Canada Law Journal.

VOL. XXXV. FEBRUARY 1, 1899. NO. 3.

Co-incident with the assumption by the United States of its responsibilities as one of the great nations of the world comes to the Judges of the New York Supreme Court the propriety of braving democratic sentiment by donning a proper Court costume of black silk gowns. We trust that their brethren in other States will follow this good example. It is the right thing to do, and the custom should never have been discarded. Our young cousins south of us are getting on nicely. When they have taken some other nation in hand, and acquired a few more foreign possessions, we shall expect to see their judges robed in ermine instead of black silk.

Literary laymen have been wont to gird at us in the past for the prosaic methods of our treatise writers. Mr. Beven, in the second edition of his work on "Negligence," did somewhat to remove his craft from the charge of lack of rhetorical glamor, and gave us much pedantry where he should have given us law, or stayed his hand. Now we have Mr. F. T. Piggott following in his aberrant wake ("Two Chapters of the Law of Torts"), and making "sad-browed Astræa" the uncongenial patroness of not only what Ruskin contemptuously calls "fine writing," but also mere levity. We do not imply that Mr. Piggott fails to enunciate any sound law in his new book; but we do venture to say that the practical lawyer is offended, and justly so, when he finds the sober principles of his science overlaid with a bizarre and jocular literary method. Facetiousness has a place on the lawyer's book-shelves; but it is not usually looked for in his text-books and treatises.

The freedom with which the English legal journals criticise the judiciary may be exemplified by the castigation of Mr. Justice Ridley in a recent number of The *Law Journal*. After referring to his observations to the jury in summing up in a case, where a prisoner

had given evidence in his own behalf, the writer proceeds: "We say deliberately that his remarks in this case betray not only a very faint perception of the relative functions of judge and jury, but a total lack of the spirit of impartiality which a prisoner has a right to demand from his judge. The second incident which we have selected as a text for these observations was even more unsatisfactory. A case was being tried at Worcester Assizes. After ascertaining what the defence was to be, Mr. Justice Ridley volunteers the improper remark, 'If that is your defence, then I say it is nonsensical and preposterous, and I don't think the jury will believe it for a moment.' His lordship's attention is directed to the fact that, so far, neither the prisoner nor his counsel nor his witnesses have been heard, and he is informed that the prisoner is to be put into the box. An intimation of this sort would have steadied the equilibrium of most judges. But it only nerves Mr. Justice Ridley to still higher flights of impropriety. 'Then call him,' he retorts; 'but I give him warning that if, when he has given evidence, I am of opinion that he has committed perjury, I shall order him to be prosecuted. You had better speak with him and let him understand what I say.' The prisoner still wishes to give evidence; but his counsel prevails on him, after what has fallen from the judge, to speak from the dock. When this resolution is announced to Mr. Justice Ridley he receives it with the judicial comment, 'I should think so, indeed!' The prisoner is found guilty, with a strong recommendation to mercy, which the judge promptly disregards. In works of fiction, such as 'Alice in Wonderland' or 'Davy and the Goblin,' an episode of this description would be both relevant and amusing; in an Assize Court it is nothing less than a grave scandal. If it were likely to be repeated, it would raise a very serious issue indeed. But it may be hoped that reflection, stimulated by the emphatic expression of professional disapproval which his recent judicial conduct has elicited, will bring home to Mr. Justice Ridley's mind the fact that questions affecting liberty and life cannot be allowed to be treated by a judge as if they were merely matters of disputed accounts."

Another legal journal calls attention to matters judicial in this fashion: "It is idle to conceal the impression which prevails that, if the Bench continues to be weakened as it has been during the last few years by appointments dictated by considerations having nothing whatever to do with professional qualifications, events will

occur of more serious moment than we see at present." We should regret if such comments as above quoted indicate even a temporary decadence in the English Bench. Lovers of their country in this Dominion have felt and expressed an anxiety in a similar direction here. It is well to keep the attention of the profession and the public directed to these matters, so that both those who appoint the judges and those who are so appointed may better realize their respective responsibilities.

In connection with judicial utterances such as those above criticised, a correspondent of the London *Times* quotes the following pertinent observations of Lord Hatherly in his speech on the Judicial Committee of the Privy Council, in 1872. (See Hansard, vol. 209, p. 430):—" The dignity of the Bench is best maintained by hearing first all that persons have to say—by keeping yourself on your guard, and forming a covenant with yourself, as it were, to let every matter be fully placed before you, ere you allow yourself even to form an opinion, much less pronounce a decision upon the subject. And certainly you ought not to disqualify yourself from the office of a Judge by expressing strong opinions when only one side has been heard, or still less when nobody has been heard—opinions which have been formed by yourself in your own breast, and which possibly are so completely satisfactory to yourself that you think they must necessarily be right. That is not my opinion of judicial dignity." These are words of gold. The objectionable practice referred to is all too common on the part of many both on the superior and inferior Court Bench. It is a sign of weakness rather than of strength on the part of the Judge who so conducts himself. It is disconcerting and irritating to counsel and unjust to litigants.

PERJURY BY PRISONERS TESTIFYING IN THEIR OWN BEHALF.

The English judges seem to have developed some very remarkable differences of opinion as to the proper course to be followed when prisoners have committed perjury in giving their testimony under the provisions of the Criminal Evidence Act which came into force a few months ago. Mr. Justice Wills has

gone so far as to charge a grand jury, that the committal of a man for perjury at previous assizes was an entire mistake, as it contravened the fundamental principle that, when a question has been once decided in a court of justice, it can never be raised again between the same parties in any proceedings. The principle referred to, however, seems to be wholly out of place in this connection. So far as regards civil proceedings, it was settled long ago that a man may be perjured by an oath taken in his own cause as well as by an oath taken where he is a witness for another, (Russell on Crimes, 6th ed., p. 320), and it is difficult to see any good reason why the same rule should not prevail in criminal proceedings. Indeed this view of the learned judge is quite opposed to the few authorities on the subject that have come under our notice. In New South Wales a defendant has been successfully prosecuted for perjury in evidence given in his own behalf (*Reg.* v. *Dean*, 17 N.S.W. 357). Similarly in an unreported case tried some three or four years ago before Justice Vaughan Williams, the prisoner was sentenced for perjury in his own behalf, the learned judge saying that it was all important that prisoners should know that they could not commit perjury with impunity. And now within the last few months another English case is reported in which a man was convicted of perjury in evidence by which he sought to establish an alibi in a prosecution before the magistrates for trespassing in pursuit of game.

The technical propriety of such prosecutions may, therefore, be taken for granted. But there is certainly room for a wide divergence of view as to the extent to which it is advisable to direct such prosecutions, due regard being had to the supposed policy which prompted the enactment of the statute. An illustration of the extreme form of one theory upon the point is furnished by the truly preposterous conduct of Justice Ridley on a recent occasion which has been commented upon elsewhere. It is, of course, perfectly evident that, if judges are to make a common practice of terrorizing prisoners in this manner, the new law will tend more and more to become a dead letter. As Mr. Justice Mathews has justly and pertinently remarked, in comparing the situation to that which was created by the earlier statute allowing litigants to give evidence in civil proceedings, "no man would go into the box if he had the fear hanging over him that, whether he was believed or disbelieved, a prosecution for perjury would

follow." It is probably a case in which the only governing principle is the very vague and elastic one, that the propriety of a prosecution shall be left to the discretion of the presiding judge and the law officers of the Crown. That the leaning should be rather towards refraining from further attempts to punish the prisoner is strongly indicated by the consideration to which Mr. Justice Mathews has adverted.

But, however this may be, we fancy that few will be found to disapprove of the course followed by Mr. Justice Hawkins in a recent case where the prisoner had manifestly committed perjury. The learned judge declined to add anything to the sentence on this account, humanely remarking that, if subsequently tried for perjury, the prisoner might possibly have something to say to the jury.

THE SENATE AND THE CONSTITUTION.

Of the many difficult problems which the founders of Confederation were called upon to solve, the most difficult was that of the constitution of the second chamber, generally held to be a necessary part of the machinery of representative government. The constitution of the popular representative body presented no questions but those of detail. The principles upon which it was to be based were well understood, and there were numerous precedents and analogies by which the application of those principles could be guided. The case of the second chamber was different. No precedents and no analogies applicable to our condition could be found, or, if found, they were open to serious objection. No class of men existed in the country, who, by virtue of hereditary influence, or previous training, were marked out as specially qualified for the duty of carefully watching, revising, and when necessary, checking the legislation of the elective body, and preventing hasty and ill considered action arising from popular caprice, and from the waves of enthusiasm or gusts of passion, which frequently disturb the judgment of assemblies directly dependent upon the voice of the people. That there were men in the country qualified for such a duty, and capable also of wisely directing public opinion, of setting the highest examples of patriotism, of taking the largest and most enlightened views of public affairs, and not afraid, in the discharge of their duty, of popular prejudice or popular resent-

ment, no one could reasonably doubt. But how to select them, and how to place them in a position where their high qualities might be of service to the country, was the difficulty.

So much by way of introduction. I now desire to approach the consideration of this important subject from a purely constitutional point of view, for none other would be suitable for the columns of a legal journal; but from that standpoint it is eminently one which deserves the attention of the profession, who are so deeply interested and so largely engaged in all matters affecting the making of the laws which they are called upon to assist in administering.

