# Canada Law Journal.

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Mr. Justice Ferguson, we regret to say, was unable to take his place in the Divisional Court on the 7th January last. He has unfortunately been confined to his house for over eight weeks past with illness, brought on, we are sorry to hear, by overwork. In the last autumn sittings, the learned Judge made strenuous efforts to clear his dockets at two or three assizes, and, in order to do so, prolonged the sittings of the Court frequently until midnight. His anxiety to save suitors expense and delay is certainly praiseworthy, but it has proved rather a serious business for the learned Judge himself. It is to be feared that time enough is not allotted for the holding of the Courts, with the result that an altogether unreasonable effort is made to crowd the business of three or four days into one or two.

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Mr. Bagshawe, a member of the English Bar, in recently commenting on this sort of thing in England, makes the following observations, which are deserving of attention in this Dominion: "Whenever I hear of a Judge sitting more than seven, or at the outside eight, hours a day, I say to myself: 'Lord help the poor people who come before him.' Judges are, after all, human beings—some of them very human—and I affirm, as a fact, that no human being can properly exercise judicial functions for more than a distinctly limited number of hours in a day. If he goes on longer, he is almost certain to get too tired, or, which is saying the same thing, too sleepy, or too impatient, or too irritable, to do his work properly. From similar causes, the barristers and solicitors (who are paid), and the jurymen and witnesses (who are practically not paid), who are kept on duty—or, which is worse,

kept hanging about for more than a reasonable time—get cross or stupid. Consequently the fate of a litigant or prisoner whose fortune depends upon the decision of a Court—in which every person, from the Judge to the usher, is over-fatigued, and more or less out of temper—is apt to be, and frequently is, disastrous." With Mr. Justice Furguson's unhappy experience as a warning, it is to be hoped that the effort in future to do more than a reasonable day's judicial work in a day may be abandoned.

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## *LANDLORD'S RIGHT OF DISTRESS.*

In commenting recently on the Landlord and Tenant Act, 1895, s. 4 (ante vol. 31, p. 525), we expressed the opinion that notwithstanding the apparently revolutionary character of that section, the true meaning of it is to enable assignees of leases and others having no reversion, to distrain ; and that the effect of it is, therefore, to enlarge rather than to narrow the right of distress. The contrary view was taken by a writer in our contemporary, the *Canadian Law Times;* we are, therefore, pleased to notice that the opinion advanced by us was recently adopted by Chief Justice Meredith, in a considered judgment in the case of *Harpelle* v. *Carroll*, which will, we presume, hereafter appear in the Reports. As the matter, however, is of some importance, and has caused much comment, we now give in advance some extracts from the judgment which will be read with interest:

"The contention of the defendant is that the provisions of this section are retrospective, and that the effect of them is, save as to cases pending when the Act was passed, to take away the right of the landlord to distrain, except where the agreement by which the relation of landlord and tenant is created confers that right, and that in such cases the right to distrain, being a mere license, does not justify the distraining property belonging to a stranger. * * * Apart from a consideration of the effect of the section, if it stood by itself, there is, I think, in the other provisions of the Act of which it forms part, evidence that the Legislature did not intend to make so

radical a change in the law as was contended for." [The learned Chief Justice then referred to sec. 3, sub-sec. 4, as showing that its presence in the Act was consistent only with the intention to retain the right of distress, and proceeds.] "The section is, with the exception of its saving clause, substantially in the same words as section 3 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, 23 & 24 Vict., c. 154. It is highly probable that if the framer of the Ontario Act had had before him the caustic criticism which the Irish Act, as a whole, and its several parts, including section 3, received, as would appear from the reports of the cases to which I shall afterwards refer, from the Judges of the Courts of that country during the short time the Act was in force there, he would have chosen different language to express the idea which he probably had—that of doing away with the necessity of the having of the immediate reversion to entitle one to distrain who had let lands to another. The right of the plaintiff to distrain may also, I think, be supported upon the ground that the provisions of section 4 are not retrospective in the sense of their applying to tenancies existing at the time the Act was passed, and for this proposition *Busteed* v. *Chute*, 16 Irish Chy. R. (1865) 222, is, I think, a sufficient authority. But, even if section 4 of the Ontario Act apply to existing cases, I do not think that it has the effect of taking away the common law right of distress of the landlord. I am inclined to think that it will be found that the section, instead of curtailing, has enlarged the right of distress by extending it to all cases in which there is an agreement of the nature mentioned in it; but, however that may be, I ought not, I think, without a much clearer expression of the will of the Legislature, to give to its enactment such a construction as would practically sweep away the whole body of the law (common and statute) affecting the relations of landlord and tenant, and the rights, interests and obligations arising out of that relation, without substituting for it anything but the bald provisions of this section." Notwithstanding this judgment, however, which will probably be sustained on the main point, it would be well for the profession still to act on their guard in drawing leases.

## ANIMUS FURANDI.

The Court for Crown Cases Reserved, in Ireland, have been recently deliberating on a case of a similar kind to that of *Reg.* v. *Ashwell*, 16 Q.B.D. 190, and have arrived, by a majority of one in a Court of nine, at a conclusion—whereas, in the English case, the Court, composed of fourteen Judges, was equally divided in opinion. In *Reg.* v. *Ashwell*, the prisoner had asked the prosecutor for the loan of a shilling, and by mistake the prosecutor handed him a sovereign, which the prisoner received, believing it to be a shilling. Sometime afterwards the prisoner discovered the mistake, and then fraudulently appropriated the sovereign to his own use. Lord Coleridge, C.J., Huddleston and Pollock, BB., and Grove, Denman, Hawkins and Cave, JJ., were of opinion that the prisoner was guilty of larceny; whereas Field, Manisty, Stephen, Mathew, Smith, Day and Wills, JJ., were of opinion that he was not. The prisoner had been convicted, and the result of this division of opinion was that the conviction was affirmed.

In the Irish case, *Reg.* v. *Hebir*, (1895) 2 Ir. 709; L.T. Jour. 100, p. 113, the facts were very similar; the prosecutor handed the prisoner a £10 note in mistake for a £1 note, and the prisoner received it under the belief that it was a £1 note; he subsequently discovered the mistake and kept the note. O'Brien, C.J., Palles, C.B., Andrews, O'Brien and Johnson, JJ., decided that it was not larceny (Murphy, Holmes, Gibson and Madden, JJ., dissenting). The crucial point upon which this difference of opinion arises is, whether or not at the very time the chattel comes into the possession of the prisoner, there must be an *animus furandi*.

The Judges who deny that the act is criminal, found themselves on the ground that the original possession of the chattel was acquired lawfully, and that a subsequent fraudulent determination to act dishonestly in reference to it cannot convert the act into larceny. The Judges who favor the opposite view consider that it is sufficient if there is an *animus furandi* as soon as the prisoner discovers the true nature of the article. It is conceded that if, after receiving the article under

a mistake as to its nature, he parts with it under a like mistake, he would be guilty of no offence. Where such high authorities differ, it would, perhaps, be presumptuous to offer any opinion as to the merits of the controversy; but even some of the Judges who deny the criminality of the act, nevertheless admit that it is one for which punishment ought to be provided, but they do not think that to call it larceny would be a proper and reasonable development of the law as it is, but rather in the nature of legislation.

Although in *Reg.* v. *Ashwell* the conviction was affirmed by reason of the equal division of the Court, yet it cannot, I think, be contended that that is a decision which would be binding in Canada, and we very much doubt whether a similar act could by any possible construction be held to be theft under the Criminal Code.

G. S. HOLMESTED.

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## *THE PREROGATIVE OF MERCY AND THE SHORTIS CASE.*

From the earliest period of our colonial history, and especially since the establishment of responsible government, the exercise of the prerogative of mercy has been the subject of controversy. Disputes have frequently arisen, especially in Australia, between the representatives of the Sovereign responsible for their actions to the Crown, on the one hand, and the various bodies who were their authorized advisers, responsible to the people, on the other.

Those who feel interested in the subject cannot do better than consult Todd's Parliamentary Government in the Colonies, in which will be found the principal cases in regard to which differences have arisen, as well as very full quotations from the instructions given to the Governors on the subject, and the correspondence between the Colonial and Imperial authorities relating thereto. Stated in general terms, the constitutional theory is that the Courts try the accused according to law, and acquit or convict according to the evidence. The Crown

questions not the justice of the decision, either as regards the finding of the jury, or the sentence of the Judge. But, upon a review of the whole case, it decides either to let the law take its course, or to exercise the prerogative of mercy, either in pardoning the criminal altogether, or in commuting or lessening the sentence. This power being a matter of prerogative, and emanating from the Sovereign alone, is exercised by the Sovereign alone, and does not involve any ministerial responsibility. As a matter of practice, and even of necessity, the Sovereign has the assistance of the Judge, and the advice of the Home Secretary, in arriving at a decision.

