1901) P. 289, Barnes, J., decided that a large steamship going, in a dense fog in St. George's channel, at the rate of 9 to 10 knots an hour, is not going at "moderate speed" within the meaning of the Regulations for Preventing Collisions at Sea, art. 16, and the owners were consequently responsible for the damages resulting from a collision, and this decision was affirmed by the Court of Appeal (Lord Alverstone, C.J., and Smith, M.R., and Romer, L.J.).

SALVAGE—DAMAGE TO DOCK—COMPETING MARITIME LIENS—PRIORITY.

The Veritas (1901) P. 304, may be described as a veritable chapter of accidents. A vessel with engines broken down, after being safely towed into the Mersey by salvors, was run into by another vessel, and, to prevent her sinking in deep water, second salvors endeavored to beach her, with the result that she came into collision with a landing stage belonging to a Dock Board. As a wreck, obstructing navigation, the Dock Board took possession of her under their statutory powers and raised and sold her, paying the net proceeds into Court after deducting the expenses, and the question to be decided was how the fund so realized was apportionable between the first and second salvors and the Dock Board, who claimed a lien for damage to the landing stage. Barnes, J., determined the priorities as follows: (1) the Dock Board, in respect of its lien, or claim for damages ex delicto; (2) the second salvors, and (3) the first salvors.

HUSBAND AND WIFE — DESERTION — RESONABLE EXCUSE—REFUSAL OF WIFE TO ALLOW MARITAL INTERCOURSE.

In *Synge* v. *Synge* (1901) P. 317, the Court of Appeal (Rigby, Collins and Romer, L.JJ.,) affirmed the decision of the learned President of the Divorce Court (1900) P. 180 (noted ante vol. 36, p 663), to the effect that a wife refusing marital intercourse with her husband without sufficient reason, cannot allege desertion by her husband because he refuses to live with her and commits adultery.

WILL—LIMITED POWER OF APPOINTMENT—APPOINTMENT MADE PRIOR TO DATE OF POWER—WILLS ACT 1837, (1 VICT., C. 26) SS. 24, 27—(R.S.O., C. 128, SS. 26, 29).

In *Re Hayes, Turnbull* v. *Hayes* (1901) 2 Ch. 529, the Court of Appeal (Rigby, Collins and Romer, L.JJ.,) have affirmed the decision of Byrne, J. (1900) 2 Ch. 332 (noted ante vol. 36, p. 667) to the effect that a special power of appointment cannot be deemed to be executed by general words in the will of the donee of the power made prior to the date of the power, notwithstanding that the testator purported to dispose of all property over which he had a disposing power, and that the Wills Act provides that wills are to speak as from the death of the testator. The Court of Appeal also agreed with Byrne, J., that s. 27 of the Wills Act (R.S.O., c. 128, s. 29) primâ facie only extends to property over which the testator has a general power of appointment at the time of his death; and, primâ facie, does not extend to special powers non-existent at the time of the making of the will, unless an express intention appear therein to exercise any such power the testator may have at the time of his death.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT OF CANADA.

Ont.] ROYAL TEMPLARS *v.* HARGROVE. [Oct. 1, 1901.

Appeal—Special leave—60 & 61 Vict., c. 34, s. 1 (e)—Insurance.

H., a member of the order of Royal Templars, held a benefit certificate entitling him, if he reached the age of seventy years or became entirely disabled, to receive a sum of money based on the membership of the order. On reaching the age stated he demanded the amount and on the order refusing to pay brought an action therefor, the defence to which was that he had stated his age incorrectly in his application for membership and violated certain conditions which, however, the court held were not set out nor referred to in the certificate. A judgment for H. at the trial was affirmed by the Court of Appeal and the amount recovered being under $1,000, the defendant moved the Supreme Court for special leave to appeal under 60 & 61 Vict., c. 34, s. 1 (e).

Held, that the questions involved not being of public importance and the judgment of the Court of Appeal appearing to be well founded, the leave would not be granted. *Fisher* v. *Fisher*, 28 Can. S.C.R. 494, followed.

Hogg, K.C., for motion. *Sinclair*, contra.

Que.] DOMINION CARTAGE CO. *v.* MCARTHUR. [Oct. 29, 1901.

Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workmen—Employer's liability—Presumptions—Findings of jury sustained by courts below.

As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is want of evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff have been sustained by two courts below. TASCHEREAU, J., dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *George Matthews Co.* v. *Vouchard*, 28 S.C.R. 580, and *Metropolitan R. W. Co.* v. *Wright*, 11 App. Cas. 152, those findings ought not to be reversed on appeal. *Asbestos* v. *Durand*, 30 S.C.R. 285, discussed and approved. Appeal allowed with cos's.

Macmaster, K.C., and *Fleet*, for appellant. *Hutchings* and *Harvey*, for respondent.

N.S.] KAULBACH *v.* ARCHBOLD. [Oct. 29, 1901.

Will—Capacity of testator—Undue influence.

A codicil to a will executed shortly before testator's death, increasing the provision for a niece of his wife who had lived with him for nearly thirty years, for a considerable portion of which time she was his housekeeper, was attacked as having been executed on account of undue influence by the niece.

Held, reversing the judgment of the Supreme Court of Nova Scotia (TASCHEREAU and SEDGEWICK, JJ., dissenting) that as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been

proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence.

Held, also, following *Perera* v. *Perera* (1891) A.C. 354, that even if there was ground for saying that the testator was not at the time capable of making a will, the codicil would still have been valid. Appeal allowed with costs.

Newcombe, K.C., for appellant. *Harrington*, K.C., and *Drysdale*, K.C., for respondent.

Ont.] GRAND TRUNK R. W. Co. *v.* JAMES. [Oct. 29, 1901.

Railway company—Fencing—Culvert—Negligence—Cattle on highway—51 Vict., c. 29, s. 195. 53 Vict., c. 28, s. 2.

A railway company is under no obligation to erect and maintain a fence on each side of a culvert across a water course; and where cattle went through the culvert into a field and from thence to the highway, and straying on to the railway track, were killed, the company was not liable to their owner. (TASCHEREAU, J., dissenting.)

Judgment of Court of Appeal, 1 O.L.R., 127, affirming the decision at the trial, (31 O.R. 672), reversed. Appeal allowed with costs.

W. Nesbitt, K.C., and *Glyn Osler*, for appellants. *Teetzel*, K.C., and *Thompson*, K.C., for respondent.

Que.] GAREAU *v.* MONTREAL STREET RAILWAY. [Oct. 29, 1901.

Nuisance—Operation of electric railway—Power-house machinery—Vibrations, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact.

Notwithstanding the privileges conferred upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city by its Act of Incorporation, the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. *Drysdale* v. *Dugas*, 26 S.C.R. 20, followed.

In an action by the owner of adjoining property for damages thus caused the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality.

Held, (TASCHEREAU, J., dissenting) that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.

In reversing the judgment appealed from, the Supreme Court deemed it expedient, in the interest of both parties, to assess damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise the record to be transmitted to the trial court to have the amount of damages determined. Appeal allowed with costs.

De Bellefeuille, K.C., for appellant. *Lafleur*, K.C., and *Meredith*, K.C., for respondent.

Man.] SINCLAIR *v.* PRESTON. [Oct. 29, 1901.

Interest—Written contract—Debt and time certain—3 & 4 Wm. 4, c. 42, s. 28.

One Charlebois was contractor for building the Great North West Central Railway and Preston was a contractor with him for the fencing. Preston and Sinclair entered into an agreement by which the latter was to do the work of fencing, the agreement containing the following provision: "Estimates for the said work shall be made monthly by the company's engineer, or at such other times as the said engineer shall deem reasonable and proper, and such estimates less ten per cent. rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company."

Preston obtained judgment, which by consent was entered against the Railway Co. direct for the price of his work and received satisfaction therefor by assigning it to other persons. Sinclair was paid the price of his work but demanded interest, claiming that his right to payment attached under the above clause on the judgment being assigned. He sued for the interest which the trial judge allowed but the full court overruled his judgment, holding that interest could not be recovered under the statute in force, 3 & 4 Wm 4, c. 42, s. 28.

Held, affirming the latter decision (12 Man. L.R. 228) that under said statute it must appear by the written instrument that there is a debt certain payable at a time certain before interest will be allowed, and it does not so appear by the contract in this case. Appeal dismissed with costs.

Aylesworth, K.C., for appellant. *Robinson*, K.C., and *Elliott*, for respondent.

Que.] SCHWOB *v.* FARNHAM. [Oct. 29, 1901.

Peremption d'instance—Retrospective legislation—Arts. 1, 279 C.P.Q.—Art. 454 C.C.P.

Where the period of peremption commenced after the promulgation of the new Code of Civil Procedure of the Province of Quebec, the exceptions

declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitations provided by article 279 of the new code. *Cook* v. *Miller*, 3 L.R. 466 ; 4 R.L. 240, referred to. Appeal dismissed with costs.

Lafleur, K.C., for appellants. *Racicot*, K.C., and *Duff*, K.C., for respondent.

Que.] TWO MOUNTAINS ELECTION CASE. [Oct. 29, 1901.

Dominion election—Voters' list—Proof of status of elector—Affidavit—Jurat.

A list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at an election, and upon which the name of the petitioner against the return at such election appeared as a person having a right to vote thereat, is sufficient proof of his status.

The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne."

Per GWYNNE, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition. Appeal dismissed with costs.