The first suggestion in view of the difficulties hereinbefore alluded to, would be, as the easiest and simplest course to adopt, and the one most in accord with purely democratic ideas, to abandon altogether the scheme of a second legislative body, and to throw the whole responsibility of legislation upon the popular representatives. T he men of really conservative opinions, though representing both the Reform and Conservative parties, who framed the British North America Act, such a course would have been highly objectionable. Not only would it have been opposed to all preconceived ideas of statesmanship, but it would have been opposed to the practice and experience of governments the most democratic in their representative institutions. The establishment of a second chamber being thus held to be a matter about which no question could be raised, two plans naturally suggested themselves—one the selection and appointment of the members by the nomination of the Crown, that is to say of its responsible ministers; the other, nomination by popular election. The idea of a body partly elected and partly nominated, we dismiss without consideration, as containing in itself elements of antagonism which would entirely destroy its usefulness. To both the nominative and elective principles of appointment, serious objections present themselves. In the former case the nominations practically made by the party in power would, it may be contended, necessarily result in the appointment of friends and supporters, and would be regarded as a fitting reward for political services; and to persons so appointed the ties of party might seem more binding than the obligation to rise above party considerations which should be the chief characteristic of the second legislative body. The tendency would be to become the mere registrars of the acts of the ministerial majority, to regard its maintenance in power as the chief object to be accomplished, and

in the event of a change of administration to frustrate the policy of the party to which it was opposed. Such action would clearly be in violation of the object for which the second chamber was established, and would give reasonable ground for the contention that being useless or worse than useless, the sooner it was abolished the better. To appointments for life the further objection may be urged that men so chosen are apt to cling to their office when by physical or mental infirmity they are no longer capable of properly discharging their duty, and thereby bring the whole body into contempt.

To the principle of popular election, no matter how carefully guarded, and however limited the franchise, the great objection exists that such a body being elective, and directly representing the people, would claim equal authority with the more popular assembly. It would be liable to the same influences, and it would be composed of the same class of men, equally desirous to catch the breeze of popular opinion, and equally anxious to avoid any course, no matter how necessary in the public interest, which might run counter to the sentiment of the moment. From such a body would be excluded the very class of men of whom it ought to be composed, for the men referred to in the preceding part of this article as those best qualified for the duties of the second chamber are precisely the men who would be least inclined to enter the stormy arena of popular election, who would not, and probably could not, give the time and attention necessary for the cultivation of the arts which are required for the successful politician, and who, above all, would not make themselves the slaves of the party machine, nor bow to the dictation of the party whip. Recent events in the United States shew most clearly how the Senate of that country, a body designed to exercise most important functions, and which, for a long time, by its independence, and the character of its members, commanded universal respect, has lost those distinguished characteristics, and has surpassed the popular chamber in its subserviency to clamour, and its yielding to corrupt and degrading influences.

These objections to an elective body were urged with great force in the pre-Confederation debates, and notably by Hon. George Brown, the result being that the preference was given to the principle of nomination by the Crown.

Owing to recent events the Senate has been attacked in no measured terms, and every argument which can be urged against

the principles on which it was established has been urged as a reason why it should be abolished. In reply to this we cannot do better than quote the language of a well-known writer, whose sympathies are certainly strongly on the side of democracy:

"We are told that the belief in the need of a second chamber is a mere superstition. If it is, the superstition is very prevalent, for of the nations which since the beginning of this century have been framing for themselves Parliamentary Constitutions, Greece alone so far has failed to recognize the necessity of a second chamber. Japan, whose constitution has been framed in view of the fruits of general experience, has two chambers in her Imperial Diet, France it is true, during the agony of the revolution had only a single chamber; but the precedent will hardly be thought auspicious, since never, even in the case of the maddest despot, has there been a more frightful display of the consequences of uncontrolled power."

In considering the question as to the necessity or advisability of a second chamber the analogy of the British House of Lords, certainly the most influential and the most august of all such bodies, naturally presents itself. We are told in reference to this that in this country no such body can exist—that the House of Lords is a remnant of antiquated feudalism, and is but the representative of a privileged class which has no counterpart, and can have no counterpart in this country.

It is not true, certainly it is not the whole truth, to contend that the British House of Lords, the Imperial Second Chamber, the model upon which it was intended, as far as circumstances would permit, to establish the Canadian Senate, is merely the representative of a particular class of the community. The House of Lords does represent a very large and very important part of the body politic, but the importance of its position is due to the fact that it does very efficiently, and ably discharge the important function of revising the general body of legislation, of dealing with it from a position not affected by temporary influences, of giving time for further consideration, and of bringing to bear upon public questions the opinions of a body of men, many of whom are of the ripest experience, the greatest intelligence, and most cultivated thought.

It is perfectly true that in this country we cannot have a body of men of the standing of the House of Lords, possessing in the same eminent degree either its strength, or its weakness, but we

can have a body of men who will in some degree fulfil the functions which make the real value of the House of Lords as a part of the governing body. Such was the idea of those who framed the Act of Confederation. They sought to bring together a body of men such as we have endeavored to describe—a body of men representing all political parties, yet dependent upon none—men of varied attainments—men of ripe experience not only in political life, but in all those elements of material and intellectual progress which make up the life of a nation—men removed from the din of party warfare, yet understanding the people—their wants and aspirations, their habits and modes of thought; competent therefore to judge as to the best means of promoting their interests and developing their resources. And, with these ends in view taking their legitimate part in the management and control of public affairs.

Is there any reason why this ideal should not be realized, and if, in the past it has not been realized, why has it not been so? Apart from all questions of partisanship it cannot be denied that there are in the Senate a number of men who do realize the idea above expressed, in whom the people of this country have well-deserved confidence, whose ability as servants of the public is beyond question, whose integrity both in public and private life is above suspicion. If this is so, and who can deny it, then the true idea of the Senate has not altogether failed, and in so far as it has failed, it has failed because the Minister of the day has not realized his responsibility, and has sacrificed to party what was due to the country. Instead of doing as it was intended that he should do, select the Senators from men of all parties, he has confined the selection to his own, and the same party having been in power for a long series of years a large majority of one party has been created, and, party interests having been preferred to any other, the true principle of selection has been departed from, with great resulting discredit to the Senate, and harm to the State. Evils of this kind may to some extent be guarded against, but the only true remedy will be found in a high sense of responsibility on the part of the Minister, sustained, as in all public matters he should be, by that keen regard for the public welfare which forms the true life of a political party.

Some reforms in the constitution of the Senate may be suggested. In order to cause a flow of fresh blood so as to keep it in touch with public opinion, and to avoid the preponderance of

one particular party, as well as to prevent members outliving their usefulness, a time limit as to age, or, which would amount to the same thing, appointment for a certain number of years instead of for life, might be found beneficial. Much importance would be added to and value gained from the work of the Senate if more work was given it to do, and if its labours were not hindered and interfered with by the course taken in the Commons. Many private bills should be introduced in the Senate where there would be time, so often wanting in the Commons, to give them that careful consideration which is essential for good legislation. It is also one of the evils of our present practice that measures of importance which have been discussed ad nauseam in the Commons are sent to the Senate in the dying hours of the session, at a time when anything like fair consideration is impossible, and the Senate is condemned as a useless body by men whose verbosity is the real cause of the apparent neglect.

That in some cases the Senate may have made mistakes is but to say that it is human. That it has been influenced by partizan motives, which ought to have no power over the members of such a body, is freely charged, but the charge, if true, should properly be laid upon the shoulders of those who have departed from the original design, and lost sight of the proper qualifications which members of the Senate should possess. Careful and wise selection, having in view the real object to be attained, will remedy this evil in the future, and restore to the Senate that position of power and usefulness which the framers of the Constitution intended it should occupy. That it can occupy, no matter what political party may be in power, such a position without meeting sometimes hostile criticism is neither possible nor desirable. The independence which the Senate should possess will sometimes have to check the spirit of partizanship which often dominates the action of the popular Assembly and to insist upon further reflection before changes are effected. And this is necessarily the case, for the popular Assembly must always be under the control of a majority of one or other of the great parties which from time to time govern the country. But in such conflicts safety will be found, and in the end public opinion will sustain those who in the honest discharge of a public duty are not afraid to stem, when necessary, the current of popular feeling.

W. E. O'BRIEN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

COSTS—PLAINTIFF ORDERED TO GIVE SECURITY FOR COSTS—STAY OF PROCEEDINGS—AFFIDAVITS FILED BY DEFENDANT DURING STAY.

In *Whiteley Exerciser* v. *Gamage* (1898) 2 Ch. 405, an order was made dismissing the action with costs for non-compliance with an order directing the plaintiff to give security for costs. That order contained the usual stay of proceedings until the security should be given. Immediately before the order for security was made the plaintiffs' motion for an injunction had been ordered to stand for two weeks, the defendant undertaking to deliver to the plaintiff copies of his affidavits within ten days. In pursuance of this undertaking the defendant prepared his affidavits in answer to the injunction motion, and on the subsequent dismissal of the action claimed to tax the costs of them as part of his costs of the action. The taxing officer disallowed them, but on appeal to North, J., he held that they were taxable. He says: "The defendant was not bound, as the taxing master held, to stay his hand because there was a stay against the plaintiffs." Another point in the case was that pending the appeal to North, J., the plaintiff company was dissolved by operation of law, but North, J., notwithstanding its dissolution, held that he had jurisdiction to hear the appeal and that the appellant was in the same position as he would have been had it been heard and disposed of when first set down.

REGISTRY LAW—PROPERTY PASSING UNDER STATUTE—BANKRUPTCY—PRIORITY.

In re Calcott & Elvins (1898) 2 Ch. 460, although a case turning on the English Bankruptcy Act, may nevertheless be usefully referred to as affording light on the construction to be placed on the Ontario Registry Act (R.S.O., c. 136). The land in question had been the property of a person who had been adjudicated a bankrupt; he had concealed from the trustee his ownership of the property, and had, subsequent to his bankruptcy, twice mortgaged the land. These mortgages were duly registered. The order of adjudication was never registered. One of the mortgagees offered the property for sale under the power of sale contained in

his mortgage. The purchaser objected to the title on the ground of the bankruptcy of the mortgagor; the vendor claimed that he had acquired priority over the trustee in bankruptcy under the Registry Act. Kekewich, J., gave effect to the contention of the mortgagee, and held he was able to make a good title; but the Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.) disagreed with him, and held that the order of adjudication was not a conveyance, that the property passed to the trustee by virtue of the statute, and that such a statutory transfer was not a conveyance within the meaning of the Registry Act, and that prior registration of the order was not necessary in order to give the trustee priority over the mortgagee. A similar decision was arrived at in *Harrison* v. *Armour*, 11 Gr. 303; but subsequent legislation has superseded that case as regards the point there in question.