As representing the Crown, the same power is conferred upon Colonial Governors, but to be exercised within certain limits prescribed by the royal instructions which accompany their commissions, and, according to recent practice, upon the advice of their responsible advisers; except in cases in which Imperial interests are concerned, when the Governor-General, as an Imperial officer, must finally decide upon his own independent judgment, after consultation with his Ministers. With the latter class of cases we have not here to deal. It is with those in which Imperial interests are not concerned that difficulties have chiefly arisen. And they have arisen because while the Governor was required to ask the advice of his Ministers, he was left free, by his instructions, to follow it or not, as in his judgment he thought proper. This condition of things, it was contended, was not in accordance with the true principles of responsible government. Nevertheless the rule was clearly laid down by Lord Carnarvon, in 1875, in a circular despatch to the Governors of the Australian colonies, that the Governor was to ask for the advice of his Executive Council, but having received that advice, he was to act upon it or not, according to his own deliberate judgment, *whether the members of his Council concurred therewith or not.* In defence of this practice, Lord Carnarvon said in the House of Lords, in 1875, as quoted by Todd: "No doubt it may be objected to the system of a Governor consulting his Ministry, and still acting on his own judgment, that it sets up a double responsibility. In reply, I submit that in this case a concurrent responsi-

bility is better. On the one hand, the Governor will not be relieved of his responsibility to the Crown; and, on the other hand, the local Government will not be relieved of its responsibility to its own Parliament, so that while the Colonial Parliament may punish the Minister for improper advice, the Crown may punish the Governor for an improper decision. *The fact is that in these matters we ought not to be too logical.*"

Prior to Confederation, and after it until 1878, the same instructions were in force in Canada, and in pursuance of them both Sir Edmund Head and Lord Dufferin commuted sentences upon their own judgment, and in opposition to the advice of their Council. In 1876 the subject was taken up by Mr. Blake, then Minister of Justice, and the result of his representations was that when the Marquis of Lorne came out, fresh instructions were issued, in which the following words occur: "And we do hereby direct and enjoin that our said Governor-General shall not pardon or reprieve any such offender, without first *receiving, in capital cases, the advice of the Privy Council* for our said Dominion, etc."

Now, in applying this rule to the case before us, let us first consider how far, in such cases, the Governor-General is bound absolutely to act upon the advice of his Council. Is he bound, as he is in other matters, either to act upon their advice, or place them in a position which would compel their resignation? Is not this a case in which, as Lord Carnarvon says, we must not be too logical? If the doctrine of ministerial responsibility is to be thoroughly carried out, the exercise of clemency as emanating from the grace of the Sovereign, and as part of the Royal prerogative, becomes a thing of the past. Is this a desirable conclusion, and does it necessarily follow from the words of the instructions? Let us again quote Lord Carnarvon: "It has been argued," he says, "that ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the prerogative of pardon. But I am led to believe that this view does not meet with general acceptance, and there is at all events good reason why it should not. The pressure, *political* as well as social,

which would be brought to bear upon the Ministers if the decision of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequences might be a serious interference with the sentence of the Courts." The force of these words will hardly be overborne by the necessity for being *logical* in carrying out in all respects the doctrine of ministerial responsibility. We have italicised the word *political* in the foregoing extract because, in the case before us, one of the reasons alleged why the sentence should be carried out was that popular feeling was so strong that in case of a reprieve, the member for the constituency in which the event took place could not, as a supporter of the Government, be re-elected! Such, or similar considerations *might*, we do not say they *did*, influence the Executive. They certainly would not influence the Governor-General. It may be said that the same argument would apply to all acts of government. True, but again we must not be too logical. There is a distinction to be drawn between any act connected with the administration of justice and ordinary acts of administration, and between the exercise of the prerogative of mercy and the exercise of any other prerogative. It may be said that this reasoning is hypothetical because, as a matter of fact, in this case we know that His Excellency did not "first receive the advice of his Privy Council." Was he then justified in acting at all? Clearly in such a case he could only act by virtue of the prerogative, the exercise of which we have been contending for; and as he did act he clearly did exercise that prerogative. He acted upon Lord Carnarvon's *dictum* of not being too logical, and when his Privy Council failed to do their duty—failed to give him the advice which it was their duty to give, and which it was his right to receive—he fell back upon the power of the prerogative, and exercised it to the best of his judgment—whether rightly or wrongly is a matter with which we are not now concerned.

Again, as suggested above, are the terms of the instructions to be construed as placing the responsibility for interfering with the sentence of the Court upon the Cabinet? The words do not convey that impression, and a careful considera-

tion of the change that was made in the phraseology of the instructions existing prior to 1878, when the instructions were issued, subsequent to the adoption of the suggestions made by Mr. Blake, confirm the opinion that the change made was in form rather than substance, and that while the Governor-General is directed to "receive the advice of his Council," he is still free, after having received that advice, to decide the case "upon his own deliberate judgment." Can any prerogative of the Crown be limited, much less abrogated, by mere implication? or by anything short of express words? No doubt, in the great majority of cases, the Governor would act upon the advice of his Council, and the instances would be very rare in which either he would be called to account for acting upon that advice, or his ministers be called to account for giving it. It unfortunately has happened, as it notably happened in the case of Riel, that the question whether the plea of insanity should prevent the execution of the sentence of the Court has become a great political question, involving grave political consequences. In that case Ministers took the full responsibility of the advice which they offered—advice upon which the Governor-General thought proper to act. No question, therefore, arose, such as that which we are now discussing, and very happily it was so. But had His Excellency taken a different view and decided that the plea of insanity was borne out, and in consequence commuted the death penalty into one of imprisonment for life, as the Governor-General has just done in the case of Shortis, he would, if our reasoning is correct, have been acting within his constitutional power in doing so, and equally his Ministers, having fulfilled their duty in giving him advice, would not have been called upon to resign unless the House of Commons, to which they were responsible, had expressed the opinion that in giving that advice they were in error.

In the case before us the Ministers gave no advice. Being unable as a body to form an opinion, they were incompetent to advise. They were unable to, and, therefore, did not fulfil their duty. It is idle to say that, being unable to agree, their giving no advice was equivalent to saying affirmatively that

the law should take its course. The duty of His Excellency was to receive their advice, and it was equally their duty to give it. They had no right to leave him unadvised in so important a matter; but, being so unadvised, through no fault of his own, it was clearly within his power as a constitutional Governor to exercise his prerogative according to his own deliberate judgment. Whether or not that judgment was wisely exercised, in view of the evidence adduced before him, is not the question at present under discussion.

W. E. O'BRIEN.

# ENGLISH CASES.

## *EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.*

The Law Reports for December comprise (1895) 2 Q.B. pp. 537-669; (1895) P. pp. 341-353; and (1895) 2 Ch. pp. 773-895.

SHIP—CHARTER PARTY—BILL OF LADING—LIABILITY OF OWNER FOR ACTS OF MASTER—SPECIAL AGREEMENT BY CHARTERER TO BE ANSWERABLE FOR MASTER—CONSTRUCTIVE NOTICE.

*Manchester Trust* v. *Furness*, (1895) 2 Q.B. 539; 14 R., Nov. 29, although dealing with a branch of law with which in Ontario we have not much concern, incidentally involves a point of more general application. By a proviso contained in a charter party, it was expressly agreed that the captain and crew, although appointed and paid by the owners, should be the servants of the charterers, and that in signing bills of lading, the captain should only do so as the agent of the charterers, and that the charterers would indemnify the owners from all liability for bills of lading so signed. The captain signed bills of lading for goods in the ordinary form, to be delivered to the holders of the bills, they paying freight, and "other conditions as per charter party." The goods having been misdelivered, the present action was brought against the ship-owners for the loss thereby occasioned. Mathew, J., held that the defendants were liable, notwithstanding the terms of

the charter party, which were only binding as between the charterers and the ship-owners; and also that persons dealing with the captain in the ordinary course of business were not affected with constructive notice of the provisions of the charter party by the reference in the bills of lading to the charter party, on the ground that the equitable doctrine of constructive notice of contents of documents is confined to documents relating to land and estates, and is not applicable to mercantile transactions or documents. His decision was affirmed by the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.,) Lindley, L.J., on this point observes: "In dealing with estates or land, title is everything, and it can be leisurely investigated; in commercial transactions, possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralyzing the trade of the country." It is more particularly with regard to this point that the case deserves careful attention.

SHIP—BILL OF LADING—WARRANTY—IMPLIED CONTRACT—FITNESS OF REFRIGERATING MACHINERY.

*Owners of cargo of "Maori King"* v. *Hughes*, (1895) 2 Q.B. 550; 14 R., Nov. 228, is another case in relation to a bill of lading. The goods in question consisted of a cargo of frozen meat, shipped for transmission from Australia to England. The bill of lading was headed "Refrigerator Bill," and described the goods as 4,553 carcasses of hard frozen mutton, shipped in apparent good order, and to be delivered in like good order, subject to exceptions therein mentioned, one of which was: "Steamer not to be accountable (inter alia) for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation, or other appliances." The ship started from Melbourne, but in consequence of the refrigerating machinery breaking down, the cargo had to be landed and sold at Sydney by the defendants, at a great loss. The statement of claim alleged that it was an implied term of the contract contained in the bill of lading, that the ship and the refrigerating ma-

chinery therein were at the time of the shipment fit to carry the frozen meat to Europe. The defendants took issue on this question of law, and an order was made before the trial of the issues of fact, for determining it. Mathew, J., held that there was an implied contract to the effect claimed by the plaintiffs, and the Court of Appeal (Lord Esher, M.R., Kay and Smith, L.JJ.,) agreed with him.

COMPANY—SHARES, ISSUE OF—ULTRA VIRES—COMMISSION TO STOCK-BROKERS.

*Metropolitan Coal Association* v. *Scrimgeour*, (1895) 2 Q.B. 604; 14 R., Nov. 239 was an action brought by the liquidator of the plaintiff company against the defendants, who were stock-brokers, claiming a return of a sum of £21 10s., paid to them by the directors of the company for a commission in placing the shares. The plaintiff contended that the payment was made ultra vires and without consideration: the Mayor's Court dismissed the action, and its judgment was affirmed by the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.). It was argued for the plaintiff that this was virtually issuing the shares at a discount, which was illegal, but the Court of Appeal scouted that idea, and were unanimous that the payment of a reasonably fair commission to brokers, for obtaining purchasers for the shares of the company, was a legitimate expense, properly payable by the company. *In re Faure*, 40 Ch.D. 141, was distinguished from the present case on the ground that there the payments were not reasonable or bona fide.

LANDLORD AND TENANT—SUB-LEASE IMPLIED COVENANT FOR QUIET ENJOYMENT—DURATION OF COVENANT.