Belcourt, K.C., and *Perron*, for appellant. *Beaudin*, K.C., for respondent.

Que.] BEAUHARNOIS ELECTION CASE. [Oct. 29, 1901.

Dominion election—Status of petitioner—Franchise Acts.

The principal contention raised on preliminary objections to an election petition was that the petitioner had been guilty of corrupt practices before, during, and after the election, and that by the effect of the statutes 61 Vict., c. 14, 63 & 64 Vict., c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act, regulating the franchise in the Province of Quebec, substituted therefor so as thereby to deprive the petitioner of a right to vote under s. 272 of The Quebec Elections Act (59 Vict., c. 9), and being so deprived of a vote, that he had no status as petitioner. In the Election Court evidence was taken on issues joined and the judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—

Held, that as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.

Per GWYNNE, J.—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by provincial legislation. Appeal dismissed with costs.

Belcourt, K.C., for appellant. *Bisaillon*, K.C., and *Laurendeau*, for respondent.

B.C.] BURRARD ELECTION CASE. [Oct. 29, 1901.

Election petition—Deposit of copy—Preliminary objections.

Where a copy of an election petition was not left with the prothonotary when the petition was filed, and when deposited later the forty days within which the petition had to be filed had expired :—

Held, GWYNNE, J., dissenting, that the petition was properly dismissed on preliminary objections (8 B.C. Rep. 65). *Lisgar Election Case*, 20 Can. S.C. 1, followed.

Per GWYNNE, J.—The Supreme Court is competent to overrule a judgment of the Court differently constituted if it clearly appears to be erroneous. Appeal dismissed with costs.

J. Travers Lewis, for appellant. *J. Lorne McDougall, jr.*, for respondent.

Ont.] ROBINSON *v.* MANN. [Oct. 31, 1901.

Promissory note—Indorser—Bills of Exchange Act, 1890, s. 56—Chattel mortgage—Consideration.

Under s. 56 of The Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee is liable as an indorser to the latter, overruling 2 O.L.R. 63 ; 37 C.L.J. 413.

The provisions of the Ontario Chattel Mortgage Act requiring the consideration of a mortgage to be expressed therein, is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect, affirming 2 O.L.R. 63. Appeal dismissed with costs.

Ryckman, and *Kirkpatrick*, for appellant. *Hellmuth* and *Saunders*, for respondent.

EXCHEQUER COURT OF CANADA.

ALGOMA CENTRAL RAILWAY COMPANY *v.* THE KING.

Burbidge, J.] [Dec. 2, 1901.

Customs legislation—Duty upon foreign-built ship—Construction of statutes.

Held, 1. The Parliament of Canada has legislative authority to impose a Customs duty upon a foreign-built ship, to be paid upon application by her in Canada for registration as a British ship.

2. The provision in item 409 of the Customs Tariff Act of 1897 which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register is not a clear and unambigious imposition of the duty such as would support the right of the Crown to exact the payment of such duty.

W. Nesbitt, K.C., for appellants. *Newcombe*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Falconbridge, C.J.] JACKSON *v.* G. T. RY. [Dec. 6, 1901.

Trial—Jury—Verdict—Weight of evidence—Railways—Fire.

In an action against a railway company to recover damages because of fire caused by sparks from an engine two witnesses called on behalf of the plaintiff—men without much practical experience—testified that in their opinion the engine in question was defectively constructed in a certain particular, while eleven witnesses called by the defendants, all men of practical experience, testified that the engine was constructed in accordance with the best prevailing practice. The jury found for the plaintiff.

Held, that in a case of this kind, depending upon the weight to be given to scientific and expert testimony, and not upon questions of credibility and demeanour, such a verdict could not stand, and it was set aside and the action dismissed. Judgment of FALCONBRIDGE, J., reversed, ARMOUR, C.J.O., dissenting.

Wallace Nesbitt, K.C., and *H. E. Rose*, for appellants. *Johnston*, K.C., and *J. D. Montgomery*, for respondents.

HIGH COURT OF JUSTICE.

Street, J.] BARRIE *v.* ÆTNA INSURANCE CO. [Oct. 1, 1901.

Insurance—Fraud—Trial—Dispensing with jury.

Action on policy of insurance for $2,000 on stock of caps, furs, gents' furnishings, silks, satins, carriage rugs, etc., etc.

At the opening of the trial His Lordship stated that he thought it would be advisable to try the case without a jury.

G. T. Blackstock, K.C. (for plaintiff): That is not our view; it is a question of fraud.

His Lordship: It is not a question of amount?

Mr. Blackstock: No, we are perfectly willing to take a reference on the question of account.

His Lordship: What is the question of fraud?

Mr. Blackstock: Your Lordship sees the loss is admitted, and the defendants admit a liability to pay us but for the fraud. They admit a large loss which they are liable for, but from the payment of which they say they are exempt by reason of fraud.

His Lordship: What is the fraud?

Mr. Blackstock: Two grounds of fraud are alleged; one is that in and by the said statutory declaration of loss the defendant falsely and fraudulently misrepresented the amount. The other is that in the procuring of the insurance there was fraudulent misrepresentation as to the amount of stock he had. We are quite willing to take a reference at any time, have always been willing and are willing now; we think it is a case for a reference, but, of course, if the question of fraud is to be passed upon then there will be a reference afterwards.

His Lordship: Both questions of fraud depend on the account.

Mr. Blackstock: No, it depends on certain classifications of goods, percentage of damages to certain classes of goods.

S. H. Blake, K.C. (for defendant, with him *L. G. McCarthy* and *MacInnes*): You cannot get at the fraud without taking the accounts.

His Lordship: I shall try it without a jury.

Mr. Blackstock: I assume Your Lordship will not take the question of account if Your Lordship is satisfied of the absence of fraud.

His Lordship: Is not the question of account the basis of the question of fraud?

Mr. Blackstock: In a general way it is, no doubt, but there will come a time before Your Lordship has gone exhaustively into the account when you may come to the conclusion there was no fraud.

His Lordship: If I find there is no fraud, or if at any time in the case it appears that the question of fraud is eliminated, then there will be the mere taking of account, which could be done just as well by a reference.

Mr. Blake: It will be necessary to go very considerably into it. The question of fraud is based upon the question of amount, and you cannot go into the amount without the accounts, and I shall have to go into it if my learned friend does not.

STREET, J., decided that the case should be tried without a jury.

Boyd, C.] SAWERS *v.* CITY OF TORONTO. [Oct. 22, 1901.

Taxes—Distress for—"Owner"—Agreement for purchase—Seal of company—Part performance—"Local improvement" rates—"Taxes"—Bailiffs—Withdrawal from possession—Return and resumption of—Abandonment—R.S.O. 1897, c. 224.

In 1898 plaintiff entered certain premises under an agreement for sale from a mortgagee under the power of sale in the mortgage agreeing to pay taxes, made some payments of purchase money thereunder and remained in possession until the agreement was cancelled by the mortgagee for default in payments in May, 1901.

In the assessment roll for 1899, made in 1898, the mortgagor appeared as the owner. Notice of these taxes was served on the plaintiff, he being

then in possession. He paid the first instalment for that year, but neglected to pay the other two instalments, and the defendants distrained on him therefor in February in an action for illegal distress.

Held, 1. The plaintiff was an "owner" within the meaning of the Assessment Act, R.S.O. c. 224.

2. Although the agreement was not under the seal of the company, the mortgagee, there was a part performance sufficient to entitle the plaintiff to make good the contract against the company.

3. "Local improvement" rates being grouped with other taxes under the Assessment Act, and included in the collector's roll, are to be deemed "taxes" in its broad sense, which are to be collected and realized by uniform statutory process.

4. The warrant specifying two bailiffs is no objection, as no warrant need be drawn up, and anyone acting as bailiff may be authenticated as such by subsequent recognition.

One of the bailiffs, having rightly entered and seized, was induced to withdraw from possession by a statement made by the owner that he was a tenant, but after consultation with the other bailiff, returned and resumed possession.

Held, that it was competent for him to forthwith return and continue the first lawful taking, and that on the facts there was no sufficient evidence of voluntary abandonment by the first bailiff quitting the house to get advice from the other bailiff, and the action was dismissed with costs: *McDougall* v. *McMillan* (1873) 25 C.P. 75, at p. 92, followed; *York* v. *Township of Osgoode* (1894) 21 A.R. at p. 173, affirmed; (1895) 24 S.C.R. 282, referred to; and *In re Flatt and the United Counties of Prescott and Russell* (1890) 18 A.R. 1, distinguished.

John W. McCullough and *James McCullough*, for plaintiff. *Fullerton*, K.C., and *Chisholm*, for defendant.

Street, J.] BYER *v.* GROVE. [Oct. 29, 1901.

Devolution of estates Act—Real representative—Caution—Sale of land—Lapse of year—Injunction.

Mary Grove died intestate, October 19th, 1900, seized of certain lands. Letters of administration of her real estate were issued by the defendant on October 14th, 1901. Prior to such issue the defendant advertised the lands of the deceased to be sold on October 22nd, 1901, more than a year after the death of the intestate. No caution had been filed under the Devolution of estates Act; and it appeared that there were no debts.

Held, that the plaintiff was entitled to an injunction restraining the defendant from selling his interest in the lands under the above circumstances. Clearly the defendant had no right to sell the lands at the time he proposed doing so as by the operation of the Devolution of estates Act, the property had become vested in the heirs of the deceased.