COMPANY—SALE OF ASSETS—AMALGAMATION—DISTRIBUTION OF CONSIDERATION FOR ASSETS—SHAREHOLDERS' MEETING—CLOSURE.

Wall v. *London and Northern Assets Corporation* (1898) 2 Ch. 469, was an action brought by a shareholder of the defendant company, to restrain the carrying out of a sale of part of the assets of the company, and the distribution of the proposed consideration for such sale. The action also called in question the validity of certain proceedings at a meeting of the shareholders called for the purpose of ratifying the proposed transaction. The defendant company was formed, *inter alia*—(*a*) to raise capital and invest it in such bonds, stocks and securities as in the articles mentioned; (*i*) to sell any part of the assets, and to accept the consideration in cash shares or other securities, and to divide any assets of the company in specie among its shareholders; (*o*) to amalgamate with any persons, companies or firms carrying on business of a like nature. A company known as the Debenture Co. carried on a like business, and the defendant company agreed to sell to the Debenture Co. all its assets, except certain shares of the Debenture Co. held by the defendant company, for £60,991, of which £59,736 was to be paid in shares of the Debenture Co., and the balance either in cash or shares of the Debenture Co., at the option of the defendant company. It was provided by the agreement that the shares so to be allotted as the consideration for the proposed sale, should be divided among the shareholders of the defendant com-

pany in manner therein mentioned. It was doubtful whether the proposed division was not illegal as interfering with the rights of the shareholders under the memorandum and articles of association of the defendant company. A meeting was called of the shareholders of the defendant company. At this meeting an amendment was proposed by the plaintiff and ruled out of order by the Chairman. After a discussion of the motion to confirm the resolution, a majority of the shareholders voted in favour of terminating the discussion, and the motion for confirmation of the proposed sale was then put and carried by a majority of the shareholders present or represented. On the motion for an interim injunction, counsel for the defendant company undertook that the proposed division of the shares of the Debenture Co. should not be made until after the trial of the action otherwise than in accordance with the articles and memorandum of association. Stirling, J., thereupon refused to grant an injunction, being of opinion that the proposed transaction was valid, and not invalidated, on the ground that the directors of the defendant company were also largely interested in the Debenture Co.; and that the proceedings at the shareholders' meeting were regular. On appeal the decision of Stirling was affirmed, the Court of Appeal (Lindley, M.R., and Chitty and Collins, L.JJ.) being of opinion that the transaction was within clause (*i*) above referred to, and also within clause (*o*), providing for amalgamation with another company. As regards the proceedings at the meeting of shareholders, the Court of Appeal found no reason to question their validity, and held that, though it would be irregular for the majority at such a meeting to prevent all discussion by the minority, yet, when a reasonable opportunity has been given for the views of the minority to be stated by some of them, it is competent for the majority to vote that the discussion be closed, and a vote taken on the motion before the chair; and it is not necessary that every member of the minority who wishes to speak should be heard.

STATUTE OF LIMITATION.—MONEY CHARGED ON LAND—ACKNOWLEDGMENT—PART PAYMENT—DEVISEE OF LAND CHARGED, ALSO TENANT FOR LIFE OF INCOME OF OTHER LAND CHARGED—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57), S. 8—(R.S.O., C. 133, S. 23).

In re Allen Bassett v. *Allen* (1898) 2 Ch. 499, is a case which turns on the Real Property Limitation Act, 1874, s. 8 (see R.S.O.,

c. 133, s 23). The facts of the case were as follows: A testator, by his will dated January 11, 1855 devised his real estate and bequeathed his personal estate to trustees, upon trust, for sale, and out of the proceeds to pay his debts, and to pay the income of the residue to his wife for life, with remainder over to his children living at her death. By a codicil dated January 30, 1855, the testator revoked the devise contained in his will as to certain specified parcels of land which he devised to his wife for life, with remainder to his two sons in equal shares in fee. The whole of the testator's real estate was subject to a charge of £3,000, created by a predecessor in title of the testator. In 1865 the trustees of the will sold the greater part of the real estate (other than that specificially devised by the codicil), and out of the proceeds paid the £3,000 and some of the testator's own debts. The widow died in 1895, having from the time of the sale until her death received the income of the residue of the proceeds of the sale, and also the rents of the unsold land, including that devised by the codicil. She never gave the trustees any acknowledgment of the liability of the specifically devised land to bear a proportionate part of the £3,000, or paid to them any part of the £3,000, or any interest thereon. It was contended by the residuary devisees that a payment by the tenant for life of the interest on the £3,000 must be presumed, because if she had in fact paid it to the trustees she would have been entitled to get it back from them as tenant for life. North, J., although of opinion that the specifically-devised land was liable at the time of the testator's death for a proportionate part of the £3,000, yet was of opinion, in the absence of any actual payment or acknowledgment by the tenant for life, that the right to charge the specifically-devised land was barred by the Statute of Limitations, s. 8 (R.S.O., c. 133, s. 23), and that the case was governed by *In re England* (1895) 2 Ch. 820 (noted ante vol. 31, p. 438).

MARRIAGE SETTLEMENT — CONFLICT BETWEEN TWO—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—REVOCATION.

In the case of *In re Gundry, Mills* v. *Mills* (1898) 2 Ch. 504 a lady in contemplation of marriage on March 15th, 1879, executed a marriage settlement in which she covenanted to settle on the same trusts her after acquired property, and on May 7, 1879, she executed a second settlement which also contained a covenant

to settle after acquired property upon the trusts of the second settlement which were different to those of the first; under the first settlement the wife having a power of appointment only in favour of her issue, and by the second settlement she had an unlimited power of appointment. The marriage took place on May 10, 1879. No evidence was offered as to the circumstances under which the second settlement came to be executed. The wife claimed that the second settlement had the effect of revoking the first so far as there was any inconsistency between the two, but North, J. declined in the absence of evidence to decide that it had that effect.

BUILDING CONTRACT—DEVISEE OF LAND ON WHICH BUILDINGS ARE IN PROCESS OF ERECTION—DEVISEE, RIGHT OF, TO HAVE BUILDINGS COMPLETED AT COST OF PERSONAL ESTATE.

In re Day, Sprake v. *Day* (1898) 2 Ch. 510 was an administration action, and in the course of the administration it appeared that the testator had contracted for the building of houses on certain property devised to his daughter, these houses were in course of erection at the time of his death, and were not then complete. The testator had also commenced the erection of certain houses on land belonging to his daughter which were also incomplete at his death. The daughter claimed that she was entitled to have the buildings on the land devised, and also those commenced on her own land, completed at the cost of the testator's personal estate. North J., held that the claim was well founded as to the buildings on the land devised, and supported by the case of *Cooper* v. *Jarman* L.R. 3 Ex. 98, but, in the absence of any proof of any binding agreement for the erection by the testator of the buildings on the daughter's own land, she was not entitled to any claim against the personal estate for the completion of those buildings.

WILL—TRUST FOR SALE—POWER TO APPLY CAPITAL OR INCOME FOR REPAIRS—IMPLIED POWER TO MORTGAGE.

In re Bellinger, Durell v. *Bellinger* (1898) 2 Ch. 534. A testator gave his real and residuary personal estate to trustees, in trust, for sale, with power of postponement, followed by a power, in common form, during such postponement to manage and let the real estate, and to make out of the income or capital of his real and personal estate any outlay they might consider necessary

for renewals of leases, improvements, repairs, premiums on policies or otherwise for the benefit or in respect of his real or personal estate; but the will contained no express power to mortgage. The point submitted for the opinion of Kekewich, J., was whether the trustees had power to raise money by mortgage of the real estate for the purposes of effecting repairs on the houses on the real estate, and he held that the power to apply the corpus of the property in that way necessarily implied a power to mortgage.

LEASE — CONSTRUCTION — RIGHT-OF-WAY — MISDESCRIPTION — FALSA DEMONSTRATIO.

In *Cowen* v. *Truefitt* (1898) 2 Ch. 551, the plaintiff was lessee of the rooms on the second floor of Nos. 13 and 14 Old Bond Street, together with right of access to and from the premises "through the staircase and passages of No. 13." As a matter of fact there was no staircase in No. 13 leading to the demised premises, but there was such a staircase in No. 14. It was held by Romer, J., that a right of access over the staircase in No. 14 passed to the lessee, and that the words "of No. 13" might be rejected as a falsa demonstratio, though admitting the case was not free from difficulty.

PRIVY COUNCIL—LEAVE TO APPEAL—COSTS, TERMS IMPOSED AS TO, ON GRANTING LEAVE TO APPEAL.

In *Montreal Gas Co.* v. *Cadieux* (1898) A.C. 718, an application was made to the Judicial Committee for leave to appeal on behalf of the defendants, and the question sought to be raised was whether the defendants were compellable to supply gas to a person in one place when he neglects and refuses to pay for gas supplied to him by the defendants in another place. The committee granted the leave asked, but on the terms that the defendants should submit to pay the respondents' costs of the appeal in any event.

EVIDENCE—REASONS OF JUDICIAL OFFICER INADMISSIBLE AS EVIDENCE—IMPROPER MOTIVE FOR DOING A LEGAL ACT—RULE OF COURT, INVALIDITY OF.