*Baynes* v. *Lloyd*, (1895) 2 Q.B. 610; 14 R., Nov. 188, was an appeal from the decision of Lord Russell, C.J., (1895) 1 Q.B. 820 (noted *ante* vol. 31, p. 406), which the Court of Appeal (Lord Esher, M.R., and Kay and Smith, L.JJ.,) have affirmed. The case, it may be remembered, turned on the effect of a sub-lease made, under a bona fide mistake by lessors, for a term of years extending beyond that to which they themselves were entitled. The sub-lease did not contain the word "demise," nor any express covenant for quiet enjoyment. At the expiration of the lessor's lease, their sub-lessees were ejected by the

superior landlord, and the case turned on whether any covenant for quiet enjoyment beyond the time for which the sub-lessor's lease extended, could be implied. The Court of Appeal agreed with Lord Russell, C.J., that even assuming that in the absence of the word "demise," a covenant for quiet enjoyment could be implied, still such an implied covenant would be limited by the lessor's own estate, and, therefore, that the plaintiffs could not succeed.

LANDLORD AND TENANT — ORAL AGREEMENT — LETTING FOR NON-CONTINUOUS PERIODS—ENTRY—PAYMENT ON ACCOUNT OF RENT—STATUTE OF FRAUDS (29 CAR. 2, C 3), S. 4.

*Smallwood* v. *Sheppards*, (1895) 2 Q.B. 627, is another case on the law of landlord and tenant. The plaintiff made an oral agreement to rent to the defendant a piece of vacant land for three successive bank holidays, for £45, to be paid in three instalments of £15 each, on each of the three days. The defendant occupied the land for the first of the days, and paid £15: he refused to occupy it on the other two days or to pay the balance of the rent. After the expiration of the other two days the plaintiff brought the present action to recover £30, the balance of the rent, and the defendant set up the Statute of Frauds, s. 4, as a bar to the claim. The Judge of the County Court in which the action was brought gave judgment for the plaintiff, and the Divisional Court (Wright and Kennedy, JJ.,) affirmed his decision. Wright, J., who delivered the judgment of the Court, says: "There having been an entry for the purposes of occupation, under an agreement for a single letting (although the period of the agreed letting was not continuous) at a single or lump rent or price, and a payment on account of the entry, the plaintiff's right to recover the balance after the termination of the letting period is, in our judgment, not affected by the fact that the agreement was a parol agreement."

DAMAGES CONTRACT—BREACH OF WARRANTY - REMOTENESS—THE WORKMEN'S COMPENSATION FOR INJURIES ACT (55 VICT., C. 30, O.)

*Mowbray* v. *Merryweather*, (1895) 2 Q.B. 640; 14 R., Dec. 143, was an action brought to recover damages for a breach of an implied warranty under the following circumstances: The plaintiffs were stevedores and contracted to discharge a cargo

from the defendant's ship, the defendant agreeing to supply the necessary tackle reasonably fit for the purpose. In breach of his agreement the defendant supplied a defective chain, which broke and caused an injury to the plaintiffs' servant. This servant sued the plaintiffs under the Employers' Liability Act (see 55 Vict., c. 30, O.), basing his claim on the ground that the defect in the chain might, with reasonable care, have been discovered by the plaintiffs; and the plaintiffs settled the claim by paying £125. This sum the plaintiffs now sought to recover from the defendant. It was not pretended that the settlement with the plaintiffs' servant was not a proper one, but it was contended by the defendant that the damages claimed were too remote, as the damage to the workman was not the necessary consequence of the defendant's breach of warranty, but for the intervening negligence of the plaintiffs; but the Court of Appeal (Lord Esher, M.R., and Kay and Rigby, L.JJ.,) declare that although as between the plaintiffs and their servant, they were bound to examine the chain and see that it was fit for the purpose, yet as between the plaintiffs and defendant, there was no such obligation; and inasmuch as under *Heaven* v. *Pender*, 11 Q.B.D. 503, the servant might have sued and recovered the amount direct from the defendant, so where, as here, it had been paid him by the plaintiffs, it constituted the proper measure of damages as between the plaintiffs and defendant, and such damages were not too remote, but were the natural result of the defendant's breach of warranty.

SHERIFF—EXECUTION—FI. FA.—BREAKING OUTER DOOR—BUILDING NOT A DWELLING HOUSE.

In *Hodder* v. *Williams* (1895) 2 Q.B. 663, 14 R., Dec. 133, a somewhat bold attempt was made to induce the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.,) to overrule the case of *Penton* v. *Browne*, 1 Sid. 186; 1 Keb. 698. In that case it had been laid down about 200 years ago that in the execution of a *fi. fa.* it was lawful for a sheriff to break open the outer door of any building not a dwelling house. This had been repeatedly recognized as law by several Judges and text-writers, and the Court of Appeal refused to depart from it.

PROBATE—AMENDMENT—MISNOMER OF EXECUTOR.

*In the goods of Honywood*, (1895) P. 341, an application was made to amend the letters probate. The grant had been made in favor "Frederick Marsden," the executor named in the will, but it appeared that his true name was "Frederick John Marsden." The probate was accordingly amended so that the grant should read in favor of "Frederick John Marsden, called in the will Frederick Marsden."

SUIT IN FORMA PAUPERIS—COSTS TO SUCCESSFUL PAUPER, HOW AWARDED.

*Richardson* v. *Richardson*, (1895) P. 346; 11 R., Nov. 19, was a matrimonial cause in which the plaintiff sued in *forma pauperis*, in which the question arose on what principle costs should be taxed to the successful plaintiff. Following *Carson* v. *Pickersgill*, 14 Q.B.D. 859, Jeune, P.P.D., held that the plaintiff could only tax his solicitor's expenses out of pocket, and a reasonable sum for office expenses. We may observe that the Ontario Rules are entirely silent on the subject of suing or defending in *forma pauperis*.

INTERLOCUTORY MANDATORY INJUNCTION—DEFENDANT EVADING SERVICE OF WRIT—NOTICE OF INTENTION TO APPLY FOR INJUNCTION.

*Von Joel* v. *Hornsey*, (1895) 2 Ch. 774, was an action to restrain the defendant from erecting a building so as to interfere with the plaintiff's ancient lights. The defendant was warned by the plaintiff that if the building were continued the plaintiff would sue to restrain him, but the defendant persisted and after action was brought he evaded service of the writ for several days, and in the meantime continued building until substituted service was effected on him. On the motion for an interim injunction, Kekewich, J., not only restrained further building, but also ordered the defendant to pull down so much of the building as had been erected after the plaintiff had warned the defendant that he intended to bring an action, and his order was affirmed by the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.,) following the principle adopted in *Daniel* v. *Ferguson*, (1891) 2 Ch. 27.

WILL—CODICIL—ANNUITY—REVOCATION BY CODICIL OF GIFT IN WILL—DECISION AS TO INTERESTS OF UNBORN CHILDREN.

*Re Freme's Contract*, (1895) 2 Ch. 778, an appeal was had from the decision of Kekewich, J., (1895) 2 Ch. 256. The question was whether a codicil had had the effect of revoking a gift made by the will in favor of persons not expressly referred to in the codicil. By the will in question the testator gave to each of his grand-daughters, A. and B., an annuity of £300, and after their respective deaths he directed that the said sum of £300 should be raised and paid unto and amongst their respective children as they should respectively appoint, and in default of appointment, amongst them equally during their respective lives. By a codicil he recited that he had by his will given to each of his two grand-daughters an annuity of £300; and he revoked the gifts "of the said annuities," and in lieu thereof gave to each of them an annuity of £150, to be payable and charged in the same way as the annuities of £300 were by the will payable and charged. The children of A. and B. were not in any way referred to in the codicil, and the point at issue was whether or not the gifts in their favor contained in the will were also revoked by the codicil. Kekewich, J., decided that the effect of the codicil was to substitute the annuities of £150 to A. and B. and their respective children in lieu of the annuities of £300 given by the will, and this decision the majority of the Court of Appeal (Lindley and Lopes, L.JJ.,) affirmed, but Rigby, L.J., dissented, he thinking that the annuities of £300 in favor of the children after the deaths of A. and B., were unaffected by the codicil. It was objected that the question could not be decided, because there might be future born children who would be affected, but as there were some children *in esse* before the Court, and the rights of future born children would be identical with theirs, the Court felt no difficulty on that score in adjudicating the point. The majority of the Court considered it of importance in the construction of the will that the testator had in his will referred to the annuities to each grand-daughter and her children as one annuity and not several, thereby indicating an intention not to treat the annuities in favor of the children as distinct from those to the parents.

EXPROPRIATION OF LAND—COSTS OF ARBITRATION—AWARD TAKEN UP AND FEES PAID BY LAND-OWNER—TAXING MASTER'S CERTIFICATE.

In *Shrewsbury* v. *Wirrall Railways Committee*, (1895) 2 Ch. 813; 12 R., Nov. 70, land had been expropriated for the purpose of a railway; the value of the land had been ascertained by arbitration and the value fixed at £11,865: the arbitrator's fees were £410, and the land-owner was entitled to the costs of the arbitration. He paid the arbitrator's fees and took up the award and claimed the right to tax, as part of his costs of arbitration, the fees paid to the arbitrator. The taxing officer disallowed them as not having been properly payable by the land-owner. On appeal to Romer, J., this ruling was affirmed, and the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.,) agreed with Romer, J. The Act under which the expropriation took place provided that the arbitrators were to deliver their award to the expropriators, who were to retain the same, and on demand furnish a copy to the other party to the arbitration. The Court of Appeal therefore considered that the land-owner had voluntarily paid the arbitrator's fees for the purpose of getting possession of the award, which he was not entitled to; and therefore they were not properly any part of his costs of the arbitration, and even if they were, the Statute did not allow any appeal from the certificate of the taxing officer.

STATUTE OF LIMITATIONS—MONEY CHARGED ON LAND—PRESUMPTION OF PAYMENT OF INTEREST—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38 VICT., C. 57) S. 8 (R S.O. C. 111, S. 1).