Middleton and *Fitch*, for plaintiff. *Woods* and *Lennox*, for defendant.

Street, J.] IN RE STARR, STARR *v.* STARR. [Nov. 6, 1901.

Husband and wife—Statute of Limitations—Executors and administrators —Right of retainer—Devolution of Estates Act.

In 1876 Mary Starr advanced by way of loan or gift to her husband the purchase money of certain land which was accordingly conveyed to him. On his death in 1893 he devised the land to Mary Starr, and one of his sons in equal shares. In 1901 she obtained an order for partition or sale of so much of the land as had not been theretofore sold, and a sale of such balance of the land being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the land as above mentioned.

Held, that, even assuming that such money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations. There is no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him in the same way as if she was not his wife.

Held, also, that though she was executrix under the will of her husband, she had no longer any right of retainer in respect to her alleged debt, inasmuch as by her own acts, that is first by registering no claim within the twelve months allowed for this purpose, and then treating the property as vested in the defendants, the heirs of her co-devisee, who had previously died, she had put the assets out of her own possession and control.

Armour, K.C., for defendants. *Watson*, K.C., for plaintiff.

Boyd, C.] IN RE ARNOLD CHEMICAL CO. [Nov. 8, 1901.

Practice—Winding-up Act—Service of petition—Time.

By s. 8 of the Winding-up Act, R.S.C. c. 129, "a creditor . . may, after four days' notice of the application to the company, apply by petition . . . for a winding-up order."

Held, that the petition was properly lodged when notice of the application was served on the 4th for the 8th November.

J. Bicknell, for petitioner. *George Ross*, for company.

Street, J.] IN RE CAMERON. [Nov. 9, 1901.

Will—Executors and administrators—Direction to set aside a certain sum and pay income to life tenant.

Appeal from the Master's report. A testator directed his executors to set apart and invest $50,000 out of his estate and pay the income semi-annually to his wife during her life time, with power to appoint, and in default of appointment, over. He then gave the residue equally amongst his children. The estate consisted of income producing securities to the value of $30,000 and a large amount of unproductive land.

Held, that the executors were bound to reserve sufficient productive assets for the preservation of the lands and payment of necessary expenses; and that the widow was entitled to the income of the balance from the expiration of a year from the testator's death, and to have such balance set apart towards the fund of $50,000, ultimately to be made up to that sum as the lands were sold according to the following rule:—As lands and other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the date of the expiration of one year from the testator's death, and accumulated at compound interest with half yearly rests would, with the accumulations of interest have produced at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital and added to the sum theretofore set apart towards the $50,000 and the residue to be treated as income and paid over to the widow.

W. H. Blake, for appellant, a beneficiary. *Garrow*, K.C., for the widow.

Boyd, C.] YOUNG *v.* DENIKE. [NOV. 11, 1901.

Will—Devise to parent and children—Separate gifts—Fee divested—Delivery of possession by purchaser—Lien for improvements and purchase moneys—Occupation rent.

A testator by will made before 1st January, 1874, devised his farm "to J. H. for the term of his natural life; after his death to his children in equal shares; should he die without a child living at the time of his death then to G. for his life and after his death to his children in equal shares; if G. should die without a child living at his death then," etc., etc.:—

Held, that there were two gifts, one to J. H. for life and the other to his children in equal shares, which carried the remainder in fee to the child or children, subject to be divested if he died with a child living at his death.

Under the circumstances of this case, where the defendants had taken possession under an agreement to purchase in fee with covenants for good title free from incumbrance from the plaintiff who claimed through J. H., under the above devise, an order was made for the delivery up of possession to the plaintiff, and a lien was granted to the defendant on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent.

Clute, K.C., and *N. Gilbert*, for plaintiffs. *P. C. Macnee*, for defendants.

Meredith, C.J., MacMahon, J., Lount, J.] [Nov. 14, 1901.

REX *v.* DUERING.

Justice of the peace—Territorial jurisdiction—Act for protection of sheep—Offence against—Locality of—Owning vicious dogs—Order for destruction—Order for damages—Information—Quashing orders—Costs.

Upon a motion to quash an order of a justice of the peace for the county of Waterloo, under ss. 11-13 of R.S.O. 1897, c. 271, an Act for the protection of sheep and to impose a tax on dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs:—

Held, that the offence under s. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town, and it not appearing that the convicting magistrate was acting for or at the request of such police magistrate.

Upon the same information the same magistrate also made an order, under s. 15 of the Act, for payment by the defendant to the complainant of $10 (said to be the value of the sheep) and costs.

Held, that a proceeding under s. 15 is independent of one under ss. 11-13, and the magistrate had no power to award damages for the injury to the sheep, without a separate complaint.

The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate.

J. C. Haight, for defendant. *William Davidson*, for complainant.

Meredith, C.J., MacMahon, J., Lount, J.] [Nov. 15, 1901.

BROPHY *v.* ROYAL VICTORIA INS. CO.

Pleading—Statement of claim—Striking out—Cause of action—Embarrassment—Demurrer—Amendment—Terms—Rules 259, 261, 298.

In an action to recover the amount of an insurance upon the life of C. under a policy issued by the defendants and assigned to the plaintiff, the plaintiff alleged, in the alternative, that the defendants had reinsured with another company, and after the death of C. the defendants requested the reinsuring company to pay the amount reinsured to the defendants, which the reinsuring company did, with a direction to pay the amount over to the plaintiff, which the defendants refused to do.

Held, that this amounted to an allegation that the defendants had received a sum of money to the use of the plaintiff, which they refused to pay over to him, and that they were trustees thereof for him; and the paragraphs of the statement of claim containing the alternative allegations should not be struck out summarily under Rule 261, as disclosing no reasonable cause of action, nor under Rule 298 as tending to prejudice, embarrass, or delay the fair trial of the action.

Rule 261 is intended to apply only where the pleading is obviously bad. A party may still have a point of law disposed of, although he is not at liberty to demur: Rule 259.

Attorney-General for the Duchy of Lancaster v. *London and North-Western R. W. Co.*, [1892] 3 Ch. 274, and *Kellaway* v. *Bury*, 66 L.T.N.S. 599, followed.

Semble, that where a pleading is struck out and the party pleading is allowed to amend, there is no authority for imposing the terms that he is to file with the amendment an affidavit shewing prima facie its truth.

D. O'Connell, for plaintiff. *E. Martin*, K.C., for defendants.

Meredith, C.J., MacMahon, J., Lount, J.] [Nov 15, 1901.

BENTLEY v. MURPHY.

Discovery—Examination of plaintiffs—Specific performance—Denial of contract—Tender—Financial means.

In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for $5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of $2,500 in payment of the down instalment. Defences in denial of the contract and of fraud were, among others, set up.

Held, that, as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered.

The defendants also sought to examine the plaintiffs as to their means to shew that they were persons of no means, which, if proved, it was contended, would be a circumstance to induce the court to refuse to adjudge specific performance, even if the contract were proved.

Held, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means.

D. L. McCarthy, for plaintiffs. *Foy*, K.C., and *Mulvey*, for defendants.

MacMahon, J.] SECOR *v.* GRAY. [Nov. 18, 1901.

Corroborative evidence—Advance of money—Claim of interest.

The plaintiff sued the surviving member of the firm of Cleghorn & Company, together with the representatives of a deceased member of the firm, for $1,000, loaned by him in the life time of the deceased to the firm, for the purposes of the firm. He also claimed interest, alleging that this was spoken of at the time the money was borrowed, and that the deceased member of the firm had asked him what the interest would be, and he told her five per cent.; the surviving member of the firm denied all recollection of interest having been mentioned.

Held, that inasmuch as there was corroboration as to the main fact, namely, the borrowing by the firm of $1,000, this was sufficient to entitle the plaintiff to recover the interest claimed.

Thurston, for plaintiff. *Shepley*, K.C., and *Baird*, for executors.

Street, J.] MIDDLETON *v.* SCOTT. [Nov. 21, 1901.

Mortgage—Mortgagee's costs—Unnecessary proceedings—Tender—Waiver.

Appeal from report of Local Master at Chatham. A mortgagee's right to the costs of proceedings taken by him upon a mortgage, as for example, by service of notice of exercise of a power of sale does not depend upon the necessity for taking such proceedings. The holder of an overdue debt is entitled to take the promptest proceedings to recover it, and his right to recover the costs of such proceedings does not depend upon his being able to give satisfactory reasons for having taken them. But if such proceedings are afterwards abandoned by him he cannot claim the costs of them.

The solicitor of a mortgagor went to the solicitor of the mortgagee, and, finding he was not in, left a letter for him telling him he was prepared to pay the principal and interest due upon the mortgage, naming the right amount, and that the mortgagee's solicitor might have it by calling at his office. The mortgagee's solicitor did not call. Some days later the mortgagor's solicitor wrote to the mortgagee telling her he was prepared to pay the said sum, which letter the mortgagee's solicitor answered by sending a statement of the amount he claimed in which he included subsequent interest and a certain sum for costs, stating in the letter that the whole matter of dispute between himself and the mortgagor's solicitor hinged upon his right to the costs.

Held, that these latter words were merely descriptive of the question in controversy and could not be treated as a waiver of a proper tender; and that the mortgagee was entitled to have the actual money unconditionally offered to him by the mortgagor, which had not been done in this case. There had never been the production of the money due the mortgagee, to her or her solicitor at any time after it became due, nor had the mortgagee's solicitor at any time done anything to absolve the mortgagor from the necessity of so producing and tendering it.