King v. *Henderson*, (1898) A.C. 720, is an appeal from New South Wales. The action was brought to recover damages for maliciously presenting a petition in bankruptcy against the plaintiff. The plaintiff was non-suited at the trial, and he then moved for a new trial on the ground of the refusal of the judge at the trial to

admit the reasons given by the registrar on dismissing the defendant's application for a sequestration, and also for refusing to submit to the jury the question whether the defendant had not instituted the proceedings for the ulterior purpose of forcing the appellant out of a firm, of which he was a member. The Judicial Committee (Lords Watson, Hobhouse and Davey and Sir R. Couch) were of opinion that the registrar's reasons were not evidence, and had been properly excluded. Also that in the absence of proof of positive fraud, on the part of the defendant, the fact of their having some ulterior motive, other than the equal distribution of the plaintiff's assets, in taking the proceedings in bankruptcy, was immaterial and no evidence of any want of reasonable and probable cause. We may observe that the question of improper motive as affording a ground of action has recently received a good deal of judicial elucidation, notably in this case, and by the House of Lords in *Allen* v. *Flood*, noted ante vol. 34, p. 224.

A subsidiary question arose in this case as to the validity of a Rule of court, which purported to give the court a jurisdiction beyond that contemplated by the statute, under which it was assumed to be made, and the committee was of opinion that the Rule was ultra vires and void.

CUSTOMS—TARIFF ACT, CANADA, 1894 S. 4—R.S.C.(1886) C. 32 S. 150—CONSTRUCTION—DATE OF IMPORTATION OF GOODS.

In *Canada Sugar Refining Co.* v. *The Queen* (1898) A.C. 735, the construction of the Canada Customs Tariff Act, 1894, as amended by the Tariff Act, 1895, was in question. The Act requires duty to be paid upon raw sugar "where such goods are imported into Canada or taken out of warehouse for consumption therein." And the question was when the duty attaches and becomes payable. The Judicial Committee of the Privy Council (Lords Watson, Hobhouse and Davey) determined that it is when the goods are landed and delivered to the importer, or to his order, or, if placed in bond, when delivered out of bond, and not when they arrive at a port of call in Canada, or at the port of discharge. The appellants contended that s. 150 of the Customs Act, 1886, which directs that the precise time of the importation of goods is to be the time when "they came within the limits of the port at which they ought to be reported," favoured their construction that the importation into Canada took place on their first arrival at any port in Canada,

or at all events at the port of discharge, but their Lordships were of opinion that s. 150 must be construed consistently and harmoniously with the rest of the Act and with reference to its context, and so construing it, the "report" referred to in s. 150 must mean the report to be made by the Master under s. 25 completed by the entry to be made by importer under s. 34, and adopting that construction it means the port where the goods are to be landed mentioned in s. 31.

Correspondence.

DIVISION COURT EXECUTIONS.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,: Referring to the letter of your correspondent in your number for November 15th, 1898, concerning the repeal by the Legislature of those sections of the Division Courts Act enabling a party to transfer a judgment to the County Court where the sum remaining unsatisfied thereon amounted to $40, there is another point in which it appears to me that the new procedure of issuing execution against lands direct from the Division Court is defective. This is in regard to the seizure and sale of a term of years. The law was and still is that a term of years being a chattel could not be sold under an execution against lands, but only under an execution against goods: *Court* v. *Tupper*, 5 O.S. 640. But though it could be sold under an execution against goods issued from the Superior Court, it could not be sold under an execution against goods issued from the Division Court, as it is within sec. 234 of the Division Courts Act: *Duggan* v. *Kitson*, 20 U.C.R. 316. Under the former practice, when a transcript of a judgment from the Division Court was once filed in the County Court, it thereby became a judgment of that Court, and an execution could be issued thereon under which a term of years could be sold. Now the judgment remains a judgment of the Division Court. The term of years cannot be sold under the Division Court execution against goods, nor can it be sold under the execution against lands. Can it be sold at all?

Napanee. W. H. PARRY.

TENANT DISPUTING LANDLORD'S TITLE.

To the Editor of the Canada Law Journal.

SIR:—The Supreme Court of Nova Scotia have by a recent decision somewhat shattered the old time-honoured doctrine that a tenant cannot dispute his landlord's title. The facts were as follows:—A., an heir at law to B, the mortgagor of certain lands, leased to C. under a written agreement a certain house being on a part of the mortgaged property. Afterwards foreclosure proceedings were taken against the representatives of B., of whom A. was one, and an order of sale passed, and the property was sold to D., who notified C. to pay the rent to him. D. could not get possession of the property peaceably, and had to apply for an order against all in possession. Now, sisters of the deceased mortgagor resisted, so far as the right to the possession of a portion of the mortgaged premises, including the premises leased by A. to C., and an order passed expressly reserving that portion. In the meantime A. repaired the premises and insisted on the rent being paid to him; C. paid to no one; A. distrained for rent, and C. replevied. The whole question, of course, turned on C.'s right to dispute his landlord's title. The County Court Judge, before whom the cause was originally tried, decided that C. could not dispute A.'s title under the circumstances. The Supreme Court, on appeal, have unanimously reversed this decision, and that without taking time to look into the question. The Court consisted of Ritchie, Meagher and Henry, JJ.

The grounds for the decision have not reached me, but it is likely they distinguished it from the leading case of *Delaney* v *Fox*, in 26 L.J. C.P. 248, and also in 15 Ruling Cases 299. I cite from the latter report. At the trial before Martin, B., at the Yorkshire Spring Assizes, 1857, the defendant gave prima facie evidence of his title, and the plaintiff then showed that at the time she was let into possession by the defendant he had no title himself, and that the real owner, Mrs. Knowles, distrained on the tenant of a cellar in the house in question, and threatened to distrain on the plaintiff, who, under the influence of that threat, paid her the rent. It was objected on behalf of the defendant that the plaintiff was estopped from denying his, the defendant's title, but a verdict was given for the plaintiff, with 40s. damages on the first court, leave being reserved to the defendant to move to have the verdict

entered for him. A rule nisi was afterwards obtained to enter a verdict for the defendant on the ground that the plaintiff was estopped from shewing that the defendant had no title, and for the defendant to amend his pleadings, the plaintiff being at liberty if it should be necessary, on the argument of the rule to move that the verdict should be entered for her on the second court of the declaration. Cockburn, C.J., said: "I think this rule must be made absolute. I am of opinion that in this case the plaintiff was estopped from denying the title of the defendant under whom she had got possession of the premises as her landlord, upon the common-law principle that a person who gets possession of land from another is, by taking possession from him, estopped from denying his right to give possession. It has been attempted to make a distinction between an action of ejectment and one of trespass, and what was said by Pollock, C.B., in *Watson* v. *Lane*, is relied upon. Now, if ejectment had been brought against the tenant, he would have been estopped from denying his landlord's title, and so it is in trespass also. But, on the other hand, it is true that the tenant may show that the landlord's title has expired, and he may do that, among other ways, by shewing an eviction, either actual or in point of law, and *The Mayor, etc., of Poole* v. *Whitt* is instanced as a case of constructive eviction. It is not necessary to decide that question here, because there was not even a constructive eviction. Here there was only a payment of rent on a threat. The case cited was one neither of ejectment or trespass, but was founded upon a covenant to deliver up fixtures at the end of a term, and what was said by the Chief Baron in *Watson* v. *Lane* had reference to the form of action. Here there can be no difference in principle between trespass and ejectment. There was nothing which could amount to a constructive eviction, even if we were of opinion—of which I am not as at present advised—that there could be for this purpose such a thing as a constructive eviction." Williams, J., said: "It has been fully established by a long series of cases that a tenant shall not be permitted as against the landlord who let him into possession, to dispute that landlord's title so long as the possession continues, but he may shew that it has expired. The case of *Doe* v. *Barton*, 11 Ad. &. El. 307, was decided as an instance of that doctrine, but it may be doubted whether it really was so. As regards the eviction the rule is that if a party having title paramount enters and then restores posses-

sion to the tenant, the question may be raised because the possession is not the same."

The learned County Court Judge in his decision takes the same ground as Williams, J. He says: "Plaintiff never went out of possession nor delivered back the premises to Mr. McAlpine, which, I think, he was bound to do before he could dispute his landlord's title, nor was he evicted by one having a superior title to his landlord." I presume the Court found there was a constructive eviction, and the letting of the premises by A. in his personal capacity was the same as if he demised as administrator of B. Let us suppose that A. was entitled to the possession of the demised premises in his own right adversely to B.'s right, would the proceedings that were taken preclude him from claiming the premises? In other words, having been brought in as administrator, was he bound to disclose his title? I apprehend from the decision that he was so bound. The head-note in the report of *The Mayor, etc., of Poole* v. *Whitt* is as follows: "In an action of covenant on a lease the defendant pleaded that before the making of the lease one P. impleaded the plaintiff's lands; that the plaintiffs were found by the inquisition to be seized of the demised premises, which were then leased to T.B. for seven years, subject to two mortgages; that the sheriff delivered the premises aforesaid to P. to hold until the damages should be fully levied; that before any rent became due, P. by virtue of the said delivery to him, ejected, expelled and put out the defendant therefrom. The plaintiffs traversed the eviction in the words of the plea. It was proved at the trial that P. demanded rent of the defendant, and threatened, if he did not pay, to turn him out, whereupon the defendant paid P. three-quarters of a year's rent, and attorned to him without the plaintiff's knowledge:—*Held*, that P. having merely a reversion expectant on the determination of the mortgage terms, had not title to evict the defendant; that the attornment was immaterial, and the plaintiffs were entitled to succeed on that issue,—the expulsion, as pleaded, not having been established by the evidence. *Semble*, that where a party being entitled to evict another in occupation of premises proceeds to exercise his right, upon which the tenant consents to change the title under which he holds, and attorns to the claimant, that is equivalent to an expulsion."

The most that was decided here was that if proceedings were actually taken by the true owner against the tenant, that might be

construed into an eviction by form of law, that is, a constructive eviction; but this doctrine is received with doubt by each of the learned Judges in *Delaney* v. *Fox*. As the Court did not give any written decision, and a very meagre report, if any, will be given officially, I thought it wise, owing to the importance of the decision, to ask you to publish this.

Sydney, N.S. D.A.H.

REPORTS AND NOTES OF CASES

Province of Ontario.

HIGH COURT OF JUSTICE.

Ferguson, J.] HIGGINSON *v.* KERR. [Dec. 30, 1898.