In *Re England, Steward* v. *England*, (1895) 2 Ch. 820; 12 R., Nov. 63, an appeal was had from the decision of Kekewich, J., (1895) 2 Ch. 100 (noted ante vol. 31, p. 438). It may be remembered that the point in controversy was whether, where land subject to a charge is devised to a tenant for life who is also entitled to the income of the charge for life, it can be presumed that the tenant for life has paid the interest on the moneys charged, so as to keep alive the claim in favor of the trustees of the charge, as against the estate of the person who created the charge and covenanted for its payment. The Court of Appeal (Lindley, Lopes and Rigby, L.JJ.,) agreed with Keke-

wich, J., that there was no presumption of payment of interest by the tenant for life, and the Real Property Limitation Act, 1874, was a bar in favor of the covenantor's personal estate, and in arriving at this conclusion they determined, following *Sutton* v. *Sutton*, 22 Ch. D. 511, that where land is charged with the payment of money, the period of limitation for bringing an action, either against the land or against the personal estate on any covenant for its payment, is governed by the Real Property Limitation Act, 1874, a point, it may be noted, upon which the Court of Appeal of Ontario has arrived at a different conclusion: see *Allan* v. *McTavish*, 2 A.R. 278; *Boice* v. *O'Loane*, 3 A.R. 167; *McMahon* v. *Spencer*, 13 A.R. 430.

TRUSTEE—BREACH OF TRUST—FOLLOWING TRUST FUNDS—SATISFACTION—PARENT AND CHILD PORTION.

*Crichton* v. *Crichton*, (1895) 2 Ch. 853; 13 R., Nov. 114, was an action by the beneficiaries under a marriage settlement, to compel the executors of a trustee to make good certain of the trust funds which had been misappropriated. The settlement was made in 1832, and related to a sum of over £20,000 (the property of the intended wife), which was vested in four trustees, on trust, to pay the income to the intended wife for life, and after her death to the husband; and, after the death of the survivor, for such issue of the marriage as the husband and wife by deed, or the survivor by deed or will, should appoint, and in default of appointment, for all equally. The husband ultimately, as executor of the last surviving trustee, obtained the entire control of the trust fund, and he proceeded to deal with part of the trust funds without regard to the settlement. He had two sons, Arthur and Henry, the only issue of the marriage. £10,000, part of the trust funds, he transferred to the joint names of himself and wife, and out of this sum he transferred £9,000 to the trustees of his son Arthur's marriage settlement. Another £4,000 he transferred into the joint names of his son Arthur and himself, of which the son received the income until his death, when he (the father) came into possession of the principal by survivorship. Arthur had apparently no knowledge of the source from which the £4,000

transferred to his trustees was derived. With regard to Henry, his father, besides making a settlement on his marriage, had also transferred to him certain stocks amounting in the aggregate to £4,801 (but it did not appear that they were derived from the trust funds). He also conveyed an estate to him which had been sold by his executors for £7,000. It was claimed by the executors of the trustee that these payments to the sons were a satisfaction pro tanto of their claims under the settlement of 1832. North, J., however, was of opinion that the settlement on Henry's marriage being made before the father's liability existed, could not be a satisfaction of such liability, and that the transfer of the stock to Arthur's trustees and into the joint names of the father and Arthur could not be deemed a satisfaction in whole or in part of his claim under the settlement. But, inasmuch as it was shown that the stocks transferred to Arthur's trustees were part of the trust funds, his representatives could not recover that over again. He was also of opinion that the stock transferred to Henry was not a satisfaction of any part of the father's indebtedness, and though it was argued that Henry's share under the settlement was a portion, and that a subsequent provision by the father of a lesser amount was a partial satisfaction, North, J., refused to accede to the argument, on the ground that the portion of Henry under the settlement was not provided by the father, or one for which either he or his estate was in any way liable.

WILL CONSTRUCTION—HEIRLOOMS—TRUST FOR PERSON ENTITLED TO "ACTUAL" POSSESSION OF REALTY.

In *re Angerstein, Angerstein* v. *Angerstein*, (1895) 2 Ch. 883, Kekewich, J., decided that, where heirlooms are bequeathed upon trust for the person entitled to the "actual possession" of the testator's freehold estates, such heirlooms do not vest absolutely in the tenant in tail, who dies in the lifetime of the tenant for life of such estates.

# CORRESPONDENCE.

## PROFESSIONAL ETHICS.

*To the Editor of the Canada Law Journal.*

DEAR SIR,—I wish to protest against a practice which has grown up in this city, of lawyers giving notes of their cases, as soon as writ is issued, to the gentlemen of the press, who print the same in the news column of the daily papers, thus giving such lawyers some cheap advertising. The public offices, too, furnish the reporters with memoranda of all writs issued, and of all Surrogate cases; and, presumably, free of charge. In many cases friends do not wish details of the deceased's affairs to be published, and information given by lawyers while a case is going on is often partial and misleading. No objection could be taken to the press getting information from the public offices, if they paid for it like the rest of the world, nor to their reporting cases which have been tried. It does not seem professional for lawyers, every time they issue a writ or take a step in the cause, to give it out for publication. It also often prejudices the public mind against the person proceeded against, though in the end the defendant may be entirely successful. Yours, etc.,

LAWYER.

Hamilton, January 6, 1896.

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## NEW RULES OF PRACTICE.

*To the Editor of the Canada Law Journal.*

SIR,—Could anything be clumsier or more curious in its results than our Rule of Practice No. 461, as amended by Rule 1448.

It now reads " All writs . . . shall be served upon his solicitor when residing in Toronto, or if his solicitor does not reside in Toronto, then either upon his solicitor, or if such solicitor does not reside in the county where such proceedings are conducted, or resides in some part of such county other

than the county town and has not an office in the county town, then upon the agent, if any, named in the solicitor's and agent's book," &c.

It is obviously intended to provide for service upon the solicitor only, if he resides in Toronto or has an office in the county town where the proceedings are conducted; otherwise, either upon the solicitor or his booked agent.

The clumsiness of the Rule as it now stands is an example of a plain and simple sentence being built upon and patched up until it is scarcely possible to ascertain its meaning. Then note some results of the Rule:

If a solicitor resides in Toronto, but keeps his office elsewhere (this is not impossible, I believe), service must be made upon him personally, or at his office outside of Toronto, and he is not obliged to have a Toronto agent.

In cases where proceedings are being conducted in the office of a local Registrar, &c., outside of Toronto, there may be two solicitors, each having an office in the county town. One resides in the county—say ten miles from the county town—while the other resides in an adjoining county, five miles from the county town.

Service upon the former must be made either personally or at his office. It will not answer to serve his booked agent. While service may be made upon the non-resident by serving his booked agent, if he has one; but if he has none, then by posting up copies in the office where the proceedings are being carried on. Curious, isn't it?

J. W. G.

Jan. 18, 1895.

# BOOK REVIEW.

*Principles of the English Law of Contract, and of Agency in its relation to Contract.* By SIR WILLIAM R. ANSON, Bart., D.C.L., of the Inner Temple, Barrister-at-law, etc.; eighth edition; New York, Macmillan & Co., London, and The Copp Clark Co., Ltd., publishers, 9 Front street west, Toronto. 1895.

The edition before us is the first American copyright edition of Anson on Contracts, with American Notes by Earnest W. Huffcut, Professor of Law in the Cornell University School of Law.

Anson on Contracts has always been *par excellence* the students' book on this important subject. It does not, like Mr. Leake's work, treat a contract as a subject of litigation from the point of view of the practising barrister or solicitor; nor, like Sir Frederick Pollock in his work, does he enquire "What is the nature of that legal relation which is termed contract, and how it is brought about?" telling us how the contract may be made, and by what clause in its structure it may be invalidated. Sir William Anson's book is, in fact, a luminous statement of elementary principles, with illustrations sufficient to explain the rules laid down by the author.

The object of the American edition is to give parallel references to selected American authorities where the law of the United States corresponds with that of England (as stated by the author), and to indicate the points at which American authorities disagree with the English law, or are divided among themselves. Our business relations with the United States and similarity as to many of our laws and subjects of contract in many particulars, will make these notes of much use to the Canadian practitioner; whilst to the student, the book is, of course, invaluable.

## DIARY FOR FEBRUARY.

1 Saturday ......Sir Edward Coke born, 1552.
2 Sunday ........*Septuagesima Sunday.*
3 Monday........Law Society of U. C. Convocation meets.
4 Tuesday .......Weekly Court at London and Ottawa.
6 Thursday.......W. H. Draper, 2nd C. J. of C. P., 1856.
9 Sunday ........*Sexagesima Sunday.* Union of Upper and Lower Canada.
10 Monday........Canada ceded to Great Britain, 1763.
11 Tuesday .......T. Robertson, J. Ch. D., 1887. Weekly Court at Ottawa.
14 Friday ........Toronto Un'ity burned, 1890. Weekly Court at London.
16 Sunday ........*Quinquagesima Sunday.*
17 Monday........Weekly Court at Ottawa.
18 Tuesday .......Supreme Court of Canada sits. Robt. Sedgewick, J. of S.C., 1893.
19 Wednesday ....Ash Wednesday.
21 Friday ........Weekly Court at London.
23 Sunday .. ......*First Sunday in Lent.*
25 Tuesday.........Weekly Court at London.
27 Thursday.......Sir John Colborne, Administrator, 1838.
28 Friday ........Indian Mutiny began, 1857. Weekly Court at Ottawa.

# REPORTS AND NOTES OF CASES

## Dominion of Canada.

### SUPREME COURT.

Ontario.] [Dec. 9, 1895.

CLARKSON *v.* MCMASTER.

*Construction of statute—55 Vict. c. 26, s-s. 2, 4 (O.)—Chattel mortgage—Agreement not to register—Void mortgage—Possession by creditor.*

By the Act relating to chattel mortgages (R.S.O. 1887, c. 125) a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vict., c. 26, sec. 2 O., that expression extends to "simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences." (R.S.O. 1887, c. 124.) By sec. 4 of 55 Vict., c. 26, a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors . . before such taking of possession."