Middleton, for defendant. *Wilson*, K.C., and *O'Flynn*, for plaintiff.

Meredith, C.J.] IN RE HAWKINS *v.* BATZOLD. [Nov. 21, 1901.

Prohibition—Division Court—Order for committal—Previous order for payment—Affidavit.

The plaintiff in 1899 recovered judgment against the defendant in a Division Court action for a debt contracted before 61 Vict., c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith.

Held, that the court had jurisdiction under sub-s. 5 of s. 247 of the Division Courts Act, R.S.O. 1897, c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal, without a previous order for payment based upon such an examination and default thereunder.

Where it appears that the judgment debtor has been examined before the judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication as to that which must be made to appear to warrant the making of an order under sub-s. 5 of s. 247.

Semble, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection, to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition would not be granted.

W. J. Tremeear, for defendant. *G. C. Campbell*, for plaintiff.

Meredith, C.J., Falconbridge, C.J.] [Nov. 26, 1901.

MCNULTY *v.* MORRIS.

Medicine and surgery—Malpractice—Questions for jury.

Motion by the plaintiff to set aside a nonsuit entered by ROBERTSON, J., and for a new trial, upon the ground that there were questions of fact depending on conflicting evidence which should have been submitted to the jury. The action was brought by a labouring man who had his leg broken at the village of Delaware, to recover damages for malpractice against the surgeon who set the leg, and who attended the plaintiff from the 1st September, 1899, the day of the accident, until the 18th September, when the plaintiff was moved from Delaware to his home at Melbourne, a few miles away. There was an oblique fracture of the tibia, and also a fracture of the small bone of the leg. There was no question that the man's leg was not right; there was an overriding of the bone. There was a conflict of expert surgical testimony.

Dromgole and *J. C. Elliott*, for the plaintiff, contended that the questions of disputed fact which should have been left to the jury were:—(1) Was the fracture ever reduced? (2) What was the subsequent treatment; was tape measurement applied, and was the proper splint applied? (3) Was the defendant relieved from the charge of the case?

Hellmuth and *Saunders*, for the defendant.

The judgment of the court was delivered by FALCONBRIDGE, C.J.: A plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady and the defendant's treatment. For example, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture. In the present case there were facts in dispute as to which the plaintiff was entitled to the jury's findings. For example, there was conflict of evidence as to what the treatment actually was in at least two particulars, viz., whether defendant had used tape measurement to ascertain whether the fracture had been reduced, and how far up on the leg the first splint extended. It is also a matter of dispute on the testimony whether the defendant had, at a certain stage of the treatment, been discharged by the plaintiff or relieved from attendance. The question whether a certain tendon was at the time of the trial lying between the fractured portions of the bone seems to have been rather an ordinary question of fact and of credibility of witnesses than of scientific opinion. And there are obvious subsidiary questions dependent on the way in which the jury might determine these already suggested, *e.g.*, when the overriding of the bone commenced. There should be a new trial without a jury. The case of *Kempffer* v. *Conerty* (an unreported decision of the Court of Appeal), Jan. 9, 1901, explaining the rule laid down in *Jackson* v. *Hyde*, 28 U.C.R. 294, followed. Order made for a new trial. Costs of last trial and of this motion to be costs to plaintiff in any event.

Meredith, C.J., MacMahon, J., Lount, J.] [Dec. 2, 1901.

IN RE TORONTO PUBLIC SCHOOL BOARD AND CITY OF TORONTO.

Public Schools—Expenditure—Annual estimates—Revision—Powers of municipal council—Salaries of teachers—Contracts with—Repairs—Furnishing of board room and offices—Discretion of board as to amount—Medals for pupils—Liabilities of previous year—"Miscellaneous"—Furniture of school rooms—Rent of school rooms.

An application by the school board for a mandamus to the city corporation to levy certain sums of money alleged by the board to be required for school purposes for the year 1901. The council of the corporation had received the estimates of the board of the amounts required, and had struck off certain items in whole, and reduced others, upon various grounds.

1. At the end of the year 1900 all the teachers who were engaged or re-engaged for 1901 signed a contract in writing with the board, which was also duly executed under the seal of the board, by which the teachers were employed by the board "in the school and at the yearly salary set opposite his and her name respectively . . . or at such salary and in such

school or division of the same as they may from time to time appoint, for the term of one year, beginning on the 1st of January, 1901, and ending on the 31st December, 1901;" and the board further thereby agreed "that they . . . would pay such salary to the said teacher monthly;" and it was further agreed that the board and the teacher might, at their option respectively, terminate the engagement by giving notice in the manner provided by the school regulations. The salary payable to each teacher under this agreement was set opposite his or her name in a schedule attached to it. On the 21st March, 1901, the board passed a resolution increasing the salaries of all the teachers who had been employed during 1900, the result being that the aggregate salaries of the teachers for 1901, who had signed the agreement at the end of 1900 were increased by about $41,000 beyond the amount payable to them under the terms of that agreement. The city coporation refused the request of the board to levy the sum required to pay these additions to the salaries of the teachers, upon the ground that they were voluntary and unauthorized.

The provisions of the Public Schools Act, 1 Edw. VII. c. 39 (O.), which are applicable, are s. 65, sub-ss. 5 and 9; and ss. 71, 74 and 81.

Held, that it is only when it is made to appear that an expenditure would be clearly an illegal one, or ultra vires the school board, that the council is justified in refusing to raise the sum required by the board. It was by no means clear that, after the resolution of March, 1901, the board was not under a legal obligation to pay the larger salaries; and it was not intended that the council should inquire into the validity of contracts entered into in good faith between the board and teachers, and treated and acted on by them as valid. All that the council has a right to ask is, that what the Legislature has termed an "estimate" shall shew that the board has in good faith estimated the amounts required to meet the expenses of the schools for the current year, and the purposes for which the sums are required, in such a way as to indicate that they are purposes for which the board has the right to expend the money of the ratepayers, and, when that has been done, the duty is imposed upon the council of raising by taxation (except in the special case for which provision is made by s. 74) the sums required according to the estimate.

Semble, that, even if an action by a teacher for salary on the basis of the March resolution would fail if it were set up in answer that the agreement sought to be enforced was not in writing, signed by the parties to it, and under the seal of the corporation, the board could not be compelled to set up such a defence, and if they refused to do so and wished to pay the salary in accordance with the resolution, the council would not be justified in refusing to provide the money.

2. For repairs, the estimate submitted by the board was: "Ordinary yearly repairs and alterations to school property under the Act, based on expenditure of the past ten years, $25,000.

Held, a sufficient estimate to cast upon the council the duty of levying and collecting the whole $25,000; more especially as it was supplemented upon a request being made for further information, by a detailed statement of repairs to be made, shewing the nature of the repairs to be made on each building, but not the probable cost of these repairs separately; the word "alterations" used in the estimate might have covered additions to school-houses (s. 76, sub-s. 1), but the detailed statement shewed that repairs only were intended.

3. Another item was: "Dais and railing in board rooms, and counters, partitions, screens, etc., in office, $6,000—to carry out plans approved by the city council of last year, for which they included the item in a money by-law." The board rented from the city corporation a part of a building for use as a board room and for offices and the $6,000 was for the fittings and furnishings thereof.

Held, having regard to the fact that plans and an estimate of the cost were approved by the council of 1900, and a by-law in that year provisionally passed and submitted to the electors for borrowing $6,000 to defray that cost, that the estimate was sufficient.

Held, also, that it did not provide for expenditure of the class dealt with by sub-s. 1 of s. 76.

Held, also, that, although there was no direct authority in the Public Schools Act for the expenditure of money in furnishing Board rooms and offices, such authority may be implied from ss. 56 and 65, and s. 8 (25) of the Interpretation Act, R.S.O. 1897, c. 1.

Held, also, that neither the council nor the Court could deal with the question whether the amount was extravagant, nor, where there is good faith on the part of the board, call upon it to give reasons for the exercise of its discretion.

4. *Held*, that an item of $50, part of the sum asked for medals and certificates for pupils, should not have been disallowed by the council. It is within the general powers of school boards to provide such recognitions of standing and merit, at the expense of the ratepayers.

5. *Held*, items intended to provide for liabilities incurred in 1900, the payment of which was deliberately held over until 1901, were properly disallowed by the council as not forming part of the expenses of the schools under the charge of the board for 1901.

6. Under the head of "miscellaneous, based on the yearly expenditure of past years," the board asked for $1,000. The council asked for no details of this, but struck it out in toto.

Held, that the estimate was sufficient, and that the item should not have been struck off without particulars being asked for, when they were asked for in other cases.

7. The council struck off $4,250 from an estimate of $11,750 for new furniture in new school rooms, and renewing the furniture in certain existing school rooms where it is worn out, and for repairs to old furniture.

Held, that this estimate, with the details given at the request of the council was sufficient, and should have been accepted. The cost of the furniture of a school room is not part of the cost of the erection of a school house under s. 75 of the Act.

8. *Held*, that the item of $220 for rent of school rooms to be used by the children taken care of by "the Girls' Home" should not have been struck out; s. 65, sub-ss. 3 and 4, and s. 67.

F. E. Hodgins, for the school board. *J. S. Fullerton*, K.C., for the city corporation.

Street, J., Britton, J.] [Dec. 4, 1901.