Will—Construction—Legacy—"Cousins"—Indefinite disposition—Trust—Power of appointment—General power.

The testator died a bachelor, leaving no relations nearer than first cousins. By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of $1, and then proceeded: "(9.) I desire that my executors herein named shall have full power to make such and any disposition of the residue and remainder of my property and estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations. (10.) I also give my said executors power, and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good, and deserving. (12.) I also give my executors power to hold property in trust for any of my friends whom they may think proper." By clause 1 he appointed four of his neighbours executors and trustees of his will.

Held, 1. The word "cousins" in clause 7 must be taken to mean first cousins only.

2. Clause 9 did not contain a gift of the residue, but a power to make disposition of it. Both the subject and object of this disposition were left undefined and wholly in the discretion of the executors, and the disposition was therefore void, and no trust was created in favour of the relations in Ireland. The power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust. The executors were given an absolute power of appointment in respect of the residue, which they might

exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue unless in case of default of appointment.

3. The fact that the executors were in clause 1 called "executors and trustees," and by clause 12 empowered to hold property in trust for any friends of the testator as they might think proper, did not shew that the residue was held by them in trust or that there was any trust connected with the power given.

Aylesworth, Q.C., for plaintiffs, the executors. *E. J. Reynolds*, *Ludwig* and *G. C. Biggar*, for the several defendants.

Meredith, C.J.] THOMSON *v.* CUSHING. [Jan. 7.

Equitable execution—Interest in land—Writ of fi. fa.—Necessity for—Provisions of will—Effect as to creditor—Declaratory judgment.

The testatrix bequeathed to her executors a sum of money in trust to be expended by them in the purchase of a farm for her nephew, to be conveyed to him subject to the express condition that it should not be sold, mortgaged or affected in any way, but should be held and enjoyed by him as usufructuary during his life, and at his death should become the property of his children. In a subsequent paragraph of the will the testatrix directed that no part of her estate should be liable to seizure or attachment by any creditor of any legatee, "the same being made as and for the alimentary maintenance and support of my several legatees, and I therefore declare the same to be insaisissable." The executors bought a farm for the nephew and had it conveyed to themselves. Subsequently they executed an instrument in which, after reciting the will and the purchase of the farm, they declared that they stood seized of it upon the trust and for the purposes and subject to the provisions contained in the will. In an action by a judgment creditor of the nephew to have the latter's interest in the land declared and sold to satisfy the judgment, or for a receiver to receive the rents and profits:—

Held, 1. The plaintiff could not reach the interest, if any, of his judgment debtor in the lands in question without having a fi. fa. lands in the hands of the sheriff of the county in which the lands lay, at the time of the commencement of the action.

2. The directions of the will were ineffectual to prevent the lands being made liable to creditors, the judgment debtor had no interest in the land which could be made available by legal process for satisfaction of the judgment; and if they were not effectual, there was nothing in the way of ordinary process; and in either case the action was not sustainable.

3. The plaintiff had no locus standi to claim a declaration as to the right of the judgment debtor in the lands. *Bunnell* v. *Gordon*, 20 O. R. 281, followed.

E. D. Armour, Q.C., and *H. J. Martin* for plaintiff. *A. W. Briggs*, for defendant E. Sawtell. *A. J. Boyd*, for infant defendants. *Macdonald*, Q.C., for other defendants.

Meredith, C. J.] STRUTHERS *v.* TOWN OF SUDBURY. [Jan. 7.

Assessment and taxes—Exemptions—R. S. O. c. 224, s. 7, s.-s. 5—Public Hospital.

The Sudbury General Hospital was the property of private individuals, and the profits derived from carrying it on belonged to them; it had not a perpetual foundation; no part of its income was derived from charity; it was not managed by a public body; but one object of it was the benefit of a large class of persons; and the Ontario Legislature had placed in the list of institutions named in schedule A. to the Charity Aid Act, R.S.O. 1887, c. 248, and declared it to be entitled to aid under the provisions of that Act, subjecting its by-laws to the control of the Executive Government and the hospital itself to Government inspection.

Held, that it was entitled to exemption from municipal taxation as being a "public hospital" within the meaning of s.-s. 5 of s. 7 of the Assessment Act, R. S. O. c. 224. *Blake* v. *Mayor, etc., of London*, 18 Q.B.D., 437, 19 Q.B.D. 79, distinguished.

Aylesworth, Q. C., for plaintiffs. *W. R. White*, Q.C., for defendants.

Meredith, C. J., Rose, J., MacMahon, J.] [Jan. 7.

MAISONNEUVE *v.* TOWNSHIP OF ROXBOROUGH.

Ditches and watercourses — Award—Engineer—Jurisdiction—Omissions—Declaration of ownership—Friendly meeting—57 Vict. c. 55, ss. 7, 8—Directory provisions—Waiver—Validating clause, s. 24.

The landowner who initiated the proceedings under the Ditches and Watercourses Act, 57 Vict. c. 55, upon which the township engineer acted in making an award, had not filed a declaration of ownership pursuant to s. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to s. 8, before filing his requisition.

The plaintiff whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching.

Held, that the provisions of ss. 7 and 8 should be treated as directory only.

Held, also, following *Moore* v. *Gamgee*, 25 Q. B. D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating landowner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction.

Held, also, that s. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions.

Aylesworth, Q.C., for the plaintiff. *Leitch*, Q.C., for the defendants.

Meredith, C. J.] THOMPSON *v.* PEARSON. [Jan. 10.

Costs—Scale of—Ascertainment of amount—County Courts Act, R.S.O. c. 55 s.23 (2)—Contract.

The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of a certain stock at a named price, the plaintiffs undertaking that in the event of loss the defendant's liability should not exceed $200. The contract involved the making by the plaintiffs of a contract for the future delivery of the shares at the price named, and their acquiring the stock when it became necessary, by the rules of the exchange, to complete the transaction. In an action upon this contract the plaintiffs recovered $200.

Held, that the amount of their claim, as found by the judgment was not liquidated or ascertained by the act of the parties within the meaning of s. 23 (2) of the County Courts Act, R.S.O. c. 55; and the plaintiffs were entitled to costs on the scale of the High Court, although the amount recovered did not exceed $200, the trial judge having certified for costs on the High Court scale, in the event of the amount recovered being found to be unascertained.

R. McKay, for plaintiffs. *J. H. Denton*, for defendant.

Meredith, C. J.] HARRIS *v.* TORONTO ELECTRIC LIGHT CO. [Jan. 11.

Discovery—Examination of officer of company—Duty to obtain information from servants—Privilege.

Upon the examination for discovery of an officer of an incorporated company, in an action brought against the company by a person whose building they supplied with electrial power, to recover damages by fire which he alleged to have been caused by their negligence, the deponent, being asked whether on the date of the fire there was any indication at the power house or the defendants' works that there was any trouble or breakage in the wires on the circuit by which power was supplied to the plaintiff, answered that there were such indications.

Held, that he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; and if he had not such knowledge, but could obtain it from a servant of the defendants who acquired the knowledge in the course of his employment, he was bound to obtain it so as to enable him to answer the question; and even if the information which the deponent had was obtained for the purpose of enabling counsel to advise, and he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purposes of discovery. *Bolckow* v. *Fisher*, Q.B.D. 161, and *Southwark Water Co.* v. *Quick*, 3 Q.B.D. at p. 321, followed.

J. B. Clarke, Q.C., for plaintiff. *Henry O'Brien*, for defendants.

Meredith, C.J.] [Jan. 13.

ACCOUNTANT OF THE SUPREME COURT OF JUDICATURE *v.* MARCON.

Chattel mortgage — Erroneous description of dwelling house — Falsa demonstratio.

The goods intended to be included in a chattel mortgage were described in the body thereof as the goods and chattels mentioned in the schedule, all of which now are the property of the mortgagors, and are situate upon the premises on the north-east corner of Queen Street and Birch Avenue, in the township of York. Indorsed on the mortgage was a schedule containing a list of the goods, which consisted of household furniture, each article being described, and the articles in each room set ou under a heading describing the room according to the purpose for which it was used. The mortgage contained a covenant on the part of the mortgagors that if they should do any of certain acts, one of which was the parting with the possession of the goods, the mortgagee was to be entitled to take possession. One of the mortgagors was described as an "esquire."

Held, that, having regard to these provisions, it was to be taken that the mortgaged goods were the property of the mortgagors; that they were in their possession, and were contained in the building described in the mortgage; that that building was the dwelling house of the mortgagors; and that the goods were the household furniture in use by the mortgagors. *Hovey* v. *Whiting*, 13 S.C.R. p. 559, referred to.

And, although, when the mortgage was executed, the goods actually were in the house at the north-west corner of Queen Street and Birch Avenue, and not that at the north-east corner, the mortgage was not void; the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagors' dwelling house would remain.

Coatsworth, for execution creditor. *H. T. Beck*, for claimant.

Meredith, C.J., Rose, J., MacMahon, J.] [Jan. 14.

IN RE ROBERTSON AND CITY OF CHATHAM.

Municipal corporations — Local improvements—Frontage system—Assessment—Benefit—Appeal—Court of Revision—County Court Judge—Prohibition—R.S.O. c. 223, ss. 664-685.

The municipality in 1894 by by-law adopted the local improvement system as to the making of sewers, and also passed a general by-law for the purpose mentioned in s-s. 1 of s. 612 of the Municipal Act then in force, 55 Vict. c. 42.

The appellant's lands fronting on a street along which the municipality proposed to make a sewer, were, with the other lands so fronting, assessed at a uniform rate per foot frontage, for a portion of the cost of the sewer, and certain lands not fronting on the street, but which would derive benefit

from the sewer, were assessed for the remainder of the cost. The appellant appealed against his assessment to the Court of Revision, but his appeal was dismissed, and he then appealed to the County Court Judge, who found that the lands in question would be benefitted by the proposed sewer, but that the assessment was too high, and he reduced it, directing that the amount struck off should be assessed pro rata over the other properties included in the assessment.