*Held*, reversing the decision of the Court of Appeal (22 A.R. 138), that under this legislation a mortgage so void is void as against all creditors and not merely those having executions in the sheriff's hands, and simple contract creditors who have commenced proceedings to set it aside; that the words "suing on behalf of themselves and other creditors" in the amending Act only indicate the nature of proceedings necessary to set the mortgage aside,

and that the same will enure to the benefit of the general body of creditors; that the mortgage is void as against persons becoming creditors after its execution as well as before, and as against an assignee appointed after the mortgagee has taken possession; and that a void mortgage will not be made valid by such taking of possession.

*Held*, per STRONG, C. J., that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, such mortgage is, on grounds of public policy, void *ab initio*.

Appeal allowed with costs and judgment of MacMahon, J., restored.

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

*Thompson*, Q.C., for the respondents.

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Quebec.] [Dec. 9, 1895.

BANQUE JACQUES CARTIER *v.* THE QUEEN.

*Constitutional law—Powers of members of Government—Letter of credit—Contract of member of executive—Ratification by legislature.*

The Provincial Secretary of Quebec, in order to aid one D. to obtain advances by which he could execute a government contract for printing, wrote him a letter stating that the Government would have an amount voted for him in the ensuing session of the legislature, which would be paid to him as soon as the session ended, or to any person to whom the letter should be transferred by D., and endorsed by him. The Provincial Secretary had the assent of his colleagues to the writing of this letter, but was not authorized by order in Council to do so. The money was voted by the legislature as stated in the letter.

*Held*, affirming the decision of the Court of Queen's Bench, that the said letter created no contract between D. and the Government of Quebec.

*Held* also, that the vote of the money by the legislature could not be said to ratify the contract with D., as no such contract existed, nor did it any more than the letter itself create an obligation binding on the Government, which could only be done by order in Council.

D. endorsed the letter and transferred it as a letter of credit to La Banque Jacques Cartier.

*Held*, that such endorsement did not vest in the bank a claim that could be enforced at law against the Government.

The "letter of credit" was not a negotiable instrument under the Bills of Exchange Act, 1890, or the Bank Act, R.S.C., c. 120.

Appeal dismissed with costs.

*Langelier*, Q.C., and *McKay*, for the appellants.

*Casgrain*, Q.C., Attorney-General for Quebec, and *Ferguson*, Q.C., for the respondent.

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Manitoba.] Dec. 9, 1895.

FRANCIS *v.* TURNER.

*Debtor and creditor—Agreement between—Conditional license to take possession of debtor's goods—Creditor's opinion of debtor's incapacity—Bona fides in forming opinion—Grounds—Replevin—Joint conversion.*

F., a trader, having become insolvent, and being indebted, among others,

to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent. of their claims, T. M. & Co. endorsing his notes for securing such payment, they to be paid in full, but payment to be postponed until a future named day. T. M. & Co. were secured for endorsing by an agreement under seal by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co. should at once become due and they could take possession of the stock in trade, book debts and property of F. and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable.

This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed and T. M. & Co. then consisting of T. & N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co. until a certain day after and resumed possession, but when T. M. & Co. returned on said day he disputed their right and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee.

*Held*, affirming the decision of the Court of Queen's Bench (GWYNNE, J., dissenting), that F. and the assignee were guilty of a joint conversion of the property replevied.

*Held* also, affirming said decision (GWYNNE, J., dissenting), that if T. M. & Co. formed an honest opinion that F. was incapable, such opinion must govern though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing, from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with did not necessarily show *mala fides;* and that the change in the firm of T. M. & Co. did not vitiate the notice as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F.

Appeal dismissed with costs.

*Ewart*, Q.C., for the appellants.

*Howell*, Q.C., for the respondents.

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British Columbia.] Dec. 9, 1895.

CITY OF VANCOUVER *v.* BAILEY.

*Construction of statute—General act—Repeal of special act—Repeal by implication—By-law—Municipal corporation.*

The original charter of the City of Vancouver provided that any by-law for the purpose of raising money for municipal purposes should receive the assent of a majority of the ratepayers. By an amendment to the charter in 1893, the assent of three-fifths of the ratepayers voting on any such by-law

was made necessary. In the same session of 1893, the general Municipal Act was amended, and one provision of the amendment was that every money by-law of a municipality could be passed by a majority of the ratepayers voting upon it. In proceedings to quash a by-law of Vancouver to raise money for supplying the city with electric light,

*Held*, affirming the decision of the Supreme Court of British Columbia, that the general Act would not repeal the special charter of the city by implication, even if passed at a subsequent session, and, *a fortiori*, an Act passed at the same session would not so repeal it.

Appeal dismissed with costs.

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

*Robinson*, Q.C., for the respondent.

## EXCHEQUER COURT.

### TORONTO ADMIRALTY DISTRICT.

RANKIN *v.* "THE ELIZA FISHER."

*Assignment of seamen's wages—Action by assignee—Maritime lien not transferable—Admiralty Courts administer English maritime law.*

The rights, remedies and privileges of the master of a ship, under the Merchants' Shipping Act of 1854, s. 191, are co-extensive with those of a seaman, and the maritime lien of a master for wages is personal and cannot be assigned.

TORONTO, October, 1895, McDOUGALL, LOCAL J.

This was an action brought by one William Rankin, an assignee, for wages alleged to be due to one Robert Rankin, the master of a ship.

The plaintiff claimed by virtue of the assignment to be entitled to a maritime lien upon the proceeds of the vessel in priority to the mortgage debt due one Patterson, under whose mortgage the vessel had been sold and the proceeds brought into Court.

The amount due in respect of the mortgage at the date of the trial of this action was proved and practically admitted, and the proceeds were insufficient to pay the mortgage debt and costs of the mortgage action in full. On the 15th July, 1895, Robert Rankin assigned his claim to the plaintiff for the arrears of wages sued for in the action.

*Thos. Mulvey* for the plaintiff.

*J. F. Canniff* for the mortgagees intervening.

McDOUGALL, Local Judge : It is not the Master who sues, but his assignee, the plaintiff, and the objection taken by counsel for the mortgagees, who dispute the liability of the proceeds to this claim, is that the Master cannot assign his claim, and by such assignment transfer to the assignee the Master's maritime lien against the vessel or the proceeds. The debt is doubtless assignable at common law, but the Master having parted with his claim for wages, his lien, which it is contended is personal to the Master only, is claimed to be at an end. See Abbott on Shipping, 13th ed., p. 883 : "Bottomry bonds have long been regarded as negotiable, but this character does not extend to maritime liens generally. A person who, *with the leave of the Court*, advances money to pay

the wages of the crew, has long been allowed the same priority the crew would have had, and in proper cases such orders continue to be made." Also see Coute's Admiralty Practice, at p. 19: "A maritime lien is inalienable, and except in the case of bottomry it cannot be assigned or transferred to another person so as to give him a right of action *in ren* as assignee. A lien may be extinguished in various ways. It is extinguished on payment of a debt by or on behalf of the owner of the *res;* where also a payment is made by another person without the direction or privity of the owner, *e.g.*, where a mortgagee has paid seamen their wages in order to save the vessel, upon which he has security, being wasted by their actions, the lien is equally extinguished and cannot be revived in the person of the payer, who accordingly has no right of action in the Court of Admiralty in respect of his advances."

The cases cited in support of the non-assignability of the lien are *The New Eagle*, 4 Notes of Cases, 427; *The Janet Wilson*, Swabey 261, and *The Louisa*, 6 Notes of Cases, 532.

(The learned judge then reviewed these cases in detail, and proceeds :)

The Master for his wages or disbursements was originally without a lien, so that his only remedy was personal, either by law or equity. Upon this state of law supervened the statute giving him the same rights, liens and remedies for his wages as were possessed by ordinary seamen. The words of this Statute are as follows: "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman not being a master has for the recovery of his wages:" Merchants' Shipping Act (1854), sec. 191.

What then is a seaman's lien? It is the right of a mariner to take action against the ship itself for the recovery of his claim. It is a right and a remedy for his own exclusive benefit. It arises by implication and is held to exist independently of possession. It is a privilege conferred by maritime law with the object of securing to the seaman his wages, the fruit of useful and oftentimes perilous services. When, therefore, his wages have been paid, *it matters not by whom*, the design of the privilege is answered, and his maritime lien is at an end.

It has always been contrary to the policy of maritime law to invest him with any capacity to transfer this remedy against the *res*, to a third person. The Legislature by several enactments has signified in no uncertain terms their approval of this restriction. Mariners are proverbially an improvident class; they are easily imposed upon, and returning from a voyage, would readily become the victims of sharpers and usurers, did the right exist to them to readily dispose of their claims for wages earned on the voyage.

Section 182 of the Merchants' Shipping Act of 1854, enacts: "No seaman shall by any agreement forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his rights to wages in case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

Section 235 of the Merchants' Shipping Act (1854) enacts : "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any Court ; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or any attachment, encumbrance or arrestment thereof; and no assignment or sale of such wages or of salvage made prior to the accruing thereof shall bind the party making the same ; and no power of attorney or authority for the receipt of any such wages or salvage shall be irrevocable."

Section 182, above quoted, has been expressly held in *The Rosario*, L.R., 2 P.D. 41, to be an enactment in aid of the general law and not a substitute for it. Sir Robert Phillamore, at p. 45, held in that action, which was an action for salvage, that it was no defence for the defendants to set up an alleged agreement whereby fourteen of the sixteen plaintiffs had, for valuable consideration, assigned to the defendants all their respective shares of the salvage award ; that such an agreement was void under Section 182 above cited, and a demurrer to the statement of defence was allowed.