IN RE CHATHAM BANNER CO. BANK OF MONTREAL'S CLAIM.

Banks and banking—Bank Act s. 46—Inspection of customer's account—Evidence in judicial proceeding—Company—Manager—Private liabilities—Winding-up—Position of liquidator—Promissory notes—Consideration—Impeaching.

Section 46 of the Bank Act, 1890, 53 Vict., c. 31 (D.), providing that "no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank," does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law, between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks.

The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim.

Held, 1. The liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them to the company's account, was entitled to refer to the manager' own account with the bank, though the manager was not a party to the proceeding; more especially as the bank had set up certain transfers of cash from one account to the other as justifying them in charging the company's account with the manager's liabilities.

2. There was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no farther.

3. Periodical acknowledgements given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an enquiry into the account, where specific errors in it were charged, to the knowledge of the bank.

G. H. Kilmer, for liquidator. *A. B. Aylesworth*, K.C., for bank.

Street, J., Britton, J.] [Dec. 4, 1901.

IN RE MERCHANTS LIFE ASSOCIATION. HOOVER'S CLAIM.

Company—Winding-up—Creditor's claim—Delay in presenting—Excuse—Merits—Leave to renew application—Statute.

In the winding-up of a life insurance company, the liquidator's list of claimants was filed in the Master's office on the 5th of June, 1900, and a proper advertisement was published requiring claims to be delivered to the liquidator on or before the 7th May, 1900. On the 19th April, 1901, the claimant applied to the Master to amend the list of claimants by increasing the amount for which he was entitled to rank.

Held, that the claimant, coming in after the time allowed for filing claims, was bound to shew upon affidavit some prima facie case of merit, and to explain the reasons for his delay in coming in with his claim. The claims of creditors should not be shut out so long as there remains unadministered a portion of the fund applicable for their payment. Even where an application is dismissed for want of an affidavit shewing merits and explaining delay, the dismissal may well be without prejudice to a further application upon proper material; but in this case the rights of the claimant had been entirely cut off by an enactment of the Legislature to which a retrospective effect had been given, and it would, therefore, be of no assistance to the claimant to permit him to renew his application.

H. T. Beck, for claimant. *J. H. Hunter*, for liquidator.

Street, J., Britton, J.] [Dec. 4, 1901.

IN RE MERCHANTS LIFE ASSOCIATION OF TORONTO. VERNONS' CASES.

Life insurance—Proof of claim on unmatured policy—Present value of reversion in sum assured—Mode of calculating—Statute—Amendment—Declaration as to former law—Effect on rights declared by judgment.

By an order of the Divisional Court made on the 5th February, 1901, upon appeal from a certificate of the Master-in-Ordinary in proceedings for the winding-up under the Ontario Insurance Act of a friendly society carrying on the business of life insurance, it was declared that the amount for which the holder of an unmatured policy payable at the death of the insured was entitled to rank upon the assets should be ascertained, as at the date of the commencement of the winding-up, by calculating, first, the present value of the reversion in the

sum assured by the policy at the decease of the life assured, and, second, the present value of a life annuity of an amount equal to the future premiums which would have become payable during the probable duration of the life assured, and allowing the difference in favour of the first calculation as the sum for which the claimant should rank, and the claim was referred back to the Master to make the calculation: 1 O.L.R. 256, ante.

Held, on appeal from a subsequent certificate of the Master shewing the result of his calculation, that the sum to be arrived at was a matter of simple calculation from the ordinary life insurance tables. The line applicable for the purpose of ascertaining the present value of the reversion in the $1,000 assured by the claimant's policy was the following:

Age.	a X.	A. X.	P. X.
45	13.1645	.390044	.027537

The column ax shews the present value of an annuity of $1, payable at the end of each year during life. When the annuity is payable yearly in advance, the number before the decimal point is to be increased by 1. The column Px shews the amount of the net annual premium to be charged during life upon an insurance of $1, in order that a proper fund may be provided to meet the insurance at death. The column Ax is the result of the multiplication of the figures in the column ax, plus 1, by those in Px, and shews the amount to be paid down in advance as a single premium for the insurance of $1 payable at death. The figures in column Ax multiplied by 1,000 furnished an absolute answer to the first calculation required to be made—$390.04.

The Master took the figures in column ax, plus 1, but multiplied them by the figures actually charged by the insolvent association to a person insuring at the age of 45.

Held, that this was wrong, the fact of the company having undertaken its contract upon an insufficient consideration has nothing to do with this particular question; the arithmetical value of the reversion is not decreased by the fact that the premium stipulated for was too low; the premium paid has nothing to do with this calculation.

It was not disputed that the present value of a life annuity of an amount equal to the future premiums was $177.54.

Held, therefore that the claimant was entitled to rank for $212.50.

By 1 Edw. VII, c. 21 (O.), assented to on the 15th April, 1901, the law as it previously existed was altered in several important respects, notably in the manner of valuing unmatured policies, and the rights of persons who had entered into contracts with this association were impaired; and, by sub.s. (6) of s. 1, it was enacted that these amendments and additions "declare the law of the Province as it existed on, and has existed since, the 14th April, 1892," without any saving of rights acquired, or contracts entered into, or of actions pending under the law as it stood.

Held, however, that these amendments did not affect the rights of the claimant, because these rights had been declared by the judgment of the 5th February, 1901, before the Act was passed, and judgments are not re-opened even by such legislation.

Hardcastle on Statutes, 3rd ed., p. 363, *Eyre* v. *Wynn-Mackenzie* (1896) 1 Ch. 135, and *Day* v. *Kelland* (1900) 2 Ch. 745, specially referred to.

H. T. Beck, for claimant. *J. H. Hunter*, for liquidator

Street, J., Britton, J.] [Dec. 4, 1901.

IN RE CANADIAN CAMERA AND OPTICAL CO. A. R. WILLIAMS CO'.S CLAIM.

Company—Winding-up—Claim against assets—Lien on goods sold—Rights of liquidator—Conditional Sales Act—Bills of Sale Act.

The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H. subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only.

Held, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale to H., and they were entitled to recover the full amount due under the terms of the order out of the estate.

By the Conditional Sales Act, the title of a purchaser in good faith and for valuable consideration from the bailee of goods under a contract such as that in question is entitled to prevail against the bailor, unless certain requirements of the Act are complied with, but the rights of creditors of the bailee are not increased, and remain as if the Act had not been passed. The liquidator as representative of the creditors is not helped by the Act, because the creditors never had a right to treat the bailee as owner, nor as representative of the company, because the contract of the company with the bailee stands good both against the company and the liquidator.

A conditional agreement such as that in question is not affected by the Bills of Sale Act a. all; it is not a mortgage, nor intended to operate as a mortgage within the meaning of that Act; nor is there anything in any statute affecting its validity.

W. E. Middleton, for claimants. *G. H. Watson*, K.C., for liquidator.

Moss, J.A., Falconbridge, C.J.] [Dec. 6, 1901.

HUTTON *v.* JUSTIN.

Trustee—Lien—Sale of land to enforce—Abortive sale—Foreclosure—Purchase by trustee—Report on sale—Certificate in lieu of order—Terms.

An appeal by the plaintiff from an order of MEREDITH, C. J., in Chambers. The order was made upon a motion by the defendant for an order for foreclosure after an abortive sale, or for such order as the court might think proper under the circumstances. The order directed that the Master should advertise for tenders, and if the property could not be sold, that the defendant should be allowed to purchase at $17,500 a sum less than the claim for the realization of which the property was to be sold. The judgment of the Court of Appeal declared the defendant a trustee, with a lien for advances, and a subsequent judgment, after the accounts had been taken, directed a sale to realize the amount found due to the defendant.

Held, 1. The defendant's position as a trustee debarred him from the ordinary remedy of foreclosure to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate: *Tennant* v. *Trenchard*, L.R. 4 Ch. 537, 20 W.R. 785, and this was the effect of the order.

2. It was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested. *Girdlestone* v. *Gunn*, 1 Ch. Ch. 212, and *Odell* v. *Doty*, ib. 207 referred to.

3. The property embraced in the order not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim.

The defendant offering to submit to terms, the order was varied so as to provide that the defendant should be allowed to purchase at $18,500 in the event of $17,500 not being realized by a sale by tender or private contract.

W. H. McFadden, for plaintiff. *B. F. Justin*, defendant in person.

Falconbridge, C.J., Street, J.] [Dec. 11, 1901.

IN RE JOHNSTON.

Solicitor and client—Taxation—Allowance of lump sum—Work done out of court—Power of taxing officer.

A solicitor was employed to collect claims aggregating eighty two thousand dollars, from eleven different insurance companies, which claims

were resisted by the insurance companies on the ground that they were gambling policies, while the widow of the insured also contended that the insurance was intended to be a trust for her and her family, subject only to a lien in favour of the insurer for what he had actually expended on premiums, with interest. The solicitor prepared the necessary proof papers and then entered into negotiations with the companies, resulting in nine out of eleven paying the amounts of their respective policies, aggregating seventy thousand dollars, without suit. The solicitor also negotiated a compromise of the widow's claim which left sixty thousand dollars for his client. The client then placed the claim on the other two policies in the hands of another solicitor, who took legal proceedings to collect them, which were unsuccessful. The former solicitor then rendered a bill to his client, shewing in detail the negotiations he had conducted, and charging his full disbursements and ordinary costs in connection with an action commenced by the widow, and charging a lump sum to cover the services rendered by him in the negotiations out of court, which extended over a period of seven months and entailed much work. The client obtained an ex parte order referring the bill to taxation, when the taxing officer allowed three thousand two hundred dollars as a lump sum to cover the work done in the said negotiations, having first, with the acquiescence of the parties, satisfied himself by conferring with various referees and officers and members of the profession, as to what charges were usually made in matters of such a kind, and then determining the matter in the light of his own general knowledge and experience.