Held, that he had no jurisdiction to do so; and prohibition awarded against the enforcement of his order.

Having regard to the provisions of the Municipal Act, R.S.O. c. 223, ss. 664-685, relating to local improvements, the method of assessment in such a case as this is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and assess the proportion appertaining to each class according to its frontage, and not according to the proportion of benefit received by each parcel or lot of land.

The County Court Judge could not inquire into the matters dealt with by s. 773 (6), as to lots being unfit for building purposes, because the municipal council had taken no action under that sub-section; and, if such action had been taken, it would not have been subject to appeal.

History and construction of the legislation commented on.

J. T. Small, for appellant. *Aylesworth*, Q.C., for municipality.

ASSESSMENT CASES.

In re Appeal of the Accountant of the Supreme Court of Judicature of Ontario.

Assessment—Trust moneys on deposit to the credit of Accountant of Supreme Court, Ontario.

The city assessed, as personalty vested in a trustee, the moneys at the credit of the accountant of the Supreme Court of Judicature for Ontario, in the bank (excluding investments) at the sum of $400,000. On appeal to the County Judge from a confirmation by the Court of Revision of such assessment:

Held—1. Such moneys were assessable as personal property, and properly assessed as trust moneys in the name of a trustee, the accountant of the Supreme Court.

2. These moneys were not held for Her Majesty or for the uses of the province, but in trust for the individuals entitled to such moneys, and that such moneys were therefore not exempt from taxation.

3. The assessment should be increased beyond the said sum of $400,000 to the amount of the actual amount of such uninvested moneys standing to the credit of the accountant of the Supreme Court at the date of the hearing of the appeal.

[Toronto, Nov. 17, 1898—McDougall, Co.J.

The assessment department of the city of Toronto this year, for the first time, claimed the right to assess moneys paid into Court and standing at the date of the assessment to the credit of the accountant of the

Supreme Court. This fund, discarding investments made by the accountant, mortgages, debentures, etc., represented a very large amount. It was admitted to be between $1,250,000 to $1,500,000. The fund comprises the moneys of infants, lunatics and suitors which have been paid into Court to the credit of the accountant from time to time, under the direction or orders made by the Court. The legal status of the accountant is regulated by R.S.O. 51, sec. 159:

(1) Subject to any rules of Court made under the provisions of sections 122 to 129 of this Act, the present accountant and his successors appointed under section 131 of this Act shall be the accountant of the Supreme Court of Judicature for Ontario, and shall be so designated.

(2) For the purpose of holding the mortgages, stocks, funds, securities and all estate therein, and any interest in real and personal estate, effects or property, and of all moneys and effects mentioned and described in sections 162 and 163 of the Judicature Act, 1895, or in any rule or order of Court, the said accountant shall be a corporation sole by the name of "The accountant of the Supreme Court of Judicature for Ontario," and the said accountant, as such corporation sole, shall have perpetual succession, and may sue and be sued, may plead and be impleaded in any of Her Majesty's Courts in this province.

The nature of the estate of the accountant in the said moneys appears by sec. 162 of the Judicature Act of 1895 (58 Vict. O., c. 12), which enacts that all mortgages, stocks, funds, annuities and securities invested in the name of the accountant of the Court of Chancery, or in the accountant of the High Court, and all other mortgages, stocks, funds, securities and all estate therein, and any interest in real and personal estate, effects or property, and all moneys and effects, bonds and guarantees . . . vested in and held by the accountant of the High Court in his own name or in the name of his office, as such accountant, subject to the same trusts as they may then respectively have been subject to, are hereby declared to be, and to have been, from and after the 30th day of March, 1885, vested in the said corporation sole under the name aforesaid.

Sec. 163 transfers all mortgages, funds, etc., etc., vested prior to the 30th day of March, 1885, in the name of the Registrar of the Court of Appeal . . . are hereby declared to be and from and after the said day to have been transferred to, and vested in, the accountant of the Supreme Court of Judicature for Ontario, as such accountant, subject to the trusts which respectively attached thereto.

Sec. 164 provides that in case at any time there is no accountant the funds, etc., standing in his name shall become and be vested in any officer named by the Supreme Court, by general rule, "subject to the same trusts, as they may then respectively be subject to."

Dr. Hoskin, Q.C., for the appellant. *Fullerton*, Q.C., and *H. L. Drayton*, for the city.

McDougall, Co.J.: A corporation sole is a person: R.S.O., c. 1,

sec. 8, s-s. 13. The accountant is therefore a trustee of the moneys in Court which are vested in him, subject to the same trusts as such moneys were subject to when they came into his hands. As such trustee he may sue and be sued. He does not hold these funds for Her Majesty or for the use of the province, but for the various private individuals entitled to or who may be declared to be entitled thereto by the Court. The Crown has no beneficial interest in these moneys.

Under the Assessment Act, R.S.O. 224, sec. 7, All property in this province is liable to taxation unless specially exempt. Personal property liable is defined in sub-section 10 of section 2 as including "all goods, chattels, interest on mortgages, dividends from bank stock, dividends on shares, or stocks of other incorporated companies, money, notes, accounts and debts at their actual value, income and all other property, except land and real estate . . . and except property expressly exempted."

Now, turning to the exemptions, sub-section 1 of section 7 exempts all property vested in or held by Her Majesty, or vested in any public body or body corporate, officer or person in trust for Her Majesty, or for the public use of the province.

Next, considering how trust moneys are to be assessed and rated by the municipality, section 46 of the Assessment Act enacts that personal property in the sole possession, or under the sole control of any person or trustee, guardian, executor or administrator, shall be assessed against such person alone. Sub-section 2 of 46 directs that the trustee shall be assessed in his representative character for the value of the real and personal estate held by him . . . at the full value thereof.

It was stated by the accountant in examination before me that the moneys in Court held by him, invested and uninvested, represented the several moneys of a large number of individuals. The accounts would exceed 5,000 in number, and many of the separate accounts might represent a variety of interests of a number of individuals.

It was contended before me that it was never intended by the Legislature to allow these particular funds to be subject to taxation, but a careful consideration of the various statutes and clauses above referred to force me to the conclusion that the Legislature has not expressly exempted them. It has expressly vested funds, the property of private individuals, which have come into the hands of the Court, in the name of an officer whom it constitutes a corporation sole to hold such funds upon the same trusts as those impressed upon the funds before they were paid into Court. These private persons are the beneficial owners of the funds. It is true, in some instances, that at the time such moneys were paid into Court the rights of the private parties as between themselves may not have been determined. The Court is given power to settle such questions, but the moneys meanwhile are safeguarded by being paid into Court. It is nowhere declared that the officer, the accountant, the corporation sole, holds these funds in any sense for Her Majesty or for the use of the province.

There are very few cases which can be cited which will aid in determining the questions raised upon this appeal. One or two referred to on the argument, however, may be adverted to. The *Mersey Docks* v. *Cameron* and *Jones* v. *Mersey Docks*, 11 H.L.C. 443, is a case which probably treats most closely the principle which is involved in the present appeal, namely, the right to assess property vested in a trustee constituted by an Act of Parliament to be the custodian of moneys of a large number of private individuals, the trustee himself a bare trustee, having no beneficial interest in the property, or in the result of its management. There it was held that trustees who were constituted by an Act of Parliament the Mersey Docks Board, and were specially appointed to have control of certain docks, etc., vested in them as trustees in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were liable to be rated as occupiers, though they occupied such docks, etc., only for the purpose of the Act and derived no benefit from the occupation.

In the case of the liquidators of the *Maritime Bank* v. *Queen*, 17 S.C.R. 657, it was held that money deposited with the Finance Minister for the Dominion, by virtue of his office, in trust for an insurance company, was not the money of the Crown, and that the Crown held the money in trust for the company; and the Finance Minister having deposited the same in a bank which failed, the Crown was not entitled to exercise the prerogative right of the Crown of payment in full by the liquidators of the full amount in priority to other creditors.

Quirt v. *Queen*, 19 S.C.R. 510, decided that a piece of land part of the assets of an insolvent bank, and vested by 33 Vict., c. 40 (D.), along with all the other assets of the bank in the Dominion Government, was exempt from taxation because the Crown had a beneficial interest in the land. In this case the government had sold the land to a purchaser and taken a mortgage back. The creditor had covenanted to pay the taxes, but had failed to do so, and the land had been sold for taxes. *Held*, that the sale must be set aside. Here it will be observed that the only ground for exempting the land from liability for taxation was because the Crown possessed as mortgagee (and possibly as a creditor) a beneficial interest in the land. If the accountant of the Supreme Court is to be treated as representing the Crown, and the funds and security standing in his name is held for Her Majesty, or for the use of the province, then lands mortgaged to the accountant are not liable to be sold for taxes under the authority of the last cited case. If it is foreclosed under mortgage, the lands so foreclosed would not be liable to taxation while held by him.

Mr. Holmested stated that in making investments for the money in Court the investments were not made from the money belonging to any particular estate, but generally out of all the funds to his credit as accountant. It further appears that a very large amount of moneys to the credit of this fund is, under the direction of the Court, placed in the hands

of the Toronto General Trusts Company to invest (see Con. Rule 81). If lands came into the hands of the accountant as mortgagee, and were liable to taxation, the charges for taxes, etc., and incidental charges in connection with the making of the investment, would be paid, if paid at all, out of the general funds standing to his credit, and the same could not be charged against any particular estate.

However startling it may be to learn that these funds are liable to taxation under the existing law, it is nevertheless my duty to interpret it according to my best judgment. The policy of such taxation can only be dealt with by the Legislature. It is an elementary principle of the construction of a statute imposing a tax on all property to construe all clauses creating exemptions strictly, and, unless the property sought to be taxed is clearly within the exemptions named, it must bear its share of the tax burden. The Legislature will probably be asked to deal with the question, if the present decision should be deemed to be a correct exposition of the law as it stands.