The question for decision in this action has been expressly dealt with in *The City of Manitowac*, in the Vice-Admiralty Court of Quebec, reported in Cook 178 (1879), a case not cited before me on the argument. There the Court expressly held that the lien of the salvors, which also included a claim for seamen's wages, necessaries, pilotage and towage, was personal and inalienable, and did not vest in the plaintiffs, who were assignees, by virtue of the assignment. In the judgment at page 189, the following language is used by the learned judge : "I do not regret that this Court is compelled to decline jurisdiction over the assignment of salvage and the other matters for which this suit is brought, not only because its efficiency would be impaired if it had to determine the validity of assignments and disputed accounts, subjects of municipal law and regulation, and involving delay, but because in the case of assignments of claims such as those in question, the assignors, the mariner and the salvor, may be subject to gross injustice where their wants compel them to accept a tithe of their due for a claim admitting of no question. I express no opinion on the merits of this case ; as it is not opposed, I take it for granted that the claims of the promoters are well founded, and if they are, they have their remedy before the ordinary tribunals of the country, to which they can apply for relief."

I have been referred to a number of American decisions in which the question of the assignment in maritime liens is dealt with ; these decisions are conflicting, some affirming the principle that all the remedies and securities, including the lien of the assignor, pass to the assignee, who can pursue them in the same manner as the assignor himself could have done ; other cases affirm the contrary doctrine and sustain the view that a maritime lien is purely personal and for the exclusive benefit of the original lien holder, and there is no capacity vested in the lien holder to transfer his liens to third persons. I do not find any assistance from these decisions, for I have to determine this case according to the civil and maritime law of the High Court of Admiralty of England.

No case can be cited to support the view that the High Court of

Admiralty has sanctioned a proceeding *in rem* at the instance of an assignee of a claim for a master's or seaman's wages.

In *Gaetano & Maria*, L.R. 7 P.D., at p. 143, Mr. Justice Brett, in the Court of Appeal, in dealing with the question as to what law is administered in the English Court of Admiralty, expresses himself as follows: "The first question on the argument before us was, what is the law which is administered in an English Court of Admiralty, whether it is English law or whether it is that which is called the Common Maritime Law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt; the law which is administered in the Admiralty Court in England is the English Maritime Law; it is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and principles, has adopted as the English Maritime Law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge of the Admiralty Court of England has promulgated (Lord Stowell and those before him, and Dr. Lushington after him), and I do not understand that the present learned judge of the Admiralty Court differs in the least from them."

It was urged before me that the lien of a Master for his wages as created by the Statute, was more beneficial in its nature, and not to be treated as subject to the same restrictions as the lien existing in favor of common seamen. I cannot perceive that any difference exists or was intended to be created by the Statute in the quality or legal incidents to be attached to the Master's lien, which distinguishes it in any way from the lien in favor of an ordinary seaman.

The Master was, by the Statute, placed in the same beneficial position as a seaman; his rights, remedies and privileges were made co-extensive, neither more nor less; his maritime lien for his wages, like that of a seaman, is personal and exclusively for his own benefit, and is therefore by the policy of maritime law inalienable.

The plaintiff in this case, therefore, has no right of action *in rem* for the recovery of his claim in the Admiralty side of the Exchequer Court of Canada.

Plaintiff's action dismissed with costs.

## Province of Ontario.

### HIGH COURT OF JUSTICE.

*Divisional Court.*

BOYD, C., ROSE, J.
ROBERTSON, J. } [Jan. 17.

RE THOMPSON.

*Garnishing summons—Execution—Priority—Creditors' Relief Act, sec. 37.*

On the 15th March, 1895, J. W. Lang & Co., of Toronto, creditors of one Thompson, garnished moneys under sec. 185 of the Division Courts Act, and on the 6th of April, Thompson assigned for the benefit of creditors, and his wife,

who claimed an interest in the moneys garnished, also assigned her interest in said moneys to her husband's assignee. An order was subsequently made discharging the garnishees, on payment of moneys into Court. An issue was directed to be tried in the Division Court, to ascertain who was entitled to the moneys, and judgment given in favor of Lang & Co., on the 2nd Nov., 1895. On the 25th Nov., 1895, writs of execution were placed in the hands of the sheriff of the County of Elgin, and on the 2nd Jan., 1896, an order was made for payment of the moneys out of Court to the sheriff for distribution under the Creditors' Relief Act. From this decision Lang & Co. appealed to a Divisional Court.

*Held*, that by the result of the proceedings and judgment in the Division Court, the question of the title to the fund was *res judicata.*

The Division Court having found the attaching creditors entitled as against the assignee for benefit of creditors, there is no debt or fund of the debtors in the County of Elgin. Sec. 37 of the Creditors' Relief Act must be construed to refer only to a case where facts would entitle a sheriff, if there had been no attaching order issued by a creditor, to obtain an attaching order at his own instance under sub-sec. 1, and to entitle him to such, there must be executions in his hands, and not sufficient lands and goods to satisfy them, and a debt by a person resident in the sheriff's county.

*Wood* v. *Joselin*, 18 A.R. 59, followed.

*W. R. Riddell* and *F. J. Travers*, for appellants.

*N. W. Rowell*, for the sheriff.

*W. H. Blake*, for the assignee.

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*Divisional Court.*

BOYD, C., STREET, J.
MEREDITH, J.

Jan. 17.

RE MCCABE *v.* MIDDLETON.

*Division Courts—Garnishee proceedings—"Cause"—"Action"—Jurisdiction.*

This was an appeal by the primary debtor from an order of Rose, J., (noted ante p. 31) granting a mandamus to the Judge of the Third Division Court of the County of Elgin, directing him to proceed with the hearing of a plaint in a garnishment proceeding transferred to that court from the First Division Court of the County of York.

*Held*, that if a proceeding under sec. 185 is begun in the wrong court, sec. 87 gives plain authority to transfer it to the proper forum, *i.e.*, to the place of residence of the garnishee, if within Ontario. This section applies to all processes issued in the Division Court, "process" being defined by rule 2 (15) as "any summons issued under the seal of the court." By sec. 80 the claim or action or proceedings being transferred from the County of York to the County of Elgin, the residence of the garnishees, that local court became seized of the whole, with ample jurisdiction to deal with all matters in controversy on the merits. Sec. 81 gives the alternative proceeding in choice of courts as between the cause of action and the defendant's residence in ordinary litigation; but that is displaced if the garnishee element is introduced contemporaneously

with the ordinary claim between debtor and creditor, by the explicit language of sec. 185.

Appeal dismissed with costs to be paid by primary debtor and garnishees.

*E. D. Armour*, Q.C., for primary debtor.

*Totten*, Q C., for garnishees.

*Tytler* for primary creditor.

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## *Chancery Division.*

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BOYD, C.] [Dec. 11, 1895.

LEE *v.* LEE.

*Alimony—Recovery of judgment therefor—Default in payment of—Subsequent judgment therefor in County Court—Validity of order for sale of husband's lands.*

Where, after the recovery for judgment in an alimony action, directing payment to the wife of a yearly sum in quarterly instalments, the wife, on default being made in payment of two of the quarterly instalments, brought an action therefor in the County Court and recovered judgment, she was, notwithstanding, held entitled to the usual order for the sale of the husband's lands, etc., for the realization of the alimony.

*Semble*, that the judgment recovered in the County Court was a nullity.

*F. E. Hodgins*, for the plaintiff.

*Treemaine*, for the defendant.

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## *Common Pleas Division.*

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BOYD, C.] [Dec. 12, 1895.

TAYLOR *v.* HOPKINS.

*Will—Estate in fee—Disposal during coverture—Effect of.*

The testatrix, by the residuary clause of her will, gave her executors and trustees the residue of her real and personal estate in trust. Firstly, to sell and dispose of such portions thereof as they should deem necessary to carry out the provisions of the will, paying legacies and bequests, debts and funeral expenses. Secondly, to divide the residue equally between her seven children, naming them, share and share alike, and directing that advances made to the children should be taken as part of their shares, and that the surviving issue of deceased children to inherit his or her parents' share. Full power was given to the executors and trustees to select and apportion the children's shares. It then provided that the daughters' shares, when paid over to them, should be held and enjoyed by them, free from their husbands' control, and from their debts and engagements, with full power, notwithstanding coverture, and without their husbands' concurrence, to deal and dispose of their shares or any part thereof, during their lifetime, in such manner and for such purposes as by any deed or deeds, writing or writings, with or without the power of revocation, to be sold and delivered in the presence of, and attested by, two or more witnesses. The executors and trustees were then directed, as soon after

testatrix's decease as convenient, and without any unusual delay, to pay all legacies and bequests, and make the division to the children as they attained twenty-one years of age, and in the meantime to invest their shares, etc.

*Held*, that by the first part of the clause the children took a fee simple in the lands, which as to the daughters was not interfered with by the subsequent part of the clause dealing with their shares during coverture.

*O. R. Macklem*, for the plaintiff.

*C. J. Holman*, for the defendant.

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## *Queen's Bench Division.*

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Divisional Court.] [Dec. 14, 1895.

MCGINNIS *v.* DEFOE.

*Arrest—Felony—Issue of warrant—Absence of written information—Reasonable suspicion that felony committed—Notice of action—Sufficiency of.*

A magistrate acts without jurisdiction, and so renders himself liable in trespass, where, without any written information charging another with a felony, he issues a warrant for his arrest therefor; and while a reasonable ground for the belief that such person had committed the felony might justify the magistrate in arresting such person himself, it does not enable him to issue his warrant for his arrest by another.

*Ashfield's case*, 6 Co. 320, followed.

The notice of action in this case alleged that the defendant, on the 8th of September, 1893, wrongfully, illegally, and without reasonable and probable cause, issued his warrant and caused plaintiff to be arrested and kept under arrest on a charge of arson, and on said 8th of September maliciously, illegally and wrongfully, and without any reasonable and probable cause, caused plaintiff to be brought before him, etc., and to be committed for trial, etc., and to be confined in the common jail, etc., alleging the subsequent indictment of the plaintiff and his trial on the charge, and his acquittal.