Held, affirming the decision of BOYD, C., that the decision of the taxing officer should be affirmed; that *In re Attorneys*, 26 C.P. 495, completely covered the case; and that the contention that the client was entitled to have the solicitor's remuneration assessed in an action must be disregarded, as he had himself selected the forum by issuing the order for taxation.

O'Connell, for the client. *Middleton*, for the solicitor.

Falconbridge, C.J., Street, J.] [Dec. 14, 1901.

KIDD *v.* HARRIS.

Marriage—Widow of deceased brother—Validity—Legitimacy—Presumption—Will.

The testator was married on the 30th June, 1855, to the widow of his deceased brother, and she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife:—

Held, that the validity of the marriage between the testator and the widow of the deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then

alive; and the appellants, the children of the testator and the other women, were not legitimate and had no locus standi to appeal from a judgment establishing a document as the will of the testator. *Hodgins* v. *McNeil*, 9 Gr. 305, and *Re Murray Canal*, 6 O R. 685, approved.

E. H. Smythe, K.C., for appellants. *G. E. Kidd*, for plaintiffs. *A. Haydon*, for specific legatees. *W. Morris*, for other parties.

Meredith, C.J.] PARENT *v.* COOK. [Dec. 16, 1901.

Practice—Third parties—Notice—Time—Enlarging—Rules 209, 353.

In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants by their statement of defence justified the acts complained of under agreements which, they alleged, authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served a notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title :—

Held, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353.

Semble, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209.

J. H. Moss, for third parties. *W. M. Douglas*, K.C., for defendants.

Province of Nova Scotia.

COUNTY COURT, YARMOUTH.

THE KING *v.* TOWNSEND.

THE KING *v.* MURTAGH.

Protection of game—Fishing in Canada by foreigners—"Temporarily domiciled"—Appeal.

Held, that a foreigner is not "temporarily domiciled" in Canada, within the meaning of those words in Order of Council of August 1, 1894, by reason of his coming to this country for a few weeks for the express purpose of fishing, and living in a house built for the convenience of the fishing party, in which are kept necessaries for the support and articles of personal comfort. The defendant, therefore, was not exempt from the regulations in the Order of Council of June 30, 1894, requiring him to procure a permit, and not having done so was properly found guilty of a violation of the Fisheries Act.

Held, also, that there is an appeal from such a conviction as from other summary convictions.

[Yarmouth, Oct. 17, 1901—Savary Co. J.

These cases came before a Stipendiary Magistrate on the complaint of a Fishery overseer, the conviction in each case being that the defendant had violated certain regulations made under s. 18 of the Fisheries Act, respecting fishing by foreign sportsmen in the inland waters of Canada.

The evidence on which it was contended that the defendants were "temporarily domiciled" in Canada was as follows: "I have been here two or three trips fishing. I came here trout fishing and for that express purpose. We are owners of a camp near Kempt, which I suppose is on Crown Land. It is simply a fishing camp; it contains three rooms and attic in which we live; it is a regular shingled house, built for the express purpose of residing in during these trips. After each trip we usually make arrangements for the next trip; we leave all our traps in the camp; a good deal of clothing and fishing material, which remain there till we return next season."

The defendants were found guilty by the Stipendiary Magistrate of fishing without having procured the necessary permit for that purpose. They appealed to the Judge of the County Court for District No. 3.

Pelton, K.C., for the Crown.

Harrington, K.C., and *George Bingay*, K.C., for defendants.

SAVARY, Co. J.—There is an appeal to this Court from these convictions, as from other summary convictions. The appeal to the Minister of Marine and Fisheries given by the Act, c. 95, Revised Statutes of Canada, s. 18, subsection 6, does not take away the general right of appeal to this Court under

the Crim. Code, s. 879. My duty is to decide whether these parties were properly convicted. If my decision should be against them, they can still appeal to the Minister and procure the remission of the penalties if he thinks the enforcement of the law a hardship in the particular case.

These regulations under s. 18 of the Fisheries Act are first, an order in Council of June 30th, 1894, of which the object is stated to be "the more efficient protection of game, fish and the prevention of abuse by foreigners angling in the inland waters of the Dominion," and it proceeds to ordain that no person other than a British subject shall angle for, fish for and take (besides other fish specified) trout in Canadian waters without having first obtained an angler's permit issued by the local fishery officer in each district under the authority of the Minister of Marine and Fisheries; and that each person not a British subject shall pay for such angler's license a fee of $5.00 for a period of three months, or $10.00 for a period of six months. On the first day of the following August a further order in Council was passed, with a preamable stating that it was deemed advisable to amend the regulations of June 30th, so as to exempt under certain conditions foreigners domiciled in Canada from the regulations requiring permits, and proceeding to ordain as follows: "Foreigners when temporarily domiciled in Canada and employing Canadian boats and boatmen shall be exempted from the regulations requiring permits."

The argument was on the meaning of the words "temporarily domiciled," and counsel on both sides seemed to agree that this was a self-contradictory phrase; an inartistic and inconsistent term, hardly capable of a sensible construction.

On full consideration I must say I cannot altogether concur in this view, but on the contrary it may be that no other language could be found which would more adequately express the intention of the enacting authority. Foreigners "visiting Canada," or "temporarily residing" in Canada might have included some whom it was the policy of the law to exclude from the privilege of fishing in our waters freely and on the same terms as our own people. It was laid down by an old authority that "the word 'domicile' has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicile for many purposes, and yet may be domiciled in England so as to give jurisdiction for divorce:" Fisher's Digest, p. 3187. So in the case of regulations under the Fisheries Act the word may be used in a sense not strictly technical, but one which renders the adjectives "temporary" and "permanent" by no means inconsistent or inapplicable. It may, for instance, mean living in the country for a limited period under such conditions as would give the foreigner a domicile here for all purposes, if such residence were, or were intended to be permanent. In the case of *Le Mesurier* v. *Le Mesurier*, App. Cas. 1895, p. 517, Lord Watson (at p. 540) speaks of the domicile "for the time being" of a married pair, and in another place quotes from Lord Westbury in *Gould* v. *Gould*, L. R. 3 H. L. 85, the

expression "permanent domicile," showing that these terms are not so very anomalous or self-contradictory, but that the expression "temporarily domiciled" must be construed and given effect to under the ordinary rules governing the construction of statutes and with a view to the object and policy of the legislature. In *King* v. *Foxwell*, 3 Chan. Div., p. 318, Jessel, M.R., asks himself the question, "What is domicile?" and answers in effect that "a man in order to change his 'domicile of origin' must choose a new domicile by fixing his sole or principal residence in a new country with the intention of residing there for a period not limited as to time."

This is quite in accord with the definition of the term "domicile" given in Wharton's and Bouverie's law dictionaries, and therefore surely in order to decide whether a party is "temporarily domiciled" in Canada, it is only necessary to enquire whether he has fixed his "sole or principal residence" in the country for a period limited as to time. I do not see how I can hold that these parties had either their "sole" residence or their "principal" residence in Canada during the time they were here merely for the purpose of enjoying a few weeks' fishing, even although they may have erected a building at more or less expense, not as a home, but for additional convenience and comfort in the prosecution of their sport. They were not owners or tenants of houses here, occupying them with their families for the summer months, as quite a number of their countrymen do, nor guests at any of our hotels, as so many with families are, as well as many single men without families, but according to the case laid before me, they come here every year expressly and solely for the purpose of sport and leave as soon as it is over.

Let us suppose some point on the frontier, where it takes but an hour or so to cross the boundary line and reach a stream or lake on the Canadian side, and two American gentlemen come over for the purpose of fishing, both employing Canadian boats and boatmen, but one of them having his tent erected on the American and the other on the Canadian side of the line. I cannot see in the obvious policy of the regulations any reason why the last mentioned should be allowed to fish without a permit, while the other is prohibited. The enacting authority could never have intended to attach the idea of domicile to a building intended and adapted merely to facilitate and render more comfortable the fishing operations of a party, who comes here for no other purpose than to fish, whether such an erection cost $5 or $500.

I am not called on to say what conditions of residence by a foreigner would constitute a temporary domicile under these regulations. It is sufficient for the purpose of this case to say that those disclosed in the evidence and in the case stated do not. It is not my duty to enquire whether, in view of the restrictions, if any, placed on Canadian sportsmen using American waters, the regulations before me are or are not unduly restrictive or inhospitable; nor am I sportsman enough to know whether these

regulations are more or less exacting, in proportion to the privileges bestowed, than the provincial legislation, which requires a license fee of $30.00 from any one not domiciled in Nova Scotia to hunt moose in the province. Nor am I called on to say whether a foreigner actually domiciled here is shut out by these regulations, and therefore in a worse position than a mere visitor, as suggested. It will be time enough to decide that when the occasion requires it.

I find that (1.) The defendants under the amended order in Council of August 1, 1894, were not exempt from the previous regulations requiring permits. (2.) The defendants were not temporarily domiciled in Canada within the meaning of the amended order. (3.) The defendants were guilty of violating the Fisheries Act. (4.) The defendants were properly convicted. The convictions will, therefore, be confirmed and the appeals dismissed with costs.