Before concluding, I might point out, that the funds in Court invested in the accountant as trustee can be assigned by the legal owner entitled to them if sui juris; that they are liable to a species of equitable execution affected by procuring a stop order, which ties up the fund to the extent of the claim, and prevents payment out of that fund from the moneys in Court without notice to the claimant. It also appears to be liable to a solicitor's lien, which, it has been held, takes precedence even of a stop order: *Haynes* v. *Cooper*, 33 Beav. 431. As to special orders and assignments, Con. Rule 82 may be referred to.

The appeal will therefore be dismissed. The assessment, however, will be increased to the amount of the moneys (uninvested) standing to the credit of the accountant at the date of the hearing of this appeal. The accountant will furnish the assessment department with the correct figures. In view of the importance of this decision, and with the object of obtaining the decision of the highest Court in the province, I propose to state a case to the Lieutenant-Governor-in-Council, with the view of having the same referred to the Court of Appeal.

Nova Scotia.

SUPREME COURT.

Full Court.] KENNY *v.* HARRINGTON. [Nov. 15, 1898.

Agents—Liability of principal in respect of contracts made by in excess of power—Power of attorney defining powers—Deposit of, in Registry Office ineffective as notice in absence of statute—Evidence.

Defendant gave to his father, A.H., a power of attorney to carry on a general trading business for cash only or barter or exchange of goods, with moneys supplied by defendant from time to time for that purpose, bu giving A.H. no power or right whatsoever to make, accept or indorse any promissory note for defendant, or in his name, or to pledge his credit to any extent whatever without further authority. Subsequent to the giving of the power of attorney, defendant instructed A.H. that he was not to purchase any goods from plaintiff. A.H., in violation of these instructions, purchased goods from plaintiff, and gave a note for the amount.

In an action by plaintiff to recover from defendant the amount claimed for the goods so sold, evidence was given by A.H. to the effect that defendant must have found out by the books and papers that he was dealing with plaintiff. There was also some evidence of defendant, from which it might be inferred that A.H. could purchase goods on credit provided defendant knew of it.

Held, per GRAHAM, E.J., HENRY, J., concurring. 1. that the trial judge was justified in coming to the conclusion that the purchase of goods on credit was within the apparent scope of the powers of A.H. as agent.

2. The deposit of the power of attorney in the office of the registrar of deeds could not affect the case in the absence of a statute giving efficacy to such deposit.

3. The fact that the goods were charged in plaintiff's books to A.H. without using the word "agent," and that a note was taken from A.H. in his own name for the amount was not sufficient reason for disturbing the finding of the trial judge that the credit was given to defendant, plaintiff being aware at the time that A.H. was defendant's agent, and A.H. having no credit of his own.

Held, per MEAGHER, J., RITCHIE, J., concurring. (1) The evidence of A.H. that defendant must have known from the books and papers of his dealings with plaintiff being mere matter of opinion, greater effect must be given to the positive evidence of defendant that he had no such knowledge, there being nothing to shew that the testimony of defendant was discredited by the trial judge.

2. A statement of defendant that plaintiff must wait like the rest of the

creditors was not to be construed as an admission of liability, it having been used in relation to creditors of A. H.

3. The evidence as a whole shewing that the credit was given to A. H. and not to the defendant, and there being nothing to justify the trial judge in holding that the terms of the power of attorney had been enlarged, the defendant's appeal should be allowed with costs, and judgment entered for defendant with costs.

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

Full Court.] MOTT *v.* MYLNE. [Nov. 15, 1898.

Justice of the peace—Issuing warrant for arrest without jurisdiction—Notice under R.S. c. 104—Bona fide belief in legal authority.

The defendant M. laid an information before the defendant J., a justice of the peace, charging plaintiff with obtaining from him a suit of clothes for one W. under the false pretence that she would pay for the same the following week. The information having been sworn to, J. issued a warrant under which plaintiff was arrested. In an action brought by plaintiff claiming damages for false arrest, the trial judge gave judgment in favour of the defendant J. on the ground that the notice of action given under R.S. c. 104 was defective, on account of failure to state the place at which the offence was committed.

Held, per RITCHIE, J., McDONALD, C.J., concurring. (1) The representation that plaintiff would pay for the clothes the following week was not the representation of a fact, either past or present, within the meaning of the Code.

2. As the information did not allege that plaintiff had been guilty of any crime, the arrest was illegal and made without any authority.

3. The older cases as to notice to a justice has been modified by more recent decisions, and the test now is whether or not the magistrate bona fide believes in the existence of facts, which, if they existed, would give him jurisdiction.

4. Admitting that the magistrate in the present case was acting bona fide, and believed he had jurisdiction, no circumstances were brought to his notice which if true would give him jurisdiction, and his belief on the subject was without ground on which it could be based, and was unreasonable.

Per HENRY, J., GRAHAM, E.J., concurring. The justice having acted with some colour of reason, and with a bona fide belief that he was acting in pursuance of his legal authority, he was entitled to protection, although he may have proceeded illegally or in excess of his jurisdiction.

Laurence, Q.C., for appellant. *H. A. Lovett* for respondent.

Full Court.] KIRK *v.* THE NORTHERN ASSURANCE CO. [Nov. 15, 1898.

Fire insurance—Adjustment of loss—Company bound, by when approved by general agent, and such approval communicated to assured—Particulars of loss—Estoppel.

The general agent of the defendant company at H. sent an adjuster to A. for the purpose of adjusting a loss under a policy on a general stock of merchandise owned by plaintiffs, which had been destroyed by fire. The adjuster, without proceeding in the usual way, made an estimate of the amount of the loss and prepared proofs which were signed and attested by plaintiffs. The adjuster then returned to H., and handed the proofs to the general agent of the company, who thereupon wrote to the local agent at A., informing him that a cheque for the amount of the compromise arranged between the adjuster and K., one of the plaintiffs, would be sent in due course. This adoption of the compromise effected by the adjuster having been communicated to plaintiffs by the local agent of the company who was authorized for that purpose,

Held, that the company was bound thereby.

One of the conditions of the policy required the insured to deliver within fifteen days after the fire as particular an account of the loss as the nature of the case permitted. In the method of estimating the amount of the loss adopted by the defendant's adjuster no account of the quantities and descriptions of goods in the store just before the fire was given or attempted to be given, and the account was, therefore, in this respect, not as particular as it might have been.

Per RITCHIE, J. As the mode adopted was the one selected by defendant's adjuster, and plaintiffs afforded him every facility and information for making it up to his satisfaction, and he had free access to all books and accounts, there was no reason for setting aside the finding of the jury that plaintiffs delivered as particular an account of the loss as the nature of the case permitted.

Held, also, that the defendant company, after the time for putting in proofs had expired, should not be permitted to object that all possible information had not been furnished, in order that they might estimate the loss in a way different from that selected by their own adjuster and embodied by him in the proofs of loss, when the fullest information that he required was furnished him, and particularly when the jury had found that he represented to the plaintiffs that the proofs furnished were in compliance with the conditions of the policy.

Harris, Q.C., for appellant. *H. McInnes* for respondent.

Full Court.] [Nov. 15, 1898.

MARGESON *v.* GUARDIAN FIRE AND LIFE ASSURANCE CO.

Fire insurance—Condition as to appraisal of loss—Assured discharged from compliance by act of company—Proofs of loss—Waiver.

A policy of fire insurance contained a provision that "in the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent appraisers, etc."

Held, per GRAHAM, E.J., McDONALD, C.J. and RITCHIE, J., concurring, that the company having repudiated all liability in respect of the claim, they most distinctly averred that there was no disagreement as to the mere amount of the loss, and therefore no appraisal would be required, and that the assured having asked for an appraisal, and having named two disinterested appraisers, was discharged from the performance of the condition by the company's refusal.

Held, also, that the matter of the appointment of appraisers was one for negotiation, and that the plaintiff M. having named one person who was not accepted, was not therefore debarred from naming another.

Per MEAGHER, J., dissenting. 1. The trial judge having found that there was a disagreement as to the amount of loss within the meaning of the clause of the policy on that subject, there was no sufficient reason for dissenting from his finding.

1. That in the event of a disagreement such as arose in this case, an appraisement in the manner prescribed in the conditions became an essential step, and that the award or appraisement was a necessary part of the proofs of loss to be furnished.

3. That there was no such waiver as would have entitled plaintiffs to recover in the absence of such compliance with the conditions of the policy; and that a denial of liability which may have been founded upon such want of compliance would not operate as a waiver.

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

Full Court.] REG. *v.* COX. [Nov. 15, 1898.

Crown case reserved—Grand jury panels—Criminal Courts and procedure—Powers of Dominion and Local Legislatures.

By c. 38 of the Acts of Nova Scotia for 1898, the number of grand jurors to be summoned at any term of the Supreme Court in any county of the province was reduced to 12 instead of 24 as formerly, and 7 grand jurors were empowered to find a true bill in any matter instead of 12 as formerly. By a special Act passed on the same day (Acts of 1898, c. 101,) the list of grand jurors for the county of Hants having been destroyed by fire, the clerk of the County Court at Windsor was authorized to draw the names of 12 grand jurors to serve as such at the next term of the Supreme Court at Windsor. Upon the grand jury, summoned under the provisions

of the last-mentioned Act, being called, on the opening of the sittings, 10 only appeared in answer to their names. These were sworn in regular form, and having considered the case preferred against the prisoner, returned an indictment upon which he was tried and convicted. Upon a Crown case reserved, as to the competency of the Legislature of the province to pass the Acts referred to,

Held, that it is within the power of the Local Legislature to fix the number of grand jurors who shall compose the panel, that being part of the organization or constitution of the Court; but that the Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure, and exclusively within the powers of the Dominion Legislature.

Longley, Q.C., Attorney-General, for the Crown. *Harrington*, Q.C., for the prisoner.

Full Court.] ZWICKER *v.* ZWICKER. [Nov. 15, 1898.