*Held*, a good notice of action in trespass.

*Clute*, Q.C., for the plaintiff.

*W. R. Riddell*, for the defendant.

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Divisional Court.] [Dec. 14, 1895.

HENDRIE *v.* TORONTO, HAMILTON & BUFFALO R. W. CO.

*Railways—Lands injuriously affected—Right to compensation.*

On an appeal from the judgment of MEREDITH, C. J., at the trial following his judgment on the motion for the injunction reported vol. 31, p. 488, to the Queen's Bench Divisional Court, the judgment was affirmed and the appeal dismissed with costs.

*McCarthy*, Q.C., and *D'Arcy Tait* for the appeal.

*Robinson*, Q.C., and *Bruce*, Q.C., *contra*.

## *Practice.*

Court of Appeal.] [Jan. 14.

MERIDEN BRITANNIA CO. *v.* BRADEN.

*Costs—Liability to solicitor—Taxation against opposite party.*

Where, by an express contract, a party does not incur or become liable for costs to the solicitor representing him in an action, he cannot tax costs against the opposite party.

*Jarvis* v. *Great Western R. W. Co.*, 8 C.P. 280, and *Stevenson* v. *City of Kingston*, 31 C.P. 333, approved.

Decision of the Chancery Division, 16 P.R. 410, affirmed.

*W. H. P. Clement* and *A. McLean Macdonell*, for the appellant.

*J. W. Nesbitt*, Q.C., for the respondents.

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Court of Appeal.] [Jan. 14.

WILLIAMS *v.* LEONARD.

*Amendment—Pleading—Bills of Sale Act—Chattel mortgage.*

Decision of the Queen's Bench Division, 16 P.R. 544, affirmed on appeal.

*Moss*, Q.C., for the appellant.

*Gibbons*, Q.C., for the respondents.

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Court of Appeal.] [Jan. 14.

MILLS *v.* HAMILTON STREET RAILWAY CO.

*Costs—County Court—Nonsuit—Appeal.*

Upon the trial of a County Court action, counsel for the defendants, at the close of the plaintiff's case, formally moved for a nonsuit and stated that he would renew the motion at the close of the defendants' case. Then he called and examined three witnesses, but, when a fourth was sworn, the Judge interposed and said he would take the responsibility of entering a nonsuit. He heard argument from the plaintiff's counsel opposing this course, and the defendants' counsel said he proposed to tender his evidence and go on and complete the case. The Judge refused to hear further evidence, and entered a nonsuit, which in term he refused to set aside, the defendants' counsel neither opposing nor assenting to the motion. The plaintiff successfully appealed to the Court of Appeal. Upon the argument there, the defendants' counsel took the same position, but urged that the defendants should not be ordered to pay costs.

*Held*, however, that nothing was shown to induce the Court to depart from the general rule; and the defendants were ordered to pay the costs of the appeal, the last trial, and the action in term.

*J. W. Nesbitt*, Q.C., for the plaintiff.

*E. Martin*, Q.C., for the defendants.

*Practice.*

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WINCHESTER, MASTER.] [Jan. 25.

RATTEY *v.* THE JOURNAL PRINTING CO.

*Security for costs—Default—Time—Dismissal of action—Discretion.*

After issue was joined in a libel action, an order for security for costs under R.S.O. c. 57, sec. 9, was made in terms of *Thompson* v. *Williamson*, 16 P.R. 368. The plaintiff having allowed a sittings of the Court to pass without any attempt to take the action down to trial, a motion was brought to dismiss the action for want of prosecution.

*Held*, that a judge has a discretion to make an order dismissing an action, though the defendant has not abandoned the order for security for costs.

Following the old Chancery Practice, an order will go that the plaintiff comply with the order for security for costs within four weeks from service of the order, and that in default the action be dismissed with costs.

Motion refused. Costs in the cause.

*La Grange* v. *McAndrew*, 4 Q.B.D. 210; *Giddings* v. *Giddings*, 10 Beav. 29; *Grant* v. *Winchester*, 6 P.R. 56, were referred to.

*H. M. Mowat*, for the defendants.

*D. Armour*, for the plaintiff.

## GENERAL SESSIONS OF THE PEACE.

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### COUNTY OF SIMCOE.

REG. *v.* McLEAN.

*Public Health Act—Duty of physician under R.S.O., c. 205, sec. 80—Verbal report to Medical health officer not sufficient—Appeal from decision of two magistrates in case partly heard before one.*

*Held*, 1. That an appeal to the Sessions will lie from a *dismissal* of an information, though it will not lie from a *conviction* under the Act.

2. That an appeal can be had from a decision of *two* magistrates, the case having improperly been partly tried before *one*.

3. A report by a physician to the Medical health officer by telephone, or on a post card not giving the particulars required by sec. 17, schedule A of the Act, will not relieve him from the penalty imposed for default.

4. The Medical health officer is not bound to *send* forms to the various physicians practising in the municipality, but merely to furnish same when applied for.

[BARRIE, Dec. 13, 1895, BOYS, J. J.

This was an appeal from an order of magistrates dismissing an information against John McLean, M.D., for neglecting to report to the Local board of health or Medical health officer for the Township of North Orillia, a case of scarlet fever which came to his knowledge as a physician, on being called upon to visit a person infected with that disease.

The evidence established the following facts: Dr. McLean, who resides in the town of Orillia, but practises his profession among other municipalities

in the Township of North Orillia, was called to see a sick child of Mr. Wilson in North Orillia. He found the child ill with scarlet fever, and on his return home tried to notify the Medical health officer for the township, of the case, through the telephone, but failing to do so, he wrote, as he stated, that officer a post card, telling him there was a case of scarlet fever in Mr. Wilson's house. The Medical health officer stated that he did not receive the card or telephone message, and had no notice of the case from Dr. McLean. An information was subsequently laid against Dr. McLean under the Public Health Act, R.S.O., c. 205, sec. 80, for neglecting to report the case. The information was taken by Geo. J. Booth, Esq., J.P., and on the 27th day of August last, Mr. Booth, sitting alone, partly heard the case and then adjourned it for a further hearing until September 3rd. On that date Mr. Booth was ill, and Mr. Calverley, another Justice of the Peace, further adjourned the case until September 9th, when Mr. Booth again adjourned it until September 17th. On that date Mr. Arch'd Thomson, J.P., and Mr. Booth, J.P., opened the Court and the informant asked for a further adjournment. The defendant objected to an adjournment and also to the jurisdiction of the Court, and stated he attended there under protest and was not to be considered a consenting party to anything, and attended without prejudice to his rights. According to the notes of the magistrates, the Court decided to proceed with the case, and made a decision that it be dismissed with $10.60 costs against the informant, but according to the evidence before the judge, an adjournment was first declared and the defendant and his witnesses withdrew, and after that the case was gone on with and the decision mentioned arrived at.

From this decision the informant appealed to the General Sessions of the Peace.

*H. H. Strathy*, Q.C., for appellant.

*R. D. Gunn* for respondent.

BOYS, J. J.—Under the 112th sec. of the Health Act no appeal can be had to the General Sessions upon any *conviction* under the Act. Here I consider the judgment is an order, and not a conviction, and there is a distinction between the two, a distinction preserved in this same section of the Act. I conclude therefore an appeal to this court will lie. (See *The Queen* v. *Coursey* 26 Ont., R. 685.)

Section 107 of the Act requires complaints of this kind to be tried before two magistrates or a police magistrate. Here all the evidence taken was heard by one magistrate alone, and the decision was arrived at by two magistrates; this I consider was not in accordance with the statute, since an authority given to two magistrates cannot be exercised partly by one and partly by two; this must render the order bad in law.

The questions then arise: (1) Can there be an appeal in a proceeding which, under the magistrates' court as constituted, could under no circumstances lead to a valid decision?

(2) Can an appeal be made by the informant aga.nst an order of this kind in a matter wholly within the jurisdiction of the Province of Ontario, and arising under an act of that province?

On the first point I have satisfied myself the appeal will lie. It is provided by statute that no action can be brought against a magistrate for an act done in excess of his jurisdiction until the conviction or order has been quashed, R.S.O., c. 73, sec. 4: *Graham* v. *McArthur*, 25 U.C.Q.B. 478.

On the second point mentioned, the difficulty that stood in the way of the appeal when the case of *In re Murphy and Cornish* was before the courts (see 8 P. R. 420) appears to be got over now by section 879 of the Criminal Code, which permits any person aggrieved by an order or conviction, the prosecutor or complainant, as well as the defendant, to appeal; and by R S.O., c. 74, sec 5, the practice and proceedings, in an appeal to the sessions in matters within the Legislative authority of the Province of Ontario, shall be the same as the practice and proceedings in an appeal under the Dominion statutes, except that either of the parties to the appeal may call witnesses and adduce evidence in addition to the witnesses called, and evidence adduced, at the original hearing.

The order of the magistrates must be quashed on the ground that the evidence was taken by one magistrate sitting alone, but without costs.

I will now consider the case on the evidence and its merits.