Province of New Brunswick.

SUPREME COURT.

En Banc.] [Nov. 8, 1901.

INGRAHAM *v.* TEMPERANCE AND GENERAL LIFE ASSURANCE CO.

Justice's Civil Court - Affidavit for capias—Failure to shew jurisdiction.

An affidavit for a capias in a Justice's Civil Court does not require to shew the facts necessary to give the court jurisdiction. Failure to state the residence of the plaintiff as directed by the form prescribed will not invalidate.

E. R. Chapman, for appellant. *O. S. Crocket*, contra.

En Banc.] COLLINS *v.* LANDRY. [Nov. 8, 1901.

Trial by proviso—Side-bar rule necessary.

The old practice requiring a side-bar rule to be taken out for trial by proviso still prevails in this province.

C. J. Coster, for plaintiff. *J. D. Phinney*, K.C., for defendant.

En Banc.] STEEVES *v.* DRYDEN. [Nov. 15, 1901.

County Court—Directing jury to answer specified questions of fact—Supreme Court practice applicable.

Sec. 158 of the Supreme Court Act empowering a judge on the trial of a cause to direct the jury to answer any questions of fact stated to them by him is applicable to the County Court.

Jonah and *Powell*, K.C., for appellant. *Teed*, K.C., contra.

In Equity, Barker. J.] [Nov. 26, 1901.

BANK OF MONTREAL *v.* MARITIME SULPHITE FIBRE CO.

Company—Winding-up—Debenture holder's mortgage—Covering mortgage—Receiver—Liquidators.

In a suit to enforce a mortgage to secure debentures issued by the defendant company, a receiver was appointed. Subsequently a winding-up order was made against the company, and liquidators were appointed. The liquidators disputed the validity of the mortgage, and the extent of the property covered by it.

Held, that there being a conflict of interests between the mortgagees and the general creditors. the receiver should not be discharged and the liquidators appointed to act in his place.

An order appointing a receiver on behalf of debenture holders secured by mortgage was varied to be limited to property described in the mortgage.

Pugsley, K.C., and *Lawlor*, K.C., for official liquidators. *McLean*, K.C., for debenture holders.

Province of British Columbia.

SUPREME COURT.

Full Court.] [March 7, 1901.

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

Appeal from interlocutory order—Action decided pending appeal.

This was an appeal from an interlocutory order, and pending the appeal the action had been tried and decided. The Full Court ordered that the appeal be struck out of the list, refusing to accede to the request of appellant's counsel, who wanted the appeal to go on to decide the question of costs.

Davis, K.C., for appellant. *Wilson*, K.C., for respondent.

Note.—The same course was followed subsequently, March 19, 1901, in *Chisholm* v. *Le Roi*, and Nov. 19, 1901, in *McCune* v. *Botsford*.

Full Court.] CANADIAN DEVELOPMENT CO. *v.* LE BLANC. [May 6, 1901.

Yukon law—Appeal to Supreme Court of British Columbia—62 & 63 Vict., c. 11, s. 7—Collision—Damages—How assessed—Non-observance of Canadian sailing rules—Practice—Costs—Preliminary Act—Order XIX., Rule 28 of the English Rules.

Appeal from a judgment of DUGAS, J., in the Territorial Court of the Yukon Territory. The plaintiffs sued for $408 damages sustained by their

steamer, the Canadian, as the result of a collision with the defendants' steamer, the Merwin, in Thirty-Mile River on 21st August, 1899. The defendants counter-claimed for damages. At the trial the plaintiffs' claim was dismissed and defendants on their counter-claim got judgment for $735. Plaintiffs appealed.

Held by the Full Court that the appeal must be limited to the judgment on the counter-claim as the claim was not for an appealable amount.

The plaintiffs did not file a preliminary act as required by Order XIX, r. 28 of the English Rules, which DUGAS, J., held to be in force in the absence of a local rule. At the trial it was also held that no evidence could be given in support of the plaintiffs' claim.

Held, that the above ruling was correct.

The ship Canadian navigated by an American pilot was making a landing against a current of about six miles an hour. The ship Merwin, also navigated by an American pilot, was coming down stream. Both vessels before collision gave blasts which were interpreted by each ship according to American regulations. It was held at the trial that under the circumstances the Canadian was alone to blame.

Held, by WALKEM and DRAKE, JJ., that both vessels were to blame, and the appeal should be allowed without costs. By IRVING, J., that both vessels were to blame, and that it be referred back to assess the damages to the Canadian, and then the damages should be apportioned according to the Admiralty rule. By MARTIN, J., that the appeal should be dismissed.

Observations as to the undesirability of the importation of foreign sailing rules, and as to the necessity of using in Canadian waters the signals authorized by the Canadian Rules.

Appeal allowed without costs and no costs of counter-claim in court below.

Bodwell, K.C., and *Duff*, K.C., for the appeal. *Cassidy*, K.C., contra.

Full Court.] WILLIAMS *v.* FAULKNER. RAYMOND *v.* FAULKNER. [July 24, 1901.

Yukon law - Order of reference - Jurisdiction - N. W. T. Orders XXIII., rr. 233 and 236, and XXXIII., r. 401 - Co. Or. N. W. T. 1898, c. 21.

Appeals from the judgment of Craig, J., in the Territorial Court of the Yukon, argued together at Victoria. Plaintiffs sued defendants, who were adjoining placer mining claim owners for damages for wrongfully drifting and tunnelling through their claims and taking away pay-dirt. On plaintiffs' application, Dugas, J., made an order appointing one McGillivray to inspect the dump and workings in question for the purpose of ascertaining (1) if the said workings encroached on the mining claim of the plaintiffs, the Baker Fraction, and if so, to what extent; (2) if any pay-dirt had been taken from the said mining claim, and if so, to what amount; (3) the amount of pay-dirt in the dump in question; and (4) generally the condi-

tion and manner of the said workings; and that the said McGillivray report the result of such inspection to the court, or a judge, on or before the 1st day of July, 1900, or such further time as the court or a judge may appoint, with power to the said McGillivray to take evidence as to the matters hereby referred to him for inspection, and apply to the court or a judge at any time for directions as to such inspection.

In his report he answered the questions as follows: (1) That the defendants had encroached on the mining claim of the plaintiffs, the Baker Fraction, to the extent of forty-four yards of bed-rock; (2) That pay-gravel had been taken from said claim by defendants to the amount of $7,700.00, a portion of which has been rocked out in the mine and a portion put in the dump; (3) he estimated there were about 2,463 yards, and value at $83,279.00; (4) that the drifts and tunnels are not made in a miner-like manner, in order to be maintained for permanent use. They should not have been made wider than five feet and should have been made straight on the sides, arched at the top, whereas these drifts and tunnels in instances had been made as much as twelve feet in width, flat, and gouged in underneath.

On this report plaintiffs moved for judgment, and CRAIG, J., after examining McGillivray as to how he arrived at his conclusions, approved and confirmed the report and entered judgment in pursuance thereof. Defendants on the appeal tendered evidence to shew that McGillivray refused to hear witnesses tendered by them, and also refused to allow counsel to appear before him, saying that he would not be bothered with them.

By s. 3 of the Judicature Ord. the jurisdiction of the Supreme Court of the N.W. Territories shall be exercised so far as regards procedure and practice in the manner provided by this ordinance and the rules of court, and where no special provision is contained in this ordinance or the said rules it shall be exercised as nearly as may be as in the Supreme Court of Judicature in England as it existed Jan. 1, 1898.

Held, by the full court, that the power to make an order of reference in an action is a matter of jurisdiction, and not merely a question of "procedure and practice," within the meaning of s. 3 of the Judicature Ordinance, and therefore the Yukon court had no power under this section to make an order of reference. Appeal allowed with costs and new trial ordered in both cases.

Hunter, K.C., and *Duff*, K.C., for appellants. *Davis*, K.C., and *Cassidy*, K.C., for respondents.

Martin, J] RICHARDS *v.* BANK OF B.N.A. [July 31, 1901.

Banker's lien—Overdrawn accounts—Partner's separate account.

In July, 1900, the plaintiff was a member of the firm of Richards & Riley who had a firm account in the Bank of B.N.A., and on 21st July

they sold out their business. The plaintiff went to the bank to find out the firm's correct balance and was told by the ledger-keeper, who made a mistake and gave a credit balance of $200.00 too much. The firm then issued cheques for the amount as given and they were paid by the bank. About this time the plaintiff opened a private account with the bank, and in August he was informed by the bank that the firm's overdraft of $199.97 had been charged to his private account. Plaintiff then drew all the rest of his money out and the bank refused payment of his cheque for $199.97.

Held, in an action for damages, that the plaintiff was entitled to judgment for $199.97 with interest from the time of presentment.

Pottinger and *Kappele*, for plaintiff. *Bowser*, K.C., for defendant.

Walkem, J.] REX *v.* BEAMISH. [Oct. 12, 1901.

Criminal law--Summary conviction--Appeal to County Court--Habeas corpus proceedings after—Cr. Code, s. 523, 881.

Application for writ of habeas corpus. The prisoner was charged with an offence under 523 of the Criminal Code and convicted by the Police Magistrate of Rossland, and sentenced to two months' hard labour. Immediately after conviction he appealed to the County Court, and Leamy, Co. J., affirmed the conviction.