Deed executed, but retained by grantor—Words "signed, sealed and delivered"—Leave to adduce further evidence refused—Costs.

By deed bearing date April 5th, 1877, one Z. purported to convey his homestead and several small tracts of land to the plaintiff and defendants as tenants in common. The deed appeared to have been handed to the witness B.Z., who went before a justice of the peace and swore to a memorandum indorsed upon the deed as follows: "I, B.Z., the subscribing witness to the foregoing deed, do hereby certify that I saw the parties sign, seal and execute the same," but was immediately afterwards returned to the grantor, who retained it in his own possession down to the time of his death in 1894, and seemed to have regarded it as in some respects the equivalent of a testamentary disposition, and only to take effect upon his death. There was no evidence of any change in the use or possession of the property covered by the deed, but, on the contrary, evidence shewing that the grantor retained possession of the property as well as of the deed.

Held, dismissing defendant's appeal with costs, that the trial judge was justified, notwithstanding the use of the words "signed, sealed and delivered," in the attestation clause, in finding that there was no delivery of the deed, and that a motion, based on the certificate indorsed on the deed, for leave to adduce further evidence, should be dismissed with costs.

Quære whether the certificate indorsed upon the deed would be sufficient to entitle it to be received for registration.

F. T. Congdon and *A. K. MacLean* for appellants. *Wade*, Q.C., for respondent.

Full Court.] BROWNELL *v.* ATLAS ASSURANCE CO. [Nov. 15, 1898.

Fire insurance—Condition in policy—Proofs of loss—Waiver—Agency—Estoppel—Assigner and assignee.

A policy on a stock of goods owned by the plaintiff B. required the insured, in the event of a loss occurring, to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permitted. A fire having occurred, J., who acted as adjuster for the defendant company for the provinces of Nova Scotia and New Brunswick, called upon B. and demanded and obtained from him his books, invoices and other documents, and proceeded to make up an estimate of the loss. The proofs of loss were prepared by J., with the assent of B., upon forms which J. brought with him for that purpose. J. failed to complete the proofs within the time limited by the policy. The jury, among other things, found that J., by his acts, words and conduct, induced B. to delay sending to the company or its agent the necessary proofs within 15 days, and the facts being such as to warrant that conclusion,

Held that J. must be treated as agent of the company, and that the latter were estopped from alleging as a defence to the action that the proofs of loss were not put in within the time limited.

Per HENRY, J., dissenting. The condition as to the time for putting in the proofs of loss, under the terms of the policy, could only be waived by writing indorsed upon the policy and signed by the principal agent of the company in the district where the loss occurred.

Per MEAGHER, J., McDONALD, C.J., concurring. B. was entitled to sue notwithstanding that he had made an assignment which in form and terms included the cause of action, provided notice of the assignment had not been given. Also that the legal right to the money, as well as to the remedies for its recovery, remained in the assignor until notice in writing was given. Also that until such notice was given, the assignee could sue in the name of the assignor for the recovery of the debt or chose in action assigned.

H. McInnes for appellant. *Dickey*, Q.C., and *F. T. Congdon* for respondent.

New Brunswick.

SUPREME COURT.

Barker, J.] RE JEWETT ARBITRATION. [Dec. 12, 1898.

Arbitrator's fees.

A man who chooses to act as an arbitrator cannot fix his fees upon the basis of the value of his services in his own special business for the time

given to the arbitration. He need not act as an arbitrator unless he chooses, or he may stipulate as a condition to his consenting to act that his remuneration shall be at a fixed rate, but in the absence of that, if he chooses to act as an arbitrator he must be contented with an arbitrator's pay. What that pay is depends upon the particular circumstances of each case. The expert, the professional man, the lawyer, surgeon or engineer as the case may be, who has been selected as arbitrator because the matters in controversy were such as his special training and education enabled him the more intelligently to determine, cannot be rated the same as one who has no such exceptional qualification. It is obvious also that in determining as to the reasonableness of the compensation regard must be had to the nature and importance of the matter in dispute, the amount of money involved, and the time necessarily occupied in the work.

C. N. Skinner, Q.C., for City of St. John. *A. I. Trueman*, for arbitrators.

Barker, J.] MARCHIE *v.* THERIAULT. [Dec. 20, 1898.

Registration of copy of instrument—Proof of execution—57 Vict. c. 20, s. 69.

Prior to the marriage of the defendant domiciled in Quebec, her intended husband entered into a contract with her before a notary public, at Fraserville, Quebec, in which it was stated that the future husband endowed the future wife in the sum of $5,000 as a dower prefixed on the property the most clear of the said future husband, and that the same was mortgaged to begin that day, etc. The original instrument remained on file in the notary's office. A copy certified by the notary was registered in the registry office of Madawaska Co., N.B., on June 12, 1878. Subsequently the husband executed a mortgage of his land in Madawaska Co. to the plaintiff, who had no notice of the marriage contract. On the death of the husband suit was brought by the plaintiff for the foreclosure of the mortgage and sale of the mortgaged premises, and the defendant claimed that the mortgage should be postponed to her lien on the land by virtue of the marriage contract.

Held, the registry of the copy of the marriage contract was unauthorized and invalid: that under the registry laws of New Brunswick the original instrument duly acknowledged or proved to the registrar must be produced for registry, and that the defendant could not claim a title to the land as against the plaintiff.

2. The defendant was not entitled to the benefit of the provisions of s. 69 of 57 Vict. c. 20, as the plaintiff's mortgage was obtained prior to the passing of that Act, but that if the Act did apply the marriage contract was not within it as the acknowledgment or proof of the instrument being wanting, the registration was a nullity, and was not cured by s. 69.

Pugsley, Q.C., and *James Stevens*, Jr., for plaintiff. *Stockton*, Q.C., and *La Forest*, for defendant.

Barker, J.] MILLS *v.* PALLEN. [Dec. 20, 1898.

Receiver—Bankruptcy of trustee—Delay in application—Costs.

The defendant was the sole acting trustee of his father's estate. Two years after the estate came into the defendant's hands the plaintiff brought suit for the payment to her of a claim alleged to be due her by the deceased testator, and the appointment of a receiver of the estate. The plaintiff's claim was disputed by the defendant and on being litigated in an action at law, was found to be considerably less than the amount claimed by the plaintiff. The appointment of a receiver was opposed by all others interested in the estate. In the will the ground put forward for the appointment of a receiver, was the alleged bankruptcy of the defendant. The defendant, however, was in no worse financial position than when he took over the estate, and the plaintiff had at that time a knowledge of his business affairs, and made no objection to his acting as trustee. The plaintiff's claim was paid after its amount had been determined in the action at law.

Held, that plaintiff's appplication should be refused with costs.

Tweedie, Q.C., for plaintiff. *Robert Murray*, for defendant.

Barker, J.] LEONARD *v.* LEONARD. [Dec. 20, 1898.

Will—Construction—Absolute devise—Defeasance.

A testator devised real and personal estate to his wife absolutely to enable her to maintain a home for herself and children until they should respectively attain the age of twenty-one years. The residue of the estate was devised and bequeathed to trustees for his children. The will then provided that the devise and bequest to the testator's wife should be in full satisfaction and lieu of dower "and should she marry again the property in such event so devised to her as herein stated, shall vest in my said executors and trustees for the benefit of my said sons as hereinbefore expressed."

Held, that the widow took an absolute gift, but that the proviso was not inoperative as being repugnant to the gift to her, and that in the event of the widow's marriage the personal as well as the real estate would be divested out of her.

Allen, for the widow. *A. I. Trueman*, for the children. *Hanington*, Q.C., for the trustees.

Barker, J.] POIRIER *v.* BLANCHARD. [Dec. 23, 1898.

Contempt—Breach of injunction—Form of motion.

On breach of an injunction order the party in contempt should not be called upon to shew cause why an attachment should not issue against him, or to shew cause why he should not stand committed. The motion ought to be that he shall stand committed upon notice to him that the court will be moved for that purpose.

Gilbert, Q.C., for application. *Campbell*, contra.

Tuck, C.J.] HESSE *v.* ST. JOHN RAILWAY CO. [Jan. 4.

Making cause a remanet—Withdrawing record.

Where notice of trial has been given, and the cause has been entered, a motion to make the cause a remanet cannot be allowed, if opposed, and plaintiff not wishing to proceed to trial must withdraw the record.

R. F. Quigley, for the plaintiff. *H. H. McLean*, for the defendant.

ST. JOHN COUNTY COURT.

Forbes, Co. J.] FORSTER *v.* BLIZARD. [Dec. 20, 1898.

Arrest—Claim for interest—Affidavit—Independent causes of action.

The affidavit for defendant's arrest set out in one paragraph a good cause of action upon a bill of exchange. Another paragraph was as follows: "That the said B. is also indebted to me in the further sum of three dollars and ninety five cents for money payable by the said — to me for interest upon money due from the said B. to me and foreborne at interest by me to the said B. at his request.

Held, that it should have appeared how the claim for interest arose, and that it did not sufficiently appear that the interest was claimed in respect of the bill of exchange, but that the affidavit stating one good cause of action, the arrest should not be set aside.

Mullin, for the plaintiff. *Keller*, for the defendant.

Flotsam and Jetsam.

At the Madras High Court, one Bonamali Naik, a Temple servant, appealed against the sentence of death passed on him by Mr. Wolfe Murray, the Sessions judge of Ganjam, for having murdered one Keshatria Naik, who succeeded the accused after he was dismissed from his appointment. The accused got rid of his rival by throwing him into a well, so that deceased died of asphyxia. In the course of his judgment the Sessions judge quoted the following couplet (from W. S. Gilbert's "The Wreck of the Nancy Bell"):—

He up with his heels
And smothered his squeals.

Their Lordships, while confirming the conviction and sentence, observed that the Sessions judge ought to have used serious and proper language in disposing of a serious and grave crime, and was not justified in quoting the couplet he had done.—*Advocate of India*, Bombay.