Assuming Dr. McLean tried to reach the Medical health officer by the telephone and failed to do so, and that he afterwards wrote him a post card and posted it to his address, stating there was a case of scarlet fever at Mr. Wilson's, I cannot consider this a reasonable compliance with the Act, which by sec. 80 requires that within twenty-four hours he should have given notice in such manner as is directed by rules 2 and 3 of sec. 17, schedule "A," and these rules provide that the notice shall be given on special forms to be provided by the medical health officer, or secretary of the local board of health, setting forth various particulars regarding the case—the names and age of the patient, the locality where the patient is, the disease, the school attended by children from the house, and the measures employed for isolation and disinfection. A card merely stating there was a case of scarlet fever at Mr. Wilson's, cannot be considered a substantial compliance with these requirements. Dr. McLean states he was not supplied with the proper forms to give the notice required. I do not think this can excuse him; rule 1 of sec. 17 of the schedule says he shall be provided with the forms by the Medical health officer, or secretary of the local board of health; this must mean that he is to be provided with them free of charge on application for them; it can hardly mean that the forms are to be sent to all medical men practising in the municipality. How can they be ascertained in cities such as Toronto or even in much smaller municipalities? Some medical men are continually changing their places of residence, others periodically go "on circuit," as it were, to long distances from their homes; others again, who are specialists, or widely and favorably known, go to all parts of the province on special calls, and how are all these to be found out and supplied with the forms in every municipality they visit? The only reasonable interpretation to the Act I can see is that the blank forms are to be kept on hand and supplied free of charge to medical men when applied for.

I conclude, therefore, that Dr. McLean has violated the provision of the Act requiring the notice referred to to be given, and as this is the first case of the kind, to my knowledge, in this county, and he appears to have made some effort to give the notice, a nominal penalty of one dollar is inflicted without costs.

As far as there is any power to protect the magistrates from any action for damages in the matter, they are entitled to protection.

I may add that it is to be regretted that some better provision for reserving udgment, and allowing more time for the consideration of appeals, is not provided than at present exists. As I understand the case of *Re Coleman* 23 Q.B. 615, a judgment of this kind must be given during the Sessions; this necessitates a hurried consideration of the case, perhaps during the continuance of other business before the Sessions, or the County Court; or else an adjournment of the Sessions, with all the expense connected with it, must be had for the purpose of obtaining a reasonable time to prepare the decision.

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# Province of Nova Scotia.

## SUPREME COURT.

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EN BANC.] [Nov. 30, 1895.

KIRK *v.* CHISHOLM.

MCPHEE *v.* CHISHOLM.

*Assignment with preference—Accompanying affidavit—Bill of sale Act—What instruments comprised in.*

An affidavit of bona fides accompanying a deed of assignment for the benefit of creditors generally, with a preference to a select creditor in a specified amount, did not state that the amount set forth as being the consideration was justly and honestly due by the grantor to the grantee, and the question was whether such an instrument was a bill of sale, and so came within the provisions of c. 92 R.S. N.S. s. 4 (Bills of sale Act).

*Held* (following *Black* v. *Sawyer*, 2 Old 1, and *Archibald* v. *Hubley*, 18 S.C.R. 116; *Durkee* v. *Flint*, 7 R. & G. 487, not followed), that the instrument not coming within the exceptions mentioned in s. 10 of said Act, was subject to the provisions of s. 4, and was void for lack of an affidavit complying with the statutory requirements.

*C. F. McIsaac*, for plaintiff.

*Gregory*, for plaintiff.

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EN BANC.] [Nov. 30, 1895.

MCMILLAN *v.* GIOVANETTI.

*Replevin action—Bona—Satisfaction of condition—Authority of solicitor to compromise after judgment.*

G. having suffered a conviction and fine under the C. T. Act, and his goods having been seized under warrant of distraint, became plaintiff in a replevin action and obligor on the usual bond, McM. and McI, the now plaintiffs, being obligees and defendants. Judgment was given against G. for a

return of the goods and payment of costs. H. and H., solicitors of McM. and McI., who were entrusted with the enforcement of the replevin judgment, accepted the sum of $110 in full settlement of said fine and costs. They likewise gave to G. a satisfaction piece releasing the judgment, in which McM. joined, but McI. did not.

In an action to enforce the penalty of the replevin bond with allegation that the goods were not returned and the judgment not satisfied,

*Held*, that in the absence of evidence as to the value of the goods, the return of which had been adjudged, it was not unreasonable to assume that the compromise of H. and H. related to the costs in the action, that their authority having been continued after judgment, it was competent to them to make such a settlement, which was binding on their clients; that this was not a case in which a smaller sum had been accepted in satisfaction of a greater without other consideration; that, therefore, receipt and satisfaction piece constituted absolute proof that the condition of the bond had been satisfied.

*W. B. A. Ritchie*, Q.C., for appellants.

*H. Mellish*, for respondent.

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MEAGHER, J. In Chambers. [Oct. 8, 1895.

CROWELL *v.* LONGARD.

*Appeal from County Court—Security for costs—Stay of proceedings—English and Nova Scotia rules compared.*

On appeal by defendant from a decision of a County Court Judge, granting summary judgment under O. 14. r. 1, no stay of execution pending appeal having been sought by defendant or allowed, plaintiff applied under O. 57, r. 13, for an order compelling defendant to give security for costs of appeal on the ground that defendant had no property, real or personal, within the jurisdiction. On the part of defendants it was urged that under the above rule no security could be ordered unless a stay of execution had been sought and granted.

*Held*, that though the question was not free from difficulty by reason of the omission from O. 57, r. 13, of the words "under special circumstances" which appear in the English rule (O. 58, r. 15), yet considering the wide and general language of the rule and the fact that only the judge appealed from, or the Court, can grant a stay, while the Court or any judge under the rule may order security, there could be a substantial conformity with the English practice and the ordering of security in such a case is within the judicial discretion.

Security ordered in a bond with at least one surety.

*W. B. MacCoy*, for plaintiff.

*McInnes*, for defendant.

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WEATHERBE, J. In Chambers. [Dec. 23, 1895.

STAIRS *v.* ALLEN.

*Service out of jurisdiction—Forum of action—Interpretation of clause in bill of lading.*

In an action against defendant, a foreign steamship owner, for breach of contract arising out of the non-delivery of goods at Halifax, plaintiff obtained

leave to serve out of the jurisdiction. The bill of lading under which the goods were shipped contained the following clause : "The claims, if any, for damages for short delivery or any other cause shall be settled direct with the agents of the line at Liverpool, according to British law, to the exclusion of proceedings in any other country." A case having been stated for the opinion of his lordship on motion to set aside writ and service,

*Held*, that the above mentioned clause imported something more than a mutual agreement to refer all claims against defendant to the agent at L., as a condition precedent to the bringing of action ; that on a true construction of the clause the proper forum of the action was English, and consequently that plaintiff was not entitled to service out of the jurisdiction.

*H. C. Borden*, for defendant.

*C. D. Macdonald*, for plaintiff.

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RITCHIE, J. }
In Chambers. } [Jan. 17.

JOHNSON *v.* BELL ORGAN CO.

*Service out of jurisdiction—Foreign company—Breach within province—Service on company.*

Having obtained leave under O. 11, r. 1 (e), plaintiffs served defendants (an English company with a head office registered in London and having no branch office and resident agent in N.S.) at Guelph, Ont., where the principal offices of the company in Canada were, in manner valid by the laws of Ontario. The cause of action was an alleged breach of contract of agency, whereby defendants constituted plaintiffs their sole agents for the sale of goods within the Province, and the breach alleged was a selling through other agents. Defendants appeared under protest and moved to set aside writ and service on the grounds : (1) That the breach did not arise within the jurisdiction ; (2) That the service on the company was bad, not having been effected at the head-office in London, in accordance with the provisions of the English Companies' Act, sec. 63.

*Held*, that on the principle of *Reynold* v. *Coleman*, 36 C.D. 453, the contract of which a breach was alleged was one that "ought to be performed within the jurisdiction" ; also that the real head office of the company being in Guelph, though in compliance with the English Act it had a registered office in London, service at the former place on the principal officer of the company there, was good and effectual service.

*W. A. Henry*, for defendants

*Borden*, Q.C., and *Covert*, for plaintiffs.

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RITCHIE, J. }
In Chambers. } [Jan 23.

FALES *v.* FOSTER.

*Partnership—Accounting—Receiver—Illegality.*

In an action for the winding up of a partnership between plaintiff and defendant, medical practitioners, and for an accounting, it appeared that plaintiff, during a portion of the period of the partnership, was not duly

qualified and registered in accordance with the statutory provisions, and also that he was largely indebted to the partnership.

On motion, by plaintiff, for an order restraining defendant from collecting partnership debts and for the appointment of a receiver, it was urged on behalf of defendant that the partnership was an illegal one and plaintiff therefore not entitled to the intervention of the Court so as to secure the appointment of a receiver, and that in any case, owing to the relative state of accounts between the partners, defendant was the proper person for such appointment.

*Held*, that as a partnership business had actually been carried on since the plaintiff was qualified to practice, and the partnership having come to an end it was at this stage not necessary to decide as to the legality of the origina articles of co-partnership, but that defendant was entitled to be appointed receiver upon his fyling an approved bond with sufficient sureties.

*McInnes*, for plaintiff.

*Wade*, Q.C., for defendant.

## Province of New Brunswick.

### SUPREME COURT.

TUCK, J. In Chambers.} [June 20, 1895.

EX PARTE UPHAM.

*Service of summons—Wrong name—Criminal law.*

One Susannah Upham was served with a summons in which she was described as "Susan" Upham. A conviction was had by default, and the defendant sent to jail.

On an application for a habeas corpus it was

*Held*, that the service was good.

BARKER, J.] [Nov. 19, 1895.

IRVING *v.* MCWILLIAMS.

*Sale of crown lands—Agreement not to bid—Specific performance—Public policy.*

The plaintiff and defendant entered into an agreement not to bid against each other at a crown lands sale of certain timber licenses. The defendant was to buy certain licenses, and the plaintiff was to have a specified portion of them on paying *pro rata* to defendant. The defendant bid at the sales and procured the licenses, which were made out in his name. Afterwards a dispute arose between plaintiff and defendant as to what portions plaintiff was to have, and plaintiff brought this suit in equity for specific performance. It was contended by the defendant that the agreement was against public policy being calculated to stifle competition, and therefore could not be enforced.

*Held*, that the agreement was not against public policy.

*M. G. Teed* and the Attorney-General, for plaintiff.

*J. D. Phinney*, Q.C., and *A. A. Stockton*, Q.C., for defendant.