Held, dismissing the application, that the decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by habeas corpus.

Gillan, for the application. *Daly*, K.C., contra.

Full Court.] WENSKY *v.* CANADIAN DEVELOPMENT CO. [Oct. 16, 1901.

Passenger's baggage or luggage—What is—R.S.C. 1886, c. 82, s. 3—Pleading—Point not pleaded or taken in court below.

Appeal to the Full Court of the Supreme Court of British Columbia from the judgment of CRAIG, J., in the Territorial Court of the Yukon. Plaintiff was a passenger for Dawson on defendants' line of steamboats and his ticket contained the proviso: "Baggage liability limited to wearing apparel only. Each ticket is allowed one hundred and fifty pounds of baggage free, and not exceeding $100 in valuation, and half tickets in like proportion. All exceeding this rate and valuation will be charged for. This Company shall not be held accountable for merchandise, notes, bonds, documents, specie, bullion, jewelry, or similar valuables or stores to be landed under designation of baggage, unless bills of lading are regularly signed, and freight charges paid thereon, and under no circumstances shall this Company be held responsible in case of loss of baggage for over $100, unless extra charge has been paid on excess of valuation." He paid $10 excess baggage. Part of the baggage, including a sealskin jacket, etc., men's suits and wolf robes, to the value $655 was lost. Plaintiff sued for

the full amount, and defendants pleaded that their liability under the contract was limited to $100. It was held that the defendants were liable for more than $100, but under the Carrier's Act for not more than $500.

Held, on appeal, that the contention that defendants were not liable for certain articles, not the wearing apparel of the plaintiff himself, was not open to defendants as that point was not raised in the pleadings or taken at the trial.

Remarks of DRAKE and MARTIN, JJ., as to what is included in the term "wearing apparel" which must differ according to different circumstances and climates. Appeal dismissed.

Duff, K.C., and *J. H. Lawson, Jr.*, for appellants. *Davis*, K.C., for respondent.

Full Court.] CLEARY *v.* BOSCOWITZ. [Nov. 13, 1901.

Mining law—Certificate of work—Impeachment of—Evidence—Mineral Act, s. 28, and Amendment Act of 1898, s. 11.

Appeal from judgment of MCCOLL, C.J., who dismissed plaintiffs' adverse action. Defendant relied on certificates of work obtained by him in respect of the mineral claims covering the ground in dispute, and plaintiffs sought to shew that the full amount of work required by the statute as a pre-requisite to such certificates of work being issued had not been performed. The Chief Justice refused to admit the evidence, holding that evidence impeaching a certificate of work could not be received in any proceeding to which the Attorney-General was not a party. The Full Court affirmed the decision, holding that if a certificate of work is to be set aside the Attorney-General must be a party, and until set aside, all things are presumed in favour of its holder.

The plaintiffs, in making their case, admitted that defendant had obtained certificates of work.

Held, that this in itself was affirmative evidence of defendant's title within the meaning of s. 11 of the Mineral Act Amendment Act of 1898.

S. S. Taylor, K.C., for appellants. *Davis*, K.C., for respondent.

Full Court.] MCKELVEY *v.* LE ROI MINING CO. [Nov. 14, 1901.

Full Court—Reference of motion for judgment to trial judge—Jurisdiction.

At the conclusion of the trial of an action for damages for personal injuries, the trial Judge (MCCOLL, C.J.), did not see fit to enter any judgment on the findings of the jury, but left the parties to move the Full Court as they might be advised. Both parties accordingly moved the Full Court for judgment, the arguments being confined to the question of the liability of the defendant company.

Held, per WALKEM, DRAKE, and IRVING, JJ.: The Full Court is an Appellate Court only, and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge.

Per MARTIN, J. (dissenting), that as the question of jurisdiction was not raised by counsel nor by the court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company.

MacNeill, K.C., for plaintiff. *Hamilton*, for defendant company.

COUNTY COURT.

Harrison, Co. J.] THE KING *v.* CAMPBELL. [March 29, 1901.

Crown, prerogative of—R.S.B.C. 1897, c. 52, s. 64.

Action brought in the County Court of Westminster against defendant, who resided in the County Court District of Yale, for damages for the conversion of timber growing on Dominion lands in Yale District. Defendant objected to the jurisdiction of the court as the case did not come within s. 64 of the County Courts Act, inasmuch as he did not reside in Westminster District, and the cause of action did not arise either wholly or partly in that district.

Held, that it is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such court would not be open, either because of the defendant not residing, or of the cause of action not arising in the district.

Howay, for plaintiff. *Corbould*, K.C., for defendant.

Book Reviews.

Banks and Banking. With new authorities and decisions, and the law relating to warehouse receipts, bills of lading, etc., 2nd edition; by J. J. Maclaren, K.C., D.C.L. Toronto: The Carswell Co., Limited, 1901.

A new edition of this work was rendered necessary by the Amending Act of 1900, which makes important changes in the Bank Act. Decisions upon the Act since publication of the first edition have been added, and portions of the work re-written The learned editor also brings down the cases relating to warehouse receipts, cheques, etc., to the present time. The value of the book to the banking community is increased by the publication of the Act of 1900, incorporating the Canadian Bankers Association and their by-laws.

The Liability of Municipal Corporations for Torts. By Waterman L. Williams, A.B., L.L.B. Boston: Little, Brown & Co 1901. 345 pp.; $3.50.

This is one of the most useful books in connection with municipal law that has been issued for some time. The author has made the subject of torts a special study, having already published a work on statutory torts in Massachusetts. The law of negligence, in these days of rapid transit and labor-saving appliances, comprises a very large portion of the litigation in this country, and makes an ever-increasing item in a lawyer's business. The subject of municipal liability for negligence and other torts keep pace with this increase.

The scope of the present work is set forth in the headings of the chapters into which it is divided, and which are as follows:—General principles of the liability—Liability for ultra vires torts—For the acts of officers and agents—As owners of property—Relative to bridges—Relative to streets and highways—Relative to drains and sewers—Relative to waters and water courses—For property destroyed—Relative to nuisances—Relative to public health, charities and schools, and to ordinances.

Although the consideration of municipal law in the United States depends somewhat upon the statutes of the various States of the Union, there is so much similarity between social and governmental conditions and business matters in all parts of the North American Continent that a treatise upon the principles underlying the decisions in one country is necessarily very helpful in the other. The author has not merely made a very useful collection of leading cases on the subjects discussed, but has done much more, inasmuch as he discusses the cases intelligently and fearlessly and states his conclusions concisely and clearly. The book before us is one that we can safely recommend to our readers.

Flotsam and Jetsam.

The English legal periodicals speak very highly of the appointment to the English Bench of Mr. Swinfen-Eady, K.C. Although judicial emoluments are much greater in England than in this country, he loses a great deal by the change, as his fees are said to have mounted to a very large sum annually. We note, by the way, that our esteemed fellow-citizen, Mr. Walter S. Lee, well known and highly respected in financial circles in this country, is a near connection of the new judge.

The *Law Times* records some amusing "breaks" on the part of newspaper reporters. Mr. Hussey Burgh, the acknowledged leader of the Irish Bar, and at the time Prime Serjeant, with precedence of the Irish Attorney-General, in a debate in the House of Commons, said he "founded himself on the authority of the eminent Serjeant Maynard." The next day all the

newspapers reported him as saying that he "founded himself on the authority of an eminent sergeant-major." The late Mr. Bonar Dowse, when at the Bar, in a speech in an important case, quoted Tennyson's words, "a cycle of Cathay," but the learned reporter declared next day he had said "a circus in Bombay." On another occasion, when a judge, he remarked from the Bench that "the ordinary Irish resident magistrate was as incompetent to state a case as to write a Greek ode," whereas the newspaper reporter made out that he said that "the ordinary Irish resident magistrate could no more state a case *than he could ride a Greek goat.*"

After these lapses we must excuse a Toronto reporter who stated that a learned counsel who had said he "relied on the well-known rule of *ejusdem generis*," had declared to the court that he "relied on the well-known rule of *be just and generous.*"

NOTES OF UNITED STATES DECISIONS.

EVIDENCE – ENTRIES IN BOOKS.—Books of original entries are held, in *Hall* v. *Chambersburg Woolen Company* (Pa), 52 L. R. A. 689, not to be admissible in evidence to prove deliveries of goods sold under a contract requiring their delivery from time to time in the future. A note to this case reviews the authorities as to what is provable by books of account.

Entries in the books of a partnership are held, in *Chick* v. *Robinson* (C. C. A. 6th C.), 52 L. R. A. 833, to be admissible against a special partner who, by statute, is given the privilege to examine into the state and progress of the partnership concerns and to advise as to their management, to shew the time of the payment of money into the firm by him, and on the question as to his partnership liability under the statute, which made that depend in part upon the payment by him of his share of the capital at the time of filing the certificate of partnership and an affidavit stating that the capital specified in the certificate has been paid in. An extensive note to this case reviews the authorities on partnership books of account as evidence.

DONATIO MORTIS CAUSA. A gift of bank certificates causâ mortis is held to have been made where the donor called for the keys of a trunk and asked to have it unlocked and the certificates indorsed, or said that he himself had indorsed them; and the donee is held, in *Royston* v. *McCulley* (Tenn.), 52 L. R. A. 899, not to be estopped from claiming this gift by first making an unsuccessful attempt to hold the property under an alleged nuncupative will.